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Title VII Seven Years after

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COMMENTS

TITLE VII SEVEN YEARS AFTER: A GLANCE AT THE BASIC STATUTORY SCHEME AND CONTENT OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AND THE JUDICIAL GLOSS PLACED UPON IT BY RECENT DEVELOPMENTS

On June 19, 1964, after 534 hours, 1 minute, and 37 seconds of filibuster,[1] the Senate passed an amended version of Title VII of the Civil Rights Act of 1964 which had been passed by the House.[2] It was sent to the House where it was passed as amended on July 2, 1964.[3] The signing into law on the same day by the President was hailed by many as a great stride in the civil rights area. At last Congress had acted in the field of discrimination in employment with the promulgation of a federal statute that provides relief from a problem which is truly national in scope and affects the basic fiber of the nation.

Title VII of the Civil Rights Act of 1964[4] precludes employers, employment agencies, and labor organizations from discriminating in employment upon the basis of race, color, religion, sex, and national origin. Such discrimination constitutes an unlawful employment practice.[5] In addition, the Act establishes a five member Equal Employment Opportunity Commission (EEOC) which has the duty of interpreting the Act and seeking compliance.[6] An aggrieved party must file initially with the EEOC who investigates the charge and, after a determination of reasonable cause, attempts to obtain a voluntary compliance through informal conference, conciliation, and persuasion.[7] All matters in the conciliation process are strictly confidential.[8] If the EEOC fails to obtain compliance within a certain time limit, it must notify the party of his right to institute a civil suit in federal court.[9] The federal court upon finding a violation has the power to grant appropriate affirmative relief which includes reinstatement or hiring, with or without back pay.[10] In addition, the court may award the prevailing party reasonable attorney fees.[11]

[1] BNA, THE CIVIL RIGHTS ACT OF 1964, at 21 (1964).
[2] 110 CONG. REC. 14511 (1964).
[3] 110 CONG. REC. 15897 (1965).
[4] 42 U.S.C. 2000e (1964). Hereinafter the original section numbers of the Act will be utilized.
[5] § 703.
[6] § 705; and § 706(a).
[7] § 706(a).
[8] § 709(e).
[9] § 706(e).
[10] § 706(g).
[11] § 707(k).

The Attorney General may institute an action in federal court when he has reasonable cause to believe that there is a "pattern or practice" of resistance to the rights granted by Title VII.[12] In this action, he may seek injunctive relief or such relief as he deems necessary.[13] The power of the Attorney General under the Act will not be considered in this paper.

The main emphasis of the following pages will be upon the contents of the act itself as developed by recent cases in order to provide an overall familiarity with Title VII and the rights secured by it.

UNLAWFUL EMPLOYMENT PRACTICES

An unlawful employment practice on the part of the employer is defined as a refusal or failure to hire; or a discharge or discrimination against an employee in relation to compensation, terms, or conditions of employment; or a limitation, segregation, or classification of employees in any way which would adversely affect an individual's status as an employee on the basis of race, color, religion, sex or national origin.[14]

Section 703(b) proscribes an employment agency from refusing or failing to refer for employment, or otherwise discriminating against an individual on the basis of race, color, religion, sex or national origin.

A labor organization commits an unlawful employment practice when it excludes or expels from membership or otherwise discriminates against an individual or classifies its membership or refuses to refer an individual which affects his status as an employee predicated upon race, color, religion, sex or national origin.[15] In addition, an attempt by a labor organization to cause an employer to discriminate in violation of the Title VII is an unlawful employment practice.[16]

Employers and labor organizations are barred from denying admission or employment in an apprenticeship program on a discriminatory basis as well as any advertising for employment which indicates that the hiring is on the basis of race, color, religion, sex or national origin.[17]

Congress has defined an unlawful employment practice to cover a wide array of relationships in employment. Every element of the relationship is covered and any individual who comes in contact with an employer, employment agency, or labor organization in an employment-connected relationship has a right to be free from discrimination.

[12] § 707(a).
[13] § 707(a).
[14] § 703(a)(1); and § 703(a)(2).
[15] § 703(c)(1); and § 703(c)(2).
[16] § 703(c)(3).
[17] § 703(d); § 704(a); and § 704(b).

EMPLOYMENT HIRING QUOTAS

Section 703(j) expressly provides that Title VII does not require the granting of preferential treatment to any individual upon the basis of quotas.[18] The literal language of this section does not preclude the granting of such a preference, it merely states that Title VII does not impose such a duty.

In *Contractors Association v. Schultz*[19] the Philadelphia Plan was attacked on the grounds that such plans conflict with the above mandate and that they require "reverse discrimination" which is in effect discrimination and contrary to the spirit of Title VII. The district court resolved the conflict by articulating that the employer was not legally bound to hire according to the quota. The statute merely requires a good faith effort and thus there is no discrimination.[20] Although the validity of such "affirmative action" plans has withered Title VII attacks[12] and such plans are deemed beneficial to social change, the real question as to whether "reverse discrimination" constitutes discrimination within the meaning of Title VII has not been adequately resolved.

Some courts have refused to grant affirmative relief in the form of hire or reinstatement with or without back pay as allowed by section 706(g) on the grounds that such relief constitutes an unlawful preference.[22] Limiting the power of the courts to order affirmative relief on this basis is inconsistent with the express terms of the Act and the intent of Congress to grant such power. The Sixth Circuit Court of Appeals in *U.S. v. IBEW, Local 38*,[23] correctly interpreted the extent of section 703(j) in relation to the remedial powers of the federal courts when it stated:

> . . . we believe that section [section 703(j)] cannot be construed as a ban on affirmative relief . . .

[18]§ 703(j) states that Title VII does not require the granting of preferential treatment to any individual ". . . on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State section or other area, or in the available work force in any community, State, section, or other area.

[19]Contractors Association v. Shultz, 311 F. Supp. 1002, 2 F.E.P. 472 (E.D. Pa. 1970). All cases, as well as internal cites, will be cited to the FAIR EMPLOYMENT PRACTICE CASES (hereinafter referred to as F.E.P.) of the BNA LABOR RELATIONS REFERENCE MANUAL. *See* Hanson, *The Affirmative Action Requirement of Executive Order 11246 and Its Effect on Government Contractors, Unions and Minority Workers*, this issue, for more discussion of "affirmative action plans" similar to the Philadelphia Plan.

[20]Contractors Association, *supra* note 19 at 477. The court state "[t]he Plan does not require the contractors to hire a definite percentage of a minority group. To the contrary, it merely requires that he make every good faith effort to meet his commitment to attain certain goals. . . . It is equally clear that if this plan is properly administered it will be a plan of inclusion rather than exclusion."

[21]*Id.* at 477; Joyce v. McRane, 320 F. Supp. 1284 (D. N.J. 1970).

[22]Dobbins v. Local 212, IBEW, 272 F. Supp. 413, 1 F.E.P. 387 (S.D. Ohio 1968); Dewey v. Reynolds Metal Co., 429 F.2d 324 (6th Cir. 1970).

[23]U.S. v. IBEW, Local 38, 428 F.2d 144, 2 F.E.P. 716 (6th Cir. 1970).

> Any other interpretations would allow complete nullification of the stated purposes of the Civil Rights Act of 1964.[24]

In order to effectively curb and extinguish discrimination in employment, the affirmative remedial and injunctive powers granted to the federal courts under Title VII must be utilized to their fullest extent.

WHO IS COVERED

EMPLOYERS

An employer who employs 25 or more employees for each working day in 20 or more calendar weeks of the current or preceding year and is engaged in an industry affecting commerce is covered by the prohibitions of Title VII.[25] The Act will also apply where there are multiple establishments which separately have less than 25 employees, but when combined have more.[26] The definition of employer does not include the United States, a United States wholly owned corporation, an Indian tribe, a state or local government, or a bona fide private membership club.[27]

EMPLOYMENT AGENCIES

Title VII covers any employment agency which "regularly" with or without compensation procures or attempts to procure employees for a covered employer or attempts to procure opportunities to work for a covered employer.[28] In determining if the employment agency is covered, the status of the employer served is determinative. Excluded from the definition are agencies of the United States or state or local government.[29] Although this appears to exempt a great bulk of employment agencies from coverage, a further qualification includes expressly the United States Employment Service and any state or local employment service receiving federal assistance.[30] By this inclusion the bulk of employment agencies are covered.[31]

[24] *Id.* at 720.

[25] § 701(b). [701(h) defines "industry affecting commerce" as ". . . any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry 'affecting commerce' within the meaning of the Labor-Management Reporting and Disclosure Act of 1959." The coverage of Title VII is broader, both horizontally and vertically, than the NLRB. The only requirement for coverage is the requisite number of employees and the requisite "affecting commerce." The self-imposed monetary standards of the NLRB do not apply to Title VII. In addition, coverage extends to all types of employers who meet the numerical prerequisite, including hospitals and agricultural concerns.

[26] The EEOC has adopted the NLRB's criteria of "interrelation of operations, common management, centralized control of labor relations and common ownership" in determining when such multiple establishment is present. EEOC GENERAL COUNSEL'S OPINIONS, July 27, 1969. *See* No. 71-708, 3 F.E.P. 141 (EEOC 1970) (franchise company is a joint employer under NLRB criteria even though discrimination took place in the store of an individual franchise owner who employed less than 25).

[27] § 701(b).

[28] § 701(c).

[29] § 701(c).

[30] § 701(c).

[31] The United States Employment Service is the largest federal employment agency and most state employment agencies receive federal funds through unemployment compensation.

A recent case[32] has excluded from the definition of employment agency a newspaper since it is not engaged to a significant degree in this kind of activity as a profession. Thus, newspapers can publish employment advertisements under separate "men" and "women" headings even though this is an unlawful employment practice under the Act.

Another conflict is whether the doctrine of sovereign immunity prevents an individual from obtaining injunctive relief or affirmative relief under the Act against a state without its consent. Although injunctive relief presents no problem,[33] a district court has held that back pay constitutes damages and, relying upon United States Supreme Court authority, that damages against a state are barred by the doctrine of sovereign immunity.[34] Since the Supreme Court authority dealt solely with case or controversy jurisdiction of the federal courts, the existence of a specific federal statute granting relief in the form of back pay, to say the least, raises dire constitutional issues as to the power of Congress under the Interstate Commerce Clause vis-a-vis the 11th Amendment.

Labor Organizations

A labor organization ". . . engaged in an industry affecting commerce" is covered by the Act.[35] The actual term is defined broadly to include any entity associated or related with a labor union from a business agent to a joint or national council, whose purpose is to deal with employers concerning the tenure and conditions of employment of employees.

A labor organization is regarded as being engaged in industry affecting commerce if: (1) it maintains a hiring hall for a covered employer regardless of the number of members; or (2) its members number 25 or more and it is: (a) certified by the National Labor Relations Board or Railway Labor Board; (b) recognized by a covered employer; or (c) related to a covered labor organization by charter, joint interest, or affiliation.[36] Thus, a labor organization with less than 25 members is within the confines of the Act if it maintains a hiring hall or is affiliated with a national union or joint council.

Persons Entitled To Seek Relief

Any individual is entitled to seek relief from discrimination in employment upon the basis of race, color, religion, sex or national origin. United States citizenship is not necessary since aliens within the United States are entitled to the benefits of the Act.[37]

[32]Brush v. Newspaper Printing, 315 F. Supp. 577, 2 F.E.P. 811 (N.D. Cal. 1970).

[33]Anthony v. Brooks, 1 F.E.P. 229 (N.D. Ga. 1967) (sovereign immunity does not apply to injunctive relief).

[34]Mickel v. ESC, ... F. Supp. ...., 3 F.E.P. 81 (D. S.C. 1970) (sovereign immunity bars damages against a state in federal court, citing *Duhne v. New Jersey*, 251 U.S. 311 (1920).

[35]§ 701(d).

[36]§ 701(e).

[37]§ 701(g) & (i).

The jurisdictional standards set by Congress in regard to the prohibition against discrimination easily fall within the requiste limits of "affecting interstate commerce." As stated above, most labor unions and the more important employment agencies are generally covered. But the Act excludes from coverage a great majority of employers. In order to accomplish its goal of completely eliminating discrimination in employment, the Act should be extended to cover more employers who, as a rule, are better positioned and more likely to discriminate. It is the small private business that has less than 25 employees that must be reached if any attempt to combat discrimination in employment is to have a permanent effect. One source has estimated that only 260,000 of the 3,300,000 employers registered with the Social Security System or eight percent will be covered by the Act. This eight percent employs 29,000,000 of the 73,000,000 persons employed in this country.[38] Thus, a little more than one-third of the employees in America are protected from discrimination on the basis of race, color, religion, sex or national origin under Title VII. Although the enactment of Title VII was a major step in the elimination of discrimination, coverage of more employers is necessary in order to fully achieve this goal. There have been attempts to increase the coverage under Title VII.[39]

DISCRIMINATION ALLOWED

Section 703(e) (1) allows an employer, employment agency, or labor organization to discriminate where ". . . religion, sex or national origin . . . is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of that particular business or enterprise . . ." The omission of the words "race" and "color" indicate that discrimination upon these two basis may never qualify as a BFOQ. The distinction between race, color, and national origin in this instance becomes very important.

The justification for the allowance of discrimination in the form of a BFOQ lies in the balancing of the two competing interests of the employee and the employer. Congress tipped the scale in favor of the employer in this case. As will be stated later the burden of showing the existence of a BFOQ is generally upon the employer.

In addition, Section 703(h) allows an employer to utilize a "bona fide seniority system or merit system" providing different standards of compensation, terms, conditions or privileges of employment or to rely upon the results of any "professionally developed ability test," provided neither are intended to discriminate.

[38]Address by Burke Marshall, then Assistant Attorney General, SOUTHWESTERN LEGAL FOUNDATION, Oct. 16, 1964.

[39]In November 1970, the Senate approved S.B. 2453 which will extend Title VII coverage to employers who have eight employees and labor organizations which have eight members. In addition, state and local governments are included as employers and the exemption granted to educational institutions is repealed. 1 BNA LAB. REL. REP., 75 Analysis 33.

Also, a religious group or educational institution can discriminate opon the basis of religion in employment.[40] Congress denied the protection of Title VII to members of the Communist party or any similar organization required to register with the Subversive Activities Control Board,[41] and individuals who are required to obtain a security clearance when one is required by the government.[42] Congress also allowed businesses near Indian reservations to grant preferences in employment to Indians[43] and employers to pay different wage differentials based upon sex in accordance with the Fair Labor Standards Act.[44]

TYPES OF DISCRIMINATION

Title VII proscribes discrimination in employment only upon the basis of race, color, religion, sex or national origin. These five types will be discussed below with emphasis upon recent developments related to each area.

Race and Color

Discrimination in employment based upon the color of a man's skin or the race of human beings to which he belongs is the type of discrimination that prompted the enactment of Title VII. Since this type touches ever aspect of discrimination in employment and has no areas or developments which are peculiar to itself, it is too broad to discuss separately. Most of the current issues and developments involving this type of discrimination will be discussed later on.

Religion

The regard for religious tolerance has long been a part of our national heritage. Title VII in keeping with this deep-seated tradition bans discrimination upon the basis of religion.

A question of major significance in this area is the definition of religion. The U.S. Supreme Court's construction of "religious belief" in regard to conscientious objector status will probably serve as a guide. One EEOC case has so decided requiring only an "intensly personal conviction" as opposed to membership in an organized sect.[45]

The EEOC guidelines require an employer to make reasonable accomodations to the religious needs of his employees unless it creates an undue hardship on the conduct of his business.[46] An undue hardship is

[40] § 702; § 703(e)(2). *See* McClure v. Salvation Army, ... F. Supp. ...., 39 U.S.L.W. 2549 (N.D. Ga. 1971) (Salvation Army protected in discharging one of its officers in a discriminatory manner).

[41] § 703(f).

[42] § 703(g).

[43] § 703(i).

[44] § 703(h).

[45] No. 71-771, 3 F.E.P. 178 (EEOC 1970). *See* also McClure v. Salvation Army, *supra* note 40.

[46] 29 C.F.R. 1605.1(b) (1971).

defined to exist ". . . where the employee's needed work cannot be performed by another employee of substantial similar qualifications during the period of absence of the Sabbath observer."[47] The burden of proving an undue hardship is upon the employer.[48]

In *Dewey v. Reynolds*[49] the collective bargaining agreement required all employees to work overtime, including Sundays, when requested. An employee refusing to work on Sundays for religious purposes filed a grievance, but the arbitration decision was adverse. Following his religious views he refused to work on Sunday and was discharged. The district court held that the arbitration procedure clothed the transaction with state action and that the Free Exercise Clause of the First Amendment required accomodation by the employer. Although the Court of Appeals reversed for other reasons, it did state on petition for rehearing that to:

> . . . coerce or compel an employer to accede or accomodate the religious beliefs of all of his employees would raise grave constitutional questions of violation of the Establishment Clause of the First Amendment.[50]

It seems beyond a doubt that the court has the power to grant "appropiate affirmative relief" under Title VII unless the employer can show that such accomodation constitutes an undue hardship. With the interjection of the First Amendment complex constitutional issues arise which creates a host of problems in resolving the propriety of accomodating to the religious needs of the employee. A development of the ramifications and effect of the First Amendment upon the duties of employers under Title VII should take precedence in the area of religious discrimination.

In order to be exempt from the duty to accomodate, the employer must show an undue hardship. Although there are a few EEOC cases illustrating an undue hardship,[51] the outward limits of this concept should be developed more fully in the future by the courts, so that employers will have a secure standard upon which they can rely when dealing with the religious needs of their employees.

SEX

Although discrimination due to sex has been dormant for a period, it has now blossomed into one of the most active and rapidly growing aspects of discrimination in employment. Since the prohibition of this type of discrimination is worded in terms of an individual, it is not only limited to discrimination rue to femininity, but also includes discrimination upon the basis of masculinity.[52]

[47]29 C.F.R. 1605.1(b) (1071).

[48]29 C.F.R. 1605.1(c) (1971).

[49]Dewey v. Reynolds Metal Co., 429 F.2d 324, 2 F.E.P. 687 (6th Cir. 1970), *rehearing denied*, 429 F.2d 324, 2 F.E.P. 869 (6th Cir. 1970).

[50]*Id.* at 870.

[51]*See* No. 7099, 2 F.E.P. 227 (EEOC 1969); No. 70773, 2 F.E.P. 686 (EEOC 1970).

[52]Rosen v. Public Service Electric & Gas Co., 409 F.2d 775, 1 F.E.P. 709 (3rd Cir. 1969); Local 246 v. S. Cal. Edison Co., 2 F.E.P. 328 (C.D. Cal. 1969).

The EEOC guidelines provide that any stereotyped characterization or paternalistic view[53] of the sexes, preferences of co-workers, employers or customers, or the fact that the employer has to provide separate facilities for the opposite sex unless such cost is clearly unreasonable do not constitute a BFOQ for purposes of sex discrimination.[54]

A. Individualized Job Classification

Any attempt to classify job assignments upon an arbitary standard steeped in the alleged inferiority of women is a violation of Title VII. In *Bowe v. Colgate Palmolive Co.*[55] the Court of Appeals, although allowing the employer to maintain his rule restricting females to a 35 pound weight lifting limit, adopted the EEOC's individualization approach stating that the employer:

> . . . must notify all of its workers that each of them who desires to do so will be afforded a reasonable opportunity to demonstrate his or her ability to perform more strenuous jobs on a regular basis.[56]

Generally courts should adopt this individualized approach in dealing with any restrictive requirement that employers apply solely to women. This rationale of judging a person upon his individual qualities and potential as opposed to group characterization is a proper approach towards the elimination of the paternalistic attitude toward women in employment.

B. Airline Stewardesses

Another area of more than passing interest deals with the airlines and their deeply entrenched policy of hiring only female stewardesses. The application of a restrictive hiring policy to males solely is clearly discrimination based upon sex. Since the existence of a BFOQ is the main issue, the problem boils down to two considerations: (1) can the preferences of customers be considered in determining a BFOQ and (2) is the requirement that the position be filled by a woman reasonably necessary to the operation of the business? In *Diaz v. Pan American World Airways, Inc.*[57] the Fifth Circuit Court of Appeals overturned the lower court's decision and adopted the EEOC's guidelines forbidding customer preference as a determination of a BFOQ.[58] In addition the court utilized the business necessity test and concluded that the hiring

[53]This is referred to as "romantic paternalism."

[54]29 C.F.R. 1604.1(a)(1) (1971).

[55]Bowe v. Colgate Palmolive Co., 416 F.2d 711, 2 F.E.P. 121 (7th Cir. 1969).

[56]*Id.* at 125.

[57]Diaz v. Pan American World Airways, Inc., ... F.2d ...., 39 U.S.L.W. 2580 (5th Cir. 1971).

[58]*Id.* The lower court found a BFOQ for hiring women only stating that a preference on the part of customers is legitimate where it is ". . . related to differences in the ways in which the work will be performed by persons of different sexes, and the manner in which such performance will be received by the customer because of such differences." Diaz v. Pan American World Airways, Inc., 311 F. Supp. 559, 2 F.E.P. 520, 528 (S.D. Fla. 1970).

of members of only one sex will not undermine the business operation of the airlines. Although there are few cases in this area, this landmark case is consistent with literal language of the Act as well as its spirit and policy. Section 703(e) does state that the BFOQ must be reasonably necessary to the operation of the normal business and the Fifth Circuit properly applied this mandate in *Diaz*.

C. Marriage

The EEOC guidelines provide that a rule which forbids employment of married women, but which is not applied to married men, is discrimination based upon sex.[59] Originally, the courts refused to follow the EEOC's interpretation and allowed a policy based on marital status applicable only to females to be utilized on the grounds that Title VII only prohibited discrimination upon sex, not marital status.[60] Later cases discarded this superficial distinction between sex and marital status and held that any differentiation of hiring policies between men and women based on marital status is sex discrimination.[61] It is not the fact that the standard is stated in terms of marital status, but the fact that there is a standard which is applied differently to both sexes. This is consistent with the policies of the Act, since any differentiation in employment between the sexes is discriminatory, be it marital status or wages. The application of a policy terminating employment upon marriage which is fairly applied to both sexes is not violative of the Act since: (1) the policy is applied uniformly to all employees regardless of sex and (2) the effect or impact of such policy does not penalize an individual employee upon the basis of sex, *i.e.*, men tend to become married just like women.

D. Pre-school Age Children

In *Phillips v. Martin Marietta Corp.*,[62] the U.S. Supreme Court reversed the lower court's ruling that a policy prohibiting employees with pre-school age children, applicable only to women, was not violative of the Act by stating:

> The Court of Appeals therefore erred in reading this section [Sec. 703(a)] as permitting one hiring policy for women and another for men, each having pre-school age children.[63]

The Court emphasized the fact that there existed two different policies in regards to hiring, one applicable to men and the other applicable to women, rather than the fact that the policy was phrased in terms

[59]29 C.F.R. 1604.3(a) (1971).

[60]Cooper v. Delta Airlines, 274 F. Supp. 781, 1 F.E.P. 274 (E.D. La. 1967); Lansdale v. United Airlines, ... F. Supp. ...., 2 F.E.P. 462 (S.D. Fla. 1969).

[61]Lansdale v. Airline Pilots Assn., 431 F.2d 1341, 2 F.E.P. 869 (5th Cir. 1970); Sprogis v. United Airlines, 308 F. Supp. 959, 2 F.E.P. 385 (N.D. Ill. 1970).

[62]Phillips v. Martin Marietta Corp., ... U.S. ...., 3 F.E.P. 40 (1971).

[63]*Id.* at 41.

of "pre-school age children." Such disparate treatment between the sexes in hiring is clearly discrimination upon the basis of sex. Continuing on, the Court uttered the following in regards to such a policy limiting women with pre-school age children, applied solely to women, as constituting a BFOQ:

> The existence of such conflicting family obligations, if demonstrably more relevant to job performance could be a basis . . .[64]

Allowing a policy which terminates employment or prevents employment due to the existence of pre-school age children applicable only to women to constitute a BFOQ raises a complex problem since there appears to be discrimination within discrimination. The burdening of women with these obligations and responsibilities is entirely rue to sex and should not receive any consideration in the determination of a BFOQ. It is hoped that the courts will became cognizant of this consideration which logic requires to be considered.

E. Pregnancy and Unwed Motherhood

Complimenting marriage is the topic of maternity leave. In *Schattmen v. Texas Employment Comm.*[65] the court stated the maternity was a disability physiologically unique to the female sex and an employers policy of terminating women two months before the expected delivery date was violative of the Act and the employer failed to show the existence of a BFOQ. This decision is clearly sustainable, since the effect of the policy discriminates against the individual on the basis of his sex.

The EEOC has stated recently that:

> . . . the foreseeable and certain impact of an illegitmacy standard, even where an employer attempts to apply it equally, is to deprive females of employment opportunities.[66]

This conclusion is supportable even though the policy is applied to both sexes since the stigma of having an illegitmate child attaches more to the mother than to the father. It is hoped that the courts will follow the lead of the EEOC and adopt this rationale.

F. Protective State Laws

One bastion of the citadel of sex discrimination has fallen tumultuously in the wake of the brouhaha that has arisen in this area. Many states have passed so-called "protective legislation" regulating the employment of women. In 1969 the EEOC changed its position and adopted the principle that such state laws are not a defense to an unlawful employment practice nor a basis for a BFOQ.[67]

[64] *Id.*

[65] Schattman v. Texas Employment Comm., ... F. Supp. ...., 3 F.E.P. 311 (W.D. Tex. 1971); *Accord,* No. YAU 9-026, 2 F.E.P. 294 (EEOC).

[66] No. 71 332, 2 F.E.P. 1016 (EEOC 1970).

[67] 29 C.F.R. 1604.1(b)(2) (1971).

An early district court decision refused to accept jurisdiction to determine if Title VII pre-empted the state law relying upon constitutional validity of such state legislation.[68] In *Mengelkoch v. Ind. Comm.*,[69] the district court exercised the doctrine of abstention and deferred to the state courts the problem of construing the state law consistent with Title VII. The Ninth Circuit Court of Appeals reversed holding that there was a substantial Constitutional issue based upon the Equal Protection Clause and ordered the lower court to decide it. In *Krouss v. Sacramento Inn*,[70] the California law prohibiting employment of female bartenders was upheld as valid against Title VII attacks on the ground that the 21st Amendment granted exclusive power to the states to control traffic in liquor within their borders free from federal interference, and that pre-emption, therefore, was not applicable.

Although this myriad of constitutional issues clouds the status of state protective laws, the trend and preferable approach to the problem is to apply pre-emption and hold such laws unenforceable, since they conflict with Title VII.[71] The answer to the abstention problem is that there is a *substantial* Constitutional question predicated upon the Supremacy Clause as well as the Equal Protection Clause, as the Ninth Circuit Court of Appeals has declared. The 21st Amendment question is answered on the grounds that it only granted the interstate commerce power of Congress over liquor to the states, not the protection of the 14th Amendment.

National Origin

Discrimination on the basis of national origin, as opposed to race or color, is differentiated on the grounds of the nationality of one's predecessors. The term relates to the attributes of a person such as language or cultural background stemming from the nation in which he or his parents were born or raised.

[68] Ward v. Luttrell, 292 F. Supp. 162, 1 F.E.P. 435 (E.D. La. 1968).

[69] Mengelkoch v. Ind. Comm., ... F.2d ...., 3 F.E.P. 55 (9th Cir. 1971).

[70] Krauss v. Sacramento Inn, 314 F. Supp. 171, 2 F.E.P. 733 (E.D. Cal. 1970).

[71] Rosenfeld v. Southern Pacific Co., 293 F. Supp. 1219, 1 F.E.P. 450 (C.D. Cal. 1968) (California weight law void); Richards v. Griffith, 300 F. Supp. 338, 1 F.E.P. 837 (D. Ore. 1969) (Oregon weight law unenforceable); Local 246 v. Edison Co., ... F. Supp. ...., 3 F.E.P. 18 (C.D. Cal. 1970) (California weight law pre-empted); Caterpiller Tractor Co. v. Grabied, ... F. Supp. ...., 2 F.E.P. 944 (S.D. Ill. 1970) (Illinois Female Employment Act unenforceable); McCrimmon v. Daley, ... F. Supp. ...., 2 F.E.P. 971 (N.D. Ill. 1970) (Chicago city ordinance prohibiting women bartenders is unconstitutional); Ridinger v. General Motors, ... F. Supp. ...., 3 F.E.P. 280 (S.D. Ohio 1971) (Ohio maximum hour and weight law unenforceable); Kober v. Westinghouse Electric Corp., ... F. Supp. ...., 3 F.E.P. 326 (W.D. Pa. 1971) (Pennsylvania hour law unenforceable); Garneau v. Raythein Co., ... F. Supp. ...., 3 F.E.P. 215 (D. Mass. 1971) (Massachuetts hour law invalid); No. 608-6654 (CL 6-10-76EU), 2 F.E.P. 78 (EEOC 1969) (State law requiring periodic rest periods for women invalid); No. CL 7-6-691 (6-6-5767), 1 F.E.P. 911 (EEOC 1969) (Ohio maximum hours of employment for females not valid); No. YSF 9-056, 1 F.E.P. 911 (EEOC 1969) (Montana eight hour law for women not a defense); and No. YSF 9-120, 1 F.E.P. 918 (EEOC 1969) (California weigh law not a defense).

The EEOC guidelines[72] state that the following instances will be carefully scrutinized for possible discrimination: (1) the use of English in tests where English is not the person's mother tongue or English is related to the work; (2) a person who is married to or associates with persons of a specific national origin; (3) a person who is a member of an organization promoting a national group or who frequents churches or schools utilized by national groups; (4) a name that reflects a certain national origin; and (5) exclusion of persons who, as a class, fall outside national norms for height and weight where such requirement is not related to job performance. In addition the BFOQ exception is to be strictly construed.[73]

The promulgation of rules, restricting speaking of foreign languages or requiring English to be spoken, comprises a developing trend in this area. In a recent EEOC decision[74] Spanish-surnamed Americans were prohibited from speaking Spanish on the premises during both working and non-working time since the lead girl could not speak Spanish. Analogizing to NLRB decisions, EEOC held conversation to be a condition of employment and precluded the finding of a BFOQ due to the broadness of the rule. In another case[75] the EEOC found reasonable cause to believe that the employer discriminated in refusing to hire an otherwise qualified applicant due to his noticeable accent.

This area cannot be left without mentioning *Case No. CL68-12-431EU*.[76] Here a Polish immigrant received the brunt of numerous "Polish" jokes and derogatory remark about his ancestry and other harrassment such as lighting welding torches around his feet. Charging the employer with knowledge, the EEOC held that tolerance of ridicule in this case constituted discriminatory treatment.

As of yet there is no case in federal court reported in this area. This type of discrimination has suddenly come to the forefront and is presently in a state of development. It is hoped that the courts will develop viable principles in this area in order to effectuate the policies of the Act.

FORMS OF DISCRIMINATION

There are a multitude of forms and methods in which discrimination in employment is manifested. Many of these classifications overlap and are not easily differentiated. The discussion that ensues will be limited to the following four catergories since it is in these four that most of the major developments have occurred.

[72]29 C.F.R. 1606.1(b) (1971).
[73]29 C.F.R. 1606.1(a) (1971).
[74]No. 71446, 2 F.E.P. 1127 (EEOC 1970).
[75]No. AL 68-10155E, 1 F.E.P. 921 (EEOC 1969).
[76]No. CL 68-12-431EU, 2 F.E.P. 295 (EEOC).

HIRING AND RECRUITMENT

Any overt conduct on the part of the employer in hiring, from which it can be inferred that the decision to hire or not to hire is based upon race, color, religion, sex or national origin, is *per se* a violation. In *Gates v. Georgia Pacific Corp.*,[77] an employer transferred a less qualified employee from another department to fill a vacancy for which a qualified Negro woman had applied. The court found a violation by drawing an inference of discrimination from the employer's preference of the less qualified transfered employee.

Even the statistics of the employer's workforce relating to the number of minority workers may be used as evidence of discrimination. In *Parham v. Southwestern Bell Telephone Co.*,[78] a Negro college student applied for the position of stockman, but was offered only the position of lineman. Taking judicial notice of the Negro percentage of the Arkanses population, the Eighth Circuit Court of Appeals stated:

> We hold as a matter of law that these statistics, which revealed an extraordinarily small number of black employees, except for the most part as menial laborers, established a violation . . .[79]

Although this rationale seems questionable at first, it is both logical and permissible to infer from the small number of black employees, especially where such employees are employed only in menial positions, that an employer in an area where there is a substantial black population is discriminating in his hiring policy.

Any method of advertising employment openings which entrenches past discriminatory policies or has the effect of discrimination is violative of the Act. A policy of hiring at the gate without advertisement or public announcement of opening is discriminatory, since "[t]he word of mouth message that vacancies exist in better paying jobs . . . usually goes only to whites."[80] The granting of a preference to former employees or close friends and relatives of the existing work force where such force is predominately white ". . . is inherently discriminatory. . . ."[81]

In addition any hiring policy which appears neutral on its face or is applied uniformly to all employees is an unlawful employment practice if its implementation has a discriminatory effect. In *Gregory v. Litton Systems, Inc.*,[82] the court found that a policy of refusing employment to persons who were frequently arrested was discriminatory against Negroes, since Negroes are arrested substantially more than whites in proportion to their numbers. The court further stated that records of arrest with-

[77]Gates v. Georgia Pacific Corp., ... F. Supp. ...., 2 F.E.P. 978 (D. Ore. 1970).
[78]Parham v. Southwestern Bell Telephone Co., ... F. Supp. ...., 2 F.E.P. 1017 (8th Cir. 1970).
[79]*Id.* at 1021.
[80]Clark v. American Marine Corp., 304 F. Supp. 603, 2 F.E.P. 198 (E.D. La. 1969).
[81]Lea v. Cone Mills Corp., 301 F. Supp. 97, 2 F.E.P. 12 (M.D. N.C. 1969).
[82]Gregory v. Litton Systems, Inc., 316 F. Supp. 401, 2 F.E.P. 842 (C.D. Cal. 1970).

out conviction are not matters of public record and cannot be utilized for purposes of employment. This implies that a conviction record is a proper subject for disqualification from employment. Since arguably Negroes are also convicted of more crimes proportionately,[83] such use of conviction records is also discrimination due to race. Since discrimination on the basis of race can never constitute a BFOQ, the reliance upon conviction records in hiring should not be allowed in relation to Negro applicants. Whether the courts will accept the logic of this contention remains to be seen.

UNION CONDUCT

Any overt classification or segregation based upon race, color, religion, sex, or national origin by a union in its initiation procedure or in any relationship with the employer is *per se* a violation. The maintenance of two locals, one white and one black, the membership of which perform the same duties in the geographic area, is inherently discriminatory and merger will be ordered.[84] But the maintenance of two segregated local lodges within an integrated union is allowable as long as the union, as opposed to the lodges, is the bargaining agent, both lodges have equal rights in the operation of the union and they are not used as a device to discriminate.[85]

Any limitation upon membership or referral which has the effect of discrimination is a violation. In *Heat & Frost Insulators v. Vogler*,[86] the court enjoined the requirement that a person have four years of "improver" status, which was limited to sons or close relatives of the present predominantly white membership, in order to be eligible for referral stating:

> In pursuing its exclusionary and nepotistic policies, Local 53 engaged in a pattern and practice of discrimination on the basis of race and national origin both in membership and referrals.[87]

Where the union has notice that the employer is engaging in unlawful employment practices and refuses to take affirmative action or acquiesces in such conduct, the union is treated as ratifying the conduct of the employer and has committed an unlawful employment practice.[88]

[83]*See* R. CLARK, CRIME IN AMERICA 51 (1970); E. SCHUR, OUR CRIMINAL SOCIETY 45-51 (1969).

[84]Hicks v. Crown Zellerbach Corp., 310 F. Supp. 536, 2 F.E.P. 433 (E.D. La. 1970); U.S. v. Longstoremen, ... F. Supp. ...., 2 F.E.P 1106 (D. Md. 1970).

[85]U.S. v. Jacksonville Terminal Co., 316 F. Supp. 569, 2 F.E.P. 610 (M.D. Cal. 1970).

[86]Heat & Frost Insulator v. Vogler, 407 F.2d 1047, 1 F.E.P. 577 (5th Cir. 1969).

[87]*Id.* at 579.

[88]U.S. v. Bethlehem Steel Corp., 312 F. Supp. 977, 2 F.E.P. 545 (W.D. N.Y. 1970) (no steps taken by the union to alleviate racial discrimination); Moreman v. Georgia Power Co., 310 F. Supp. 1357, 1 F.E.P. 702 (N.D. Ga. 1969) (union failed to delete discriminatory provisions from collective bargaining contract); *But see* Dobbins v. Local 212, *supra* note 22 (affirmative action by union to relieve present day effect of past discrimination constitutes an unlawful preference).

The union is also jointly liable with the employer where the effect of any collective bargaining agreement is discriminatory.[89]

SENIORITY, TRANSFER, PROMOTION

Section 703(h) allows an employer to apply different standards of compensation, etc. according to a "bona fide seniority or merit system" so long as such differences are not the result of an intention to discriminate. The major problem is whether a seniority or merit system which has the present effect of carrying forward pre-Act discrimination constitutes a bona fide system. This situation is created where there is a requirement of departmental seniority and prior to the Act the departments were segregated, or where transfers into other departments are predicated upon objective tests, but incumbent white employees were segregated into the department and were not required to take such tests. The first case to deal with this problem of past discrimination was *Quarles v. Phillip Morris, Inc.*[90] In this case departmental positions were predicated upon departmental seniority and prior to the Act whites were segregated into the better paying departments. The court held that nothing in 703(h) or its legislative history ". . . suggests that a racially discriminating seniority system established before the act is a *bona fide* seniority system. . . ."[91]

This legislative history is rather ambiguous, because it states clearly that Title VII will have no effect upon established seniority rights and cites examples identically in point, but then states that such prior system may be a subterfuge for discrimination.[92] The court gleaned from this history an intent on the part of Congress to not "freeze" or "lock in" an entire generation of Negro employees ". . . into discriminatory patterns that existed before the act."[93] In the eyes of the court, a present seniority system maintaining a past discriminatory effect was sufficent to provide the necessary intent to discriminate so as to fall within the confines of the proviso of Section 703(h).

Only those employees who were hired prior to the effective date of the Act under the restrictive seniority plan were held to constitute the class discriminated against by carrying forward the prior seniority system. Negro employees who were hired after the effective date of the Act by the company on a non-discriminatory basis were excluded, since they did not suffer the present effects of past discrimination. The remedy ordered allowed Negroes hired prior to the Act to transfer to other departments on the basis of overall job seniority rather then departmental seniority.

[89] *See* the cases cited under the heading SENIORITY, TRANSFER, PROMOTION, *infra*.
[90] Quarles v. Phillip Morris, Inc., 279 F. Supp. 505, 1 F.E.P. 260 (E.D. Va. 1968).
[91] *Id.* at 270.
[92] *See*, statements of Senators Clark and Case, 110 CONG. REC. 7213 (1964).
[93] Quarles v. Phillip Morris, Inc., *supra* note 90 at 269.

Although many may argue over the true legislative intent of this section, it is presently the law that the carrying forward of the status quo of past discrimination is violative of VII.[94] The Supreme Court has countenanced this view also.[95]

Since the class affected is comprised of employees who were hired in a discriminatory manner prior to the Act, a total revision of a seniority or merit system which has the effect of locking in past discrimination is not needed. As a general rule, the court only requires that the employees hired prior to the Act be exempt from such qualifications which carry forward the effects of past discrimination.[96]

This development by the courts that any seniority system, merit plan, test or any practice which carries forward the effects of past discrimination constitutes a violation of Title VII is a giant stride in the attainment of the goal of effectively preventing discrimination in employment.

TESTING

The utilization of testing, both by employers and unions, is one form of discrimination that has received much national attention.[97]

The Act allows an employer to utilize the results of "any professionally developed ability test," provided it is not "designed, intended or used to discriminate."[98] The reasonable import of the legislative history is that Congress was aware of the fact that tests may discriminate against

[94]U.S. v. Sheet Metal Workers, 416 F.2d 123, 2 F.E.P. 127 (8th Cir. 1969) (referral system carrying on effects of past discrimination unlawful); Local 189 v. U.S., 416 F.2d 980, 1 F.E.P. 875 (5th Cir. 1969) (System based on job seniority as opposed to overall mill seniority is a violation of the Act where employer has maintained racially segregated lines of progression and labor pools); Broussard v. Schluberger Corp., 315 F. Supp. 506, 2 F.E.P. 874 (S.D. Tex. 1970) (Refusal to allow entry into craft training progression system without high school diploma is violation where Negroes without diplomas had been discriminatorily hired into lower paying echleon jobs before imposition of requirement); Irvin v. Mohawk Rubber Co., 308 F. Supp. 152, 2 F.E.P. 349 (E.D. Ark. 1970) (departmental seniority unlawful where Negroes are "locked into" less desirable departments); U.S. v. Bethlehem Steel Corp., *supra* note 88 (departmental seniority unlawful when Negrooes are assigned to less desirable departments); and Long v. Georgia Kraft Co., ... F. Supp. ...., 2 F.E.P. 658 (N.D. Ga. 1970) (Utilization of particular job seniority instead of plant seniority is a violation in regards to pre-Act Negroes who were hired discriminatorily).

[95]Griggs v. Duke Power Co., ... U.S. ...., 3 F.E.P. 175, 177 (1971) ("Under the Act, practices, procedures, or tests neutral on their face and even neutral in terms of intent, cannot be maintined if they operate to 'freeze' the status quo of prior discriminatory employment practices").

[96]*See*, cases cited, *supra* note 94.

[97]In TIME, March 1, 1971 at 10 the following appeared: "In order to gain admission the applicant is asked, among other things, the relationship of Shakespeare to *Othello*, Dante to *Inferno*, Brahms to music, and Whitman to poetry. He must understand such words as debutante and modiste, know that Dali is a painter and verity is the opposite of myth. Only after having established such credentials is a man judged to be qualified under the union rules to become an apprentice steam fitter in New York. In the past, the test has weeded out 66% of the non-white applicants and only 18% of the whites—a fairly effective method . . . of preserving the union's whiteness. On this particular test, one of four an applicant must pass, there is not one question about the relation of monkey wrench to pipe."

[98]§ 703(h).

certain groups due to their educational background.[99] It thus seems that Congress intended to allow discrimination in this particular situation when tests are involved, unless there is a subjective intent on the part of the employer. In the latter case the use of the test will fall within the proviso of Section 703(h) and be prohibited.

Assuming that there is no subjective intent to discriminate, the only remaining question in this area is the meaning of "professionally developed ability test." The EEOC has interpreted this phrase to mean that the test must be job-related.[100]

In *Griggs v. Duke Power Co.*,[101] the U.S. Supreme Court ruled on the issue of job-relatedness in testing. In this case the employer conditioned employment or transfer on the requirement of having a high school diploma or the passing of a standardized general intelligence test. Neither requirements were shown to be related to job performance, but both were shown to disqualify Negro applicants at a higher rate than whites. The Court of Appeals overturned the lower court's finding of a violation on the grounds that Title VII did not require employment tests to be job-related. The Supreme Court perused the legislative history and giving deference to the EEOC's interpretation concluded that it:

> . . . is inescapable that the EEOC's construction of §703(h) to require that employment tests be job-related comports with congressional intent.[102]

When dealing with unions who utilize tests as conditions of memberships or means of advancing into higher classifications, it can be argued that such tests cannot be used at all. Section 703(h) only grants to *employers* the right to use such tests. No mention is made of a labor organization. Since Title VII only prohibits practices and procedures which discriminate, unions can use tests as long as the tests do not discriminate. But assuming that any test tends to discriminate against Negroes in relation to their background, it would appear that unions will discriminate on the basis of race by administering any test. There have been no cases decided which determine if tests "lock in" or "freeze" the status quo of past discrimination and there have been no cases considering whether the exemption under 703(h) applies to a labor organization. Whether the courts or the EEOC will go so far as to prohibit unions entirely from using tests depends upon the future. It is certain though that in the wake of *Griggs* any test administered by a labor organization must be job-related.

[99] *See*, 110 CONG. REC. 7313 (1964).

[100] 29 C.F.R. 1607.3 (1971).

[101] Griggs v. Duke Power Co., *supra* note 95.

[102] *Id.* at 180. The Court relied upon a subsequent statement of Senators Clark and Case to the effect that Title VII ". . . expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications. Indeed, the very purpose of Title VII is to promote hiring on the basis of job qualification, rather than on the basis of race or color." *See*, 110 CONG. REC. 7247.

The requirement that employment tests be job-related is a land mark development in the area of discrimination in employment. The decision of the Supreme Court implements the spirit of the Act in striking down many barriers in job discrimination and effectuates the policy which should permeate the entire employment relationship. Employees should be hired on the basis of their ability to perform the job and not on the basis of extrinsic factors such as race, color, religion, sex or national origin.

CONCLUSION

In 1960, 40.1 percent of the non-white workforce was employed in blue-collared positions compared with 16.1 percent in white-collar positions. In 1965, the year in which Title VII became effective, 41.0 percent of the non-white working force was employed in blue-collared positions compared with 19.5 percent in white-collared positions. In 1969, the statistics have changed drastically with 42.8 percent of the non-white workforce in blue-collar position compared with 26.6 percent in white-collar positions.[103] A great portion of this ten percentile increase in non-whites holding white-collar jobs can be attributed to Title VII. In the seven years since its enactment, there has developed a substantial repository of case law, refining and developing the effect and application of the ban on discrimination by race, color, religion, sex or national origin. It has eliminated many of the barriers which perpetuated discrimination in this country. It has acclimated the whole field of employment and labor to the problems and difficulties of discrimination and the effect such conduct has on the national welfare.

Title VII has effectively limited discrimination in the employment areas covered by it. Except for the ineffectiveness of the EEOC to seek voluntary compliance, Title VII has successfully performed the task for which it was created. But in order to permanently eradicate discrimination in employment, the coverage of Title VII must be extended to a greater portion of the employment scene. In addition, EEOC should be armed with a panoply of powers to compel compliance. Whether such measures are taken to include more employers and to make the EEOC more than "a poor enfeebled thing" depends upon the fortuities of the future.

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[103] BNA LABOR RELATIONS YEARBOOK 1970, at 398 (1970).