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Legislation and Administration: Constitutional Law -- Barratry and Maintenance -- "Anti-Litigation" Statutes in Virginia

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LEGISLATION AND ADMINISTRATION

CONSTITUTIONAL LAW — BARRATRY AND MAINTENANCE — “ANTI-LITIGATION” STATUTES IN VIRGINIA — The Virginia Assembly, in Chapters 31 through 36 of the 1956 Executive Session Laws, required certain organizations to register with the state and regulated the practice of law. The National Association for the Advancement of Colored People and the NAACP Legal Defense and Education Fund, Inc., sought declaratory judgments on the constitutionality and applicability of these statutes to their organizations. In *NAACP v. Patty*,¹ a three-judge court² held Chapters 31 and 32, requiring the NAACP and the Fund to register with the state, and Chapter 35, defining the crime of barratry, unconstitutional. The court refused to pass upon the constitutionality of Chapters 33 and 36, containing anti-solicitation provisions, until they had been constructed by a state court. The United States Supreme Court reversed the three-judge court, holding that the federal court could not pass upon the constitutionality of any of the statutes until they had been construed by a state court.³ The NAACP and the Fund then sought a declaratory judgment in the state court. From a lower court holding that Chapters 33 and 36 were constitutional and applicable to the plaintiff organizations, an appeal was taken to the Supreme Court of Virginia. *Held*; Chapter 33⁴ is a valid exercise of the state police power to regulate the practice of law and is applicable to the NAACP and the Fund; Chapter 36 violates the Virginia Bill of Rights and the first amendment of the United States Constitution.⁵ *National Ass'n for the Advancement of Colored People v. Harrison*, 116 S.E.2d 55 (Va. 1960).

1 159 F. Supp. 503 (E.D. Va. 1958).

2 28 U.S.C. § 2281.

3 *Harrison v. NAACP*, 360 U.S. 167 (1959).

4 The statute in this particular:

Be it enacted by the General Assembly of Virginia:

1. That §§ 54-74, 54-78, 54-79 of the Code of Virginia be amended and re-enacted as follows:

§ 54-74 . . .

(6) “Any malpractice, or any unlawful or dishonest or unworthy or corrupt or unprofessional conduct,” as used in this section, shall be construed to include the improper solicitation of any legal or professional business or employment, either directly or indirectly, *or the acceptance of employment, retainer, compensation or costs from any person, partnership, corporation, organization or association with knowledge that such person, partnership, corporation, organization or association has violated any provision of article 7 of this Chapter, . . . ; provided, however, that nothing contained in this article shall be construed to in any way prohibit any attorney from accepting employment to defend any person, partnership, corporation, or association accused of violating the provision of article 7 of this chapter.* (Emphasis added.)

§ 54-78. As used in this article:

(1) “a runner” or “capper” is any person, corporation, partnership, or association acting in any manner or in any capacity as an agent for an attorney at law within this State, *or for any person, partnership, corporation, organization or association which employs, retains or compensates any attorney at law in connection with any judicial proceeding in which such person, partnership, corporation, organization or association is not a party and in which it has no pecuniary right or liability, in the solicitation or procurement of business for such attorney at law or for any such person, partnership, corporation, organization or association in connection with any judicial proceeding for which such attorney, or such person, partnership, corporation, organization or association is employed, retained or compensated.* (Emphasis added.)

§ 54-79. It shall be unlawful for any person, corporation, partnership or association to act as a runner or capper *as defined in § 54-78 to solicit any business for any attorney at law or partnership, corporation, organization or association.* (Emphasis added.)

5 U.S. CONST. amend. I: “Congress shall make no law . . . abridging freedom of speech. . . .”

VA. CONST. art I, § 12: “[A]nd any citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right.”

The NAACP and the NAACP Legal Defense and Education Fund, Inc., in order to combat racial discrimination, encourage and aid prospective litigants to bring suits asserting their constitutional rights. Many southern states, because of the success of the Association and the Fund in this undertaking have enacted legislation seeking to curb the activities of the Negro groups.⁶ One form of such control is enactment or broadening of "anti-litigation" statutes which may, if constitutional, restrict the activities of the Association and the Fund in prosecuting and financing individual litigation to achieve a group goal, *i.e.*, elimination of discriminatory laws and practices.⁷ The decision in *NAACP v. Harrison* is the first adjudication by a state court concerning such statutes. Chapter 33, defining "runner" and "capper," is an anti-solicitation statute. The decision of the Virginia court construing this statute as applicable to the activities of the NAACP and the Fund and declaring it constitutional will prevent the Association from referring prospective litigants to lawyers in the employ of the NAACP or the Fund. Furthermore, the licenses of lawyers employed by the NAACP are subject to revocation or suspension if those lawyers are knowingly employed by an association soliciting litigants or referring them to attorneys in its employ. The Virginia court's determination that Chapter 36 is unconstitutional permits the plaintiffs to continue to encourage individuals to bring suits to uphold their constitutional rights. It also allows them to contribute financial assistance directly to the litigants. Since the decision may impede the plaintiffs' progress in seeking adjudication of civil rights questions concerning the conflict between the powers of the state and the rights of individuals guaranteed by the Constitution, it is likely that the case will be appealed to the United States Supreme Court.

At common law, conduct which tended to foster litigation was made criminal. The common law crimes of barratry, champerty and maintenance are examples of such criminal activity.⁸ The power of the states to enact laws to regulate the activities of members of the legal profession is generally recognized.⁹ State regulation of the legal profession has been upheld against the objection that it violates free speech.¹⁰ Solicitation of legal business is one of the evils to be combatted by such regulation; there is a provision in the Canons of Professional Ethics, stated in general terms, forbidding solicitation,¹¹ and rather stringent restrictions on the activities of the legal profession have been enforced in many of the states, generally under some statutory enactment.¹² One of the more obvious evils to be remedied by such

6 Other attempts to curtail NAACP activity have been made through registration and disclosure laws and legislative committee investigations. See *Bates v. Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958); *NAACP v. Committee on Offenses*, 199 Va. 665, 101 S.E.2d 631, *cert. granted, cause remanded*, 358 U.S. 40 (1958); *The Legal Framework of Desegregation*, 34 NOTRE DAME LAWYER 718 (1959).

7 347 U.S. 483 (1954).

8 9 C.J.S., *Barratry* § 1 (1938): "Barratry is the crime or offense of frequently stirring up suits or quarrels between individuals, either at law or otherwise."

14 C.J.S., *Champerty and Maintenance* § 1(a), (b) (1939):

(a) Champerty consists of an agreement whereby a person without interest in another's suit undertakes to carry it on at his own expense, in whole or in part, in consideration of receiving, in the event of success, a part of the proceeds of the litigation.

(b) Maintenance exists when a person without interest in a suit officiously intermeddles therein by assisting either party with money or otherwise to prosecute or defend it.

9 *McCloskey v. Tobin*, 252 U.S. 107 (1920).

10 *Lathrop v. Donohue*, 10 Wis. 2d 230, 102 N.W.2d 404 (1960), *docketed*, 29 U.S.L. WEEK 3039, *juris. postponed*, 29 U.S.L. WEEK 3101.

11 Canons of Professional Ethics, Canon 28: *Stirring Up Litigation, Directly or Through Agents*.

12 *In re Brotherhood of Railroad Trainmen*, 13 Ill. 2d 391, 150 N.E.2d 163 (1958); *Hildebrand v. State of California*, 36 Cal. 2d 504, 225 P.2d 508 (1950); *Courtney v. Association of Real Estate Taxpayers of Illinois*, 354 Ill. 102, 187 N.E. 823 (1933); *Hightower*

legislation is the commercialism or venality which solicitation would encourage in members of the profession. Some state statutes, therefore, restrict themselves to forbidding solicitation in personal liability actions.¹³

A particular form of solicitation restricted by the statute in *NAACP v. Harrison* is that arising from the practice of law by a corporation, which the Canons of Professional Ethics condemns as unauthorized practice.¹⁴ The proscription has been judicially recognized in several states; precedents cited by the court in the *Harrison* case are typical examples.¹⁵ A non-profit organization was held to be illegally practicing law because it was organized to make available to its members the professional services of attorneys in its employ.¹⁶ Cases of more restrictive state regulations are those condemning attorneys working for unincorporated associations which are similar to legal aid societies.¹⁷ As announced in these cases, the traditional evils attendant upon employment of attorneys in such capacities are: (1) solicitation of business which encourages venality; (2) destruction of the personal relation between attorney and client; (3) control of litigation taken out of the hands of the individual litigant (*i.e.*, the attorney must serve a divided interest, that of the corporation and that of the litigant himself).

The NAACP contended in this case that the statute forbidding solicitation should not apply to its activities. It contended that the usual evils of solicitation are not present in that (1) the objectives of individual Negro litigants are the same as those of the Association and (2) the Association is a non-profit organization. To support this argument the Association relied on *Gunnels v. Atlanta Bar Ass'n*,¹⁸ in which the Bar Association sought and maintained suits by private litigants against local loan sharks. The organization's activities were not only found entirely professional by the Georgia Court but were lauded as proper conduct. The Virginia court distinguished *Gunnels* on the grounds that the Bar Association contributed its services gratuitously, a seemingly artificial distinction. In *Gunnels* the persons who contributed to achieve a recognized social goal through litigation were the members of the Bar Association who donated their professional services. In the present situation a larger and non-lawyer group of members contributed financial aid, so that lawyer members did not need to contribute all of their services gratuitously. In both situations, the objective of the group was a social good. The associations involved made no money in either case, though, of course, the lawyers in the instant situation received compensation. However, the Virginia court was not alone in its differentiation. It cites in its opinion cases as analogous to the situation under consideration as is *Gunnels*;¹⁹ and in those cases the courts found and condemned solicitation. In any event, the Virginia court needed only to say that *Gunnels* was not the law of Virginia. The wisdom of holding that the actions of the NAACP and the Fund constitute solicitation, as the word is used in the Virginia statute, is beyond the scope of this comment.²⁰

v. Detroit Edison Co., 262 Mich. 1, 247 N.W. 97 (1933); Chicago, B. & Q. R. Co. v. Davis, 111 Neb. 737, 197 N.W. 599 (1924).

13 MICH. STAT. ANN. § 28-642 (1954); REV. NEB. STAT. § 28-739, 28-740 (1956).

14 Canons of Professional Ethics, Canon 35: *intermediaries*.

15 Richmond Ass'n. of Credit Men Inc. v. Bar Ass'n. of Richmond, 167 Va. 327, 189 S.E. 153 (1937); *In re Maclub of America*, 295 Mass. 45, 3 N.E.2d 272 (1936); Courtney v. Association of Real Estate Taxpayers of Ill., 354 Ill. 102, 187 N.E. 823 (1933).

16 Courtney v. Association of Real Estate Taxpayers of Ill., 354 Ill. 102, 187 N.E. 823 (1933).

17 *In re Brotherhood of Railroad Trainmen*, 13 Ill. 2d 391, 150 N.E.2d 163 (1958). See note, 20 U. PITT. L. REV. 85 (1958).

18 191 Ga. 366, 12 S.E.2d 602 (1940).

19 Courtney v. Association of Real Estate Taxpayers, 354 Ill. 102, 187 N.E. 823 (1933), cited in 116 S.E.2d at 67; *In re Maclub of America, Inc.*, 295 Mass. 45, 3 N.E.2d 272 (1936), cited in 116 S.E.2d at 67; Chicago Bar Ass'n v. Chicago Motor Club, 362 Ill. 50, 199 N.E. 1 (1935), cited in 116 S.E.2d at 68.

20 The wisdom and propriety of permitting various groups to assist members with legal

The judicial task involved in construing the statute brought the court to the question of the statute's constitutionality. The NAACP asserted that it was unconstitutional in that it violated rights guaranteed by the first and fourteenth amendments. If the case goes to the United States Supreme Court, presumably this question will be redetermined there.

The Virginia court pointed out that Chapter 33 does not deny the NAACP the right to discuss with and advise members concerning their legal rights in matters of racial segregation.²¹ The statute does bar the Association from soliciting litigants, referring them to NAACP counsel, paying the lawyers and controlling the cases. As the aforementioned cases indicate, however, this is a legitimate restriction upon speech and action unless it in some other way contravenes the fourteenth amendment.

Cases invalidating state acts as contrary to the fourteenth amendment are not easy of classification. Some cases seem to turn on the lack of standards,²² some on discriminatory application of otherwise valid laws,²³ and some on the grounds that their necessary purpose and effect is to accomplish a prohibited result.²⁴ There is no indication that Chapter 33 is lacking in standards and no evidence that the sanctions of the law were discriminatorily applied. The effects of the law seem to present the only grounds for challenge.

It is axiomatic that the courts will not consider the motives by which a state legislature was actuated.²⁵ The purpose and effect of an enactment, however, is considered.²⁶ The distinction between the two inquiries is so subtle that it is perhaps insubstantial. The recent segregation cases indicate that purpose is synonymous with effect,²⁷ and if the necessary and intended effect of the legislative action is to accomplish a prohibited result, one which could not be accomplished directly, the law will be declared invalid. Thus, when the only effect of laws valid on their face is to keep Negro children out of all white schools,²⁸ or to exclude only Negroes from a municipality and from their franchise in the municipality,²⁹ the laws are struck down by the courts.

In *Harrison*, the court was faced, therefore, with the effect of the statute in question. Although it was enacted as part of the "massive resistance laws,"³⁰ it does not seem to have the effect of accomplishing a prohibited result. The statute does not seek to deny the Negro the right to integrate, nor does it deny the right of Negroes to seek legal enforcement of that right. By declaring Chapter 36 un-

problems is an open question. See *e.g.* DRINKER, *LEGAL ETHICS* 161-68 (1953); McCracken, *Observance by the Bar of Stated Professional Standards*, 37 VA. L. REV. 399 (1951); *Informative Opinion of the Committee on Unauthorized Practice of the Law*, 36 A.B.A.J. 677 (1950); Weihofen, "Practice of Law by Non-Pecuniary Corporations": A Social Utility, 2 U. CHI. L. REV. 119 (1934).

21 116 S.E.2d 55, 69. The Virginia court explicitly recognizes freedom of association which, with the plethora of civil rights litigation and the attempts in some states to impede the activities of the NAACP, has been frequently asserted. See *Freedom of Association*, 4 RACE REL. L. REP. 207 (1959); AMERICAN JEWISH CONGRESS, *ASSAULT UPON FREEDOM OF ASSOCIATION* (1957); *Bates v. Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958).

22 *Yick Wo v. Hopkins*, 118 U.S. 356 (1885).

23 *Patton v. Mississippi*, 332 U.S. 463 (1947); *Smith v. Texas*, 311 U.S. 128 (1940).

24 *Gomillion v. Lightfoot*, 29 U.S.L. WEEK 4042 (1960); *Miller v. Milwaukee*, 272 U.S. 713 (1926); *James v. Almond*, 170 F. Supp. 331 (E.D. Va. 1959); *James v. Duckworth*, 170 F. Supp. 342 (E.D. Va. 1959); *Beckett v. School Board of the City of Norfolk*, 185 F. Supp. 459 (E.D. Va. 1960).

25 341 U.S. 367 (1950).

26 *James v. Duckworth*, 170 F. Supp. 342, 350 (E.D. Va. 1959); *NAACP v. Patty*, 159 F. Supp. 503, 515 (E.D. Va. 1958).

27 *Ibid.*

28 *James v. Duckworth*, 170 F. Supp. 342 (E.D. Va. 1959).

29 *Gomillion v. Lightfoot*, 29 U.S.L. WEEK 4042 (1960).

30 *NAACP v. Patty*, 159 F. Supp. 503, 515 (E.D. Va. 1958).

constitutional, the Virginia court has assured the NAACP that it may continue to urge members to sue and it may assist them financially in maintaining suits. The only effect of Chapter 33 is that it regulates the manner in which such suits may be instituted. This would seem to be precisely the type of thing which the states, under their police power, are entitled to do.

So long as basic rights may still be enforced in the courts, by proper parties following traditional procedures for instituting suits, there would seem to be no violation of the equal protection or due process requirements of the Constitution. Justices Brennan and Douglas, by their dissent in *Harrison v. NAACP*,³¹ may have indicated that they consider Chapter 33, as well as all other "massive resistance laws," to be invalid. However, considering the Supreme Court's reluctance to pass on these statutes in the first place, and a traditionally broad state control of the legal profession, it is doubtful that a majority will reverse the Supreme Court of Virginia, if the case again reaches the United States Supreme Court.

Cornelius Collins

LABOR LAW — DISCRIMINATION — STATE FAIR EMPLOYMENT PRACTICE ACTS AND MULTI-STATE EMPLOYERS. — Fair Employment Practice legislation was, at the beginning, a federal experiment. In 1941, President Roosevelt created a commission to purge the defense industries of discrimination. Created by executive order,¹ that body and its successors under the Truman and Eisenhower administrations have lacked the sanction of legislation. But, if FEPC on the federal level has made little substantial headway, its growth in the states has been phenomenal.

In 1945, New York enacted the Ives-Quinn Act,² the first comprehensive FEPC statute and the model for most that have followed. Within 15 years of the New York legislative venture, 17 states have passed FEPC legislation, providing for administrative bodies, full enforcement powers and broad remedies, both civil and criminal.³ California, Delaware and Ohio were added to the list within the last two years. Almost surely, more will come.

Eight additional states, in addition to Puerto Rico and the District of Columbia, have some legislation relating to employment discrimination.⁴ Municipalities and the federal government continue to be significant factors in the over-all FEPC picture.

31 360 U.S. 167, 179-84 (1960) (dissenting opinion).

1 Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941).

2 N.Y. Sess. Laws 1945, ch. 118, § 1.

3 ALASKA COMP. LAWS ANN. §§ 43-5-1 to 43-5-10 (Supp. 1958); CAL. LAB. CODE §§ 1410-32 (Supp. 1959); COLO. REV. STAT. ANN. §§ 80-24-1 to 80-24-8 (Supp. 1957); CONN. GEN. STAT. REV. §§ 31-122 to 128 (1958); Delaware's statute is reported in CCH LAB. L. REP., 1 STATE LAWS ¶47,500; MASS. ANN. LAWS, ch. 151B, §§ 1-10 (1957); MICH. STAT. ANN. § 17.458(1)-(11) (1960); MINN. STAT. ANN. §§ 363.01 to .13 (1957); N.J. STAT. ANN. §§ 18:25-1 to 28 (Supp. 1960); N.M. STAT. ANN. §§ 59-4-1 to 14 (1953); N.Y. EXEC. LAWS §§ 290-301; OHIO REV. CODE ANN. §§ 4112.01-.08, 09 (Page Supp. 1960); ORE. REV. STAT. §§ 659.010-.990 (Supp. 1960); PA. STAT. ANN. tit. 43, §§ 951-963 (Supp. 1959); R.I. GEN. LAWS ANN. §§ 28-5-1 to 39 (1956), age and sex: §§ 28-6-1 to 28-6-21 (1956); WASH. REV. CODE §§ 49.60.010 to .320 (Supp. 1959); WIS. STAT. ANN. tit. 13, §§ 111.31 to 38 (Supp. 1960).

4 ARIZ. REV. STAT. §§ 23-371-75 (1956); *District of Columbia*: policy ordered by Board of Commissioners on Oct. 26, 1953, reported in CCH LAB. L. REP., 1 STATE LAWS, ¶43,030; *Illinois*: Public Works, ILL. ANN. STAT., ch. 29, §§ 17 to 24g (Smith-Hurd 1953), as amended (Smith-Hurd Supp. 1960); Human Relations Commission: ILL. ANN. STAT., ch. 127, §§ 214.1 to 5 (Smith-Hurd 1953); IND. ANN. STAT. §§ 40-2301 to 2306 (1952), as amended (Supp. 1960); *Iowa*: Senate Concurrent Resolution, April 25, 1955, reported in CCH LAB. L. REP., 1 STATE LAWS, ¶47,500; KAN. GEN. STAT. ANN. §§ 44-1001 to 1008 (Supp. 1957); LA. REV. STAT. R.S. 23:893 (1950); NEB. REV. STAT. §§ 48-215-216 (1960); *Nevada*: public works, NEV. REV. STAT. § 338.125 (1959); apprenticeship programs, ch. 76, L. 1960, reported in CCH LAB. L. REP., 2 STATE LAWS ¶43,035; LAWS OF PUERTO RICO ANN. tit. 29, §§ 146-151 (Supp. 1959).

Without question, these laws present a significant problem to employers doing business in a number of FEPC states. In addition to basic employment policies, application forms, advertisements for employment, promotion, demotion, salaries, retirement age and pension plans are directly affected and, to some extent, regulated by these codes. Even though most of the comprehensive statutes have followed the New York example, there are substantial differences in the scope, administration and enforcement of the laws in the various states.

The basic objective of this review is to analyze the FEPC statutes from the viewpoint of corporate compliance. Accordingly, policy arguments have, in general, been avoided.

This study provides an initial, over-all guide for use by corporate staffs, both legal and otherwise, engaged in the problems of complying with the mass of FEPC legislation.⁵

General Scope of FEPC Legislation

Alaska, California, Colorado, Connecticut, Delaware, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Washington and Wisconsin all have comprehensive fair employment codes.

The "comprehensive" code has, as its basic objective, the elimination of discrimination, based on race, color, creed or national origin, in employment practices. Generally, the codes apply to private employers, employment agencies and labor unions. Some states have included age discrimination;⁶ it has generally been a late entry. Age provisions present special problems, and are worthy of separate treatment.

Administrative bodies, often called Fair Employment Practice Commissions or Anti-Discrimination Commissions, are established by the comprehensive statutes. They have a twofold function: education and enforcement. Finally, the comprehensive statute includes the powers of enforcement. Two remedies are generally available to the commission: court order or criminal proceedings. As the chart indicates, many of the states have included both remedies.⁷

The court order is the most broad and flexible remedy available. Once a commission has made a finding of discrimination, it issues a cease and desist order. Such an order can, negatively, prohibit certain discriminatory practices; it can also, affirmatively, order the adoption of other practices, *e.g.*, the hiring of the applicant, filing of reports, etc. After issuing its order, the commission seeks court enforcement of it; if the court validates the order, violation of it is contempt of the court. Summary proceedings are then available to the court to mete out fine or imprisonment or both to violators. In addition, the enforcing court maintains jurisdiction over the employer.

Alternatively, the commission may ask the state prosecuting authorities to proceed criminally against the violator of a commission order. Generally, the penalties for a wilful violation are fine and imprisonment, or both.

Seven states and the District of Columbia have miscellaneous anti-discrimination legislation. The Louisiana statute is limited to age discrimination. Indiana and Kansas have statutes which, with but one important exception, appear to be comprehensive FEPC statutes; the exception is that they are entirely without provisions for enforcement. The Iowa law is merely a declaration of policy in the form of a legislative resolution.

Arizona, Illinois and Nevada have statutes prohibiting discrimination in public

⁵ See 3 RACE REL. L. REP. 1085 (1958) and 5 RACE REL. L. REP. 569 (1960) for good general surveys of all FEPC legislation.

⁶ Alaska, Colorado, Connecticut, Delaware, Louisiana, Massachusetts, New York, Oregon, Pennsylvania, Rhode Island, Wisconsin and Puerto Rico.

⁷ Alaska, California, Massachusetts, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Washington and Wisconsin.

STATE FAIR EMPLOYMENT PRACTICES STATUTES

<i>State</i>	<i>Date</i>	<i>Enforcement Agency</i>	<i>Penalties</i>	<i>Age</i>	<i>Narrow Statutes Only</i>
Alaska	1953	Commissioner of Labor	court order; fine and/or imprisonment	over 45	
Arizona	1955				public contractors; state government
California	1959	Fair Employment Practice Commission	court order; fine and/or imprisonment		
Colorado	1957	Anti-Discrimination Commission	court order	18-60	
Connecticut	1947	Commission on Civil Rights	court order	40-65	
Delaware	1960	Division Against Discrimination, Labor Commission	fine and/or imprisonment	45-65	
District of Columbia	1953				public works
Illinois	1933 1947				1) public works and defense industries; 2) Interracial Commission
Indiana	1945	Commission of Labor	none		
Iowa	1955	none	none		
Kansas	1953	Anti-Discrimination Commission	none		
Louisiana	1950			under 50	
Massachusetts	1946	Commission Against Discrimination	court order; fine and/or imprisonment	45-65	
Michigan	1955	Fair Employment Practice Commission	court order		
Minnesota	1955	Fair Employment Practice Commission	court order		
Nebraska	1943				defense industries
Nevada	1959 1960				1) public works; 2) discrimination prohibited in apprenticeship programs
New Jersey	1945	Division on Civil Rights, State Dept. of Education	court order; fine and/or imprisonment		
New Mexico	1949	Fair Employment Practice Commission	court order		
New York	1945	State Commission Against Discrimination	court order; fine and/or imprisonment	45-65	
Ohio	1959	Civil Rights Commission	court order; fine and/or imprisonment		
Oregon	1949	Fair Employment Practices Division, Bureau of Labor	court order; fine and/or imprisonment	25-65	
Pennsylvania	1955	Fair Employment Practice Commission	court order; fine and/or imprisonment	40-62	
Puerto Rico	1959	Secretary of Labor	double damages; fine and/or imprisonment	30-65	
Rhode Island	1949	Commission Against Discrimination	court order; fine and/or imprisonment	45-65	
Washington	1949	State Board Against Discrimination in Employment	court order; fine and/or imprisonment		
Wisconsin	1945	Industrial Commission	court order; fine	40-65	

works. To that, Illinois adds a provision against discrimination in defense industries; Illinois also has an Interracial Commission with investigative and cooperative authority but without enforcement powers. Nebraska prohibits discrimination in defense industries. Nevada has a special provision affirmatively stating that the apprenticeship program shall be open to all without regard to race, creed, color and national origin; the public works provision of that state also prohibits discrimination on the basis of sex. Generally, the statutes of these seven states present no problem to employers, with the exception of those engaged in public works or defense contracts.

There are some general exemptions to the comprehensive codes. Generally, small employers (*e.g.*, with from four to eight employees) are not affected; clubs, fraternal organizations and various associations and corporations not organized for profit are exempted. Domestic servants are, generally, not included.

The most troublesome exemption is the "bona fide occupational qualification," which is generally provided for in the statutes. The legislators recognized that, in some cases, religious background, national origin or, where applicable, age are vitally important in particular occupations. For example, the New York Commission held that the country of origin was a valid consideration in the employment of foreign language teachers.⁸

Comparison of Comprehensive Statutes

Drafters of most of the comprehensive statutes appear to have followed the New York code. There are differences, but few are substantial. The objective in this section is to take a close look at the New York act, passed in 1945, and compare it with the California code, enacted in 1959.

Commission Operations: The New York statute provides for a chairman and five commissioners; each job is a full-time occupation. Commission offices are located in four cities⁹ and advisory community councils are organized throughout the state. The State Commission Against Discrimination (SCAD) operates a broad educational program to advise the public of its activities and its availability.

In California, the commission is organized within the Department of Industrial Relations. There are five commissioners who, presumably, devote only a part of their time to the commission.¹⁰ Unlike New York, California provides for an executive head apart from the commission chairman.¹¹ Offices are maintained in San Francisco and Los Angeles.

Exemptions: Under New York law, employers with fewer than six employees are excluded from the act; the number is five in California.¹² Social clubs, fraternal, charitable, educational and religious organizations or corporations are exempt if not organized for profit purposes in New York.¹³ The California law is, in substance, similar.¹⁴ Both New York and California exclude domestic servants, and California adds "agricultural workers residing on the land where they are employed as farm workers" to the list of exemptions.¹⁵

Scope: Relating to employers, the basic prohibitions of the codes are similar. They prohibit employment discrimination based on race, creed, color and national origin or ancestry. In addition, they prohibit the use of advertisements or forms which indicate such a discriminatory policy.

8 35 MICH. STATE B. J. 41, 47 (May 1956).

9 Albany, Syracuse, New York and Buffalo.

10 CAL. LAB. CODE § 1416 (Supp. 1959), provides that the commissioners shall serve without compensation; they receive a per diem expense payment of \$50 plus expenses.

11 CAL. LAB. LAWS § 1415 (Supp. 1959); that job, unlike that of a commissioner in California, is a full-time occupation.

12 N.Y. EXEC. LAWS § 292(5); CAL. LAB. CODE § 1413(d) (Supp. 1959).

13 N.Y. EXEC. LAWS § 292(5).

14 CAL. LAB. CODE § 1413(d) (Supp. 1959).

15 N.Y. EXEC. LAWS § 292(6); CAL. LAB. CODE § 1413(e) (Supp. 1959).

The California statute, which is patterned after that of New York and is substantially the same, reads as follows:

It shall be an unlawful employment practice, unless based on a bona fide occupational qualification . . .

a) For an employer, because of the race, religious creed, color, national origin, or ancestry of any person, to refuse to hire or employ him or to bar or to discharge from employment such person, or to discriminate against such person, in compensation or in terms, conditions or privileges of employment. . . .

c) For any employer or employment agency to print or circulate or cause to be printed or circulated any publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitations, specification or discrimination as to race, religious creed, color, national origin, or ancestry or any intent to make any such limitation, specification or discrimination.¹⁶

Procedure and Enforcement: In New York any person who has been aggrieved by a discriminatory practice may file a complaint with the commission. "Person" is defined to include organizations. In addition, the attorney general and the Industrial Commission may file complaints. The complaint must be filed within 90 days of the alleged act of discrimination.

If the investigating commissioner finds probable cause for discrimination, he attempts to find a solution through the processes of conference, conciliation and persuasion. If either party has objection to the terms of the conciliation, provision is made for appeal to the commission.

If a solution cannot be reached by the informal proceedings, a hearing is held by the commission. The hearing is typical of similar administrative procedure; for example, strict rules of evidence are not followed. The commission has authority to subpoena witnesses and require evidence to be brought to the hearing. If the commission finds an unfair or discriminatory employment practice, it issues a cease and desist order. The order may prohibit certain discriminatory activities, and require, affirmatively, hiring, reinstatement, back pay, reporting and changes in employment practices.¹⁷

Under the judicial review provisions, the commission is given the power to seek a court order for the enforcement of the terms of the commission order. The employer or the aggrieved party may appeal the decision and order of the commission within 30 days.

Penal provisions are also included in the code, giving the commission the normal choice of remedies. Violation of a commission order is a misdemeanor; the maximum penalty is imprisonment for one year or a fine of \$500, or both.¹⁸ California's statute carries a maximum criminal penalty at six months.¹⁹

The California FEPC legislation is almost identical to New York's in provisions for enforcement, procedure and penalties for violations.

Section 1422 of the California statute provides a one-year statute of limitations on filing complaints; unlike California, section 297 of the New York act makes the limit three months. Moreover, California allows a 90-day extension if the aggrieved party did not have the facts or the knowledge of the discriminatory act within the one-year period.

Effect on Application Forms — Rulings: Both New York and California have published rulings for employers governing what may and may not be included on

16 CAL. LAB. CODE § 1420(a), (c) (Supp. 1959); N.Y. EXEC. LAWS § 296(a), (c).

17 CAL. LAB. CODE § 1426 (Supp. 1959), deals with orders of the commission; it lists some of the things the commission may include and is careful to note that the extent of the order is not, of necessity, limited to that list.

18 N.Y. EXEC. LAWS §§ 297-99, include the provisions for procedure, enforcement and penalties for violations.

19 CAL. LAB. LAWS § 1430 (Supp. 1959).

application forms for employment.²⁰ In New York, the following questions or blanks are prohibited:

- 1) Original name of applicant;
- 2) birth place of applicant;
- 3) birth certificate, naturalization or baptismal record (It is, however, lawful to require statement of age);
- 4) religion, religious affiliations, church parish, pastor, or religious holidays observed (It is unlawful to state that, "This is a Catholic, Jewish or Protestant organization");
- 5) complexion or color of skin;
- 6) requirement or option of attaching photograph; requirement of photo after interview but before hiring;
- 7) country of which applicant is a citizen (It is, however, lawful to ask whether applicant is a citizen of the United States);
- 8) citizenship of applicant's parents or spouse (It is, however, lawful to ask whether they are citizens of the United States);
- 9) lineage, ancestry, national origin, descent, parentage, nationality, or nationality of applicant's parents or spouse;
- 10) language commonly used by applicant (It is lawful to ask what languages are written or spoken fluently by the applicant; it is, on the other hand, unlawful to ask why the applicant acquired the ability to use other languages);
- 11) name or address of applicant's relatives, other than father and mother, husband or wife or minor, dependent children;
- 12) name and address of nearest relative to be notified in case of accident or emergency (It is lawful to ask name of *person* to be notified);
- 13) applicant's *general* military experience;
- 14) list of all clubs, societies and lodges to which applicant belongs (It is lawful to ask for a list of organizations, the names of which do not indicate race, creed, color or national origin of members).

The New York Commission, in its Annual Report for 1954, reported an illustrative case dealing with photographs. The employer in the case used an application form which included a space for a picture with the notation "required unless contrary to local legislation." The commission ruled that such a practice did not comply with its anti-discrimination law.²¹

As previously noted, the California and New York statutes provide for a bona fide occupational qualification. The procedure to be followed, where an employer needs some prohibited information for good purpose, is to request an advisory opinion from the commission.

Litigation

Few cases dealing with FEPC statutes have been reported.²² One reason is the elaborate conciliation procedure that is an integral part of FEPC. In those cases which have been decided, the anti-discrimination statutes have suffered few setbacks.

The United States Supreme Court has never been called upon to determine the constitutional validity of an existing FEPC statute. The Court did, however, unanimously uphold the predecessor to the New York code in *Railway Mail Association v. Corsi*.²³ The statute prohibited racial discrimination by a labor organization. The appellant association had a policy of admitting only whites as members. The

20 Material on "Guides" reported in GCH LAB. L. REP., 1 STATE LAWS ¶47,511; 2 STATE LAWS ¶47,507. See also 1 STATE LAWS ¶47,550 for some variations from the New York pattern.

21 *Matter of American Stores Company*, ANNUAL REPORT OF THE STATE COMMISSION AGAINST DISCRIMINATION, NEW YORK (1954).

22 Some jurisdictions have included housing provisions in the basic anti-discrimination statutes. For recent cases dealing with housing, where the commissions have been upheld, see *Levitt & Sons, Inc. v. Division Against Discrimination*, 31 N.J. 514, 158 A.2d 177 (1960), *Evans v. Ross*, 57 N.J. Super. 223, 154 A.2d 441 (1959), and *McKinley Park Homes v. Commission on Civil Rights*, 20 Conn. Sup. 167, 129 A.2d 235 (1957). Though outside the scope of this note, these cases are helpful in studying judicial treatment of FEPC codes.

23 326 U.S. 88 (1945).

main attack on the statute was that it was an interference with the association's right of selection of membership and abridgement of its property rights and liberty of contract, in violation of the due process clause of the 14th amendment.

The majority opinion, written by Mr. Justice Reed, indicates that a future attack on FEPC would not succeed:

We have here a prohibiting of discrimination in membership or union services on account of race, creed or color. A judicial determination that such legislation violated the Fourteenth Amendment would be a distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color. We see no constitutional basis for the contention that a state cannot protect workers from exclusion solely on the basis of race, color or creed by an organization, functioning under the protection of the state, which holds itself out to represent the general business needs of employees.²⁴

In a concurring opinion, Mr. Justice Frankfurter indicated a broader basis of support for anti-discrimination legislation:

. . . a State may choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial or religious prejudice to another's hurt. To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment.²⁵

One of the earliest state decisions concerning FEPC legislation is the Connecticut case of *Draper v. Clark Dairies, Inc.*²⁶ The dairy advertised for help and the complainant, a Negro, applied. He was not hired, but three whites, who applied later, were employed. The Connecticut commission found discrimination, and issued a cease and desist order which compelled the dairy to employ the Negro applicant. The court upheld the finding, but modified the order to prevent discrimination, on the basis of race, if the complainant applied for employment with the dairy in the future.

In another Connecticut decision,²⁷ the commission found a union guilty of discriminatory practices in refusing to admit Negroes to membership. A cease and desist order followed. But the union members voted not to admit the Negroes because they had not complied with the union requirement of sponsorship and employment by a union contractor. The court ignored the stated reasons, held the union in contempt, and fined it \$1,000. In addition, the court gave the union 30 days to comply; for every week after that period in which the order was violated, a fine of \$250 was to have been imposed.

In *Holland v. Edwards*,²⁸ the New York commission was upheld in finding an employment agency guilty of discriminatory practices. Among those practices was the use of an application form which required the disclosure of racial and religious information. The commission put the agency under its "continuing supervision" for one year, and required it to maintain elaborate records for commission perusal. The court did not rule specifically on the "continuing supervision" imposed by the commission, but indicated that it would not interfere unless the commission remedy was unreasonable.

In *Ross v. Arbury*,²⁹ the authority of the New York commission to order a business establishment to post notices pertaining to the New York statute was upheld. In 1957, the New York Court of Appeals ruled that a formal commission hearing is

²⁴ *Id.* at 93-94.

²⁵ *Id.* at 98. On the question of the constitutionality of FEPC statutes, see Waite, *Constitutionality of Proposed Minnesota Fair Employment Practices Act*, 32 MINN. L. REV. 349 (1948); 5 RACE REL. L. REP. 569 (1960).

²⁶ 17 Conn. Sup. 93 (1950).

²⁷ *International Brotherhood of Electrical Workers v. Commission on Civil Rights*, 140 Conn. 537, 102 A.2d 366 (1953).

²⁸ 307 N.Y. 38, 119 N.E.2d 581 (1954).

²⁹ 206 Misc. 74, 133 N.Y.S.2d 62, 119 N.E.2d 557 (1954).

not necessary when, in the opinion of the investigating commissioner, the evidence is not reasonably sufficient to support the complaint.³⁰

In 1957, the Supreme Court of Wisconsin refused to uphold an order of the State Industrial Commission compelling a union to admit Negro applicants.³¹ The court held that the Wisconsin FEPC statute lacked enforcement provisions; the code was merely a public policy declaration. The Wisconsin legislature has, subsequently, amended the statute to put teeth into its policy statement.³²

A particularly interesting case is pending at the present time in Colorado.³³ Continental Air Lines was found to be in violation of the Colorado statute by refusing to hire a Negro as a pilot. Moreover, the commission found Continental's application form, on which is required information concerning race, and the submission of a photograph, to be discriminatory. The commission ordered Continental to hire the complainant for the next training school. On appeal, the commission encountered procedural difficulties, and the case has not been determined on the merits. If the commission's order is upheld, it should be a significant precedent in extending affirmative remedies available to anti-discrimination commissions.

Perhaps the most interesting case in this entire area is *American Jewish Congress v. Carter*,³⁴ a New York case which is still pending. The New York commission held that the Arabian-American Oil Co. (Aramco) could properly inquire into the religion of applicants for employment as a "bona fide occupational qualification." The King of Saudi Arabia prohibits the employment of Jews in that country, and service with Aramco includes the possibility of assignment to Saudi Arabia. The American Jewish Congress applied for an order annulling the decision of the commission.

In a stinging opinion, the Supreme Court, Special Term, reversed the commission: "The film of oil which blurs the vision of Aramco has apparently affected the respondent Commission in this case."³⁵

Aramco cannot defy the declared public policy of New York State and violate its statute within New York State no matter what the King of Saudi Arabia says. New York State is not a province of Saudi Arabia, nor is the constitution and statute of New York State to be cast aside to protect the oil profits of Aramco.³⁶

The Appellate Division remanded the case to the commission for "further processing." The court declined to discuss the merits. Even though a final decision has not been rendered at this writing, the opinion of the New York Supreme Court indicates a disposition to uphold FEPC, no matter what the practical difficulties may be.

Age Discrimination

Age discrimination provisions are a relatively new feature in FEPC legislation. Massachusetts initiated the trend in 1950; a total of ten states now have age discrimination provisions.³⁷

Generally, the statutes forbid discrimination against persons in given age brackets. Delaware, Massachusetts, New York and Rhode Island prohibit discrimination against workers between the ages of 45 and 65; the age bracket in Connecticut

30 *Jeanpierre v. Arbury*, 3 A.D.2d 514, 162 N.Y.S.2d 506 (1957), *modified* 4 N.Y.2d 238, 173 N.Y.S.2d 506 (1958).

31 *Ross v. Ebert*, 275 Wis. 523, 82 N.W.2d 315 (1957).

32 WIS. STAT. ANN. tit. 13, § 111.36 (Supp. 1960).

33 *Colorado Anti-Discrimination Comm'n v. Continental Air Lines*, 355 P.2d 83 (Colo. 1960).

34 190 N.Y.S.2d 218 (1959), *modified*, 10 A.D.2d 833, 199 N.Y.S.2d 157 (Sup. Ct. 1960).

35 See Recent Decision, 35 NOTRE DAME LAWYER 443 (1960).

36 190 N.Y.S.2d 218, 221-22.

37 For discussion of related problems dealing with age discrimination, see Note, 61 YALE L. REV. 547 (1952), and Meiners, *Fair Employment Practices Legislation*, 62 DICK. L. REV. 60 (1958).

and Wisconsin is 40-65; it is 25-65 in Oregon, 40-62 in Pennsylvania, 30-65 in Puerto Rico, and 18-60 in Colorado. Alaska prohibits discrimination against workers over 45. Though not as part of an FEPC statute, Louisiana prohibits discrimination against workers *under* the age of 50.

Again, New York state will be used as an example of the enforcement provisions established with regard to the policy against age discrimination. The New York commission has published a comprehensive set of rulings, called "working presumptions."³⁸

An application form may contain a question about age in New York if two conditions are met: 1) the inquiry must be made in good faith — presumably with reference to a bona fide occupational qualification; and, 2) the application form must note that New York law prohibits discrimination on the basis of age.

Three conditions have been established for the determination of bona fide occupational qualifications. First, age must be a bona fide factor in connection with job performance; second, the age limitations must be a bona fide factor in apprentice training or an on-the-job training program of long duration; and, third, age must be a bona fide factor in fulfilling the provisions of other statutes (*e.g.*, minimum age requirements).

New York has established a special procedure with reference to exceptions to the age provisions. An employer may file with the commission a statement, supported by facts, claiming the existence of a bona fide qualification. When such a statement has been filed in good faith, the employer may put such an age qualification into effect. If the commission, in reviewing the practice, decides it does not meet its standards, it notifies the employer and gives him an opportunity to change the practice.

With reference to advertisements, New York provides that the general test is whether the advertisement indicates a barrier excluding applicants over a particular age. But the actual rulings go further. It is, for example, unlawful, in the commission's view, to use the word "young" in an advertisement.

Pre-employment physical examinations are permitted if the minimum standards used are reasonably necessary for the work involved, and if they are uniformly applied to all applicants.

A general policy of forced resignation at the age of 60 is suspect. Such a policy is unlawful, the commission has ruled, unless the employer can establish two conditions. First, it must be shown that the physical attributes of workers over 60 are harmful to their work. Second, it must be impractical to pass upon an individual employee's qualifications. Of course, the burden will be on the employer to establish both conditions.

A compulsory age specification for retirement is lawful if the policy or plan was established before July 1, 1958, and if the employer provides at least partial retirement benefits. The employer beginning a new retirement plan must justify the reasonableness of a compulsory retirement age in relation to the employer's over-all employment policy and the particular occupational category to which it applies.

Where a retirement plan does not include benefits provided by the employer, certain conditions have been established, upon which the good faith of the age specification will be judged. Among those conditions are: (1) the date the policy was established; (2) the history of administration of the policy; (3) whether or when the policy was reduced to writing and made known to employees and applicants; and, (4) the reasonableness of the specific compulsory retirement age in relation to the employer's over-all employment policy and the particular occupational qualifications to which it applies.

An employer may not reject an applicant for employment merely because

he is above the maximum age for entrance into the retirement plan. Of course, the applicant, in those circumstances, has no right to be admitted to coverage under the policy or plan.

It is important to note, with reference to the above-mentioned New York rulings, that there are no reported cases wherein such rulings have been subjected to judicial review. No other "age states" have passed comparable comprehensive rulings. There are, however, differences in application of the laws in the various states.

In Oregon, an applicant may be required to state his or her age.³⁹ In Pennsylvania, age proof in the form of certificates of age or work permits issued by school authorities may be required.⁴⁰ Similarly, Rhode Island allows certificates of age to be required.⁴¹ The Massachusetts commission has ruled that an applicant may be required to give his or her age if the requirement is based on a bona fide occupational qualification, or when necessary to satisfy minimum age law requirements, or when necessary to check for honesty, or a criminal record.⁴²

It would seem that a statement on the application form that "said question may be answered if not contrary to local law" would answer the problem presented by variations in the age states. Generally, however, the commissions have ruled that such statements are not sufficient to remove the question from being considered as a violation.

Some of the variations with regard to what is allowed for advertisement purposes are subtle. For example, Pennsylvania allows the use of the phrases: "college student wanted," "Korean veteran preferred," "recent high school graduate," and "recent college graduate." These are allowed because "it is conceivable that individuals between the ages of 40 and 62 may be included." On the other hand, use of the word "young" is prohibited.⁴³

There are no reported cases dealing with the age discrimination provisions in any of the states. Perhaps their novelty is one reason. It is suspected that another reason is that many employers prefer settlement to litigation.⁴⁴

Federal Provisions

The first Fair Employment Practice Committee was established by President Roosevelt in 1941.⁴⁵ That committee went out of existence at the end of World War II. In 1951, President Truman established the Committee on Government Contract Compliance.⁴⁶ President Eisenhower changed the name of the committee in 1953,⁴⁷ and approved a revised provision for government contracts in 1954.⁴⁸ Vice President Richard Nixon was chairman of the committee during the Eisenhower administration; Vice President Lyndon B. Johnson is its present chairman.

The last Eisenhower order directs all government contracting agencies to include the following non-discrimination clause in all contracts:

In connection with the performance of work under this contract, the contractor agrees not to discriminate against any employee or applicant for employment because of race, religion, color or national origin. The aforesaid provision shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising;

39 *Id.* at ¶47,550.

40 *Id.* at ¶47,660.

41 *Id.* at ¶47,550.

42 CCH LAB. L. REP., 1 STATE LAWS ¶47,550.

43 CCH LAB. L. REP., 2 STATE LAWS ¶47,670.

44 See, for example, case no. AVI-1-A, Massachusetts Annual Report 9-10 (1956), 2 RACE REL. L. REP. 734, 736 (1957); 5 RACE REL. L. REP. 569, 589-90 (1960).

45 Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941).

46 Exec. Order No. 10308, 16 Fed. Reg. 12303 (1951).

47 Exec. Order No. 10479, 18 Fed. Reg. 4899 (1953).

48 Exec. Order No. 10557, 19 Fed. Reg. 5655 (1954).

layoff or termination; rates of pay or other forms of compensation; and selection for training including apprenticeship. The contractor agrees to post hereafter in conspicuous places, available for employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of the nondiscrimination clause.

The contractor further agrees to insert the foregoing provision in all subcontracts hereunder, except subcontracts for standard commercial supplies or raw materials.⁴⁹

There are two types of contracts in which the nondiscrimination clause need not be included: contracts and subcontracts to be performed outside the United States where no recruitment of workers within the United States is involved; and contracts and subcontracts to meet other special requirements or emergencies, if recommended by the committee.⁵⁰

The committee rules provide that any person or organization with knowledge of a failure of a federal contractor to comply with the nondiscrimination clause may file a complaint. The committee then transmits the complaint to the appropriate contracting agency, which processes the complaint in accordance with the agency's procedure for handling complaints. Since 1954, the committee has received 888 complaints.⁵¹ Considering the magnitude of government contracts, that number is not large.

The committee itself has no power to invoke remedies for non-compliance by government contractors; that responsibility is placed on the contracting officers of the various agencies. Presumably, the most effective remedy available to the contracting officers is cancellation of the contract. The committee reports no instances of cancelled contracts.

A compliance survey program is operated by the Government Contracts Committee. The survey includes a physical examination of the contractor's plant, an examination of the employment practices followed, and an evaluation of compliance with the nondiscrimination clause. Roughly 500 contractors are surveyed each year.⁵² Of interest in the 1958-59 Report is the policy statement, by the committee, that it will emphasize the integration of minority groups into white-collar positions.⁵³

There is only one reported case dealing with the current nondiscrimination clause.⁵⁴ In that case, the Court of Appeals for the Tenth Circuit held that the evidence sustained the holding of the lower court that the plaintiff had been discharged not because of his race, but because of a reduction of the work force and the fact that his work was unsatisfactory.

There have been repeated attempts to enact a federal Fair Employment Practice Code; the first such attempt was made in 1942. To date, none has been successful.⁵⁵ However, the Democratic platform for the recent general election called for a federal FEPC.

Municipal Ordinances

Although many cities have ordinances prohibiting discrimination in employment, only 29 municipalities have provided for enforcement machinery and penalties for violations. These ordinances, with two exceptions,⁵⁶ cover private employers,

⁴⁹ *Ibid.*

⁵⁰ *Id.* at §§ 2(a), (b).

⁵¹ Report of the Committee on Government Contracts 22 (1953-58).

⁵² Report of the Committee on Government Contracts 8-10 (1958-59).

⁵³ *Id.* at 5.

⁵⁴ *Taylor v. Peter Kiewit & Sons Co.*, 271 F.2d 639 (10th Cir. 1959).

⁵⁵ For thorough studies of attempts to enact a federal FEPC, see RUGHAMES, *RACE, JOBS & POLITICS* at 199-213 (1953), and KESSELMAN, *THE SOCIAL POLITICS OF FEPC* (1948).

⁵⁶ The Chicago ordinance is limited to employers; the Milwaukee ordinance does not include labor unions.

labor unions and employment agencies. The cities are as follows:⁵⁷

Campbell, Ohio
Chicago, Ill.
Cleveland, Ohio
Duluth, Minn.
East Chicago, Ind.
Erie, Pa.
Farrell, Pa.
Gary, Ind.
Girard, Ohio
Hamtramck, Mich.
Hubbard, Ohio
Lorain, Ohio
Lowellville, Ohio
Milwaukee, Wis.
Minneapolis, Minn.

Monessen, Pa.
Niles, Ohio
Philadelphia, Pa.
Pittsburgh, Pa.
Pontiac, Mich.
River Rouge, Mich.
St. Paul, Minn.
San Francisco, Calif.
Sharon, Pa.
Steubenville, Ohio
Struthers, Ohio
Toledo, Ohio
Warren, Ohio
Youngstown, Ohio

The validity of municipal FEPC ordinances is open to serious question. First, they may be challenged on the grounds that the local government may not legislate in the area of employment practices without express authority. Second, the state, because of its own anti-discrimination legislation, may claim pre-emption of the field.⁵⁸

The Attorney General of Kansas has ruled that a municipality may not pass an ordinance prohibiting housing discrimination without express authority; presumably, this would hold true for employment discrimination laws as well. The attorneys-general of Michigan and New Jersey have declared that city ordinances in those states have been superseded by the state legislation.⁵⁹

The Pennsylvania statute, on the other hand, has specifically provided that the city ordinances will remain valid.⁶⁰ The Attorney General of Minnesota has ruled that city ordinances consistent with state laws are permissible.⁶¹

There are no reported cases determining the validity of city ordinances regulating employment practices.

Conclusion

It must be emphasized that this survey is only general; it does not purport to cover all of the variations in the enforcement rulings of the anti-discrimination commissions. Focus was placed on the New York law because it is the model that most codes have followed and, it is believed, a general policy of compliance with the New York statute will raise only minor problems with other FEPC laws.

While it may be a great defect in the structure of FEPC, the general scheme of enforcement affords a loophole for counsel engaged in the problems of multi-state compliance. That policy provides for investigation, conciliation, the court order and judicial review — all of which give the corporation or the labor union an opportunity to comply with a specific order before a penalty of fine or imprisonment attaches. There is, generally, no real problem of facing the penalties of an FEPC violation until a specific order has been issued for the individual employer or labor union. Certainly such procedures are helpful to counsel with serious problems of compliance with some of the more technical rulings of the various commissions. But, on the other hand, such procedure does, with little question, allow employers and labor unions to virtually ignore the laws until placed under a commission order. The cost of such machinery to the administrative agency and the time that is lost makes the whole procedure of lesser benefit to the complainant.

57 P-H EMPL. & LAB. REL. SERV., STATE LAWS ¶44,011.

58 3 RACE REL. L. REP. 1106 (1958).

59 *Id.* at 1106-07.

60 PA. STAT. ANN. tit. 43, § 962(b) (Supp. 1959).

61 P-H EMPL. & LAB. REL. SERV., STATE LAWS ¶44,012.

Another general commission policy which, inevitably, leads to violations is the great concern of the agencies with pre-employment and pre-interview policies. It is easy enough for a complainant to show that the requirement of a photograph on an application form or a question which would reveal religion is a clear violation of the law. But it becomes more difficult, and perhaps even impossible, to show a violation in the fact that an individual applicant has not been hired because of his race, creed, or color. The expense of prosecuting such a claim of discrimination, and the enormous problems of proving the claim, remain a major defect and stumbling block in the path of FEPC effectiveness.

But, it must be noted, these problems have not slowed, to any marked degree, the phenomenal growth of FEPC and its administrative agencies. Even if their effectiveness is open to serious question, these laws cannot be ignored in the face of such growth and refinement.

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