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Title VII: A Three-Years' View

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I. Introduction

On July 2, 1964, the Civil Rights Act of 1964, the most comprehensive civil rights statute of this century, was signed into law. Probably the most significant and certainly the most controversial title of the act was Title VII,[1] which prohibits discrimination in employment on account of race, color, religion, sex or national origin. Enactment of Title VII culminated nearly twenty years of efforts by civil rights groups to obtain federal fair employment practices legislation.

The end result was not, however, entirely satisfactory to the supporters of such legislation, for Title VII was the principal victim of the legislative compromises necessary to achieve passage of the entire bill. Amendments in the Senate significantly weakened the enforcement authority of the Equal Employment Opportunity Commission, the agency created to administer Title VII, and many observers were frankly skeptical of the potential effectiveness of the title.[2]

The Equal Employment Opportunity Commission has recently completed its third year of administration of Title VII.[3] There is at this time sufficient experience under the title to justify an examination and reevaluation of the statute and its administration, particularly in the light of pending proposals for change.

It is the purpose of this article to review the principal legal developments, administrative and judicial, in the operation of Title VII during the past three years. Such an approach will naturally emphasize the role of the Commission as an interpreter and shaper of the law. This is not the Commission's only role, of course, nor even its major role. Its principal task is the day-to-day processing, investigating, and conciliating of complaints. Its educational and technical assistance functions are also important. These functions will receive little attention in this paper, which, therefore, does not purport to be a balanced overall appraisal of the Commission's performance. Similarly, the author's involvement in the Commission's first two years of operation prevents complete objectivity with respect to the judgments expressed herein.

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* Part I of a two-part series.

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1 42 U.S.C. §§ 2000e to 2000e-15 (1964).

2 *See, e.g.*, M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 79-80 (1966); Schmidt, *Title VII: Coverage and Comments*, 7 B.C. IND. & COMM. L. REV. 459, 471 (1966).

3 Although enacted in 1964, the operative provisions of the title did not take effect until 1965. See text accompanying note 11 *infra*.

II. Provisions of Title VII

The equal employment opportunity title of the Civil Rights Act of 1964 contains the following principal features:

(a) Title VII forbids discrimination on account of race, color, religion, sex or national origin by employers of twenty-five or more employees, labor organizations with twenty-five or more members, and employment agencies. The only significant exclusion from coverage is for the employment practices of governmental units.[4]

(b) To administer the title Congress established an Equal Employment Opportunity Commission, headed by five commissioners appointed for staggered five-year terms by the President with the advice and consent of the Senate.[5]

(c) The Commission has authority to receive and investigate charges of unlawful employment practices, *i.e.*, discrimination, and, if it determines "that there is reasonable cause to believe that the charge is true [to] endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."[6] If the Commission is unable to secure "voluntary compliance" by such informal methods, it must so notify the charging party, who is then entitled to bring a civil action against the respondent in federal district court. In such a suit the issues are tried de novo. If the plaintiff prevails in this suit, he is entitled to appropriate equitable relief, including hiring or reinstatement and back pay.[7]

(d) Charging parties must resort to available procedures under state antidiscrimination laws for a specified period of time before filing a charge with the Commission, but they are not required to exhaust such procedures.[8]

(e) To compensate, at least in part, for the absence of enforcement authority in the Commission, the title grants to the Attorney General the right to sue to prevent "patterns or practices" of discrimination. This right of action is apart from and independent of the Commission procedures.[9]

As enacted, the title differed significantly from the fair employment practices legislation which had been enacted in most of the major industrial states and proposed for many years in Congress. Such legislation generally provided for enforcement by an administrative agency with authority to hear and determine cases and to issue orders for remedial action.[10] Not only was the enforcement procedure of Title VII unique, but the procedural provisions of the

4 42 U.S.C. §§ 2000e(b),(e), 2000e-2 (1964).
5 42 U.S.C. § 2000e-4 (1964).
6 42 U.S.C. § 2000e-5(a) (1964).
7 42 U.S.C. § 2000e-5 (1964).
8 42 U.S.C. § 2000e-5(b) (1964).
9 42 U.S.C. § 2000e-6 (1964).
10 *E.g.*, ILL. ANN. STAT. ch. 48, §§ 851 to 867 (1966); MASS. ANN. LAWS ch. 151(b) (1965).

statute, hastily worked out as part of the "leadership compromise" in the Senate, were somewhat ambiguous on significant questions.

Title VII also departed from legislative precedents in its prohibition of sex discrimination. This provision, added to the title on the floor of the House and never subjected to extensive analysis during the subsequent congressional debates, was to create for the Commission considerable difficulties of interpretation.

In retrospect, at least, it seems clear that given the inherent difficulties of dealing with employment discrimination and the weaknesses and ambiguities of Title VII, the Commission's task of turning the statute into a going operation was certain to prove a formidable one. To ease the impact of Title VII, however, Congress had provided that its operative provisions not take effect until one year after enactment.[11] This delay would not only cushion the impact of the new law, but would also enable the Commission to become organized and to make plans for the administration of the title. Unfortunately, the opportunity afforded by the one-year delay was lost to the Commission. The commissioners themselves were not appointed until May, 1965 and did not take office until June 2, one month before the title was to go into effect. Thus, the Commission was faced at the outset with the necessity of simultaneously creating an administrative organization competent to investigate and process charges of discrimination, making the legal and policy determinations essential to such processing, and educating and advising the affected persons and groups as to their rights and responsibilities under the new law.

III. Procedural Problems

A. The Right to Sue

The Commission's first major problem was to devise machinery and procedures for handling the many complaints of discrimination which were received as soon as Title VII became effective. With no opportunity to select an investigative staff of its own, the Commission initially operated with investigators borrowed from other agencies. Its difficulties at this stage were compounded by doubts as to the legal effect of Commission procedures on private rights of action under Title VII.

Section 706(a)[12] provides that when a charge of discrimination is filed, the Commission shall conduct an investigation. If after investigation the Commission determines that there is reasonable cause to believe that the respondent committed an unlawful employment practice, it shall endeavor to eliminate the practice through conciliation. Section 706(e)[13] provides that if the Commission is unable "to obtain voluntary compliance" within thirty days (which period may be extended to sixty days), it must so notify the charging party, who then has thirty days in which to bring suit.

While this procedure is clear enough as far as it goes, it fails to provide

11 42 U.S.C. § 2000e (1964).
12 42 U.S.C. § 2000e-5(a) (1964).
13 42 U.S.C. § 2000e-5(e) (1964).

specifically for certain fairly obvious contingencies: first, the situation where the Commission makes a determination of no reasonable cause and thus does not attempt to obtain voluntary compliance; and second, the situation where the Commission is unable within the sixty-day period allotted by section 706(e) to complete one or more of the three steps (investigation, determination, conciliation) set forth in section 706(a).

The legislative history, far from shedding light on these procedural questions, simply adds to the confusion. Three distinct positions can draw support from the Senate debate on Title VII. First, the entire Commission procedure is optional with the charging party and cannot affect his right to sue.[14] Second, a Commission determination of reasonable cause, *i.e.*, a determination favorable to the charging party, is a prerequisite for suit.[15] Third, the charging party must pursue his remedy before the Commission, but is not bound by a determination of no reasonable cause.[16] Obviously, the form and nature of the Commission's proceedings would depend to some extent on which interpretation of Title VII the Commission adopted. The first position could be quickly ruled out. The structure of the title and particularly the timetable provided in section 706(e) contemplate resort to the Commission prior to suit. Furthermore, it seems improbable that Congress intended to set up the complicated Commission procedure, only to leave the charging party free to ignore it entirely at his option.[17] As between the second and third positions, two considerations supported the latter. First, the determination of reasonable cause could in no way bind the respondent, since the whole purpose of denying quasi-judicial authority to the Commission was to assure him of a judicial rather than an administrative determination of the issues in the case. Therefore, in the interests of fairness and symmetry, a Commission determination adverse to the charging party should not have the effect of depriving him of his day in court. Second, if the Commission determination were to bind the charging party, it would seem to follow that the charging party should have certain procedural rights before the Commission, including, perhaps, the right to a hearing and to judicial review. But formal procedures could not have been contemplated when Congress directed the

14 Senator Humphrey, the principal spokesman for the bill, stated: "The individual may proceed in his own right at any time. He may take his complaint to the Commission, he may bypass the Commission, or he may go directly to court." 110 CONG. REC. 14188 (1964).

15 Senator Ervin, one of the bill's opponents, remarked shortly after Senator Humphrey's statement (see *id.*) that:

> [T]he bill certainly puts the key to the courthouse door in the hands of the Commission. This is true because the aggrieved party cannot sue in the Federal courts unless the Commission first finds that there is reasonable cause to believe the charge is true and then fails to adjust the matter by conciliation. *Id.*

16 Another supporter of the bill, Senator Javits, declared:

> [T]he Commission does not have to find that the complaint is a valid one before the complainant individually can sue or before the Attorney General can bring a suit to establish a pattern or practice of discrimination. . . . In short, the Commission does not hold the key to the courtroom door. The only thing this title gives the Commission is time in which to find that there has been a violation and time in which to seek conciliation. *Id.* at 14191.

While the Javits statement appears to point to the third position, it is not necessarily inconsistent with the Humphrey statement.

17 Yet this is exactly what Congress did this year in the Fair Housing title of the Civil Rights Act of 1968. *See* 42 U.S.C.A. §§ 3610, 3612 (Supp. 1968).

Commission to obtain voluntary compliance in thirty, or, at the most, sixty days.[18] For a Commission which was daily falling further behind in its workload, the prospect of such formal proceedings was out of the question. Consequently, the Commission took the position as early as October, 1965 that while the charging party probably could not bring suit without prior resort to the Commission, he might bring suit whether or not the Commission found reasonable cause to credit his charge.[19]

The provisions of section 706(e) posed a related and more serious problem — the effect to be given to the direction that the Commission process cases within sixty days. From the start of its operations in July, 1965, the Commission was burdened with a complaint load far in excess of that which had been anticipated and provided for.[20] In mid-August the processing time on all cases was extended to the full sixty days. Soon it became clear that sixty days would not suffice for processing cases through conciliation or even, in some cases, through the determination of reasonable cause. The Commission was faced with two conflicting statutory demands. Section 706(e) directs the Commission to notify the charging party of its inability to obtain voluntary compliance, a direction which certainly appears to contemplate that the "informal methods of conference, conciliation, and persuasion" prescribed in section 706(a) have been tried and proven unsuccessful. But section 706(e) also directs that upon the expiration of "not more than sixty days" the Commission shall notify the charging party of its failure and it provides further that the charging party's thirty-day period in which to bring suit commences with such notification. Since the Commission had already decided that a determination of reasonable cause was not a prerequisite to a private suit, it seemed at least questionable that the vague language about obtaining voluntary compliance would be held to take precedence over the specific sixty-day limit. Unwilling to imperil the rights of action of charging parties by unreasonable delay in notification, the Commission took the position that (1) the right of action of the charging party does not accrue automatically upon the expiration of the sixty-day period, but upon receipt of the Commission's notice; and (2) the Commission must send out such a notice within a reasonable time (usually ten days) after the expiration of the statutory period, regardless of the stage the case had reached in the Commission's processes.[21]

The practice of issuing so-called "60-day notices" before conciliation had been attempted, and frequently before the investigation had been completed, was generally not satisfactory either to charging parties or respondents. It compelled the bringing of a suit before the Commission procedures were completed or even well under way. To avoid this result, the Commission in certain cases assisted in

18 42 U.S.C. § 2000e-5(e) (1964).

19 EEOC Legal Interpretation (General Counsel opinion of Sept. 7, 1965). CCH EMPL. PRAC. GUIDE ¶ 17,251.083 (1965).

20 "Complaints of discrimination received during the first 5½ months that the Commission has been in operation amount to 1½ times the amount which had been tentatively estimated for the entire initial year of operation." *Departments of State, Justice, etc., and Related Agencies Appropriations for 1967, Hearings before a Subcomm. of the House Appropriations Comm.*, 89th Cong., 2d Sess., ser., pt., at 280 (1967).

21 EEOC Legal Interpretation (General Counsel opinion of October 25, 1965), CCH EMPL. PRAC. GUIDE ¶ 17,252.32 (1966).

obtaining waivers of the period of limitations in order to delay the filing of suits, while in others the "reasonable time" after expiration of sixty days was interpreted quite liberally.

Finally, the Commission, as a compromise solution, amended its regulations to provide that notice would not ordinarily be sent out prior to dismissal of a charge on its merits or, where reasonable cause had been found, prior to efforts at conciliation. However, if either party demanded notice after sixty days, such notice would be sent.[22] A party who failed to demand notice could not, therefore, complain at a later date of improper delay. Thus, the Commission reasoned, the amendment would protect the rights of those parties, whether charging party or respondent, whose interests would be prejudiced by lengthy Commission proceedings, as well as those parties whose best interests would be served by exhausting Commission procedures prior to suit.[23]

I have sketched out in some detail this evolution in Commission procedure because the same issues underlie the majority of the reported decisions to date under Title VII. In the first reported case, *Hall v. Werthan Bag Corporation,*[24] the United States District Court for the Middle District of Tennessee was forced to analyze the basic nature of a suit under section 706. Hall, the plaintiff, had filed a charge with the Commission against his employer.[25] After a determination of reasonable cause and subsequent unsuccessful attempts at conciliation, he commenced suit on behalf of himself and "all other Negroes who are similarly situated and affected"[26] by the practices of the defendant employer. Tate, a Negro employee who had not filed a charge with the Commission, moved to intervene as a member of the class.[27] The court held that a class action was appropriate under rule 23(a) of the Federal Rules of Civil Procedure.[28] It rejected the defendant's argument that the peculiar structure of Title VII precluded a class action because only a plaintiff who had resorted to the Commission procedure was entitled to judicial relief.[29] In examining the structure and legislative history of Title VII, the *Hall* court reached essentially the same conclusion as had the Commission — resort to the Commission is a prerequisite to suit, but a determination of reasonable cause is not. (The latter conclusion was dictum since there had been a determination of reasonable cause as to Hall.) "[T]he requirement of resort to the Commission was designed to give a discriminator opportunity to respond to persuasion rather than coercion . . . ; the requirement was not designed to serve as a screen to prevent frivolous complaints from reaching the courts."[30] From this it would seem to follow that Tate, who had not filed a charge with the Commission, should not be permitted to intervene. But the court distinguished between Tate's status as an individual complainant

22 29 C.F.R. § 1601.25a (1967).
23 Demands for early notice have been few, however, except in California, where the decision in *Cunningham v. Litton Industries,* 66 L.R.R.M. 2697 (C.D. Cal. 1967), has caused charging parties to bring suit promptly as a protective measure. See note 41 *infra.*
24 251 F. Supp. 184 (M.D. Tenn. 1966).
25 *Id.* at 185.
26 *Id.*
27 *Id.*
28 *Id.* at 188.
29 *Id.*
30 *Id.*

and as a member of the class.[31] Insofar as Tate sought recovery for specific acts of discrimination directed at him, he was not entitled to relief since he had not proceeded through the Commission.[32] However, insofar as he sought injunctive relief against future discrimination against Negroes, the purpose of prior resort to the Commission had already been served in Hall's case.[33] Consequently, Tate was permitted to intervene for this latter purpose alone.[34]

As to the first issue decided in *Hall,* that resort to the Commission is a prerequisite to suit, the subsequent cases have reached this conclusion with such unanimity[35] that the point may be taken as established. This has been the result not only where the charging party bypassed the Commission entirely,[36] but also where the plaintiff who proceeded before the Commission attempted to add as an additional defendant a party not named in the original charge.[37]

The second question considered in *Hall,* whether a determination of reasonable cause is a prerequisite to suit, may still be considered open as far as the reported cases are concerned. No case has held in so many words that a charging party may sue notwithstanding an adverse determination by the Commission. One case, *Bowe v. Colgate-Palmolive Company*[38] contains language indicating that the court believed that a determination of reasonable cause was a prerequisite for suit, but the court appears to have confused the Commission's notice of a determination of reasonable cause with the notice of failure to obtain voluntary compliance.[39] In any event, in that case the Commission had

31 *Id.* at 186.
32 *Id.*
33 *Id.* at 188.
34 *Id.*
35 *E.g.,* Washington v. Aerojet-General Corp., 282 F. Supp. 517 (C.D. Cal. 1968); Cox v. United States Gypsum Co., 284 F. Supp. 74 (N.D. Ind. 1968). *Contra,* Ward v. Firestone Tire & Rubber Co., 260 F. Supp. 579 (W.D. Tenn. 1966) (dictum).
36 Stebbins v. Nationwide Mutual Ins. Co., 382 F.2d 267 (4th Cir. 1967), *cert. denied,* 390 U.S. 910 (1968).
37 Mickel v. South Carolina State Employment Serv., 377 F.2d 239 (4th Cir.), *cert. denied,* 389 U.S. 877 (1967) (charge named employment agency; suit dismissed as to employer); Moody v. Albemarle Paper Co., 271 F. Supp. 27 (E.D.N.C. 1967) (charge named employer and local union; suit dismissed as to international union). This may present a problem for an unwary charging party. If a charge relates to the collective bargaining contract, the union may be an indispensable party. In such a case if only the employer is named in the charge, the charge should be amended to add the union.
38 272 F. Supp. 332 (S.D. Ind. 1967).
39 *See id.* at 338. The Commission's rules provide for notification to both parties of a determination of reasonable cause, 29 C.F.R. § 1601.19, and of a failure to obtain voluntary compliance, 29 C.F.R. § 1601.25. It is the latter notice which is, under section 706(e), a prerequisite to the charging party's right of action and sets running the thirty-day period in which to sue. Cox v. United States Gypsum Co., 284 F. Supp. 74, 83 (N.D. Ind. 1968); Kendrick v. American Bakery Co., 58 CCH LAB. CAS. ¶ 9146 (N.D. Ga. 1968). For text of a "suit letter" (a letter from the Commission advising a charging party that he may now commence suit), see Sokolowski v. Swift & Co., 286 F. Supp. 775, 778 (D. Minn. 1968). As indicated in the text accompanying note 21 *supra,* the notice under section 1601.25 was sometimes issued prior to a determination of reasonable cause under previous Commission practice. This may still be done, but only upon the formal request of one of the parties. See text accompanying note 22 *supra.* Where the Commission's determination is one of no cause, however, the section 1601.19 notice operates as a dismissal of the case, and, until recently, served the function of a suit letter as well, assuming that the charging party has a right of action. However, the Commission has altered its practice and now sends out a section 1601.25 notice together with a no-cause determination. The Commission has also amended section 1601.19 to delete the right of the parties to seek reconsideration of the determination. 33 Fed. Reg. 15866 (1968). The amendment reserves to the Commission the right to reconsider any determination on its own motion. *Quaere* whether reconsideration of a no-cause determination after the thirty-day period has expired can operate to revive a charging party's cause of action.

made determinations of reasonable cause as to all the plaintiffs who had filed timely charges. On the other hand, in *King v. Georgia Power Company,*[40] the court granted defendant's motion to strike as irrelevant and prejudicial the Commission determination of reasonable cause, which had been attached as an exhibit to the complaint. The court stated: "As a matter of pleading, it would not appear that this document is necessary or relevant in stating a cause of action."[41] Furthermore, several of the cases considered below, which hold that attempts at conciliation are not a prerequisite for commencing an action, involve situations in which suit was brought prior to the determination of reasonable cause.[42] In short, the courts appear to accept tacitly the proposition stated in *Hall* that the function of the Commission is not to filter out complaints which lack merit, and they regard suits brought prior to the determination of reasonable cause and those brought prior to attempts at conciliation as raising substantially the same issue.

Before considering further the final issue in *Hall,* the propriety of a class suit,[43] I will discuss the other procedural questions that have arisen in Title VII suits. As we have seen, the procedural requirements of section 706(e) had placed the Commission on the horns of a dilemma — whether to comply with the sixty-day requirement or with the implied direction to exhaust efforts at obtaining voluntary compliance before issuing notice to the charging party. In *Dent v. St. Louis-San Francisco Railway*[44] and five companion cases, the defendants moved to dismiss on the grounds both that the suits were brought more than ninety days after the charges were filed[45] and that the suits were instituted without any prior conciliation efforts by the Commission.[46] The court agreed with the position of the Commission that suit need not be brought within ninety days. "[T]he 60-day time period provided for the investigation and conciliation of charges is properly to be accorded a directory rather than a mandatory construction."[47] However, the court disagreed with the Commission's contention that suit could be brought upon receipt of a "60-day notice" even where there had been no conciliation.[48] The court concluded on the basis of

40 58 CCH Lab. Cas. ¶ 9150 (N.D. Ga. 1968).

41 *Id.* ¶ 9150, at 6577. *Accord,* Carrington v. Douglas Aircraft Co., 69 L.R.R.M. 2654 (C.D. Cal. 1968). In a rather confusing opinion one court has recently held that it was not deprived of jurisdiction by the fact that a determination of reasonable cause had not yet been made, but that such a determination may be a prerequisite to relief under the Act. *Edwards v. North American Rockwell Corp.,* 58 CCH Lab. Cas. ¶ 9153 (C.D. Cal. 1968). The decision was influenced by *Cunningham v. Litton Industries,* 66 L.R.R.M. 2697 (C.D. Cal. 1967), which held that suit must be commenced within ninety days after the charge is filed. Thus, in the *Edwards* court's view, a plaintiff is required to file a protective action and then await the outcome of the Commission proceeding. This seems a clearly unsatisfactory result, but *Cunningham* represents the minority view and seems likely to be reversed.

42 Moody v. Albemarle Paper Co., 271 F. Supp. 27 (E.D.N.C. 1967) (determination of reasonable cause made after suit instituted but prior to motion to dismiss). *See also* Mondy v. Crown Zellerbach Corp., 271 F. Supp. 258 (E.D. La. 1967), *reversed in part on other grounds sub nom.,* Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968) (determination of reasonable cause not made at time motion to dismiss denied).

43 See text accompanying notes 67-97 *infra.*

44 265 F. Supp. 56 (N.D. Ala. 1967).

45 *Id.* at 58. Defendants argued that section 706(e) allowed sixty days for the Commission procedure and thirty days for plaintiff to bring suit, ninety days in all.

46 *Id.* at 57-58.

47 *Id.* at 58.

48 *Id.*

the legislative history of Title VII that conciliation, *i.e.*, "some effort or attempt to obtain voluntary compliance, however minimal,"[49] was a jurisdictional prerequisite for suit. Accordingly, the suits were dismissed without prejudice.[50]

From the Commission's point of view, the result in *Dent* was far less unfavorable than would have been a holding that the sixty-day limitation was mandatory. It was, after all, because of its doubts as to the effect of the sixty-day limitation that the Commission instituted its policy of sending out notices prior to conciliation. Once it was firmly established that the sixty-day period could be ignored, there were certain advantages to the Commission in being able to control the accrual of the charging party's right of action. However, the *Dent* decision not only failed to give the accustomed weight to the administrative interpretation of a statute which was, at the least, ambiguous, but it also disregarded entirely the possible interest that either party might have in prompt litigation. The lengthy administrative delay which presently inheres in Commission procedures is likely to discourage many prospective litigants.[51] A respondent may desire to avoid the piling up of potential back pay claims. Either party may desire litigation to establish a particular legal principle. These interests are accommodated by the Commission's present procedures, but not by the *Dent* decision.[52] Finally, by permitting the defendant to litigate the question of whether conciliation had occurred, *Dent* permits the introduction of a factual issue extraneous to the merits of the case and, in effect, invites judicial scrutiny of the adequacy of the conciliation efforts in particular cases. Since the courts already have authority under section 706(e) to stay proceedings for up to sixty days for the purpose of further conciliation, no valid purpose can be served by laying open the Commission's earlier efforts to such "second guessing."

Most subsequent cases have agreed with *Dent* and the Commission that compliance with the sixty-day limitation is not mandatory, and that the thirty-day period for bringing suit does not start to run until the complainant actually receives notice from the Commission, regardless of any delay in such notification.[53]

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49 *Id.* at 61.

50 *Id.* at 63. The *Dent* court never explained the logical jump from the premise that conciliation is a prerequisite to the conclusion that the absence of conciliation deprives the court of jurisdiction over the subject matter. Conciliation had in fact been attempted unsuccessfully in all six cases before the court in the interval between the institution of the suits and the disposition of the motion to dismiss. The result of the court's decision would be to force the Commission to go through the empty formality of issuing new notices so that the plaintiffs could file new complaints. Assuming that an attempt at conciliation is a condition precedent to the right of action, it would seem more logical to regard it as an element which may be supplied by an amended pleading. For examples of amended pleadings in like situations, see Security Ins. Co. of New Haven v. United States, 338 F.2d 444 (9th Cir. 1964); Lynam v. Livingston, 257 F. Supp. 520 (D. Del. 1966).

51 Despite recent increases in productivity, Chairman Alexander of the EEOC recently stated that the average case spends eleven months in investigation and five months in conciliation. 68 LAB. REL. REP. 200. In addition, the Commission has on occasion postponed decision on (and in effect ceased to process) cases raising particularly difficult legal problems. Thus, between May, 1966 and February, 1968, processing of cases involving flight cabin attendants was suspended pending resolution of the question of bona fide occupational qualification. See text accompanying notes 173-85 *infra*.

52 *Cf.* Cunningham v. Litton Industries, 66 L.R.R.M. 2697 (C.D. Cal. 1967), which is discussed briefly in note 41 *supra*.

53 Choate v. Caterpillar Tractor Co., ___ F.2d ___, 58 CCH Lab. Cas. ¶ 9162 (7th Cir. 1968); Mondy v. Crown Zellerbach Corp., 271 F. Supp. 258, 261 (E.D. La. 1967), *reversed in*

In deciding whether conciliation is a prerequisite for suit, most courts have refused to follow *Dent*. They have held that when the charging party receives notice of failure to obtain voluntary compliance, he is entitled to take the Commission at its word. Thus the United States District Court for the Eastern District of Virginia has said:

> The plaintiff is not responsible for the acts or omissions of the Commission. . . . The plaintiff exhausted administrative remedies and satisfied the requirements of the Act by filing a complaint with the Commission and awaiting its advice. He is not required to show that the Commission has endeavored to conciliate. To insist that he do so, would require him to pursue an administrative remedy which may be impossible to achieve. If the Commission makes no endeavor to conciliate, the remedy is ineffective and inadequate.[54]

Similarly, a federal district court in Louisiana, after reviewing the legislative history relied on in *Dent* and finding it unclear, concluded that section 706(e)

> sets out only two requirements for an aggrieved party before he can sue: (1) he must file a charge with the E.E.O.C., and (2) he must receive the statutory notice from the E.E.O.C. that it has been unable to obtain voluntary compliance. There is nothing more that a person can do . . . .[55]

If, as appears likely, the appellate courts concur with this view of the law (two courts of appeals have recently done so;[56] *Dent* is presently awaiting decision on appeal), the problem of the procedural prerequisites for suit under Title VII will have been vastly simplified.

Certain other procedural defenses might be briefly noted. In *Choate v. Caterpillar Tractor Company*,[57] the United States Court of Appeals for the Seventh Circuit reversed a district court decision which dismissed a complaint on the ground that it did not allege that plaintiff's charge to the Comission

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part on other grounds sub nom., Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968); Harris v. Orkin Exterminating Co., 58 CCH Lab. Cas. ¶ 9134 (N.D. Ga. 1968); Pullen v. Otis Elevator Co., 58 CCH Lab. Cas. ¶ 9133 (N.D. Ga. 1968); King v. Georgia Power Co., 58 CCH Lab. Cas. ¶ 9150 (N.D. Ga. 1968); Peurala v. United States Steel Corp., 58 CCH Lab. Cas. ¶ 9135 (N.D. Ill. 1968); Fore v. Southern Bell Telephone Co., 69 L.R.R.M. 2631 (W.D.N.C. 1968). *Contra*, Cunningham v. Litton Industries, 66 L.R.R.M. 2697 (C.D. Cal. 1967); Miller v. International Paper Co., 67 L.R.R.M. 2790 (S.D. Miss. 1967).

54 Quarles v. Philip Morris, Inc., 271 F. Supp. 842, 846-47 (E.D. Va. 1967).

55 Mondy v. Crown Zellerbach Corp., 271 F. Supp. 258, 263 (E.D. La. 1967). Other decisions holding that conciliation is not a prerequisite to suit include Pena v. Hunt Tool Co., 58 CCH Lab. Cas. ¶ 9123 (S.D. Tex. 1968); Sokolowski v. Swift & Co., 286 F. Supp. 775 (D. Minn. 1968); Wheeler v. Bohn Aluminum & Brass Co., 58 CCH Lab. Cas. ¶ 9137 (W.D. Mich. 1968); Anthony v. Brooks, 55 CCH Lab. Cas. ¶ 9064 (N.D. Ga. 1967); Evenson v. Northwest Airlines, Inc., 268 F. Supp. 29 (E.D. Va. 1967); Moody v. Albemarle Paper Co., 271 F. Supp. 27 (E.D.N.C. 1967); Reese v. Atlantic Steel Co., 282 F. Supp. 905 (N.D. Ga. 1967). While the discussion in *Dent* has been cited approvingly in *Mickel v. South Carolina State Employment Service*, 377 F.2d 239, 242 (4th Cir.), *cert. denied*, 389 U.S. 877 (1967), that case involved a rather different issue. Only three cases have followed *Dent* in dismissing a complaint for failure to conciliate: Mickel v. South Carolina State Employment Serv., 57 CCH Lab. Cas. ¶ 9111 (D.S.C. 1968); Burrell v. Kaiser Aluminum & Chemical Corp., 287 F. Supp. 289 (E.D. La. 1968); Johnson v. Seaboard Air Line R.R. Co., Civ. Action no. 2171 (W.D.N.C. 1968). *Johnson* has since been reversed. See note 56 *infra*.

56 Johnson v. Seaboard Airline R.R. Co., ___ F.2d ___, 38 L.W. 2279 (4th Cir. 1968); Choate v. Caterpillar Tractor Co., ___ F.2d ___, 58 CCH Lab. Cas. ¶ 9162, at 6657-58 & 6657 n.5 (7th Cir. 1968).

57 ___ F.2d ___, 58 CCH Lab. Cas. ¶ 9162 (7th Cir. 1968).

had been made "under oath," as required by section 706(a). The decision of the lower court seemed an absurdly technical reading of the statute. The purpose of the oath requirement is simply to deter the filing of deliberately false or irresponsible charges. The Commission has quite reasonably provided by its regulations[58] that a charge may be amended to cure technical defects, including failure to swear to the charge. Such amendment relates back to the original filing date. Therefore, if a respondent desires a sworn charge, he should object in the course of the Commission proceeding, when the defect can easily be cured. To permit such an objection to be raised for the first time as a defense to an action under section 706 violates the principle that objections to procedural irregularities must be made in the course of the administrative proceeding and may not be made for the first time in the courts.[59] Reversing the lower court decision, the Seventh Circuit held that the oath requirement "relates solely to the administrative rather than to the judicial features of the statute."[60] Therefore, failure to verify the charge does not affect the court's jurisdiction of the action.

Section 706(a) directs the Commission to furnish the respondent with a copy of the charge. It has been the usual practice of the Commission to delay service of the charge until the commencement of the investigation, which may be several months after the charge is filed. While the courts have been somewhat critical of this practice, they have held in three cases that the validity of the charge is not affected by the Commission's delay in serving it upon the respondent.[61]

Finally, the courts have uniformly rejected the argument that a charging party has any duty to resort to remedies under a collective bargaining agreement prior to invoking the procedures of Title VII.[62] However, in *Bowe v. Colgate-Palmolive Company*,[63] the court required plaintiffs to elect whether to proceed under Title VII or to pursue their rights under the contractual grievance and arbitration machinery.[64] In *Washington v. Aerojet-General Corporation*,[65] the

58 29 C.F.R. § 1601.11(b) (1967). *See* Blue Bell Boots, Inc. v. EEOC, 58 CCH Lab. Cas. ¶ 9139 (M.D. Tenn. 1968) (Commission entitled to investigate timely but unsworn charges that were later amended). *Accord,* Georgia Power Co. v. EEOC, 58 CCH Lab. Cas. ¶ 9149 (N.D. Ga. 1968); Stastny v. Southern Bell Co., 69 L.R.R.M. 2632 (W.D.N.C. 1968).

59 United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33 (1952). The Supreme Court stated:

> Simple fairness to those who are engaged in the task of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objections made at the time appropriate under its practice. *Id.* at 37.

Of course, a section 706 suit is not a proceeding for judicial review of an agency action in the ordinary sense. With respect to the merits of the complaint, a respondent is entitled to a trial de novo whether or not he contested any issue before the Commission. But when a respondent bases his defense on an infirmity in the Commission's procedure, he should be bound to demonstrate that he made timely objection before the Commission, or, alternatively, that he had no opportunity to object before the Commission.

60 Choate v. Caterpillar Tractor Co., —— F.2d ——, 58 CCH Lab. Cas. ¶ 9162 (7th Cir. 1968). *Accord,* King v. Georgia Power Co., 58 CCH Lab. Cas. ¶ 9150 (N.D. Ga. 1968).

61 Local 5, IBEW v. EEOC, 398 F.2d 248 (3rd Cir. 1968); Pullen v. Otis Elevator Co., 58 CCH Lab. Cas. ¶ 9133 (N.D. Ga. 1968); Blue Bell Boots, Inc. v. EEOC, 58 CCH Lab. Cas. ¶ 9139 (M.D. Tenn. 1968).

62 Dent v. St. Louis-San Francisco Ry., 265 F. Supp. 56 (N.D. Ala. 1967); Reese v. Atlantic Steel Co., 282 F. Supp. 905 (N.D. Ga. 1967).

63 272 F. Supp. 332 (S.D. Ind. 1967).

64 *Id.* at 337-38.

65 282 F. Supp. 517 (C.D. Cal. 1968).

court rejected the implication in *Bowe* that a choice must be made ab initio, but suggested that when a party has pursued his remedy to decision in either forum, "be it by settlement, the decision of an arbitrator, or the decision of a judge"[66] he would be barred in the other.

B. Class Suits

Whether a class suit is appropriate under Title VII really involves two separate questions: (1) Does the subject matter of the suit meet the ordinary requirements for a class action? (2) Does the provision in Title VII for prior resort to the Commission by the "person aggrieved" impliedly bar a class action? The United States District Court for the Middle District of Tennessee, in *Hall v. Werthan Bag Corporation,*[67] resolved both questions in favor of the availability of a class action. It reached this result by casting the problem as one of determining what sort of relief Congress intended the courts to provide in cases of discrimination.[68] The legislative history and, particularly, the language of sections 706(g) and (i)[69] suggest a scope of relief comparable to that appropriate for a cease-and-desist order under the National Labor Relations Act.[70] Indeed, it would have been absurd to conclude that the long and complicated procedure for relief under section 706 could not lead to more than a court order protecting the plaintiff himself from discrimination, but leaving the respondent free to continue his discriminatory practices with respect to others. In the court's view, therefore, the overall structure of Title VII strengthened rather than weakened the argument for the availability of broad injunctive relief. As the court pointed out, a suit under section 706 protects both private and public interests,[71] and "a privately instituted class action is unique in its adaptability to Title VII's split personality."[72]

Even more significant, perhaps, was the *Hall* court's discussion of the propriety of a class action in the particular case before it. One of the requirements for a class suit is that it involve a question of law or fact common to the class.[73] This requirement is easily met, of course, where a suit challenges a particular rule or policy, such as a discriminatory seniority plan or the maintenance of segregated facilities, since the rule or policy operates in a similar and predictable way with respect to all members of the class. However, where the respondent's

66 *Id.* at 523. *Contra,* Dewey v. Reynolds Metal Co., 69 L.R.R.M. 2601 (W.D. Mich. 1968) (Plaintiff whose charge of religious discrimination was rejected on the merits by an arbitrator held entitled to pursue his remedy under Title VII).

67 251 F. Supp. 184 (M.D. Tenn. 1966).

68 *Id.* at 187-88.

69 42 U.S.C. §§ 200e-5(g), 2000-5(i) (1964). Section 706(g) provides that "the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate . . . ." Section 706(i) reads as follows:

> In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under subsection (3), of this section, the Commission may commence proceedings to compel compliance with such order.

70 29 U.S.C. §§ 151-68 (1964).

71 *Cf.* Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 401-02 (1968).

72 Hall v. Werthan Bag Corp., 251 F. Supp. 184, 187 (M.D. Tenn. 1966).

73 FED. R. CIV. P. 23(a)(2). *Hall* was decided prior to the effective date of the present rule, but FED. R. CIV. P. 23(a)(3), then in effect, contained the same requirement.

discrimination is not embodied in any announced policy, but is covert and manifested, perhaps sporadically, in otherwise unrelated personnel decisions, the existence of a common question of law or fact seemed doubtful.[74] The court in *Hall* resolved this problem by concluding that the existence of a policy, or perhaps more accurately, a propensity, to discriminate against members of a particular class is a question of fact common to the members of the class, notwithstanding that the policy may manifest itself at different times and in different ways.

> Racial discrimination is by definition a class discrimination. If it exists, it applies throughout the class. . . . But although the actual effects of a discriminatory policy may thus vary throughout the class, the existence of a discriminatory policy threatens the entire class. And whether the Damoclean threat of a racially discriminatory policy hangs over the racial class is a question of fact common to all the members of the class.[75]

The court's analysis has broad implications with respect to not only the scope of the final decree, but also the issues which may be raised and litigated by a private plaintiff in a section 706 suit.

If a Title VII action is properly directed at the underlying discriminatory policy and not merely at the several manifestations of such a policy, it would seem to follow that the plaintiff is not limited to charging and proving acts of discrimination directed at himself personally, but that he may also allege, prove, and obtain prospective relief for any discriminatory acts or practices having some actual or potential impact on his conditions of employment.[76] He is, in short,

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74 *See* Reddix v. Lucky, 252 F.2d 930, 938 (5th Cir. 1958) (suit under Civil Rights Act by voter and all others similarly situated); Carson v. Warlick, 238 F.2d 724 (4th Cir. 1956) (suit to desegregate school, jointly filed by applicants for admission).

75 Hall v. Werthan Bag Corp., 251 F. Supp. 184, 186 (M.D. Tenn. 1966). *But see* Johnson v. Georgia Highway Express, Inc., Civ. Action #11598 (N.D. Ga. 1968), holding that where a Negro employee alleged that he was discharged because of his race and the defendant employer claimed that the discharge was for cause, the critical fact question of the basis for discharge was not common to other Negro employees or applicants and a class action would not be permitted until the fact of unlawful discharge had been established. *Johnson* indicates some of the difficulties involved in trying to fit a suit based on a discrete act or acts of discrimination into the conventional categories of class actions. The pleadings indicated that over one-third of defendant's employees were Negroes. Thus, even if plaintiff's discharge was discriminatory, the court appeared unwilling to assume that his interest was representative of those Negroes who remained employed or who might later seek employment. Perhaps the difficulty lay in a failure of the plaintiff to define more specifically the employer's policy which had led to the discharge. If, for example, a Negro is discharged for not being sufficiently deferential to a white supervisor or for otherwise attempting to exercise prerogatives customarily reserved to whites, a complaint could be framed in terms of the existence of the policy which has been enforced by the discharge. On the other hand, if the discharge, assuming that it was discriminatory, was the result of a random act of malice, a class suit is somewhat harder to justify by conventional analysis, although the need to prevent a recurrence of such discrimination would remain.

76 Most courts have followed *Hall* as to the availability of class relief, and have also been liberal in their determination of the class affected, the relief available, and the standing of the plaintiff to represent the class. *See* Griggs v. Duke Power Co., 67 L.R.R.M. 2616 (M.D.N.C. 1967) (class suit on behalf of all Negro employees present and future, as well as all applicants, held appropriate); *accord,* Banks v. Lockheed Georgia Co., 58 CCH Lab. Cas. ¶ 9131 (N.D. Ga. 1968). *But see* Hardy v. United States Steel Corp., 289 F. Supp. 200 (N.D. Ala. 1967) (in suit challenging seniority lines of progression, only Negroes whose rights are governed by same lines are members of class).

If class relief is found to be inappropriate, individual relief to a member of the class may be granted. *See* Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 509-10 (E.D. Va. 1968) (no present pattern of wage discrimination against Negroes, but wages of plaintiff Briggs and witness Oatney were vestiges of previous policy of discrimination and were ordered adjusted).

a "private attorney general."[77]

The implications of the *Hall* opinion have been spelled out more clearly in two recent decisions by the United States Court of Appeals for the Fifth Circuit. In *Oatis v. Crown Zellerbach Corporation*,[78] the lower court had dismissed the suit as to three plaintiffs who had not been charging parties before the Commission, holding that the plaintiff class was limited to those individuals who had filed charges.[79] The Court of Appeals reversed.[80] It rejected entirely the construction of Title VII advanced by the lower court:

> It would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with the EEOC. . . . The better approach would appear to be that once an aggrieved person raises a particular issue with the EEOC which he has standing to raise, he may bring an action for himself and the class of persons similarly situated. . . .[81]

As to the issues that might be litigated in the class action, the *Oatis* court pointed out that the action must meet the requirements of rule 23(a) and (b) of the Federal Rules of Civil Procedure.[82] It further observed that the issues must be those which the plaintiff has standing to raise and which were earlier raised in the charge filed with the Commission.[83] Nevertheless, the court apparently saw room for broadening the factual allegations within the periphery of the issues raised in the charge, for it pointed out that those co-plaintiffs who were permitted to participate in the suit were employed in departments different from that of the charging party-plaintiff,[84] and suggested that they might properly represent subclasses consisting of the Negro employees in their respective departments.[85] Perhaps most significantly, the court cited the Supreme Court's "apt comment" in *Newman v. Piggie Park Enterprises*[86] as to the public nature of suits under Title II of the Civil Rights Act, and stated that the same logic applies to Title VII.[87]

Even the lawful termination of a charging party's employment does not destroy his standing to obtain class relief with respect to violations that occurred while he was an employee. Gunn v. Layne & Bowler, Inc., 58 CCH Lab. Cas. ¶ 9088 (W.D. Tenn. 1967). *Contra,* Johnson v. Georgia Highway Express, Inc., Civ. Action # 11598 (N.D. Ga. 1968); Russell v. Alpha Portland Cement Co., 58 CCH Lab. Cas. ¶ 9151 (N.D. Ala. 1968).

77 In *Newman v. Piggie Park Enterprises,* 390 U.S. 400 (1968), the United States Supreme Court, directing that counsel fees be awarded to the successful plaintiff in a Title II (public accommodations) suit, said:

> A Title II suit is thus private in form only. . . . If [a plaintiff] obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority. *Id.* at 401-02.

78 398 F.2d 496 (5th Cir. 1968), *reversing* Mondy v. Crown Zellerbach Corp., 271 F. Supp. 258 (E.D. La. 1967).

79 Mondy v. Crown Zellerbach Corp., 271 F. Supp. 258, 264-66 (E.D. La. 1967), *rev'd sub nom.* Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968).

80 Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968).

81 *Id.* at 498.

82 *Id.* at 499.

83 *Id.*

84 *Id.*

85 *Id.*

86 390 U.S. 400, 401-02 (1968).

87 Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968), *reversing* Mondy v. Crown Zellerbach Corp., 271 F. Supp. 258 (E.D. La. 1967).

In *Jenkins v. United Gas Corporation,*[88] the Fifth Circuit Court of Appeals reversed a decision which had dismissed as moot a class suit alleging a discriminatory refusal to grant a promotion where subsequent to the filing of the suit the plaintiff employee had received the promotion. The appellate court held that in neither its individual nor its class aspect was the suit moot. In either aspect more was involved than the question of who obtained a particular promotion. Indeed, the court suggested that the public interest in the resolution of a charge that Title VII had been violated was of such significance that it did not make very much difference whether the case were formally denominated a class action or not.[89] Furthermore, the court appeared to say that class-wide relief is invariably appropriate where racial discrimination is shown. "Indeed, if class-wide relief were not afforded expressly in any injunction or declaratory order issued in Employee's behalf, the result would be the incongruous one of the Court . . . itself being the instrument of racial discrimination . . ."[90] Thus, a decree should not simply enjoin subsequent discrimination against the plaintiff because he is a Negro; it should enjoin discrimination against Negroes. In other words, it should operate as a cease-and-desist order.

Let us recapitulate. *Oatis* stated that there are three limitations on a class action under Title VII: (1) the class action must meet the requirements of rule 23(a) and (b)(2); (2) the issues must be those which the plaintiff has standing to raise; and (3) plaintiff must previously have raised each issue before the Commission.[91] *Hall* and *Jenkins* indicate that the first test will always or nearly always be met where racial discrimination is at issue because the question whether a discriminatory policy exists is common to all members of the class. As to standing, *Hall* indicates that each member of the class is adversely affected by the existence of the policy whether or not he has experienced its actual effects.[92] *Jenkins* indicates a liberal approach to the third element, that the issue must be raised before the Commission. Pointing out that the purpose of the

88 400 F.2d 28 (5th Cir. 1968), *reversing* 261 F. Supp. 762 (E.D. Tex. 1966).

89 *Id.* at 29-32. "Whether in name, or not, the suit is perforce a sort of class action for fellow employees similarly situated." *Id.* at 33.

90 *Id.* at 34-35 n.15. The court quoted the following language from *Potts v. Flax,* 313 F.2d 284, 289 (5th Cir. 1963), a school desegregation case:

> By the very nature of the controversy, the attack is on the unconstitutional practice of racial discrimination. Once that is found to exist, the Court must order that it be discontinued. Such a decree, of course, might name the successful plaintiff as the party not to be discriminated against. But that decree may not—either expressly or impliedly—affirmatively authorize continued discrimination by reason of race against others.

91 Oatis v. Crown Zellerbach Corp., 398 F. 2d 496, 499 (5th Cir. 1968), *reversing* Mondy v. Crown Zellerbach Corp., 271 F. Supp. 258 (E.D. La. 1967).

92 Hall v. Werthan Bag Corp., 251 F. Supp. 184, 188 (M.D. Tenn. 1966). The court in *Jenkins* assumed plaintiff's standing to allege "plant-wide system-wide racially discriminatory employment practices." 400 F.2d at 32-35. It seems likely, however, that the effects of an alleged policy may be so remote or speculative with respect to a particular plaintiff, as where an unskilled worker complains of practices with respect to selection of skilled workers, as to deny standing. Perhaps it would be more useful not to analyze such situations in absolute terms of standing or no standing, but in terms of whether representation by the plaintiff will adequately protect the interests of the class. *See* FED. R. CIV. P. 23(a)(4). After all, the court in both *Oatis* and *Jenkins* cited the Supreme Court's reference to a Civil Rights Act plaintiff as a "private attorney general." Unless the term "private attorney general" is being used by the courts rhetorically, it means that the plaintiff has standing to attack actions which do not affect his private interests. *See also* K. DAVIS, ADMINISTRATIVE LAW § 22.05, at 223 (1958).

title is to keep the procedure for initiating action simple, and that ordinarily the charge will not have been prepared by a lawyer, the *Jenkins* court stated: "All that is required is that it give sufficient information to enable EEOC to see what the grievance is about."[93]

The decided cases appear to support the plaintiff's right to make a broad attack on a defendant's discriminatory practices and to obtain prospective relief, class or individual, appropriate to whatever violations he can prove.[94] The vehicle for such an attack is the class action. We may conclude from *Jenkins* that this result is dictated as much by the public interest in the fair and effective enforcement of Title VII as by application of ordinary principles respecting class actions. While these principles and the broad discretion granted to the courts under rule 23 will undoubtedly be useful in the orderly disposition of Title VII litigation, they should be applied so as to further and not to frustrate the public purposes served by such litigation.

IV. Sex Discrimination

Title VII's prohibition against sex discrimination in employment has presented the Commission with some of its most difficult problems of policy and interpretation. The addition of "sex" as one of the prohibited bases for discrimination was accomplished on the floor of the House, to the surprise and discomfiture of the principal supporters of the Civil Rights Bill. No hearings had been held on the provision in either the Senate or the House, and the legislative debates at the time of the adoption of the amendment and subsequent thereto were not particularly enlightening. It is fair to say that the peculiar

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93 Jenkins v. United Gas Corp., 400 F.2d 28, 30 n.3 (5th Cir. 1968), *reversing* 261 F. Supp. 762 (E.D. Tex. 1966). In *King v. Georgia Power Company,* 58 CCH Lab. Cas. ¶ 9150 (W.D. Ga. 1968), the court adopted the position urged by the Commission that

> the complaint in the civil action is confined to those issues the original complaint [*sic*] has standing to raise, but may properly encompass any such discrimination like or reasonably related to the allegations of the charge and growing out of such allegations during the pendency of the case before the Commission. *Id.* ¶ 9150, at 6576.

By discrimination "growing out of such allegations," the Commission apparently means discrimination evidence of which is developed during the course of the proceedings.

94 *See* Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968). However, the ruling in *Hall* that back pay is not recoverable for one who failed to file a charge with the Commission was followed in the only other case to consider the problem, *Bowe v. Colgate-Palmolive Company,* 272 F. Supp. 332, 338 (S.D. Ind. 1967), and the same logic appears to be applicable with respect to relief for any discrimination which cannot be classified as a continuing act. *See* Cox v. United States Gypsum Co., 284 F. Supp. 74, 77-78 (N.D. Ind. 1968).

Yet the position taken by the Fifth Circuit in *Oatis* and *Jenkins* is not entirely consistent with this limitation on relief. If it would be wasteful, as *Oatis* states, for all employees with the same grievance to file charges with the Commission, then back pay, if appropriate, should be awarded without regard to which employee in fact filed. Likewise, the public interest, emphasized in *Jenkins,* might demand appropriate relief for acts of discrimination proved to have occurred within a certain period even though some might not be classified as continuing acts. It is understandable that the courts would desire to limit the respondent's potential liability to a definable period and definable persons, but this liability could be defined in terms of the subject matter of the charge without limiting it further to the named charging parties. The Commission contends in an amicus curiae brief filed on the appeal of *Bowe* that it was error to deny an award of back pay to those plaintiffs who had not filed charges with the Commission. Brief for the United States Equal Employment Opportunity Commission as Amicus Curiae at 16-18, Bowe v. Colgate-Palmolive Co., *appeal docketed,* Nos. 16624, 16625, 16626, 7th Cir., Oct. 15, 1968.

problems of administering a general prohibition against sex discrimination in employment were perceived dimly, if at all. To the extent Congress recognized that there were problems, it hopefully assumed that they could be solved through judicious application of the bona fide occupational qualification exception.[95]

A. The B.F.O.Q. Exception

Despite the somewhat fortuitous origin of the sex discrimination provision, the Commission has from the start taken its enforcement seriously, and has tended to interpret the prohibition with perhaps excessive literalness. It has interpreted the bona fide occupational qualification ("b.f.o.q.") exception quite narrowly. The *Commission Guidelines on Discrimination Because of Sex*[96] explicitly recognize sex as a bona fide occupational qualification only where necessary for the purpose of authenticity or genuineness, as in the case of an actress or clothes model.[97] On the other hand, the Commission has consistently refused to concede the existence of bona fide occupational qualifications based on generalizations as to the characteristics of employees of a particular sex, as, for example, the assumption that the turnover rate among women is higher than among men, that men are less able than women to assemble intricate equipment, or that women are less capable of aggressive salesmanship. The Commission states: "The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group."[98] The Commission position is not based on any dispute as to the validity of particular generalizations;[99] its position is rather that no generalization, however valid as such, justifies a refusal to consider a job applicant on his or her merits because of sex.

To require that each applicant receive individual consideration may impose considerable burdens on management. Furthermore, there is no assurance that individual consideration will provide a sounder guide to personnel actions than the forbidden generalizations. For example, many employers have excluded women from certain training programs, reasoning that a woman's career plans are likely to change because of marriage or children with the result that the expense of her training will be wasted. If this generalization is valid, it is hard to see how consideration of women applicants on the basis of their individual

95 42 U.S.C. § 2000e-2(e) (1964). Section 703(e) provides that:
> It shall not be an unlawful employment practice . . . for an employer, labor organization, or joint labor-management committee . . . to admit or employ any individual . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

96 29 C.F.R. § 1604 (1967).

97 *Id.* § 1604.1(a)(2). Although the point is not covered by the guideline, the Commission has always assumed that a b.f.o.q. also exists for those positions which are required by accepted standards of propriety to be filled by members of a particular sex. *Cf.* 59 L.R.R.M. 87-88 (1965).

98 29 C.F.R. § 1604.1(a)(1)(ii) (1967).

99 It should be noted that not all such generalizations are true. The generalization as to the higher rate of turnover among female employees is probably true in respect to certain job categories and age groups; however, it becomes questionable when applied to women workers generally. Furthermore, insofar as discrimination discourages female employees from regarding their jobs as career possibilities, the assumption of high female turnover tends to become a self-fulfilling prophecy.

capacities can be of much value as an alternative. Even if the employer were to decide that older women or married women represented better risks, the exclusion of younger women or single women because of their sex would presumably be a violation.[100] In short, preventing employers from acting on the basis of even valid generalizations based on sex will force management to rely on less accurate bases for judgment and will, in the long run, result in higher costs.

The Civil Rights Act is not the first regulatory statute to impose additional costs on those who are regulated. The Commission is undoubtedly correct in its view that the bona fide occupational qualification exception is not carte blanche for any kind of discrimination which has a valid economic basis. When Congress commanded equality of opportunity for the sexes, in effect it resolved against the employer the question of whether exclusionary policies broadly applicable to women employees might be justified.[101]

While the Commission is right, in my view, in rejecting as permissible bases for discrimination those generalizations about female employees which "prove too much" and which, if accepted, would substantially undercut the basic prohibition, it does not follow that a b.f.o.q. should never be allowed on the basis of a generalization. The Commission seems too doctrinaire in holding, in effect, that a b.f.o.q. is not justified unless the employer shows that a member of the excluded sex cannot perform the job satisfactorily under any circumstance. A somewhat extreme example of this attitude was the Commission's disposition of a request by a newspaper publisher for a ruling that he might legally refuse to employ female minors as newspaper carriers.[102] The reasons for the employer's policy appear self-evident, and the Commission might well have taken administrative notice that such reasons apply generally to the job in question. Nevertheless, the Commission replied, cautiously, that

> a newspaper publisher may refuse to employ female minors as newspaper carriers in situations where there is a reasonable basis to believe that such female minors would be exposed to physical or moral hazards to which male minors would not similarly be exposed. However, the Commission will examine the circumstances of each case brought to its attention to determine whether such a situation exists.[103]

Since the Commission refuses to admit as a legitimate basis for classification generalizations as to the characteristics of workers of a particular sex, it follows

100 *See* 29 C.F.R. § 1604.3(a) (1967). *See* also EEOC Decision and Ruling (General Counsel opinion of Nov. 22, 1966), CCH EMPL. PRAC. GUIDE ¶ 17,304.52 (1966).

101 *But see* Note, *Classification on the Basis of Sex and the 1964 Civil Rights Act,* 50 Iowa L. REV. 778, 794-98 (1965), which argues that the preferable approach is to interpret the b.f.o.q. exception to permit employers to discriminate when they do so "rationally." However, the Note's author abandons his own argument to some extent by conceding that employers should not ordinarily be permitted to discriminate in response to the preferences or prejudices of customers or employees, even though such discrimination is quite rational from the employer's point of view. Thus the test would be to permit discrimination which is rationally based on the characteristics of employees of a particular sex, but to forbid discrimination which is rationally based on the irrationality of others.

102 EEOC Decision and Ruling (General Counsel opinion of Aug. 19, 1966), CCH EMPL. PRAC. GUIDE ¶ 17,304.24 (1966).

103 *Id.* The Commission did not indicate whether it would examine the situation on a city-wide basis or consider only the hazards on the particular route in question.

that the physical requirements of a job can never be so demanding as to justify recognition of a b.f.o.q. Whatever the capacities of ordinary women may be, an extraordinary applicant may appear, and she is entitled to consideration without discrimination. Thus, the female stevedore, like her distant relation, the fertile octogenarian,[104] may by the mere hypothesis of her existence disrupt dispositions that have failed to take her into account.[105]

The refusal to recognize any job classifications based on the general unsuitability of the job for members of a particular sex has been particularly troublesome with respect to industrial employment. Prior to 1965, industrial job classifications by sex were common. Such systems of classification could work to the advantage of either sex. While women were frequently excluded from desirable jobs which some or many of them could perform, they were also frequently protected from male competition in lighter jobs. What is more important, they were not required to advance through jobs that they could not be expected to perform or to "bump," *i.e.*, displace, junior workers in such jobs in the event of layoffs. The policy followed by the Commission tends to protect the "unusual" women who are qualified to do "man's work." In the context of collective bargaining and a seniority system such a policy may threaten other interests. Since "male jobs" are by definition jobs which most women are unable to perform, an employer would ordinarily need some discretion in determining the qualifications of women bidders. But managerial discretion with respect to promotion is traditionally resisted by labor unions, which generally prefer that promotion be determined on the basis of seniority,[106] and, where necessary, by objective standards or trial periods. If, on the other hand, the employer is liberal in permitting women to try out on jobs which may be beyond their capacities, the result may well be an increase in workman's compensation claims.[107] Finally, in many seniority systems the majority of women workers would be adversely affected by a policy that declares them eligible for jobs which they are unable to fill.[108] The Commission has recognized to some extent the problems in this area. Although it has held that separate job classifications, lines of progression or seniority lists based on sex are unlawful, it has left the way open

104 *Cf.* Jee v. Audley, 29 Eng. Rep. 1186 (1787); RESTATEMENT OF PROPERTY § 377 (1944).

105 Of course, if no women apply for the job, the question of whether a b.f.o.q. is justified is largely academic. However, no employer may indicate a sex preference in an advertisement unless it is based on a b.f.o.q. See 42 U.S.C. § 2000e-3(b) (1964). In the classification of jobs for purposes of a seniority system, it may be significant whether a job may be limited to males, notwithstanding that no woman desires to apply for it. See note 108 *infra*.

106 *See* TWENTIETH CENTURY FUND, HOW COLLECTIVE BARGAINING WORKS 554-55, 647 (1942); J. BARBASH, THE PRACTICE OF UNIONISM 163-64 (1956).

107 Medical examinations for female bidders for heavy jobs might be an adequate solution to the employer's problem. *See* Sperry-Rand Corp., 46 Lab. Arb. 961 (1966).

108 *See* EEOC Decision and Ruling (General Counsel opinion of Aug. 17, 1966), CCH EMPL. PRAC. GUIDE ¶ 17,304.21 (1966); EEOC Decision and Ruling (General Counsel opinion of Nov. 15, 1966), CCH EMPL. PRAC. GUIDE ¶ 17,304.50 (1966). *Cf.* Wierton Steel Co., 50 Lab. Arb. 795 (1968). In the case of layoffs, the value of an individual's seniority rights may depend on his ability to perform the particular job into which he is entitled to bump. If the seniority system provides that an employee who is laid off may bump only the most junior employee in the seniority district, a female employee may find her seniority worth little if the most junior employee is a male on a heavy job. The Commission has refused to approve special agreements to permit females to bump only females in such a situation, and has suggested instead a generally applicable rule that an employee may bump the most junior

for the classification of jobs as "light" and "heavy"[109] or even as "of primary interest" to one sex or the other.[110] To meet the problems of women who are forced to seek formerly male jobs because of the abolition of sex-based classifications, the Commission has suggested that employees of both sexes be permitted to turn down jobs they are physically unable to fill. But application of such a rule must place discretion somewhere to separate those who are really unable from those who would merely prefer lighter work. This is a decision-making authority which the union might be reluctant to grant to management, and one which many employers might prefer not to have. In short, the value implicit in the Commission's policy — that of permitting each employee, regardless of sex, to obtain a job suited to his individual capacities — is likely to conflict directly with one of the goals of collective bargaining: to cause personnel decisions to be governed by objective and generally accepted procedures and standards.

It is still too early, however, to pronounce final judgment on the Commission's approach to the problem. Furthermore, there is some indication that its approach is becoming more flexible. In early 1967, the Commission approved conciliation agreements in several cases in the meat packing industry. These agreements provide generally for the classifying of jobs into three categories: Group A jobs, primarily of interest to males; Group B jobs, primarily of interest to females; and Group C jobs, of interest to both sexes. The key provision of one of the agreements reads as follows:

> 4. Wherever, by practice, procedure, or contract, a job would normally or automatically be offered to an employee on the basis of seniority standing, it will be assumed that a male employee would not normally be interested in a B job and a female employee would not normally be interested in an A job, and such jobs will not, therefore, normally or automatically be offered to such employees. *Similarly, wherever by practice, procedure or contract, an employee would normally be required to accept assignment to a job, or a job would normally have been considered to be available to such employee as an alternative to layoff, such requirement or such availability shall not be deemed to apply to a male employee with respect to a B job or to a female employee with respect to an A job.* Nothing in this agreement however shall prevent any employee, regardless of sex, from requesting assignment to any job in accordance with applicable seniority rules, procedures and agreements, in which event the Company shall consider the individual qualifications of such employee to determine whether

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employee on any job which the employee can perform. Such a rule is harder to administer and is likely to lead to disputes, as well as to multiple bumps.

109 29 C.F.R. § 1604.2 (1967); EEOC Decision and Ruling (General Counsel opinion of July 28, 1966), CCH EMPL. PRAC. GUIDE ¶ 17,304.07 (1966). Ideally, the transition from a classification system based on sex to a system based on light and heavy jobs could be accomplished by declaring an open season for transfer from one classification to the other. Usually, the problems of transforming a seniority and classification system based on sex into a permissible classification system are extremely complex.

110 2 EEOC ANN. REP. 45-46 (1968). The Commission policy on sex discrimination is in marked contrast to its policy on racial classification of jobs, but racial classification is by nature invidious and discriminatory while sex classification may meet the needs of the generality of workers of both sexes. Therefore, sex classifications are permitted provided that they are sufficiently flexible to permit those who desire to compete for jobs held by the opposite sex to do so.

> ability to perform the job or learn it within a reasonable time exists, and any such individual assignment or assignments shall not affect the general group allocation of the job to Group A, B or C.[111] (Emphasis added.)

The second sentence of the quoted paragraph appears to depart from the strict purity of the Commission's previous position, for it provides in effect that an employee may, on the basis of his or her sex, decline to exercise seniority rights with respect to a particular job.[112] While the employer cannot refuse to assign an employee to any particular job on the basis of generalizations as to sex characteristics, such generalizations may validate a system which permits an employee to refuse a job or to exercise some other option not available to a similarly situated member of the other sex. In the meat packing agreements, the Commission has found a solution that seems to have been initially satisfactory to all parties while deviating only slightly from the principle of simon-pure asexuality. Whether these agreements will prove satisfactory in practice and whether their principles can be applied in other industries remains to be seen.

If the Commission's present policy should not prove viable, an alternative may be to approve sex classifications achieved through collective bargaining where the overall classification system appears fair and in the interests of the majority of workers of each sex. In other words, the test would cease to be whether the system discriminates against any individual because of his or her sex and would become whether the system discriminates against either sex as a class. It might be argued that such a result would work arbitrarily in depriving individuals, because of sex, of jobs they are qualified to fill. But seniority systems frequently, indeed generally, are based on arbitrary classifications which work to the benefit of some individuals and to the detriment of others.[113] Indeed, to make seniority instead of ability the controlling criterion for promotion or lay off might itself be regarded as arbitrary. Sex classifications in seniority systems have in many cases worked to the benefit of employees of both sexes. In approving systems for de facto classification by sex, the Commission has conceded the rationality of this basis for classification. But such de facto classifications appear designed to give the women the best of both worlds, and they will exist at the sufferance of the parties to the collective bargaining contract. Nothing in Title VII would prevent a system of classification which ignores entirely the differing capacities of the sexes. Such a system would in the long run not serve the interests of women employees because while there are numerous jobs which, because of their physical demands, are beyond the capacities of most female employees, there are few, if any, industrial jobs customarily filled by

111 Conciliation agreement with Rath Packing Co. and the United Packinghouse Food and Allied Workers, AFL-CIO, at 11, June 7, 1966, on file with the *Notre Dame Lawyer.*

112 *See also* Conciliation agreement with Dubuque Packing Co. and the Amalgamated Meat Cutters, etc., AFL-CIO, at 2, Dec. 16, 1966, on file with the *Notre Dame Lawyer.* This agreement and the agreement cited in note 111 *supra* appear inconsistent with the Commission's position as shown by EEOC Decisions and Rulings cited at note 108 *supra,* which refused to approve special bumping rights for women. The packing house agreements provide that women may not be required to accept Group A jobs, thus implicitly broadening their rights to bump into Group B or C jobs. The fact that men have comparable options with respect to different jobs is not sufficient to distinguish this case from those considered in the opinions cited above.

113 *See* Ford Motor Co. v. Huffman, 345 U.S. 330, 338-39 (1953).

women that could not be filled by men. If the present Commission approach leads to results which are satisfactory for all parties, well and good. If it results in systems which prove unfair or too difficult to administer, employers and labor organizations may take the position that they will shift to completely neutral systems unless the Commission permits hard and fast sex classifications in appropriate circumstances. The Commission should keep in mind, then, that adherence to the general principle of equality of opportunity for both sexes does not require that the right of each individual to obtain any job for which he or she is qualified be regarded as absolute. As Justice Goldberg has pointed out:

> It must not be forgotten, however, that many individual rights, such as the seniority rights involved in this case, in fact arise from the concerted exercise of the right to bargain collectively. Consequently, the understandable desire to protect the individual should not emasculate the right to bargain by placing undue restraints upon the contracting parties.[114]

B. State Protective Laws

A significant aspect of the bona fide occupational qualification problem concerns the effect of Title VII upon state laws which regulate the hours and working conditions of women and which, therefore, effectually limit their employment opportunities. Forty-one states and the District of Columbia limit the daily or weekly hours of employment for women in one or more industries.[115] A dozen jurisdictions restrict the amount of weight women employees may lift, carry, or lift and carry.[116] The legislative history of Title VII sheds little light on how Congress intended the seeming conflict between the title and such state laws to be resolved.[117] The obvious solution in terms of methodology would be to regard sex discrimination compelled by the necessity of complying with a valid state law as discrimination based on a bona fide occupational qualification.[118] But to what extent should the Commission recognize or assume the continuing validity of such state laws?

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114 Humphrey v. Moore, 375 U.S. 335, 358 (1964) (concurring opinion).

115 U.S. DEPT. OF LABOR, SUMMARY OF STATE LABOR LAWS FOR WOMEN 8 (1968). In eighteen states and Puerto Rico, night work for adult women is prohibited or regulated in certain industries or occupations. *Id.* at 11.

116 *Id.* at 17. General weight lifting limitations are in effect in six states and Puerto Rico. They range from fifteen pounds in Utah to fifty pounds in California. In addition, some states impose limitations applicable to specific occupations or industries.

117 *See* Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964,* 31 BROOKLYN L. REV. 62, 78-79 (1964); Murray and Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII,* 34 GEO. WASH. L. REV. 232, 248-49 (1965); Comment, *Sex Discrimination in Employment,* 35 FORDHAM L. REV. 503, 504-05 (1967). Murray and Eastwood point out that several of the Congresswomen supporting the sex amendment attacked the discriminatory effects of state protective laws for women workers, while several of the opponents expressed fears that such laws might be struck down. Murray and Eastwood, *supra* at 248-49 nn.87-88. The sex amendment consisted of inserting the word "sex" in appropriate places in the bill. It was introduced without the benefit of further explanation or committee consideration. Many of the members voting on the amendment had not been present for the immediately preceding debate. Accordingly, it seems unrealistic to speak of an intent of Congress in the sense of an actual consensus among the supporters of the amendment that it would accomplish any particular result not plainly inferable from the language of the amendment and the logic of the title as a whole.

118 EEOC Legal Interpretation (Commission Guideline of Nov. 22, 1965) CCH EMPL. PRAC. GUIDE ¶ 17,252.07 (1966). It might be argued that state protective laws do not compel

From the very start the Commission approached this problem with caution.[119] It was difficult, from a legal point of view, to assume that Congress intended to overthrow the laws and regulations of over forty states. Additionally, the Commission soon found serious disagreements among representatives of women's interests as to the desirability of sweeping all such protective legislation aside. While those women whose working conditions are protected by collective bargaining agreements or, to a lesser extent, by the Fair Labor Standards Act[120] might regard maximum hour laws as obstacles to desirable job assignments or to earning premium pay for overtime, such laws may be of substantial benefit in preventing exploitation of women employees in unorganized, low paid industries.[121] Although there was substantial agreement among the Commission and those it consulted that state protective legislation was badly in need of improvement and updating, the Commission could not rewrite state laws, but at most could only take the position that particular laws were valid or invalid.

In its *Guidelines on Discrimination Because of Sex*,[122] adopted in November, 1965, the Commission attempted to take a middle position. After calling upon the state legislatures for action to update their protective legislation and upon Congress for such clarification as it might choose to give, the Commission stated:

> The Commission does not believe that Congress intended to disturb such laws and regulations which are intended to, and have the effect of, protecting women against exploitation and hazard. Accordingly, the Commission will consider limitations or prohibitions imposed by such state laws or regulations as a basis for application of the bona fide occupational qualification exception. However, in cases where the clear effect of a law in current circumstances is not to protect women but to subject them to discrimination, the law will not be considered a justification for discrimination. So, for example, restrictions on lifting weights will not be deemed in conflict with Title VII except where the limit is set at an unreasonably low level which could not endanger women.[123]

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discrimination, for they do not require that men work longer or lift heavier weights than the applicable limitations for women. *See* Rivera v. California Division of Industrial Welfare, 71 Cal. Rptr. 739, 762-63 (Cal. App. 1968). Thus, it has been suggested that the effect of Title VII is to extend the benefits of all state protective legislation to men. The Commission has taken the position that where a state law imposes a minimum wage applicable to women, an employer covered by Title VII may neither refuse to hire women nor pay them more than men in order to comply with the state law. EEOC Legal Interpretation (Opinion Letters Mar. 1, 1966 and Mar. 22, 1966), CCH EMPL. PRAC. GUIDE ¶ 17,252.07 (1966). But to conclude that maximum hours laws and weight limitations apply to both sexes would be to reach an absurd result contemplated by neither the state nor the federal regulatory scheme. *See* Murray and Eastwood, *supra* note 117, at 250. The Commission is clearly correct in regarding such protective legislation as compelling the employer to discriminate.

119 Shortly after taking office, Chairman Roosevelt invited Congress to pass legislation clarifying its intention regarding sex discrimination. His testimony reflected three areas of concern: (1) state protective laws; (2) pension and retirement plans; and (3) the relationship of Title VII to the Equal Pay Act. *Hearings on Equal Employment Opportunity before a Subcomm. of the House Educ. and Labor Comm.*, 89th Cong., 1st Sess., at 105.

120 52 Stat. 1060 (1938), *as amended*, 29 U.S.C. §§ 201-19 (Supp. II, 1965-66).

121 The distinction between the interests of organized and unorganized female employees was pointed out to the Commission at the White House Conference on Equal Employment Opportunity in August, 1965. 59 L.R.R.M. 88 (1965). It contributed significantly to the Commission's reluctance to take a clear-cut stand on the protective law problem. The same point was made in testimony at the public hearings held by the Commission in May, 1967.

122 30 Fed. Reg. 14926-28 (1965); 29 C.F.R. § 1604 (1967).

123 29 C.F.R. § 1604.1(c) (1967).

Several points might be noted about this statement of position. First, it rejects the argument that Title VII was intended to supersede automatically any state protective legislation limiting the employment of women. Instead, it sets up a qualitative test based on whether the state law in question actually protects women from exploitation or hazard or discriminates against them. This distinction presents a major tactical advantage to those who rely on the validity of a state law in any given case; not only is the burden placed upon the challenger to demonstrate that the state legislation is not what it purports to be, but the whole concept of selective supersession which the Commission espoused is more difficult to ground in any inference from congressional intent than either of the extreme positions which the Commission avoided. It could be argued that protective legislation is so inherently inconsistent with the principle of equality of opportunity that however unsatisfactory the evidence of express congressional intent to override such legislation may be, the logic of Title VII demands this result. But if one is to presume that Congress intended to leave the states free to legislate in the area, it is hard to see why Congress would have considered the Commission or the federal courts appropriate forums for determining whether on balance such legislation was protective or discriminatory. This is by its nature a legislative judgment, because any such law is likely to protect some women and disadvantage others. Second, as a guideline the Commission position offers very little guidance, for it suggests no workable standard whereby the affected employers and employees may judge whether a particular law or regulation is discriminatory or protective. By the same token it leaves maximum room for maneuver to the Commission. Indeed, it does not preclude an ultimate determination that all protective laws are discriminatory rather than protective. Finally, the guideline suggests that in the future the Commission will determine which protective laws should be held valid and which invalid, and it implies that this determination will be made in the light of the over-all effect of each law on those covered by it. There is no suggestion in the guideline as to how such determinations are to be made, what procedures will be followed, what information obtained, etc. Indeed, it is doubtful that the Commission had at that time a clear idea of how it would proceed in such matters. It is perhaps not surprising, therefore, that in the nearly three years following the issuance of the guideline the Commission has never held any proceeding to consider the over-all impact of any particular state protective law.[124] Nor is it surprising that in that time, the Commission has never issued a ruling to the effect that it regarded any particular state law as invalid.

Fairness to the Commission, however, requires recognition of the fact that the circumstances required it to take some public position at a time when neither the Commission itself nor those it consulted had sufficient knowledge or expertise to resolve the difficult legal and policy questions that it confronted. Therefore, it had to buy time by adopting a position that would postpone the most difficult questions, and this the guideline certainly did. Furthermore, the Commission hoped that the call for state legislative action would bring some

124 It did, however, devote a portion of its two day hearing on sex problems, held in May, 1967, to general testimony on the state protective law problem.

response, especially where it was coupled with the threat that arbitrary and outdated legislation might be set aside in later actions by the Commission and the courts.[125] Finally, the guideline did provide that where state laws or regulations permitted administrative exceptions, an employer could not justify discrimination as compelled by state law unless he had sought in good faith to obtain an exception.[126] Thus, the Commission intended to resolve those cases capable of solution within the existing legal framework, and to generate more pressure for flexibility on the authorities administering state laws.

While the guideline served to postpone the necessity for hard decisions, as a practical matter the Commission's scope of action was bound to be limited by the fact that no ruling it issued would be binding on the authorities enforcing state protective laws. Whatever the Commission might say, these authorities were not disposed to suspend enforcement of their laws. For the employer who had to weigh the possibility of a private suit under Title VII against the near certainty of a civil or criminal action by state authorities, continued compliance with state law was the only sensible course of action. Thus, in conciliating cases the Commission was limited to negotiating solutions which would involve no violation of state law. Where the relief sought by charging parties was incompatible with continued adherence to state law, the dispute could be resolved only through litigation.

Recognizing the futility of continuing to agonize over a problem that it could not effectively resolve, the Commission issued a policy statement in August, 1966 to the effect that when the conflict between a charging party's demand for equal opportunity and the requirements of applicable state law was unresolvable, the Commission would make no determination of reasonable cause, but would advise the charging party of her right to bring suit under Title VII "to secure a judicial determination as to the validity of the state law or regulation."[127] The Commission added:

> Such litigation to resolve the uncertainties as to the application of Title VII seems desirable and necessary, and the Commission reserves the right to appear as *amicus curiae* to present its views as to the proper construction of Title VII.[128]

125 Since the enactment of Title VII, seventeen states have altered their protective legislation in the direction of greater freedom for women. *See* CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, REPORT OF THE TASK FORCE ON LABOR STANDARDS 56-58 (1968). Delaware has repealed its maximum hours laws entirely. DEL. CODE ANN. tit. 19, §§ 301-35 (Supp. 1966). Several states have exempted from maximum hours limitations women who are covered by the Federal Fair Labor Standards Act, or have otherwise relaxed such limitations with respect to them. *See, e.g.*, CAL. LABOR CODE § 1350.5 (West Supp. 1967); N.C. GEN. STAT. § 95-17 (Supp. 1967); VA. CODE ANN. § 40-35(a) (Supp. 1968).

Still other states have attempted to make overtime optional with the women affected. Rule G-19 of the Pennsylvania Department of Labor and Industry provides that with the specific approval of the state agency, women may be permitted to work in excess of the statutory limitation. CCH LABOR L. REP. ¶ 44,595. It may be wondered whether such an optional scheme is consistent with the concept of regulation of hours of labor. If women are permitted to volunteer to be available for overtime, employers may presumably hire and promote them on the basis of their willingness to do so, and eventually the option will become a condition of employment.

126 29 C.F.R. § 1604.1(c)(3) (1967).

127 CCH EMPL. PRAC. GUIDE ¶ 16,900.001 n.2 (1968). The statement was not an amendment of the guideline, which remained in effect as the Commission's view of the law.

128 *Id.*

Shortly thereafter, litigation was commenced to challenge the continued validity of California's maximum hours limitations, but, until quite recently, little progress has been made toward a decision on the merits.[129] Similar suits are pending elsewhere, and in one decided case, *Weeks v. Southern Bell Telephone & Telegraph Company,*[130] the reasonableness and validity of a Georgia thirty-pound weight lifting limit for women has been upheld. In February, 1968 the Commission announced the rescission of the August, 1966 policy statement and indicated its intention to process its cases to a conclusion and to rule on whether the state legislation involved has been superseded by Title VII.[131] Since nothing has happened since 1966 to cause employers to comply with such a Commission ruling it is hard to see what purpose is to be served by this reversal of policy.

In any event, it is still true today that the status of protective laws under Title VII can be resolved only by litigation.[132] In the absence of such resolution, much of the law regarding the breadth of the bona fide occupational qualification and the permissibility of job classifications based on sex must remain in limbo.

C. Fringe Benefits

Problems of sex discrimination involve not only hiring and job assignments, but also fringe benefits of various kinds. Quite predictably, the Commission has insisted on the principle of equality with respect to fringe benefits. However, it has also attempted to achieve some flexibility. Thus, it has required that employers make life and health insurance plans available to employees of both sexes on equal terms.[133] Where for actuarial reasons the same sum will buy different amounts of insurance, depending on sex, equality either in coverage and

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129 Mengelkoch v. Industrial Welfare Comm'n, 284 F. Supp. 950 (C.D. Cal. 1968). This case challenged state maximum hours laws on equal protection clause grounds as well as under Title VII. After deciding that the issues presented did not warrant a three-judge court, the court abstained from ruling on the effect of Title VII on California law on the ground that questions of state constitutional law were raised by the state statute, making resolution by California courts appropriate. Mengelkoch v. Industrial Welfare Comm'n, 284 F. Supp. 956 (C.D. Cal. 1968). It seems doubtful that plaintiffs will be able to raise claims based on Title VII in state courts, in view of the provisions of section 706. *Mengelkoch* is now on appeal. *See also* Coon v. Tingle, 277 F. Supp. 304 (N.D. Ga. 1967), where the court dismissed an action challenging the constitutionality of a Georgia statute forbidding the employment of females in liquor stores. Although dismissal was based on the plaintiff's failure to name the proper state officer as party, the court indicated it would have invoked the abstention doctrine in the absence of any other ground for dismissal. *Id.* at 308.

However, as this article was being prepared, a federal court ruled that California's protective laws were superseded by Title VII. Rosenfeld v. Southern Pacific R.R., —— F. Supp. ——, 69 L.R.R.M. 2822 (C.D. Cal. 1968).

In *Reynolds v. Mountain States Telephone & Telegraph Company,* [July, 1965-July, 1968 Transfer Binder] CCH EMPL. PRAC. GUIDE ¶ 8111, at 6185 (1966), the Arizona Civil Rights Commission ruled that an Arizona statute which prohibited an employer from permitting a female employee to work more than eight hours a day or forty-eight hours a week was in conflict with Title VII and with the Arizona Civil Rights Act. It held the Civil Rights statutes were controlling. The Arizona statute at issue has been amended to provide an exemption for women covered by the Fair Labor Standards Act. ARIZ. REV. STAT. ANN. § 23-281 (B)(8) (Supp. 1968). *See also* note 125 *supra.*

130 277 F. Supp. 117 (S.D. Ga. 1967).

131 33 Fed. Reg. 3344 (1968).

132 Or, of course, by amendatory legislation, which does not appear to be in prospect.

133 EEOC Decision and Ruling (Guideline Release of June 29, 1966), CCH EMPL. PRAC. GUIDE ¶ 17,303 (1966).

benefits or in employer contributions will satisfy the Act's requirements.[134] Employers objected to making family plan health insurance coverage available to female employees, who are frequently the second wage earners in the family; in response the Commission conceded that an employer could provide that such insurance would be available only to the "principal wage earner" in a family unit.[135] This, of course, would ordinarily be the man.

Pregnancy and maternity presented the Commission with a problem that could not be solved by an application of the ordinary test for equality. The Commission's aim was to work out a solution that would protect the working mother's continuity of employment and employment rights without imposing burdens on the employer so onerous as to discourage the employment of women. To this end, the Commission has ruled that a woman should be permitted to take a leave of absence for pregnancy, whether or not there is a general leave of absence policy applicable to both sexes. However, where her job cannot be left vacant or filled on a temporary basis, the employer may replace such a female employee.[136] Since a new employee is less entitled to protection than an older one, the Commission has upheld an employer's policy of denying all leaves of absence, including maternity leave, for the first twelve months of employment.[137] The Commission has not stated what the minimum acceptable leave is, but it has indicated that an employer may not require a pregnant employee to take leave of absence while her condition permits her to continue to work.[138] However, with respect to financial benefits, the Commission has leaned toward the employer's side, holding, in effect, that pregnancy is the employee's and not the employer's risk. Thus, an employer's plan for salary continuation or medical benefits for the illness or injury of an employee need not apply to the expenses of or absence due to pregnancy.[139] Of course, an employer is free to provide such benefits if he wishes to.

The greatest problem in the fringe benefit area concerns differences based on sex in pension and retirement plans. Typically, such differences tend to favor women by permitting retirement at an earlier age despite their greater longevity, and by providing shorter vesting periods for women. On the other hand, pension plans frequently provide lesser benefits for the survivors of a woman employee.[140]

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134 EEOC Legal Interpretation (Opinion Letters of Oct. 12, 1965 and Jan. 28, 1966), CCH EMPL. PRAC. GUIDE ¶ 17,252.06 (1966).

135 EEOC Decision and Ruling (Guideline Release of June 29, 1966), *supra* note 133. *See also* EEOC Decision and Ruling (Opinion Letter of Aug. 12, 1966), CCH EMPL. PRAC. GUIDE ¶ 17,304.15 (1966).

136 EEOC Decision and Ruling (Opinion Letter of Aug. 17, 1966), CCH EMPL. PRAC. GUIDE ¶ 17,304.19 (1966).

137 EEOC Decision and Ruling (Opinion Letter of Feb. 20, 1967), CCH EMPL. PRAC. GUIDE, ¶ 17,304.59 (1967).

138 *Id.*

139 EEOC Decision and Ruling (Opinion Letter of Nov. 10, 1966), CCH EMPL. PRAC. GUIDE ¶ 17,304.49 (1966); EEOC Decision and Ruling (Opinion Letter of Nov. 15, 1966), CCH EMPL. PRAC. GUIDE ¶ 17,304.51 (1966).

140 *See* 32 Fed. Reg. 5999 (1967). The Social Security Act provides for certain differences based on sex in its retirement scheme, although perhaps fewer than is generally assumed. A widower is not entitled to survivor's benefits unless he was wholly or partially supported by his wife, 42 U.S.C. § 402(f) (1964), while a widow's entitlement is not so conditioned, 42 U.S.C. § 402(e) (1964). There is no age difference based on sex, but a man retiring between the ages of sixty-two and sixty-five has his benefits computed under a less favorable formula than a woman similarly situated. 42 U.S.C. § 415(b) (1964). This latter difference

Sex differentials in pension plans are fairly common,[141] and they are a great deal more difficult to unravel than differences in health benefit plans. The latter are funded on a current basis and involve nothing in the way of vested rights. Pension funds, on the other hand, have been built up over the years, usually out of contributions by both employers and employees. If, for example, Title VII were interpreted to require that an existing three year differential in retirement ages be equalized for all employees, the retirement age for women would have to be raised or that for men lowered, or both. But it is doubtful that the contractual rights of the women employees can be so altered, and to lower the retirement age for men would create a projected deficit in the pension fund that would have to be made up by an additional contribution, presumably by an employer. Since the increased claims on the fund would be based on services rendered in major part prior to the effective date of Title VII, the additional contribution required of the employer would represent in a very real sense a retroactive imposition.[142]

The Commission has long been aware of the difficulty of this problem, and in 1965 suggested congressional action.[143] For nearly two years the Commission took no formal action on the question. Then, in May, 1967, it conducted hearings on several sex discrimination questions, including pension plans and the views of the public were solicited.[144] Again there was silence, until, on February 21, 1968, the Commission issued the following "interpretative rule":

> (a) A difference in optional or compulsory retirement ages based on sex violates Title VII.
>
> (b) Other differences based on sex, such as differences in benefits for survivors, will be decided by the Commission by the issuance of Commission decisions in cases raising such issues.[145]

To ease the blow the Commission provided that subsection (a) of this interpretative rule would not become effective until July 1, 1968, and then only with respect to charges filed after February 21, 1968, the date the rule was issued.[146]

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in treatment has been held constitutional as reasonably related to a legitimate legislative goal. Gruenwald v. Gardner, 390 F.2d 591 (2d Cir. 1968). Of course, Title VII does not purport to make any changes in the Social Security Act. *See also* 114 CONG. REC. E7896 (daily ed. Sept. 12, 1968) (extended remarks of Representative Griffiths) for an argument that sex discrimination in pension and retirement plans should cease.

141 However, according to Congresswoman Griffiths, over ninety-five percent of pension plans formulated under collective bargaining agreements contain no distinction between male and female employees. 114 CONG. REC. E7894 (daily ed. Sept. 12, 1968).

142 Eradication of differences in compulsory, as opposed to optional, retirement ages does not present this problem, however, since permitting women who so desire to continue to work will have no adverse effect on the funding of the retirement plan. A requirement that women retire at an earlier age than men appears based solely on personnel policy considerations and is clearly discriminatory.

143 See note 119 *supra*. In the 1964 debate on the Civil Rights Act, Senators Humphrey and Randolph attempted to make legislative history to the effect that Title VII does not cover sex differentials in pension plans. 110 CONG. REC. 13663-64 (1964). However, Senator Humphrey's statement that section 703(h) treats the point is difficult to reconcile with the language of that section, and no other provisions of Title VII appear to apply.

144 33 Fed. Reg. 3344 (1968). *See also* 32 Fed. Reg. 5999 (1967). The Commission notice indicates that it was casting about for some compromise formula to avoid disruption of existing plans.

145 33 Fed. Reg. 3344 (1968).

146 *Id.* The Commission did not indicate the source of its authority to suspend the effective date of interpretative rules. Title VII does not grant the Commission general rule-making

The effective date was later postponed to October 1, 1968.[147] Furthermore, the Commission's General Counsel has recently ruled that retirement plans may gradually be brought into adjustment with the Commission guideline by permitting women who are close to retirement to retain their rights to early retirement.[148]

The Commission retirement plan guideline may be short-lived. In the closing weeks of the last Congress, the Senate Finance Committee attached to an obscure bill to amend the Internal Revenue Code[149] a provision permitting pension or retirement plans to make a "reasonable differentiation in retirement ages between male and female employees" notwithstanding the provisions of Title VII or other antidiscrimination laws or directives.[150] In the Senate the retirement plan amendment easily survived a motion for its deletion,[151] but the bill itself, burdened with a variety of extraneous amendments, failed of enactment. It seems, however, highly likely that another attempt to nullify the guideline will be made in the next Congress.

V. Sex Discrimination in the Courts

The foregoing discussion of sex discrimination has concentrated almost entirely on the law as developed by the Commission. It is convenient to discuss the judicial decisions on the subject separately because in interpreting the content of the prohibition against sex discrimination the Commission and the courts have been almost completely oblivious to each other's decisions. No judicial decision has been reflected in a subsequent Commission ruling, and the courts have cited Commission guidelines and rulings only sparingly.

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authority; consequently it has no authority to make legislative rules, except with respect to procedural matters. Dobbins v. Local 212, IBEW, 69 L.R.R.M. 2313, 2340 (S.D. Ohio 1968); 42 U.S.C. § 2000e-12(a) (1964). However, it does have authority to issue interpretations, which may have a certain legal effect. *See* Air Transport Ass'n v. Hernandez, 264 F. Supp. 227, 229 (D.D.C. 1967). For a discussion of the distinction between legislative and interpretative rules, see K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 5.03-04 (1958). If in the Commission's view, Title VII means that sex differentials in pension plans are prohibited after July 1, 1968, it is hard to see why the title did not have the same meaning before that date. Nor does the Commission have authority to limit the effect of an interpretation to charges filed after a particular date, especially since the interpretation is not inconsistent with any previous Commission action on the subject.

147 33 Fed. Reg. 9495 (1968).

148 CCH EMPL. PRAC. GUIDE ¶ 16,900.31 (1968). The opinion goes on to state:

> The precise cut-off point — whether it be women who are, for example, within 5, 7 or 10 years of being able to exercise their option — will depend upon the circumstances, such as number of people affected and re-funding requirements, relating to the plan under consideration. The judgment of the parties, e.g., the employer and the union, as to what the cut-off point should be would carry considerable weight. *Id.*

This appears to be another example of legislative rule-making in the guise of interpretation, for there is nothing in Title VII that authorizes gradual adjustment to the requirements of the title. Whether a retirement plan may be altered to raise the optional retirement age for women over the objection of the employees affected would appear to be a matter of contract law. It is doubtful that the employer could raise the defense of the illegality of the existing contract, since Title VII would not prevent him from achieving equality by lowering the retirement age for men.

149 H.R. 2767, 90th Cong., 2d Sess. (1968).

150 S. REP. No. 1497, 90th Cong., 2d Sess. 6 (1968).

151 The rider termed the "Dirksen chivalry for ladies is not dead amendment," was sustained 42-12. 114 CONG. REC. S11182-83 (daily ed. Sept. 20, 1968).

If any conclusion is to be drawn from the half-dozen judicial decisions involving sex discrimination questions, it is that the courts have uniformly opted for constructions which minimize the impact of Title VII upon preexisting employment practices. Thus, from the Commission's point of view, the course of decision has been one of unrelieved disaster.[152]

It was a particular misfortune for the cause of sex equality that its first champion in the judicial arena, one Floyd Ward, had a singularly unappealing case. An able-bodied male, or so his employer had concluded, Ward argued that he was improperly denied a transfer from a heavy job to a light job which had been reserved for women and for men with physical defects. The Commission had found reasonable cause, as it had to, since it was indisputable that Ward's sex was a basis for denying him the transfer. However, in *Ward v. Firestone Tire & Rubber Company*[153] the court ruled for the defendant employer and union, and, in so doing, interpreted the bona fide occupation qualification exception as nothing more than a generalized rule of reason:

> [E]ven if plaintiff had shown that the job he sought would actually bring to him the tangible benefits that he desired, still he would not be entitled to relief if it can be shown . . . that the earmarking of this job for women (and men with physical disability) had a bona fide relation to occupational qualification and [was] reasonably necessary to normal operation of this business and that the defendants were bona fide in the administration of this program. Here it appears that certain jobs in the plant, including the one plaintiff sought, had for several years been reserved for women and, upon the advent of the Act, also for physically restricted men. . . . [I]n reserving certain jobs for women and restricted men, Firestone and the Local were bona fide in the sense that they acted with honest purpose and acted within reason in their effort to accomplish the end that is expressly recognized as legitimate by Sec. 2000e-2e(a) [Sec. 703 (e) (2)] of the Act.[154]

Here a b.f.o.q. was recognized despite the absence of any showing that either Ward personally or men as a class were unable or less qualified than women to do the job in question. The classification was upheld on the basis that it was reasonably necessary to the normal operation of the business in question to reserve light work for women, presumably because women generally were deemed unable to perform heavier work. A clearer violation of the Commission's strictures against classifying jobs on the basis of sex[155] can hardly be imagined.

Ward may perhaps be written off as the proverbial hard case. More significant is *Bowe v. Colgate-Palmolive Company*,[156] in which the court upheld a job classification system which excluded female employees from all jobs which required the lifting of thirty-five pounds or more.[157] The court held that this was a reasonable limitation despite the fact that it was imposed by the employer's

152 This course appears to have been checked at least temporarily by Rosenfeld v. Southern Pacific R.R., —— F. Supp. —— (C.D. Cal. 1968) (Civ. Action No. 67-1377-F). See note 129 *supra*.
153 260 F. Supp. 579 (W.D. Tenn. 1966).
154 *Id.* at 581.
155 *See* 29 C.F.R. § 1604.2 (1967).
156 272 F. Supp. 332 (S.D. Ind. 1967).
157 The system had been instituted in 1966 to replace a previous system wherein all jobs

own choice and not compelled by state or local law.[158] The employer demonstrated that in selecting the thirty-five pound figure, it had considered the limits in those states which imposed them as well as the recommendations of the International Labor Congress and the United States Department of Labor.[159] In reply to the argument that female employees with extraordinary strength should be permitted to perform the heavier jobs, the court replied that

> it was not and is not practical or pragmatically possible for Colgate . . . to assess the physical abilities and capabilities of each female who might seek a particular job . . . or to consider special female individuals as uniquely qualified among women in general . . . .[160]

In short, in the view of the court an employer is permitted by the b.f.o.q. provision to act in accordance with his bona fide judgment on the basis of generalizations based on "significant and meaningful biological and psychological differences between the sexes."[161]

Cook v. Dixie Cup Division of American Can Company[162] was the next sex discrimination case decided adversely to the plaintiffs. The case involved a department in which the employer had previously maintained an all-female day shift and an all-male night shift.[163] Prior to suit the employer had agreed to accept transfer applications from either sex as vacancies occurred in either shift.[164] Apparently, the plaintiffs were contending for an immediate open season for reassignment in accordance with seniority as well as elimination of a pay differential in favor of the night shift. The court's ruling for the defendant is perhaps less significant than the fact that in doing so, it quoted copiously from those portions of the *Ward* and *Bowe* opinions which gave a broad reading to the b.f.o.q. provision.[165]

In *Weeks v. Southern Bell Telephone & Telegraph Company,*[166] the plaintiff, a female employee of defendant, bid for a vacancy in the job of switchman.[167] The job called for the lifting of weights in excess of thirty pounds, the maximum permissible for women under the regulations of the Georgia Department of Labor.[168] The court, after citing section 1604.1(c) of the Commission's guidelines, held that the Georgia weight-lifting limit was reasonable and that it made sex a bona fide occupational qualification for the job.[169]

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were classified as male or female and separate seniority lists were maintained on the basis of sex. *Id.* at 345. The court agreed that the previous system had been illegal and awarded back pay to certain of the female plaintiffs who had been unlawfully laid off. *Id.* at 365-66.

158 *Id.* at 365.

159 *Id.*

160 *Id.* at 357.

161 *Id.* at 364. The new classification system approved by the court opened to women a considerable number of jobs previously limited to men. However, all previously female jobs were opened to men. Under the fairly complicated seniority system in effect at Colgate, it is quite possible that women are now worse off than before Title VII took effect.

162 274 F. Supp. 131 (W.D. Ark. 1967).

163 *Id.* at 133.

164 *Id.* at 134.

165 *Id.* at 134-36.

166 277 F. Supp. 117 (S.D. Ga. 1967).

167 *Id.*

168 *Id.* at 118.

169 *Id.* at 119.

Cooper v. Delta Air Lines, Incorporated,[170] involved a problem that has caused the Commission a great deal of difficulty, the employment practices of airlines with respect to stewardesses.[171] Nearly all domestic airlines discriminate on the basis of sex in the employment of flight cabin attendants. Most employ women exclusively; a handful of airlines employ a relatively few male attendants, largely for overseas flights. However, with few exceptions, the complaints that have reached the Commission have not been over the companies' initial hiring policies but over their policies of discharging or grounding stewardesses upon marriage or upon their reaching a certain age (generally thirty-two to thirty-five). These marriage and age limitations are not applicable to male cabin attendants, where males are employed, nor are they applicable to males or females in any other job category in the company. At an early date the Commission had ruled that a no-marriage rule applicable only to women employees was a form of unlawful discrimination,[172] and the same reasoning applies to an age limitation affecting only one sex.[173] However, the Commission delayed applying this ruling to airline stewardesses because of the previously stated possibility that sex might be found to be a bona fide occupational qualification for the job.[174] In response to an airline request, the Commission commenced proceedings in early 1966 to determine whether sex was a bona fide occupational qualification for the job of flight cabin attendant. These proceedings resulted in a Commission determination nearly two years later that it was not.[175] In the meantime, however, Commission processing of stewardess complaints had been suspended, and Mrs. Cooper brought her suit without the benefit of a determination by the Commission on the merits.[176] The court held, without reaching the question of whether sex was a bona fide occupational qualification for the stewardess job, that inasmuch as Delta employed only females in that job, the no-marriage rule simply discriminated in favor of single women and against married women and thus was not a form of sex discrimination.[177] This represents an extremely narrow interpretation of the concept of sex discrimination. To say, as the court did, that the discrimination was based on marital status and not on sex is more than a verbal quibble. The no-marriage rule was in fact applicable only to certain female employees of Delta; it was, on Delta's own evidence, a part of a policy of employing only young, single, "attractive" girls as stewardesses. Since the court did not reach the question whether this policy as a whole or in part could be justified under the b.f.o.q. exception, it is hard to see how it could summarily reject as a basis for comparison Delta's failure to apply such a rule to its male employees in other jobs.

170 274 F. Supp. 781, 782 (E.D. La. 1967).
171 *Id.*
172 29 C.F.R. § 1604.3 (1967).
173 EEOC Decision and Ruling (Opinion Letter of Nov. 22, 1966), CCH EMPL. PRAC. GUIDE ¶ 17,304.52 (1966).
174 EEOC Legal Interpretation (General Counsel Opinion of Sept. 22, 1965), CCH EMPL. PRAC. GUIDE ¶ 17,251.043 (1965). It was reasoned that if the job classification could legally be limited to females, to limit it further to single females was not *sex* discrimination.
175 33 Fed. Reg. 3361 (1968). Earlier attempts to determine the issue were frustrated by litigation. *See* Air Transport Ass'n v. Hernandez, 264 F. Supp. 227 (D.D.C. 1967), *modified,* 55 CCH Lab. Cas. ¶ 9062 (D.D.C. 1967).
176 Cooper v. Delta Air Lines, Inc., 374 F. Supp. 781 (E.D. La. 1967).
177 *Id.* at 783.

The Commission has recently delivered its long awaited decisions in the stewardess cases. In one case involving an age limitation, *Dodd v. American Airlines, Incorporated,*[178] one involving a no-marriage rule, *Neal v. American Airlines, Incorporated,*[179] and one involving both, *Colvin v. Piedmont Aviation, Incorporated,*[180] the Commission found reasonable cause to believe that respondents' policies violated Title VII. In *Dodd* and *Neal* it rejected the argument that because all the employees in the job classification were women, sex discrimination was not involved. In both *Dodd*[181] and *Neal*[182] the Commission stated:

> The concept of discrimination based on sex does not require an actual disparity of treatment among male and female employees presently in the same job classification. It is sufficient that a company policy or rule is applied to a class of employees because of their sex, rather than because of the requirements of the job.

In *Neal* the Commission cited but specifically refused to follow the *Cooper* decision.[183]

The latest judicial decision on sex discrimination under Title VII, *Phillips v. Martin-Marietta Corporation,*[184] involved a claim by plaintiff that defendant discriminated by refusing to hire women with pre-school age children. The court, conceding arguendo that defendant did employ males with pre-school age children, granted summary judgment for the defendant with the brief comment that "[t]he responsibilities of men and women with small children are not the same, and employers are entitled to recognize these different responsibilities in establishing hiring policies."[185]

Why employers should be entitled to recognize such differences — whether out of concern for possible absenteeism or paternalistic regard for the welfare of motherless children — does not appear from the opinion. Nor did the court cite any authority, judicial or administrative, in support of its result.[186] It apparently reached its conclusion on reasoning similar to that implied in *Cooper,* that an employer's policy does not discriminate on grounds of sex unless it discriminates generally against members of a particular sex. Here most of the persons in the job classification sought were women, and this, in the court's view, apparently justified the conclusion that the defendant did not discriminate against the plaintiff *because* the plaintiff was a woman. But discrimination is not prohibited only when it is the sole basis for the personnel action; at the least, Title VII's prohibition covers any situation in which the individual's race, sex,

178 [July, 1965-July, 1968 Transfer Binder] CCH EMPL. PRAC. GUIDE ¶ 8001 (1968).
179 *Id.* ¶ 8002.
180 *Id.* ¶ 8003.
181 *Id.* ¶ 8001, at 6004-05.
182 *Id.* ¶ 8002, at 6010.
183 *Id.* ¶ 8002, at 6009 & n.13.
184 —— F. Supp. ——, 58 CCH Lab. Cas. ¶ 9152, (M.D. Fla. 1968).
185 *Id.*, 58 CCH Lab. Cas. ¶ 9152, at 6580.
186 The Commission had in fact ruled that a policy such as defendant's was unlawful. EEOC Decision and Ruling (Opinion Letter of Oct. 2, 1965), CCH EMPL. PRAC. GUIDE ¶ 17,251.043 (1965).

etc., is one of several decisive factors in the decision.[187] Mrs. Phillips' sex was such a factor on the facts found or assumed by the court, and discrimination should have been found. Whether the discrimination could have been justified by the b.f.o.q. exception was another question, a step in the analysis which the court did not reach. At least, the defendant should have had to demonstrate why the presumed responsibilities of women with young children made them unsuitable for the particular job.

Perhaps too much significance should not be read into these early sex discrimination decisions. At least three — *Ward, Cooper* and *Phillips* — are clearly unsound in theory whatever one may think of the particular results. Doubtless judicial analysis of these problems will become more refined. However, the decisions to date indicate a tendency in the courts to regard the prohibition against sex discrimination as no more than a direction that employers be fair and reasonable in making distinctions based on sex. But in a field where there is little in the way of legal precedent, application of a general rule of reason involves a large measure of subjectivity and depends to a considerable degree on the outlook and predispositions of the tribunal. Since over ninety-five per cent of the federal judges are men, such an approach does not bode very well for the women.

187 *See* Hall v. Werthan Bag Corp., 251 F. Supp. 184, 186 (M.D. Tenn. 1966).