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## Self Defense for Women Lawyers: Enforcement of Employment Rights

Giovanna M. Longo  
*University of Michigan Law School*

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## SELF DEFENSE FOR WOMEN LAWYERS: ENFORCEMENT OF EMPLOYMENT RIGHTS

What goes largely unexamined, often even unacknowledged (yet is institutionalized nonetheless) in our social order, is the birthright priority whereby males rule females. Through this system a most ingenious form of “interior colonization” has been achieved. . . . The fact is evident at once if one recalls that the military, industry, technology, universities, science, political office, and finance—in short, every avenue of power within the society, including the coercive force of the police, is entirely within male hands.<sup>1</sup>

The legal profession, one traditional avenue to wealth, prestige and power, offers an illustration of the traditionally “closed to women” attitude of employers in the United States. The present status of women in the legal profession seems indicative of a pattern of discrimination which must yet be abated by the 1964 Civil Rights’ Act’s prohibition against sex discrimination. Two particular employment patterns can support inferences of sex discrimination of women in the work force and their income levels compared to those of men.

Of course, fewer women in prestige occupations and their lower income levels in general may have been produced by factors other than sex discrimination in employment. Historically fewer women than men have applied to medical, law or engineering schools. Some women have interrupted their careers or lowered their aspirations because of marriage or family responsibilities. However, it might be asked why fewer women than men attempt high income careers or why women interrupt careers or lower expectations. Women could have been discouraged by their knowledge of their limited employment opportunities in general, by societal expectations about proper feminine behavior and their resulting negative incentives to pursue a career, and/or by the lack of adequate childcare services for working women. Thus the comparative employment data cannot be dismissed as failing to support inferences of sex discrimination.

In the professions, women constitute such a small segment as to be practically negligible—one percent of the engineers,<sup>2</sup> 3.7

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<sup>1</sup> K. MILLETT, *SEXUAL POLITICS* 25 (1970).

<sup>2</sup> U.S. BUREAU OF THE CENSUS, DEP’T OF COMMERCE, *THE STATISTICAL ABSTRACT OF THE UNITED STATES* 1970, at 227 (864,000 male engineers listed, but no female engineers) [hereinafter cited as 1970 STATISTICAL ABSTRACT].

percent of the lawyers,<sup>3</sup> and seven percent of the doctors<sup>4</sup>—although women compose approximately one-third of the work force.<sup>5</sup> This dismal picture is further accentuated by comparative income figures. In 1965, overall median wages of women were only sixty percent of the men's median wages.<sup>6</sup> The low wages of women in professional, technical, and executive positions are not substantially different from these figures.<sup>7</sup>

The status of women lawyers, in particular, is analogous. Not only do women constitute a disproportionately small portion of the profession, they also achieve dramatically less success in obtaining positions as judges, law firm partners, or professors, and are paid much less. For example, of a total 333 federal district court judges, three are women;<sup>8</sup> of a total ninety-two federal circuit court judges, one is a woman;<sup>9</sup> of three thousand law firms ABA rated as "leading," only thirty-two could boast a woman partner.<sup>10</sup> In 1966, among some 2,335 teaching faculty members at 134 accredited law schools, only fifty-one women at thirty-eight of the schools were teaching faculty.<sup>11</sup> Income figures for full-time women lawyers indicate that they start at a lower salary than men and the discrepancy grows with time.<sup>12</sup> Moreover, apart from the humane concern that persons psychologically need, and as a

<sup>3</sup> Of the total 214,000 lawyers and judges in the United States, eight thousand are women, or slightly better than 3.7 percent. *Id.* 227-28.

<sup>4</sup> Of the 240,000 medical doctors in the United States, sixteen thousand are women, or 6.9 percent. *Id.*

<sup>5</sup> Of the total number of workers of all age groups in the civilian labor force, approximately seventy-five million, women numbered approximately twenty-six million, or slightly more than thirty-five percent in 1965. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, SPECIAL LABOR FORCE REPORT No. 69, at A-11 (1967).

<sup>6</sup> Of the full time workers in 1965, median wage earnings of men were \$6,388 and median wage earnings of women were \$3,828, or approximately 59.8 percent. U.S. BUREAU OF STATISTICS, DEP'T OF LABOR, SPECIAL LABOR FORCE REPORT No. 82, at A-7 (1967).

<sup>7</sup> *Id.* The statistics for male and female professional, technical, and executive workers are:

	Men	Women	
Professional	\$8,459	\$5,514	65.2%
Technical	7,895	4,202	53.2%

<sup>8</sup> See Pressman, *Legal Revolution in Women's Employment Rights*, 44 FLA. B.J. 27, 30 (1970).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> White, *Women in the Law*, 65 MICH. L. REV. 1051, 1112 (1967).

<sup>12</sup> Available income figures for 1964 indicate:

	Women	Men
Earning more than \$20,000	1%	9%
Earning more than \$14,000	4.1%	21%
Earning less than \$ 8,000	56.3%	33.6%

*Id.* 1057. White compared men and women graduates from law school classes of 1956 through 1965. The income differential between men and women after the first year of practice was \$1,500. By the time the class of 1956 was compared, the differential had increased to \$8,400. After examining eight possible explanations for this income

social reality will try, to realize their individual potentials,<sup>13</sup> it has been suggested that job discrimination costs the United States economy billions of dollars annually.<sup>14</sup>

Employment and a concomitant opportunity to compete on the basis of individual merit for the rewards of achievement, whether they be money, power, prestige, personal satisfaction in a job well done, or the fulfillment of broad social aims, contribute to the assertion of legitimate human needs for independence and self-respect, and contribute to the expression and realization of individual potential. Women professionals and professional employers need to understand the applicable law regarding the proof of sex discrimination, what exceptions there are to prohibited sex discrimination, the procedures for enforcing that law and the benefits or detriments to be expected from enforcement proceedings. The purpose of this commentary is to analyze the employment rights of women, the obligations of their employers under the law to afford equal employment opportunity, and the important stages and available remedies in a fair employment practices proceeding should litigation become necessary.

## I. APPLICABLE LAW

The most significant law dealing with sex discrimination is title VII of the 1964 Civil Rights Act.<sup>15</sup> Although the majority of

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differential. White concluded that women were discriminated against because of their sex. *Id.* 1095. Factors considered and eliminated as not relevant included differences in academic qualifications, types of employers, differences in type of work performed, and differences in the amount of work experience.

<sup>13</sup> One measure of unrest among women is the recent Harris Poll's conclusion that American women are experiencing an "underlying mood of . . . conflict, frustration, deep division and change." N.Y. Times, Jan. 19, 1971, at 40, col. 1. It likened their "attitudes to those of black people in 1962, just prior to the emergence of Dr. Martin Luther King, Jr., and to college students in late 1967, before they rallied behind Senator Eugene McCarthy." *Id.* The poll labelled as a real storm signal the fact that a "plurality of women . . . feel 'most men find it necessary for their egos to keep women down.'" *Id.* Earlier warnings against the ill effects of continuing widespread discriminatory attitudes and policies appeared in THE PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN, AMERICAN WOMEN, REPORT ON THE STATUS OF WOMEN (M. Mead & F. Kaplan, ed. 1965).

A less sweeping indication of the existence of sex discrimination is the fact that at least a significant share of poverty in the United States is suffered and endured by families in which the sole head of the household is a woman. Ten percent of American families are supported by a sole woman, and the median income for such families was fifty-eight percent less than the median income among families headed by a man. U.S. BUREAU OF STATISTICS, DEP'T OF LABOR, MONTHLY LABOR REVIEW No. 80, at 34 (1967).

<sup>14</sup> William Brown III, Chairman of the EEOC, estimated that job discrimination costs the United States thirty billion dollars annually, Address by William Brown III, to Organization Resources Counselors, Inc., in New York City, Jan. 21, 22, 27, 1970, in 1 CCH EMPLOYMENT PRACTICES GUIDE ¶ 5009 (1970). Although the specific sources of the costs were not indicated, they were presumably a combination of the cost to employers of utilizing less qualified persons than otherwise would be available, and forgoing higher quality goods and services to the consumer for the same price.

<sup>15</sup> 42 U.S.C. § 2000e (1964).

states now have fair employment practices acts banning sex discrimination,<sup>16</sup> and although title VII requires that the Equal Employment Opportunity Commission<sup>17</sup> (EEOC) initially defer to state proceedings, practically all cases come before the EEOC and are litigated under title VII. The deference which the EEOC must give to state proceedings lasts only for sixty days.<sup>18</sup> Within that time the responsible state agency generally has either not disposed of the matter or not done so to the satisfaction of the complainant.

Title VII makes it an unlawful employment practice for an employer:<sup>19</sup>

- (1) to fail or refuse to hire or to discharge any individual, or

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<sup>16</sup> As of January 1971, twenty-eight states and the District of Columbia had enacted Fair Employment Practices Acts banning sex discrimination in employment.

A series of Presidential Executive Orders has banned sex discrimination in federal employment, Exec. Order No. 11,246, 3 C.F.R. 402, 42 U.S.C. § 2000e (Supp. V, 1970), as amended by Exec. Order No. 11,375, 3 C.F.R. 32D (1967) and Exec. Order No. 11,478, 3 C.F.R. 446, 42 U.S.C. § 2000e (Supp. V, 1970). However, women lawyers must rely on administrative procedures established by the Civil Service Commission regarding government employment and on administrative procedures established by the Secretary of Labor in regard to government contractors. See Exec. Order No. 11,246, *id.*, superseded by Exec. Order No. 11,478 *id.* Also, damage suits by private parties on the basis of employment discrimination in breach of Executive Orders may not be brought because it was contemplated that only administrative action by the President's Committee on Equal Employment Opportunity would provide a remedy. Farkas v. Texas Instruments, Inc., 375 F.2d 629 (5th Cir.), cert. denied, 389 U.S. 977 (1967). Executive Order No. 10,925 and its successors constitute a formulation of policy by the President for the guidance of federal agencies and do not create a private cause of action, Blaze v. Moon, 315 F. Supp. 495 (S.D. Tex. 1970). *Blaze* involved a private suit for injunctive relief.

<sup>17</sup> The EEOC has authority only to investigate and "to eliminate any . . . alleged unlawful employment practice by informal methods of conference, conciliation and persuasion," 42 U.S.C. § 2000e-5(a) (1964). The EEOC also may "refer matters to the Attorney General with recommendations for intervention in a civil action . . . or for the institution of a civil action by the Attorney General . . . and to advise, consult, and assist the Attorney General on such matters." *Id.* § 2000e-4(f)(6). The EEOC also has the "power to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this title," *Id.* § 2000e-12(a). Courts have held the Guidelines, formulated by the EEOC to aid in the administration of title VII, to be entitled to great weight in the interpretation of title VII. *Weeks v. Southern Bell Tel. & Tel.*, 408 F.2d 228 (5th Cir. 1969); *Jackson v. Veri Fresh Poultry*, 304 F. Supp. 1276 (E.D. La. 1969). The Guidelines are to be upheld if they are a reasonable interpretation of title VII, although they are not regulations with the force or effect of law. *American Newspaper Publishers Ass'n v. Alexander*, 294 F. Supp. 1100 (D.D.C. 1968).

<sup>18</sup> 42 U.S.C. § 2000e-5(b) (1964). See *Cresslin v. Mountain States Tel. & Tel. Co.*, 422 F.2d 1028 (9th Cir. 1970) (appeal pending, 91 S. Ct. 52). The complainant had failed to file a complaint with the Arizona Civil Rights Commission before filing with the EEOC. The court held that the complaint should be dismissed. "Federal intervention does not depend on lack of suitable state relief. Nor is there any requirement for exhaustion of state remedies. On the contrary time limits for bringing federal suit after the charge has reached the EEOC are clearly not designed to encourage an aggrieved person to await the outcome of state proceedings. Federal deference to the states is defined only in terms of time: sixty days." *Id.* at 1031.

<sup>19</sup> The term "employer" means a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. 42 U.S.C. § 2000e(b) (1964).

otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ; or (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individuals' . . . sex. . . .<sup>20</sup>

Title VII provides one exception to its ban on sex discrimination in employment. That exception is commonly called the "BFOQ:"<sup>21</sup>

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

## II. PROVING SEX DISCRIMINATION

Sex discrimination in the legal profession most often occurs in two particular situations; in hiring, and in the terms or conditions of employment. For instance, an employer seeking to hire a graduating law student or experienced lawyer might send to a university law school placement office a resume which states: "The firm is particularly interested in men with initiative and the desire and ability to assume early responsibility." Future employees are repeatedly referred to as "men" in the employer's brochure. A woman applicant whose overall academic record is comparable to those of the male applicants, and who, apart from her sex, is indistinguishable from the men to whom the employer offered jobs, is denied employment.

The other principal form of abuse, that in the terms and conditions of employment, could be exemplified by the case of an employer's sole female lawyer who has been doing trusts and estates work for the past ten years. She would prefer to do other legal work, and over the past ten years she has repeatedly indicated such desire to the employer. She is still an associate and earning an associate's salary, although most men make partner between five to seven years after coming in as an associate. Her

<sup>20</sup> *Id.* § 2000e-2(a).

<sup>21</sup> *Id.* § 2000e-2(e). Twenty of the states with Fair Employment Practices Acts have BFOQ or comparable exceptions. Kansas has an interesting BFOQ exception: "Such occupational qualification shall be determined in the sole discretion of the employer," KAN. STAT. ANN. § 44-1103(a) (1970).

entering qualifications were, and her work has been, on a level matching that of the men who have been made partners.

### *A. Discrimination Against The Female Applicant*

In the case of the applicant the discrimination consists of the employer's decision to hire male students no more or possibly less qualified than the female student and in advertising for applicants by sex. Both forms of discrimination are prohibited by the specific language of title VII.<sup>22</sup>

Although advertising for applicants by sex may easily be established, it may be more difficult to prove that an employer's decision to hire a male of equal or less qualifications was motivated by sex discrimination.

The law places the burden of proving the discrimination on the party alleging the discrimination.<sup>23</sup> In some instances, this plaintiff may be fortunate enough to have evidence of an admission by the employer that he did not hire or consider the plaintiff because she was a woman. This type of evidence might be forthcoming from her own communications with the employer and from the experience of other applicants, or any persons, who have been exposed to an employer's discriminatory remarks. Aside from evidence of discriminatory intent, the female plaintiff would need evidence of her comparable or superior qualifications in order to prove that she should have been considered. As a basis for comparison, the plaintiff should be able to obtain such evidence from discovery of the employer's records and criteria upon which he based his decisions.<sup>24</sup>

Clearly, the easiest case of sex discrimination for a rejected

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<sup>22</sup> 42 U.S.C. § 2000e-2(a) (1964) (prohibits discriminatory hiring practices); *id.*, § 2000e-3(b) (1964): It shall be an unlawful employment practice for an employer . . . to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer . . . indicating any preference, limitation, specification, or discrimination, based on . . . sex. . . ." This is supplemented by the EEOC Guidelines: "It is a violation of Title VII for a help-wanted advertisement to indicate preference, limitation, specification, or discrimination based on sex unless sex is a bona fide occupational qualification for the particular job involved." EEOC Guidelines, 29 C.F.R. § 1604.4 (1970).

<sup>23</sup> *United States v. Building & Constr. Trades Council*, 271 F. Supp. 447, 452 (E.D. Mo. 1966).

<sup>24</sup> 42 U.S.C. § 2000e-8(c) (1964) provides:

"[E]very employer . . . subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom, as the Commission shall prescribe by regulation or order . . . as reasonable, necessary, or appropriate for the enforcement of this subchapter or the regulations or orders thereunder."

female applicant would be the refusal of an employer to hire the woman despite the fact that her qualifications were superior, as determined by the employer's own employment criteria, to those of any successful male applicant(s). In the absence of an admission of prejudice by the employer, the female applicant will face two especially difficult problems in proving her case. One difficulty is reflected in the situation where the rejected applicant must prove discrimination where she was one of several rejected and qualified applicants whose credentials are equivalent to the successful male applicant. The other difficulty will arise where an employer's decision not to hire was based, in part, upon personality characteristics not easily identified, quantified or objectively verifiable.

By establishing a factual record of an historical pattern of sex discrimination, the rejected applicant should be able to offer probative evidence of unlawful sex discrimination against herself. This method of proof has been used successfully in cases of racial discrimination.<sup>25</sup> However, racial historical pattern cases have dealt with laboring, and not professional, occupations. The number of persons available and trained for professional occupations is smaller; employment criteria are more complicated, more demanding, and less easily susceptible to review. Although the principles drawn from racial discrimination cases can be rationally and reasonably applied to cases of sex discrimination in the professions, the courts have yet to be requested to articulate any such analogies. Potential plaintiffs and defendants should, however, consider the reasonably possible impact of those racial historical pattern cases on the relatively undeveloped law of sex discrimination.

Statistical evidence of the employer's hiring patterns should prove useful in developing an historical pattern of sex discrimination. The plaintiff could seek such evidence through discovery of the employer's records and any other possible sources of information about applicants. The use of statistical evidence to prove a pattern of discrimination has been approved by the feder-

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<sup>25</sup> See *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421 (8th Cir. 1970), where an individual sought relief on behalf of himself and blacks as a class. Plaintiff established a class violation of title VII by using defendant company's employment statistics. The court said that the company's discrimination in employment against blacks furnished a strong inference that Parham himself was rejected on racial considerations, but that such a presumption was not conclusive because of his previous employer's poor recommendation. See also *Engineers Local 12 v. Fair Employment Practices Comm'n*, 1 CCH EMPLOYMENT PRACTICES GUIDE ¶ 9420 (Cal. App. 1969), *cert. denied*, 397 U.S. 1037 (1970) (employment statistics successfully used to establish inference of discrimination).



al courts<sup>26</sup> and has been used by the EEOC to find probable cause to believe that there has been sex discrimination.<sup>27</sup>

In *United States v. Bethlehem Steel*,<sup>28</sup> a federal district court held that evidence of statistical probabilities indicating a likelihood of job bias was admissible to infer the existence of a practice or pattern of racial bias and in some instances, might raise such a compelling inference as to make out a prima facie case of discrimination. In that case black employees were concentrated in eleven out of eighty-two departments of defendant's plant and in the hottest, dirtiest and least desirable jobs. Some 83.6 percent of black employees were so situated. In *Parham v. Southwestern Bell Telephone Co.*,<sup>29</sup> the Eighth Circuit Court of Appeals held that as a matter of law the defendant's employment statistics established a class violation of title VII. The extraordinarily small number of blacks employed, for the most part, as menial laborers, established a general practice of racial discrimination. Judicial notice was taken of the fact that 21.9 percent of the Arkansas population was black. The court found that such evidence of generalized discrimination established a strong inference that the plaintiff, Parham, was rejected on racial grounds. The presumption was not held to be conclusive only because the defendant had a valid independent reason for not hiring Parham in particular, i.e., a previous employer gave an unfavorable evaluation of Parham.<sup>30</sup> *Parham* could not be applied to women lawyers on the basis of statistics comparing the female population in the relevant geographical area with the number of previously successful female lawyer applicants. Presumably a large portion of the population would not be available for employment as attorneys because only a small portion could display the necessary training, qualifications

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<sup>26</sup> See *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421 (8th Cir. 1970); *Alabama v. United States*, 304 F.2d 583, 587 (5th Cir.), *aff'd per curiam*, 371 U.S. 37 (1962); *United States v. Bethlehem Steel*, 312 F. Supp. 977, 992 (W.D.N.Y. 1970).

<sup>27</sup> See EEOC Dec. No. 70-145, 1 CCH EMPLOYMENT PRACTICES GUIDE ¶ 6066 (Sept. 9, 1969), where a woman applied for the position of management trainee. The median age of male assistant managers was 22.3 years and of female assistant managers was 42.4 years. The Commission decided that this "pattern indicates young females are systematically excluded from the work force while young males are readily hired;" EEOC Dec. No. 71-345, 1 CCH EMPLOYMENT PRACTICES GUIDE ¶ 6167 (Oct. 13, 1970), where an employer maintained an illegal policy of hiring no black females for production jobs. No black women had ever been hired for other than clean-up work. Blacks constituted forty percent of the population in the metropolitan area. The Commission decided that the evidence supported a finding of discrimination.

<sup>28</sup> 312 F. Supp. 977 (W.D.N.Y. 1970).

<sup>29</sup> 433 F.2d 421 (8th Cir. 1970).

<sup>30</sup> In *Engineers Local 12 v. Fair Employment Practices Comm'n*, 1 CCH EMPLOYMENT PRACTICES GUIDE ¶ 9420 (1969), *cert. denied*, 397 U.S. 1037 (1970), in which there were no questions about the individual qualifications of the complainant, the court found substantial evidence to uphold a finding of racial discrimination, the evidence being a union's membership and employment statistics.

and potential to succeed in the practice of law, while a significantly larger part of the population might be presumed to display traits indicating competence as sales personnel, office and clerical workers, skilled craftsmen and stockmen. However, women could reasonably use the *Parham* case to establish sex discrimination by evidence indicating a disparity between the ratio of men to women lawyers either living in the relevant area or looking for jobs in the relevant area, and the ratio of successful men to women applicants over a period of time.<sup>31</sup>

Another type of evidence that could be probative of an historical pattern of sex discrimination against professional women would be evidence that an employer historically classified certain jobs as "male" or "female." For example, the employer had failed to hire, or hired in disproportionately small numbers, female applicants possessing the basic skills and training to be lawyers and instead historically hired disproportionately large numbers of women as secretaries or bookkeepers.<sup>32</sup> An example of such disproportionality would be an employer's hiring of ninety percent male and ten percent female attorney applicants and the same employer's hiring of ten percent male and ninety percent female qualified secretary or bookkeeper applicants. Whether the courts will find a prima facie case of sex discrimination on the basis of such statistical evidence remains to be seen. The analogies, however, reasonably can and should be made.

One manner of supplementing historical evidence, or perhaps establishing independent evidence, would be to have several women apply to the same employer and use the record of the employer's reaction to these applications to support an inference of discrimination.<sup>33</sup> The employer's own records of job appli-

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<sup>31</sup> See *Dobbins v. Electrical Workers Local 212*, 292 F. Supp. 413 (S.D. Ohio 1968), where in a pattern and practice suit the failure of any black applicants to be admitted to an electrical craft union by itself did not show a pattern or practice, but the court did say that to make a case for class purposes, it would be enough to show that applicants possessed basic skill in the particular trade involved; *EEOC v. Plumbers Local 189*, 311 F. Supp. 468 (S.D. Ohio 1970), where there were nine blacks in the city possessing city plumbing licenses. The Union required that all persons obtain one before admission to its membership. Defendant's board member stated that anyone passing the city's license exam could pass the local's journeyman exam. The court compared the lack of black employees with the diverse population of the area and defendant's regular hiring and standard job requirements and found a reasonable inference of discrimination.

<sup>32</sup> See *Clark v. American Marine Corp.*, 304 F. Supp. 603 (E.D. La. 1969), where an employer defendant who knowingly and voluntarily classified blacks to job positions not affording opportunity for advancement was held to have engaged in discriminatory employment practices. The court held that the defendants' failure to show that the discrepancies in job classification resulted from identifiable differences based on ability, intelligence or aptitude of blacks as opposed to whites necessitated a holding of unlawful employment practices. Defendant hired blacks only for unskilled labor and whites for skilled labor leading to advancement.

<sup>33</sup> One strike suit has already been permitted under title VII. See *Lea v. Cone Mills*

cations and job decisions might similarly provide relevant information. Evidence of this nature would be particularly useful in an effort to establish a simple "failure to hire" women constituting discriminatory practice where qualified women are available but where there have been no prior female applicants. This type of evidence has been found persuasive in establishing a "failure to hire" in cases of racial discrimination.<sup>34</sup>

Whether a woman establishes an inference of sex discrimination by showing expressed prejudicial attitudes or historically discriminatory employment patterns, she will encounter the additional problem of carrying the burden of proving discrimination in the face of the employer's response that his decision not to hire was based, in part, upon personality characteristics not easily identified or quantified. Although the employer may not rely on the assumption that an individual lacks these personality characteristics simply because she is a woman,<sup>35</sup> he

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Corp., 301 F. Supp. 97 (M.D.N.C. 1969), where the court granted an injunction prospectively ordering that all discriminatory practices against black women by the defendant-employer end. The court recognized that the primary motive of the plaintiffs in applying for employment with the defendant was to test its employment practices, but granted the injunction nonetheless.

<sup>34</sup> A lack of applicants is not an excuse, *Lea v. Cone Mills Corp.* 301 F. Supp. 97 (M.D.N.C. 1969); *EEOC v. Plumbers Local 189*, 311 F. Supp. 468 (S.D. Ohio 1970) (alleged lack of interest by blacks in joining the Union was not due to a lack of skilled blacks in the area, but rather to the reputation defendant had in the black community that only whites were welcome.)

Title VII makes it an unlawful employment practice for an employer to "fail or refuse to hire" because of any of the proscribed bases of discrimination. 42 U.S.C. § 2000e-2(a)(1) (1964). In a speech by EEOC Chairman William H. Brown, III, Jan. 29, 1970, it was pointed out that the "refuse" part of the statutory language is self-explanatory, but that the significance of the "fail" language had escaped many employers.

"It will not suffice to say, 'I've been sitting here just waiting to grab a few of those people, but none ever show up at my personnel office.' You must make it your business to see that minority applicants do show up, through affirmative recruitment, *and are hired*. This means not simply making promises, but attaining positive results. If such results are not forthcoming, as I hope they soon will be, then self-initiated government activity may be necessary to make sure that the same opportunities are available to minority groups as to the rest of the population . . ."

1 CCH EMPLOYMENT PRACTICES GUIDE ¶ 5011 (1970).

<sup>35</sup> "The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception: The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include . . . that women are less capable of aggressive salesmanship. . . . The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group."

29 C.F.R. § 1604.1(a)(1)(ii) (1969). See *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969); both cases involved weight-lifting limitations, which the courts held were not allowable as a means of preventing women from being considered for a job. The courts said that each woman should be judged on the basis of individual ability. See also EEOC Case No. AL 68-3-243E, 1 CCH EMPLOYMENT PRACTICES GUIDE ¶ 6015 (June 4, 1969), where an

can assert that plaintiff's interview indicated she lacked such qualities as the ability to communicate or to get along with diverse kinds of persons, initiative, reasonableness, judgment, aggressiveness, tact, or persistence in a task. If an employer's claim of deficiency in personality requirements for the job were accepted by the court, an employer could be found to have discriminated historically, yet be innocent in the individual case, as in *Parham*.

Although employers should be able to make employment decisions with due regard to personality factors of applicants, employers should not at the same time be permitted to use such considerations as a shield against legitimate charges of sex discrimination. If impressions gained through the interviewing process were given unimpeachable status as a justification for hiring decisions, one might anticipate some unwarranted use of this defense. Although no court decisions have dealt with personal interviews in professional or executive employment, several court decisions and EEOC policy might be useful in suggesting a judicial solution to this problem.

In *Colbert v. H-K Corporation*,<sup>36</sup> a Georgia district court concluded that personality tests, as a matter of law, come within the ambit of title VII's requirement that aptitude tests not "be designed, intended or used to discriminate."<sup>37</sup> The job involved was that of a general secretary, clerk-typist. Moreover, the EEOC Guidelines specify that an employer's estimation of an applicant's personality, based on a personal interview, is a personality test,<sup>38</sup> and

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employer gave an editorial writer clerical work and refused to give such work to the male editorial writers, then downgraded the female editorial writer in pay and position, although she was better qualified than other male editorial writers. The Commission decided that the employer must judge employees on the basis of individual merit, not upon stereotyped conceptions of "female jobs."

<sup>36</sup> 63 CCH LAB. CAS. ¶ 9514 (N.D. Ga. 1970).

<sup>37</sup> "[N]or shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of . . . sex. . . ." 42 U.S.C. § 2000e-2(h) (1964).

<sup>38</sup> "The term 'test' includes . . . scored interviews . . . interviewers' rating scales, scored application forms, etc." EEOC Guidelines, 29 C.F.R. § 1607.2 (1970).

"Selection techniques other than tests, as defined in § 1607.2 may be improperly used so as to have the effect of discriminating against minority groups. Such techniques include . . . unscored or casual interviews and unscored application forms. Where there are data suggesting employment discrimination, the person may be called upon to present evidence of validity being of the same types referred to in §§ 1607.4 and 1607.5. Data suggesting the possibility of discrimination exist, for example, when there are differential rates of applicant rejection from various minority and nonminority or sex groups for the same job or groups of jobs or . . . disproportionate representations of minority and nonminority or sex groups among present employees in different types of jobs. If the person is unable or unwilling to perform such validation studies, he has the option of adjusting employment procedures so as to eliminate the conditions suggestive of employment discrimination," *id.*

personality tests, like other ability tests, are required under title VII to be professionally developed,<sup>39</sup> fairly and uniformly administered,<sup>40</sup> and reasonably related to the requirements of the job.<sup>41</sup>

Since it may be relatively impossible to meet such requirements regarding the personal interview, some refinements of these standards must and most likely will be made. Even if employers were willing to use a professionally developed psychological test, such a test may quite possibly fail to be any more reliable than a personal interview in making necessarily subtle and complex evaluations of so indiscernable a quality as personality.

The EEOC Guidelines suggest that an employer's subjective personal interview which is incapable of verification for objectivity should not be allowed to be used as an excuse not to hire women.<sup>42</sup> Although this would prevent unjustified reliance on the personal interview as a basis for not hiring women, it would not protect the employer's need to retain the power to make employment decisions, in part, upon personality evaluations. Should the courts not be prepared to place such stringent restrictions on the personal interview, they should decide, on a case by case basis, whether to believe the employer's contention that personality factors were the deciding employment criteria, or to believe the plaintiff's assertion that sex discrimination was the reason for a refusal to hire. Against the employer's contentions of impressions gained during the interview and evidence of any conversation or

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<sup>39</sup> 42 U.S.C. § 2000e-2(h) (1964).

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

<sup>41</sup> "Evidence of a test's validity should consist of empirical data demonstrating that the test is predictive or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." EEOC Guidelines, 29 C.F.R. § 1607.4(c) (1970). See EEOC Dec. No. 68-9-327E, 1 CCH EMPLOYMENT PRACTICES GUIDE ¶ 6016 (June 18, 1969), where the Commission decided that use of a test which tends to exclude blacks and other minorities to a greater extent than whites is proscribed by title VII unless the test is professionally developed, *i.e.*, it is shown that the test is related and has been validated as a predictor of job performance, and only a test which has been validated for minorities could be assumed to be free of inadvertent bias.

The courts have generally held that the tests must be job related, *Hicks v. Crown Zellerback Corp.*, 1 CCH EMPLOYMENT PRACTICES GUIDE ¶ 8037 (E.D. La. 1970) (tests which operate to prefer whites to blacks without business necessity are unlawfully discriminatory, although professionally developed); *Colbert v. H-K Corp.*, 63 CCH LAB. CAS. ¶ 9514 (N.D. Ga. 1970). (As a matter of law personality tests come within the ambit of title VII's requirement that aptitude tests not be "designed, intended, or used to discriminate." Professionally developed tests reasonably related to the requirements of the job would not be struck down as discriminatory if uniformly and fairly administered.); *cf. Griggs v. Duke Power Co.* 39 U.S.L.W. 4317 (Mar. 9, 1971), where the Supreme Court held that any test must be related to the skills necessary to the job for which the application is made. The Court said that the intent of Congress was to make job qualifications controlling in employment and promotions. Congress was concerned with the consequences of the employer's employment practices and not his subjective intent.

<sup>42</sup> EEOC Guidelines, 29 C.F.R. § 1607.13 (1970).

knowledge of the plaintiff gained outside the interview, should be weighed the plaintiff's evidence of a pattern of sex discrimination in the employer's firm, evidence of discriminatory policies or attitudes displayed during the interview, and any other evidence of the defendant's discriminatory practices.

The employer's statistical record of employment policy should certainly enter into the factual determination. The EEOC Guidelines suggest that the stronger the statistical evidence showing discrimination in hiring, the less weight should be given to an employer's unsubstantiated allegations regarding an applicant's personality.<sup>43</sup> A judicial balancing of all the relevant circumstances on a case by case basis should discourage employers from using the personal interview in employment decisions as a loophole to title VII, and yet protect the legitimate need of employers to rely on personal interviews.

### *B. Discrimination Against the Female Employee*

In the case of discrimination against female professional employees in type of assignment, advancement and pay, there are virtually no helpful court cases,<sup>44</sup> and no EEOC decisions interpreting title VII. Reported title VII cases all deal with nonprofessional employees where the hiring, promotion, compensation and type of work assigned to employees may involve less complicated analyses of qualifications and performance. Because of the more complicated nature of a professional job and because of a lack of objectively verifiable standards of adequate performance, a more sophisticated approach to determining the presence of discrimination is needed than is found in cases dealing with production, clerical or semi-skilled workers. Discrimination is a factual issue to be tried by the court on a case by case basis<sup>45</sup> and what follows suggests possible methods of proving sex discrimination against women attorneys in violation of title VII.

In addition to comparing her treatment on the job to that of men performing similar jobs or to men of similar qualifications, the woman lawyer suffering discrimination in the type of work assignment, advancement, or pay may use methods of proof somewhat similar to those of a rejected female applicant.

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

<sup>44</sup> *E.g.*, EEOC v. Union Bank, 408 F.2d 867 (9th Cir. 1967) (dismissed on procedural grounds, a woman attorney's suit for sex discrimination).

<sup>45</sup> United States *ex rel.* Clark v. H.K. Porter Co., 296 F. Supp. 40 (N.D. Ala. 1968). The injunctive relief available under title VII is equitable in nature and does not warrant a jury trial; Brown v. Southern Dyestuff Co., 1 CCH EMPLOYMENT PRACTICES GUIDE ¶ 8045 (W.D.N.C. 1970); Moss v. Lane Co., 50 F.R.D. 122 (W.D. Va. 1970); even if the defendant acquiesces to the plaintiff's request, Gillin v. Federal Paper Board Co., 1 CCH EMPLOYMENT PRACTICES GUIDE ¶ 9486 (D.C. Conn. 1970).

Discrimination against women attorneys with respect to compensation for substantially similar jobs<sup>46</sup> can be established by comparative evidence. If wage differentials do exist, the employer has the burden of proving himself to be within the exceptions to title VII's requirement of nondiscrimination in compensation.<sup>47</sup> These exceptions are a bona fide seniority or merit system, quantity or quality of production, and the exceptions provided for by the Equal Pay Act,<sup>48</sup> which allows a differential in pay when there is a bona fide seniority, merit or incentive system, or when the differential is based on any factor other than sex.<sup>49</sup> Such well-structured systems generally do not exist in the partnership practice of law.

Proof of discrimination against women employees with respect to work assignment and responsibility can similarly be established by comparative evidence of the employer's treatment of men and women employees. The practicing woman lawyer might be denied an employment opportunity because of an employer's subjective evaluation of personality characteristics required for certain responsibilities. Since an employer may rely on such factors, but cannot use different standards for men and women, he will necessarily have in his possession any evidence demonstrating justification for his allegations and reliance on personality factors. The woman attorney should seek discovery of such evidence from the employer.

If an employer does not consider a woman lawyer for particular responsibilities or for areas of practice because the employer assumed women have characteristics undesirable for particular tasks or responsibilities, he has clearly violated title VII.<sup>50</sup> In the absence of evidence relating to personality characteristics, a wom-

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<sup>46</sup> The standard for comparing the complainant's job to another job requires that the two jobs be "essentially similar," not identical, United States *ex rel.* Clark v. H.K. Porter Co., 296 F. Supp. 40 (N.D. Ala. 1968) (interpreting title VII).

<sup>47</sup> A plaintiff has the burden of establishing discrimination. An employer has the burden to prove whether he comes within the BFOQ exception to discrimination. Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969). In view of the general canon of statutory construction that a person claiming an exception has the burden of proof, it is only reasonable that the employer should have the burden in this instance, because only he will have evidence tending to establish that although the jobs may be similar, the pay differential is justified by exceptions recognized by the law.

In addition, since title VII incorporates the exceptions which the Equal Pay Act allows to unequal pay for the same jobs, 42 U.S.C. § 2000e-2(h) (1964); and since the Equal Pay Act has been interpreted to require an employer to prove himself to be within the exceptions, Schultz v. Wheaton Glass Co., 421 F.2d 259 (3rd Cir.), *cert. denied*, 398 U.S. 905 (1970), title VII should not be interpreted to give employers otherwise outside the coverage of the Equal Pay Act an advantage over employers covered by both title VII and the Equal Pay Act.

<sup>48</sup> 42 U.S.C. § 2000e-2(h) (1964).

<sup>49</sup> 29 U.S.C. § 206(d)(1) (1963).

<sup>50</sup> See note 35 *supra*.

an lawyer might use statistical evidence to establish an historical pattern of the employer's failure or refusal to consider women for certain types of work or responsibilities<sup>51</sup> and the employer's contrary pattern with respect to men. This would be similar to the kind of statistical evidence that an applicant would want to compile.

It is especially important that women employees not be prevented through sex discrimination from exercising responsibility in a desired general area of the law. For example, if the litigation experience of women is limited to filing motions, or if women are permitted to have less client contact than men, women may receive less compensation because their responsibilities require less skill and because of a reduced ability to bring in new business. The point is not that a woman attorney should be able to do any kind of legal work imaginable, but that she be entitled to seek work experience and responsibility on the same terms accorded her fellow lawyers.

A practicing woman attorney may be discriminated against because of her sex in promotions and denied the opportunity to advance to higher levels of responsibility and pay, *e.g.*, from senior associate to junior partner, senior partner, et cetera. Law firms usually are partnerships subject to title VII. They are businesses in interstate commerce for profit; they are not private clubs which may accord their members the unfettered right to restrict membership to persons acceptable to the present membership. One might quibble as to whether becoming a partner is one of the "terms, conditions or privileges" of employment,<sup>52</sup> but it is difficult to conceive that attaining the status of partnership is not a privilege of employment when all associates continually strive to reach partnership, and job security is not attained until partnership is achieved. Admittedly, personality characteristics necessary for the successful management of the business do enter into a decision to make an offer of partnership. However, when charges of sex discrimination in promotions are brought, personality requirements of the job can and should be dealt with just as they are in hiring situations or work assignments.

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<sup>51</sup> This situation is analogous to the situation in which a woman attorney would use statistical evidence to establish a refusal or failure to hire; here the complaint would be a failure or refusal to accord conditions, terms, and privileges of employment nondiscriminatory. See notes 25-31 *supra*.

<sup>52</sup> 42 U.S.C. § 2000e-2(a) (1964). See note 21 *supra* and accompanying text. White brings up this possible objection to considering partnership status as a term, condition, or privilege of employment. White, *supra* note, 11 at 1106-07. White concluded that partnership is one of the "privileges" and that a firm would have difficulty buttressing its objections to women partners on constitutional grounds. *Id.* at 1107 n. 93.



### III. BONA FIDE OCCUPATIONAL QUALIFICATIONS

In addition to asserting that an applicant or employee fails to meet personality requirements or that an employee does lower quality work on the job, an employer defending against a discrimination suit might maintain that the complainant was not hired or promoted pursuant to title VII's exception for a "bona fide occupational qualification reasonably necessary for the normal operation of the business."<sup>53</sup> Possibly standing in the way of equal employment opportunity for women<sup>54</sup> are several frequently relied upon cultural assumptions which employers might claim to be BFOQ's in sex discrimination suits. Examples of such assumptions which law firm employers might claim to be BFOQ's are: (1) clients prefer to deal with male lawyers and only men are capable of winning client acceptance and approval; to hire women would cause the employer to lose these clients; (2) women are not psychologically suited for certain types of legal work (for example, labor law and litigation because of the pressures involved in negotiations and trial, or corporate practice because women are not adept at business) and are more adept at family law or trusts and estates; (3) women have a higher turnover rate, exhibit more absenteeism, and are less reliable than men because of marriage, pregnancy, and family responsibilities. An employer cannot rely on these assumptions as grounds for not hiring or promoting women unless he can persuade a court that they are BFOQ's and that his discriminatory actions are based upon valid reasons directly related to the requirements of the job.

The current judicial test for the BFOQ exception was announced in *Weeks v. Southern Bell Telephone & Telegraph Co.*,<sup>55</sup> where the woman plaintiff sought a switchman's job which occasionally involved lifting weights heavier than thirty pounds and late night calls. The court articulated the test in the following terms:

[A]n employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.<sup>56</sup>

The *Weeks* court based its narrow interpretation of the BFOQ

<sup>53</sup> 42 U.S.C. § 2000e-2(e) (1964).

<sup>54</sup> The discussion here is meant to apply to other professional, administrative and executive positions, as well as legal ones.

<sup>55</sup> 408 F.2d 228 (5th Cir. 1969).

<sup>56</sup> *Id.* at 235.

exception upon EEOC Guidelines,<sup>57</sup> and upon the recognition that, "construed broadly, the [BFOQ] exception will swallow the rule"<sup>58</sup> of nondiscrimination and would be, therefore, inconsistent with the purpose of title VII. The *Weeks* court discussed the inadequacies of the lower court's decision in *Bowe v. Colgate-Palmolive Co.*<sup>59</sup> which broadly construed a BFOQ exception for "basic differences in the physical characteristics, abilities . . . and limitations of the respective sexes."<sup>60</sup> *Bowe* was reversed on appeal, and the Seventh Circuit Court of Appeals held that Colgate would be required to afford all workers the opportunity to demonstrate their ability to perform strenuous jobs on a regular basis if it was to retain its thirty-five pound weight-lifting limit. The *Weeks* court concluded by saying that "[w]hat does seem clear is that using these class stereotypes denies desirable positions to a great many women perfectly capable of performing the duties involved."<sup>61</sup>

The weight-lifting cases are relevant to title VII cases involving professional women because the cases establish a judicial requirement of non-stereotyping of women.<sup>62</sup> Thus, employers may not lawfully discriminate against women lawyers on the basis of assumptions and stereotypes about their aggressiveness, unique psychological predilections for certain areas of work, or ability to cope with the pressures in certain fields.<sup>63</sup>

Objections to hiring women on the grounds of client preference fail to meet the *Weeks* test and have been specifically disqualified

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<sup>57</sup> EEOC Guidelines, 29 C.F.R. § 1604.1(a) (1970). "The Commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly . . . . The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception: (i) The refusal to hire a woman because of her sex, based on assumptions of the comparative employment characteristics of women in general . . . . (ii) The refusal to hire an individual based on stereotyped characterizations of the sexes . . . . The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group."

<sup>58</sup> 408 F.2d at 235.

<sup>59</sup> 416 F.2d 711 (7th Cir. 1969).

<sup>60</sup> 272 F. Supp. 332, 365 (S.D. Ind. 1967).

<sup>61</sup> 408 F.2d at 236.

<sup>62</sup> Even the district court in *Bowe* recognized this principle in regard to characteristics other than the physiological, where it is said that "traditional roles and stereotyped characteristics of taste or talent or emotions" could not operate to permit generic classification. 272 F. Supp. at 365.

<sup>63</sup> 408 F.2d at 236. "Title VII rejects . . . romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on an equal footing."

as a BFOQ by the EEOC.<sup>64</sup> Nevertheless, in one federal district court case, *Diaz v. Pan American World Airways*,<sup>65</sup> the court found, on the basis of legislative history, a client preference for female airline stewardesses to be a permissible BFOQ. An interpretative memorandum proposed by Senators Clark and Case for title VII and the BFOQ was cited by the court in explaining its decision that:

[C]ustomer preference can be a basis for an employer's selecting employees on the basis of their sex where the preference is a legitimate one, *related to the difference in the way in which the work will be performed by persons of different sexes, and in the manner in which such performance will be received by the customer because of such differences.* (Emphasis added).<sup>66</sup>

On the basis of this language, the court upheld the employer's claim that "extensive experience" indicated that women, unlike men, exhibit the interpersonal abilities necessary to promote the clients' psychological sense of well-being when in the unique environment of an airplane in flight. Defendant admitted that it could not test for these abilities, but submitted as evidence that women were more "qualified," a psychologist's opinion testimony that "the aggregate of separate personal characteristics . . . constitutes what we commonly describe as 'femininity'; that . . . 'it would be quite infrequent to find a man possessing each of these traits to at least as high a degree as the average woman.'"<sup>67</sup> The employer also relied on a professionally conducted opinion survey which indicated that clients preferred women flight attendants, but not why clients had such a preference. Thus the *Diaz* court used traditional characterizations of the sexes to permit the employer's successful assertion of client preference as a BFOQ, despite EEOC strictures and court decisions to the contrary.<sup>68</sup>

On appeal, the United States Court of Appeals for the Fifth Circuit reversed.<sup>69</sup> That court adopted the EEOC Guidelines,

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<sup>64</sup> EEOC Guidelines, 29 C.F.R. § 1064.1(a)(1)(iii) (1970). See EEOC Dec. No. 70-11, 1 CCH EMPLOYMENT PRACTICES GUIDE ¶ 6025 (July 8, 1969), where the commission decided that a bank's objections to hiring female courier guards on the basis of client preference was an unlawful employment practice: "this argument, is, in law, without merit, since it presumes that customers' desires may be accommodated even at the price of rendering nugatory the will of Congress."

<sup>65</sup> 311 F. Supp. 559 (S.D. Fla. 1970).

<sup>66</sup> *Id.* at 569.

<sup>67</sup> *Id.* at 567.

<sup>68</sup> See note 35 *supra*.

<sup>69</sup> *Diaz v. Pan American*, 39 U.S.L.W. 2580 (Apr. 20, 1971).

noting that the BFOQ as to sex should be narrowly construed. Because the nonmechanical aspects of a flight cabin attendant's job are not reasonably necessary to the carrier's essential business of transportation, the court held it could not exclude all males because some males may not perform adequately. An employer who would practice sex discrimination must show (1) the impracticability of finding men who possess abilities most women possess and (2) that such abilities are necessary, not merely tangential, to the business.

Assumptions about the suitability of women for particular areas of legal practices cannot justify employers' refusals to hire women lawyers or attempts to limit advancement or the type of legal work done. The basis for the *Weeks* formulation of the BFOQ exception rests on the requirement that women be judged as individuals, rather than as members of a class whose characteristics may be assumed to be different from those of men.

Applying the *Weeks* test and EEOC Guidelines<sup>70</sup> to assumptions concerning turnover rates and absenteeism among women lawyers would seem to indicate that sex may not be a BFOQ. An employer would have a difficult time proving that all or substantially all women lawyers are unable efficiently to perform their duties because of higher turnover and absentee rates among women than among men. In light of current studies, it seems that there is no conclusive evidence regarding differences between male and female turnover in the legal profession, although there is no significant difference between male and female absenteeism in general.<sup>71</sup> One study indicated that the job turnover rates of men and women differ to a greater degree the longer the men and women are out of law school. After three years, thirty percent of the men were at the first job and twenty-nine percent of the women were at the first job; after seven years, 14.5 percent of the men were at

<sup>70</sup> The Guidelines specifically provide that the assumption that the turnover rate among women is higher than among men does not warrant the application of the BFOQ exception. EEOC Guidelines, 29 C.F.R. § 1604.1 (a)(1)(i) (1970).

<sup>71</sup> The average number of workless days per person does not differ markedly between men and women, the differences oscillating around a very narrow range from year to year:

	Men	Women
1962-1963	5.9	6.6
1964	5.6	5.3
1965	5.7	5.6
1966	5.9	5.6

Figures for the years 1962-63 were obtained from U.S. PUBLIC HEALTH SERVICE, HEW MEDICAL CARE HEALTH STATUS, AND FAMILY INCOME 71 (1964). A work disability day is a day of work missed because of illness or injury, and would include pregnancy and childbirth. The other figures were obtained from U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, THE STATISTICAL ABSTRACT OF THE UNITED STATES 1965, at 80; 1966, at 81; and 1967, at 83.

their first job and 11.1 percent of the women were at their first job.<sup>72</sup> That study concluded that if men and women were compared from seven different graduating classes and over a nine year period, a significant statistical difference existed.<sup>73</sup> However, another study concluded that thirty-four percent of the men and only twenty-four percent of the women lawyers sampled had changed employers three or more times.<sup>74</sup>

The assumption that marriage makes women unreliable employees has been rejected as a BFOQ by EEOC Guidelines,<sup>75</sup> EEOC decisions,<sup>76</sup> and one court. In *Sprogis v. United Air Lines*,<sup>77</sup> an Illinois district court held that United's policy of firing stewardesses who married and not firing male employees and other flight attendants who married was a violation of title VII.

Likewise, pregnancy, actual or possible, as justification for sex discrimination has been rejected by one federal court and the EEOC, at least where a leave of absence is practicable.<sup>78</sup> In

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<sup>72</sup> White, *supra* note 12. White compared the classes of 1956 through 1963, and found that except for the class of 1959, his survey showed no significant statistical difference between men and women at their first jobs (men were at thirty percent and women at twenty-nine percent). *Id.* at 1090. However, there was a difference between men and women at their second jobs averaging 8.6 percent. *Id.* at 1091 (interpretation of graph). Considering that by this time the pay differential between men and women becomes noticeable, *see* note 12 *supra*, this higher turnover should not be surprising.

<sup>73</sup> *Id.*

<sup>74</sup> Glancy, *Women in the Law: the Dependable Ones*, HARV. L.S. BULL. 28 (June 1970). Ideally, a survey should be made over a sufficient time period so that it would indicate whether women and men exhibit turnover differentials when such factors as return to work after pregnancy, availability of adequate childcare facilities, and the probably relatively greater mobility of male lawyers once they have established a reputation, are considered.

<sup>75</sup> The Commission has determined that an employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by title VII of the Civil Rights Act. EEOC Guidelines, 29 C.F.R. § 1604.1(a)(1)(i) and (ii) (1970).

<sup>76</sup> Neal v. American Airlines, EEOC Dec. Case No. 6-6-5759, 1 CCH EMPLOYMENT PRACTICES GUIDE ¶ 6002 (June 20, 1968): "Respondent may, of course, lawfully terminate a stewardess who is unable to satisfactorily perform her job because of domestic responsibilities, or for any other reason, just as it terminates other employees who cannot satisfactorily perform their jobs. It cannot, however, terminate her prior to individual dereliction on her part because of its assumptions about married women as a class." *See also* Colvin v. Piedmont Aviation Inc., EEOC Dec. Case No. 6-8-6975, 1 CCH EMPLOYMENT PRACTICES GUIDE ¶ 6003 (June 20, 1968) (to the same effect); EEOC Dec. Case No. YSF 9-060, 1 CCH EMPLOYMENT PRACTICES GUIDE ¶ 6011 (May 21, 1969).

<sup>77</sup> 308 F. Supp. 959 (N.D. Ill. 1970). This is the only case which has dealt with and directly decided the issue of whether marriage is a BFOQ.

In *Lansdale v. International Air Lines Pilots Ass'n*, 430 F.2d 1341 (5th Cir. 1970), it was held that the Civil Rights Act of 1964 did not allow an airline to permit a male flight-cabin attendant to marry while not allowing female attendants the same privilege. The court held that such discrimination could stand only if the defendant proved a BFOQ, which issue the lower court had not considered. In *Gerstle v. Continental Airlines, Inc.*, 50 F.R.D. 213 (D. Colo. 1970), the court held that a stewardess could maintain a class action against an airline that refused to reinstate her following her marriage.

<sup>78</sup> In EEOC Dec. Case No. YAL 9-008, 1 CCH EMPLOYMENT PRACTICES GUIDE ¶ 6122 (Mar. 5, 1970), a union had entered into and maintained a collective bargaining agreement requiring automatic termination of female flight cabin attendants upon preg-

*Cheatwood v. South Central Bell Telephone & Telegraph Co.*,<sup>79</sup> the court held that sex is not a BFOQ because a woman might get pregnant. The defendant employer contended that pregnant women could not perform a particular job that occasionally involved lifting heavy weights. However, the plaintiff was not pregnant and while an “[e]mployer can have a rule against pregnant women being considered for *this* position, Title VII surely means that all women cannot be excluded from consideration because some of them may become pregnant” (emphasis added).<sup>80</sup>

EEOC policy indicates that women are to be integrated into the work force and that the employer should accommodate human peculiarities which do not make it possible for a person to perform the job. A person cannot be excluded from the work force because that individual may be subject to a unique physiological occurrence characteristic of a class of which the individual is a member, without considering the total employment character of the person. Of course, both men and women exhibit traits peculiar to their gender; however, what is important is the actual performance and reliability of the individual on the job. The peculiar characteristics of women should, according to the *Weeks* test, justify application of the BFOQ exception only if all or substantially all women cannot efficiently perform the job involved.

Assumptions about actual family responsibilities and how particular women handle them have been declared inappropriate as BFOQ's by the EEOC.<sup>81</sup> The United States Supreme Court recognized the inappropriateness of allowing assumptions about women as a group to be valid BFOQ exceptions in *Phillips v. Martin Marietta Corp.*<sup>82</sup> However, what the courts will do once different characteristics of men and women are proven remains to be seen. The degree of difference between any provable male or

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nancy. The Commission said that an employer may not terminate a female employee who is compelled to cease work because of pregnancy without offering her, alternatively, a leave of absence, except where the position is one which cannot be left vacant or filled temporarily during the employee's anticipated absence; see also EEOC Dec. Case No. A<sub>1</sub> 68-12-123E (May 19, 1970); in EEOC Dec. Case No. 71-308, 1 CCH EMPLOYMENT PRACTICES GUIDE ¶ 6170 (Sept. 17, 1970), an employer allowed a general disability leave of absence for twelve months without seniority interruption but did not include maternity, and instead terminated females after the sixth month of pregnancy. The court said “[A]n employment policy which has a foreseeable disproportionate impact upon a class protected by title VII is unlawful unless the employer shows that the policy is so necessary to the operation of his business as to justify the policy's discriminatory effects . . . .” The court inferred from respondent's disability leave policy and its policy on maternity that respondent was able to accommodate employee absences of the length typically associated with pregnancy.

<sup>79</sup> 303 F. Supp. 754 (M.D. Ala. 1969).

<sup>80</sup> *Id.* at 759-60.

<sup>81</sup> See notes 75-78 *supra*.

<sup>82</sup> 91 S. Ct. 496 (1971), *vacating and remanding* 411 F.2d 1 (5th Cir. 1969).

female characteristics necessary to justify application of the BFOQ exception, therefore, is unknown. The *Weeks* test is phrased in language that would make proof of a BFOQ exception highly improbable. That "all or substantially all" women would be unable to perform many tasks efficiently is unlikely. The Supreme Court in *Phillips* phrased a possible BFOQ test as one which would determine whether the existence of certain characteristics were "more relevant to job performance for a woman than a man," and thereby broadened the construction of the BFOQ to an indeterminate degree.

In *Phillips*, the Supreme Court vacated the court of appeals' holding that an employer's refusal to hire women with pre-school children was nondiscriminatory, even though the employer had hired such men.<sup>83</sup> The Court remanded for evidentiary considerations of whether the existence of family obligations was demonstrably "more relevant to job performance for a woman than a man" and, therefore, "could arguably be a basis for distinction under [the BFOQ exception] of the Act."<sup>84</sup>

Justice Marshall's concurring opinion in *Phillips* raised two important issues regarding the Supreme Court's construction of the BFOQ exception. First, Marshall raised the issue of just how broadly the exception should be construed. General rules of statutory construction require that a remedial statute's exceptions be narrowly construed so that the remedial purposes of the statute are not frustrated.<sup>85</sup> This rule has been applied to title VII.<sup>86</sup> The spectrum of construction could be characterized as going from sanctioning clear class discrimination to a requirement that women are to be considered on an individual basis. The majority opinion hinted at the broadest possible construction by implying that if women differed from men in one employment characteristic, without regard to their total employment profile, all could be discriminated against. Marshall strongly supported the narrowest interpretation, that the 1964 Civil Rights Act requires individual consideration of women and that a woman could be "dis-

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<sup>83</sup> The United States Fifth Circuit Court of Appeals had devised a "sex-plus" test. If the "plus" item used to discriminate between men and women was not some item prohibited by title VII (items other than race, religion, or national origin), then no unlawful discrimination took place. This test required that women be removed from the protection of title VII unless they happen to be members of another minority group.

<sup>84</sup> 91 S. Ct. at 498.

<sup>85</sup> *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490 (1945). In speaking of a claimed exemption from the coverage of the Fair Labor Standards Act, the Court noting that the purpose of the Act is to facilitate social progress by insuring a fair day's wage for a fair day's work, stated "[a]ny exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress." *Id.* at 493.

<sup>86</sup> *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969).

criminated" against lawfully only if she should fail to measure up to an employer's standards of performance.

Second, Marshall raised the issue of whether the BFOQ exception should be read to justify a difference in treatment if women could not compare favorably with men in an examination of every single job performance standard, although women could meet the minimum performance standards and compare favorably with men on the whole:

I cannot agree with the Court's indication that a bona fide occupational qualification reasonably necessary to the normal operation of Martin Marietta's business could be established by a showing that some women, even the vast majority, with preschool age children have family responsibilities that interfere with job performance and that men do not usually have such responsibilities. Certainly, an employer can require that all of his employees, both men and women, meet minimum performance standards . . . . Congress intended to prevent employers from refusing to hire an individual based on stereotyped characterizations of the sexes. . . . Even characterization of the proper domestic roles of the sexes were not to serve as predicates for restricting employment opportunity . . . . The exception for 'bona fide occupational qualification' was not intended to swallow the rule.<sup>87</sup>

Marshall objected to the majority's failure to acknowledge a narrow BFOQ test, whether of the *Weeks* variety or the individual consideration proposed by Marshall, and to the Court's hinting at permitting a BFOQ because of a peculiar adverse trait which women might demonstrate more on the average than men, but which has nothing to do with an individual's overall performance. It would seem to be more advantageous to both the employee and the employer to measure employee desirability on the basis of individual performance rather than on class averages. There is bound to be one trait which will affect the performance of one group more than another, men or women, whites or blacks, Gentile or Jew. From the Court's implication, perhaps the fact that men have more heart attacks than women, "if demonstrably more relevant to job performance" for men than women, should justify the refusal of an employer to hire men.

The Supreme Court seems to have intimated an attitude contrary to reason and the current weight of judicial thought about the BFOQ. In many recent weight-lifting cases the courts have required that each person be judged on individual merit and that if

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<sup>87</sup> 91 S. Ct. 496, 498 (1971).



employers were to retain the weight-lifting limitations at all, they were to be applied equally to both sexes.<sup>88</sup> Applying this judicial trend to cases involving assumptions about, or even statistical evidence of, the correlations between family responsibility and job reliability<sup>89</sup> would require employers to do just as Marshall suggests—require both men and women employees to meet minimum standards of job responsibility and to let each individual be judged on her success or failure to do so, rather than to assume that women cannot meet minimum standards.

The Supreme Court did recognize that assumptions about the employment characteristics of women could not qualify as a BFOQ exception. However, the Court's implied broadening of the BFOQ exception has threatened the survival of the rule against sex discrimination in employment and was accomplished in a *per curiam* decision so vague as to leave the lower courts with no guidance. The Supreme Court noted that it was not determining whether a BFOQ existed under the facts and remanded for evidentiary consideration of that issue. However, the Court did gratuitously suggest a test for the BFOQ, that "existence of conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis"<sup>90</sup> for application of the BFOQ. Although the Supreme Court technically was not announcing a rule of law, the mere fact that it suggested such a BFOQ standard when other standards at least arguably exist and did so in such a vague and summary context suggests that the decision could be interpreted as an indication of the tenor of any future decision should the issue actually come up before the Supreme Court.

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<sup>88</sup> These limitations based on state protective legislation have been held to be illegally discriminatory because the limitations do not constitute BFOQ's, the supremacy clause of the United States Constitution overriding the conflicting state law. *See* EEOC Guidelines, 29 C.F.R. § 1604.1(b)(1) and (2) (1970), followed in EEOC Decisions to hold such state protective legislation discrimination in violation of title VII. *See* EEOC Dec. Case No. YIA 9-045, 1 CCH EMPLOYMENT PRACTICES GUIDE ¶ 6115 (Jan. 21, 1970); EEOC Dec. Case No. YAT 9-045, 1 CCH EMPLOYMENT PRACTICES GUIDE ¶ 6116 (Jan. 19, 1970); EEOC Dec. Case No. YCL 9-144, 1 CCH EMPLOYMENT PRACTICES GUIDE ¶ 6117 (Jan. 19, 1970); MICH. ATT'Y GEN. OP., No. 4687 (Dec. 30, 1969); OKLA. ATT'Y GEN. OP., No. 69-304 (Dec. 5, 1969); WASH. ATT'Y GEN. OP., No. 69-304 (Dec. 5, 1969). *See also* *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969); *Richards v. Griffith Rubber Mills*, 300 F. Supp. 338 (D. Ore. 1969); *Rosenfeld v. Southern Pac. Co.*, 293 F. Supp. 1219 (C.D. Cal. 1968); *Jones Metal Products Co. v. Walker*, 1 CCH EMPLOYMENT PRACTICES GUIDE ¶ 8061 (C.P. Franklin County, Ohio, 1970).

<sup>89</sup> Such statistics may reflect more than the present effects of discriminatory social attitudes than any disabilities of women. Present cultural expectations concerning family responsibility may require that the woman attend to childcare, therefore requiring her absence from her job and inhibiting the formation of adequate alternative childcare facilities. To use the number of days away from the job because of family responsibilities, without considering the total employment profile, would allow present discriminatory attitudes to perpetuate themselves under sanction of law.

<sup>90</sup> 91 S. Ct. 496, 498 (1971).

If such a broad BFOQ were to be adopted as implied by the Supreme Court, its application would require great clarification. The lower courts would have to decide how *much* more relevant certain characteristics of one sex must be to job performance in order to apply the BFOQ; courts would have to decide whether employers would be permitted to hire no women or fewer otherwise qualified women if such a BFOQ were accepted; and courts would have to decide whether employers must hire on individual merit when testing is possible, despite the existence of a BFOQ pertaining to a class.

A reasonable construction of the BFOQ exception to title VII's prohibition of sex discrimination in employment might provide:

An employer may legally establish minimum job performance standards, reasonably related to the employer's legitimate business objectives,<sup>91</sup> which standards are not used with the intent to result or the effect of resulting in sex discrimination. A BFOQ exception should be allowed if it can be demonstrated that either sex, having the same minimum skills or experience as the other, fails to meet minimum performance standards of the job in question so much more frequently than the other sex that the employer's business would noticeably suffer from further employment of such less adequate persons. This test would apply only if there were no means of testing or reasonably estimating individual performance or no way for the individual to demonstrate that (s)he can meet the minimum standards.

A test of this nature for the BFOQ exception should be reasonable because it would permit employers to maintain legitimate overall job performance standards and legally to discriminate against women (or men) when further employment of that group is noticeably uneconomic, and yet it would preserve title VII's purpose of affording women the opportunity to pursue the goal of economic sustenance without unreasonable impediment.

#### IV. THE ADVISABILITY OF SUIT

A resort to complaint proceedings before the EEOC, and possibly litigation,<sup>92</sup> may in certain circumstances be advantageous to

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<sup>91</sup> An example of a job performance standard not reasonably related to the employer's legitimate business objectives would be a corporation's requiring executive trainees to lift and carry a sixty pound weight fifty yards and not requiring or expecting executives to do so as part of their job. An otherwise qualified ninety-five pound woman might have difficulty meeting such a job performance standard.

<sup>92</sup> The law requires that a complaining party first seek relief under state or local law, if there is any proscription of the particular type of discrimination complained of. 42 U.S.C.

women professionals, executives or administrators. The courts can order an employer to give the woman employee back pay which she was denied because of unlawful, discriminatory methods of compensation.<sup>93</sup> For a woman who has been denied equal opportunity in gaining a job, the commission can try to persuade, or the court can order, the employer to reconsider the applicant for the job on a nondiscriminatory basis and/or give back pay from the date of illegal rejection.<sup>94</sup> Also, the applicant and employee could get injunctive relief requiring an employer to consider them for areas of legal practice in which they are interested.<sup>95</sup>

Title VII conditions injunctive relief on showing that the defendant has "intentionally engaged . . . in an unlawful employment practice."<sup>96</sup> Considering the difficulties involved in proving a state

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§ 2000e-5(c) (1964). After expiration of sixty days from the time the individual commences proceedings under the local or state law, the EEOC considers the charges to have been filed with the Commission and begins processing the case. *Id.* § 2000e-5(c). If there is no applicable state or local law prohibiting the practices complained of, the complainant must file the charge with the EEOC within ninety days after the alleged unlawful conduct occurred, *id.* § 2000e-5(d). If the Commission determines that there is reasonable cause to believe that the charge made is true, after investigation, it tries to remedy the situation by informal methods of conference, conciliation and persuasion. *Id.* § 2000e-5(a). A complainant may file suit under title VII in a federal district court within thirty days of receipt of notification from the Commission that it has been unable to obtain voluntary compliance. *Id.* § 2000e-5(e). A Commission finding of reasonable cause is not necessary for federal jurisdiction. *Flowers v. Laborers Local 6*, 431 F.2d 205 (7th Cir. 1970); *Fekete v. United States Steel Corp.*, 424 F.2d 331 (3 d Cir. 1970); *Grimm v. Westinghouse Electric Corp.*, 300 F.Supp 984 (N.D. Cal. 1969).

<sup>93</sup> If the court finds that the respondent has intentionally engaged in an unlawful employment practice, the court may enjoin the respondent from engaging in such unlawful practice and order such affirmative action as may be appropriate, including reinstatement or hiring of employees, with or without back pay. 42 U.S.C. § 2000e-5(g) (1964). The Justice Department plans to continue seeking monetary relief, apart from any back wages, and conjectured that "such relief will soon be granted." 74 LAB. REL. REP. 375 (Aug. 24, 1970).

<sup>94</sup> Title VII makes provision for awarding of reasonable attorney's fees, 42 U.S.C. § 2000e-5(k) (1964), and empowers the court to appoint an attorney for the complaining party. *Id.* § 2000e-5(e). See *Lea v. Cone Mills Corp.*, 301 F. Supp. 97 (M.D.N.C. 1969), where the court granted an injunction ordering the defendant to desist from its unlawfully discriminatory practices. The court declined to grant back pay to applicants illegally rejected because they had applied for jobs merely to test defendant's hiring policies. This strike suit should be noted for its implications for use as leverage to encourage employers to change discriminatory hiring policies. Relief for an applicant could be a demand to consider her for employment on the same basis as other applicants and an order to hire. See *Sprogis v. United Air Lines*, 308 F. Supp. 959 (N.D. Ill. 1970) (stewardess ordered rehired after she was fired because of marriage). Relief for a female lawyer employee could consist of an order for back pay lost as a result of discrimination, possibly at the rate of pay for such jobs as she would have requested and qualified for if a nondiscriminatory promotion policy had been in existence. See *Bowe v. Colgate-Palmolive Corp.*, 416 F.2d 711 (7th Cir. 1969).

<sup>95</sup> In *Clark v. American Marine Corp.*, 304 F. Supp. 603 (E.D. La. 1969), the court did not allow the employer to fill "helper" jobs, previously open only to whites, until all blacks presently employed were given the opportunity, on the basis of the employer's promotion rules, to bid for and transfer to those jobs. In *Rosenfeld v. Southern Pac. Co.*, 293 F. Supp. 1219 (C.D. Cal. 1968), the court ordered the employer to consider, without regard to sex, the plaintiff for any position sought by her.

<sup>96</sup> 42 U.S.C. § 2000e-5(g) (1964).

of mind, if a plaintiff could get a remedy only when an employer willfully intended to discriminate, but not when an employer voluntarily did those acts which effected the discrimination, title VII would provide little protection. Moreover, a requirement of specific intent is not sensible where employer liability results only in correcting an inequitable situation and not in criminal penalties. With the exception of one case,<sup>97</sup> it has been uniformly held that "intent" to discriminate for the purposes of title VII, means to have knowingly and voluntarily done those acts which resulted in discrimination, and not necessarily to have acted with the intent to discriminate.

An injunctive remedy under title VII not only may correct past abuses, but may prohibit future violations.<sup>98</sup> Thus, it is possible to obtain injunctive relief which would require the employer to design, or the court may design, a completely new hiring policy where the present employment policy is inherently discriminatory. The Justice Department has announced that the kind of relief it will seek in pattern and practice cases<sup>99</sup> will be designed to "eliminate the structural impediments to equal employment opportunities, and the practices which perpetuate the effects of past discrimination."<sup>100</sup> The federal courts increasingly act upon the principle that they possess full powers to eliminate the present effects of past discrimination.<sup>101</sup>

<sup>97</sup> *Richards v. Griffith Rubber Mills*, 300 F. Supp. 338 (D. Ore. 1969) has interpreted the word "intentionally" to mean "willful and knowingly." *Id.* at 341. However, in all other cases it has been held that it is not necessary to intend specifically to discriminate, but only to have committed knowingly and voluntarily those acts resulting in discrimination; *Papermakers Local 189 v. United States*, 416 F.2d 980 (5th Cir. 1969); *Clark v. American Marine Corp.*, 304 F. Supp. 603 (E.D. La. 1969); *Dobbins v. I.B.E.W. Local 212*, 292 F. Supp. 413 (S.D. Ohio 1968).

<sup>98</sup> *Dobbins v. I.B.E.W. Local 212*, 292 F. Supp. 413 (S.D. Ohio 1968) held that an appropriate remedial order must accomplish three objectives in addition to prohibiting future violations: (1) deprive the defendant of gains made from the wrongful conduct; (2) eliminate effects of past unlawful practices; and (3) close off "untraveled roads" to the illicit end.

<sup>99</sup> "Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title . . . the Attorney General may bring a civil action . . . requesting such relief . . . as he deems necessary to insure the full enjoyment of the rights herein described. . . ." 42 U.S.C. § 2000e-6(a) (1964).

<sup>100</sup> 74 LAB. REL. REP. 371, 374 (August 24, 1970).

<sup>101</sup> Examples of these broad decrees are: the second decree in *United States v. Papermakers Local 189*, 282 F. Supp. 39 (E.D. La. 1969), which commanded extensive revamping of an entire seniority system and contractual practices in order to promote advancement for all black employees plant-wide; *Volger v. McCarty, Inc.*, 2 F.E.P. 491 (E.D. La. 1970), where the court extended an earlier order to provide for complete overhaul of a craft union's referral system; *United States v. Sheet Metal Workers Ass'n*, 416 F.2d 123 (8th Cir. 1969) where the court ordered a modification of union local referral systems, experience requirements for blacks otherwise qualified, and the journeyman's examination so that it could be given and graded in such a manner as to permit review. Although these cases involve racial discrimination in industrial plants, the principles announced are applicable to hiring, promotion and pay policies. It could mean that an employer of lawyers would be required to use reviewable standards in hiring, promotion, and pay policies.

Among disadvantages in resorting to such procedures against a present or potential employer would be a deterioration of working relationships leading to loss of job effectiveness or accomplishment and unpleasant working conditions.<sup>102</sup> For the woman who is already suffering such conditions, however, suit might not appreciably aggravate the situation. Nevertheless, in some instances a more attractive alternative than actually starting legal proceedings may simply be to communicate to the employer a knowledge of one's legal rights and the willingness, if necessary, to resort to legal proceedings. Such communication may itself provide powerful leverage in negotiating for fair employment practices in hiring or on the job, for the annoyance and possible public embarrassment that legal proceedings under title VII involve may provide an incentive to behave fairly.<sup>103</sup>

Lawyer-employers are especially familiar with the possible nuisance involved in being investigated by a government agency or being sued. Title VII gives the EEOC, in aid of its investigatory powers,<sup>104</sup> the power to demand any relevant evidence of any person being investigated in regard to an unlawful employment practice<sup>105</sup> and the power to enforce that demand by court order if necessary.<sup>106</sup> The courts have broadly construed the power of the EEOC to demand evidence. For example, in one case a court held that an EEOC request for information regarding all non-supervisory personnel at a plant where the alleged dis-

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<sup>102</sup> Congress recognized this threat when enacting title VII. 42 U.S.C. § 2000e-3(a) (1964) makes it unlawful for an employer to discriminate against an employee or applicant because he opposed any unlawful employment practice or took part in any investigation, proceeding or hearing under title VII.

<sup>103</sup> See note 92 *supra*. Another method for attempting to provide incentives to employers to utilize fair employment practices would be for women to insure the passage or enforcement of binding policies upon their law school placement offices. A policy statement sponsored by the New York City Bar Association and signed by nineteen law schools reads as follows: "Each signatory law school is committed to a policy against discrimination based on sex. . . . It is expected that employers will conform to this policy, expressed in law by Title VII of the Civil Rights Act of 1964, and take positive steps to assure that no such discrimination occurs in hiring, promotion, compensation or work assignment. Any complaints will be investigated, as the placement facilities of each signatory school are available only to employers whose practices are consistent with this policy." Under this statement of policy, the University of Michigan Law School banned a Wall Street firm from the use of law school placement facilities as of April 1970.

<sup>104</sup> "In connection with any investigation of a charge filed under section 2000e-5 . . . the Commission or its designated representative shall at all reasonable times have access to . . . and the right to copy any evidence of any person being investigated or proceeded against . . . and is relevant to the charge under investigation." 42 U.S.C. § 2000e-8(a) (1964).

<sup>105</sup> "For the purposes of any investigation of a charge filed under the authority contained in section 2000e-5 of this title, the Commission shall have authority . . . to require the production of documentary evidence relevant or material to the charge under investigation . . ." 42 U.S.C. § 2000e-9(a) (1964).

<sup>106</sup> *Id.* § 2000e-9(b).

crimination took place and which was limited to a five year period was not overly-broad.<sup>107</sup>

Should a complaint go as far as court proceedings, the employer may be significantly embarrassed by having the relevance and propriety of his personnel information and hiring procedures discussed in court. Information which the EEOC may demand includes pay scales and their method of computation,<sup>108</sup> qualifications of all applicants and present employees,<sup>109</sup> and employee job performance ratings and promotion procedures.<sup>110</sup>

Whether or not an individual plaintiff should win her case, her action may motivate the particular employer, and with adequate publicity, the profession in general, to examine attitudes and policies toward women lawyers. Despite the difficulties female professionals, executives or administrators would face in proving a case of discrimination, women should consider the possible beneficial effects of legal proceedings upon their occupational peers when considering various methods of improving their status within their profession and within society at large.

#### V. CONCLUSION

The past record of equal employment opportunity for women lawyers is bleak. In the past decade, however, significant statutory reform has taken place. Hopefully, the knowledge and understanding of employment rights by both women and employers will encourage fair practices. Hopefully, the legal profession, having a special responsibility with respect to the law, will examine its own attitudes and policies so that it may begin to erase sex discrimination from the profession. An opportunity for women to attempt to overcome sex discrimination in employment now exists.

— *Giovanna M. Longo*\*

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<sup>107</sup> Georgia Power & Light Co. v. EEOC, 412 F.2d 462 (5th Cir. 1969).

<sup>108</sup> EEOC v. Overnite Transp. Co., 1 F.E.P. 237 (N.D. Ga. 1967), *aff'd*, 397 F.2d 368 (5th Cir. 1968).

<sup>109</sup> Sheet Metal Workers Local 104 v. EEOC, 303 F. Supp. 528 (N.D. Cal. 1969).

<sup>110</sup> Monsanto Co. v. EEOC, 2 F.E.P. 50 (N.D. Fla. 1969).

\* Miss Longo is a third year student at the University of Michigan Law School.