EMPLOYMENT DISCRIMINATION. By Arthur Larson. New York: Matthew Bender, 1975. 2 vols. (1: Sex; 2: Procedures and Remedies) (looseleaf). $100.00.

Reviewed by Allen G. Siegel and Jeffrey P. Ayres***

While Professor Arthur Larson is not the first to examine the legal ramifications of unfair employment practices in general, or even to focus on sex discrimination in particular, his two-volume treatise, *Employment Discrimination*, promises to achieve a well-deserved reputation in both of these areas. For *Employment Discrimination* is a treatise in every sense of the word. The person who is unfamiliar with either the theoretical or procedural aspects of sex discrimination laws will profit immensely by reading both volumes from cover to cover. Through an extensive use of hypotheticals and examples, Professor Larson seems to come right out of the pages to conduct a course on employment discrimination, far beyond the introductory level. The practitioner who specializes in this area will also find *Employment Discrimination* to be an invaluable research tool. Both the table of contents and the index are surprisingly functional—especially in comparison to other works of this scope. The appendices, which include pertinent statutes, regulations and legislative histories, as well as the section containing forms, help to make the treatise a truly self-contained body of knowledge. With anticipated periodic supplements, *Employment Discrimination* will continue to provide the means for quickly locating anything from the latest district court decision on an arcane procedural point to the current weight of authority on the legality of a particular employment practice. Moreover, the practitioner, who must advise clients as well as litigate for them, will find Professor Larson's interpretations of the many unsettled aspects of sex discrimination law to be extremely enlightening and persuasive to judges considering a question of first impression.

I.

The emphasis in volume 1 is on the interplay among the various sources of sex discrimination laws vis-a-vis those activities, particularly those of employers, which the laws scrutinize. In chapter 1, Professor Larson traces the history of the American legal system's approach to the

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phenomenon of women in the labor force—from its treatment of women as legal non-entities through the contemplated Equal Rights Amendment of today.[1]

Title VII of the 1964 Civil Rights Act,[2] of course, is the most significant congressional effort in this area, and much of the treatise is devoted to it.[3] Title VII prohibits discrimination by employers against employees or applicants on the basis of sex, in hiring or firing, compensation, terms, conditions or privileges of employment, and generally in limiting, segregating or classifying employees.[4] Chapter 2 of *Employment Discrimination* summarizes Title VII, as well as the various other federal and state laws which deal with sex discrimination.

While "discrimination" is an obvious element of a Title VII violation, Professor Larson points out the conceptual problems encountered by courts and the EEOC through an overuse of this term. Strictly speaking, discrimination is legal whenever sex is a "bona fide occupational qualification" for a particular job.[5] Confusion arises when the same word is used to describe both the legal and the unlawful variety. In order to do away with this confusion, the author has formulated a two-step approach to be used when analyzing a sex discrimination problem. This approach, together with numerous examples of its application, is set out in chapters 3 and 4. At the outset, it is necessary to determine whether the employer has *differentiated* on the basis of sex. Sex differentiation occurs when being either male or female is specifically made a condition affecting employment, or when a requirement is imposed which demonstrably affects the great majority of the members of one sex in an adverse manner. Since differentiation is not necessarily illegal, however, a second step is required under Larson's approach. This second step entails a determination as to whether the differentiation is justifiable under one of the statutory exceptions—usually the "bona fide occupational qualification" exception. A finding of unlawful discrimination will only result when the sex differentiation is not reasonably necessary to the normal operation of the employer's business or enterprise.

1. The proposed Equal Rights Amendment provides in part:

> 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

H.R.J. Res. 208, 92d Cong., 2d Sess., 86 Stat. 1523 (1972). The amendment, not having been ratified by the requisite number of states, is not yet in effect.

2. 42 U.S.C. §§ 2000e *et seq.* (1970).

3. Also given extensive treatment are the Equal Pay Act of 1963, 29 U.S.C. § 206(c)(4) (1970), the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* (1970), the post-Civil War Civil Rights Act, 42 U.S.C. § 1983 (1970), and such quasi-statutory equal employment provisions as Exec. Order No. 11,246, 3 C.F.R. § 169 (1974), and Exec. Order No. 11,478, 3 C.F.R. § 207 (1974).

4. 42 U.S.C. § 2000e-2 (1970).

5. *Id.* § 2000e-2(e)(1).

In applying his two-step approach to the various forms of employment practices, Professor Larson frequently takes issue with the announced reasoning of the EEOC and the courts. An example of what most observers would label faulty reasoning can be seen in *Rafford v. Randle Eastern Ambulance Service, Inc.*[6] The male plaintiffs in *Rafford* were fired for refusing to remove their beards and moustaches. In holding that this was not sex discrimination under Title VII, the district court stated that "[t]he discharge of pregnant women or bearded men does not violate the Civil Rights Act of 1964 simply because only women become pregnant and only men grow beards."[7] Larson attacks such reasoning by postulating that an employer in a large factory which decreed that all "persons" with beards or all pregnant "persons" shall be fired would certainly be found to have differentiated on the basis of sex.[8] Since restrictions on beards are generally justified under reasonable grooming standards,[9] the *Rafford* court probably reached the correct result. By failing to make a clear distinction between what is sex differentiation and what differentiation is justifiable, however, the court focused on the wrong issues. The Larson two-step approach invariably leads to the correct result, and, more importantly, avoids the danger that potentially meritorious claims will be prematurely cut off by a failure to consider the right issue, *e.g.*, the reasonableness of the grooming standard.

Another recurring theme of volume 1, emphasized in chapter 5, is the treatment afforded to "protective laws," applicable only to female workers, which were enacted in a large number of jurisdictions and purport to restrict hours of work, night work, and heavy lifting. The protective laws, which proceed upon the now-discarded assumption that women are inherently "weaker" than males, are generally viewed today as impediments to equal employment opportunity rather than vehicles for protecting women. Professor Larson agrees with the current majority view that state protective laws are invalid[10] under the doctrine of federal supremacy, at least to the extent that they interfere with the objectives of Title VII.[11] The most significant practical ramification of federal supremacy is that an employer cannot establish a bona fide occupational qualification exception by claiming that

6. 348 F. Supp. 316 (S.D. Fla. 1972) (discussed in 1 EMPLOYMENT DISCRIMINATION § 12.12).

7. 348 F. Supp. at 320.

8. 1 EMPLOYMENT DISCRIMINATION § 12.12, at 3-21.

9. *See, e.g.*, Willingham v. Macon Telegraph Publishing Co., 507 F.2d 1084 (5th Cir. 1975), *rev'g en banc* 482 F.2d 535 (5th Cir. 1973); Baker v. California Land Title Co., 507 F.2d 895 (9th Cir. 1974); Dodge v. Giant Food, Inc., 488 F.2d 1333 (D.C. Cir. 1973); Fagan v. National Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1973).

10. *See, e.g.*, Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971).

11. 1 EMPLOYMENT DISCRIMINATION § 19.00.

the sex differentiation in question is required under state law.[12] While this result is justified as long as employers can predict that the state law will be declared invalid, inequity can result if the supremacy rationale is not consistently followed by the Commission and the courts. For this reason, Professor Larson prefers a clean-cut supremacy approach to the various compromise solutions which are sometimes utilized.[13]

This preference runs even to the superficially appealing doctrine of extension. Under the extension doctrine, any special concessions which are made to female workers by state laws must also be granted to men in order to achieve the equality in treatment required by Title VII. The author points out that extension is clearly inapplicable in a large number of situations. For example, a state law which forbids women from working in coal mines would force all mines to shut down under a literal interpretation of the extension doctrine, since neither men nor women could engage in this type of work.[14] Equality between the sexes would be achieved, but at great cost to employers as well as to society. Even when extension would not lead to such exaggerated results, however, Professor Larson argues convincingly that the doctrine should not be applied. For example, some states require that female workers be given a ten-minute rest period every four hours.[15] Should the law be deemed preempted, or should the rest periods be extended to males in order to avoid a conflict with Title VII? Larson comes down strongly in favor of preemption:

> The point needs emphasis because some commentators, with the best interests of working people at heart, all too readily welcome this unexpected bonus in the form of more generous provision of such things as rest periods, seating facilities, and lunch breaks. But the issue, of course, is not whether it would be a generally good thing for men to have more rest periods as well as women. The question is whether this result was intended by either legislature. It was not intended by the federal Congress; nothing could have been further from the collective consciousness of Congress at the time of enacting Title VII than forcing employers to increase the number of rest periods of their male employees. Nor was it intended by the state legislatures; if they had wanted to compel more rest periods for male workers they would have said so. Indeed, the omission is the clearest possible state-

12. *See, e.g.*, Kober v. Westinghouse Elec. Corp., 325 F. Supp. 467 (W.D. Pa. 1971), *aff'd*, 480 F.2d 240 (3d Cir. 1973).

13. 1 EMPLOYMENT DISCRIMINATION §§ 20.00-21.00.

14. Although many state laws prohibiting the employment of women in coal mines have been repealed in recent years, a few states retain provisions of this type. *See* ARK. STAT. ANN. § 52-612 (1971); OHIO REV. CODE ANN. § 4107.43 (Page 1973); PA. STAT. ANN. tit. 52, § 701-299.1 (Purdon 1966).

15. A number of states require rest periods and/or lunch periods for women, but not for men. *See, e.g.*, KY. REV. STAT. ANN. § 337.365 (Baldwin 1969); LA. REV. STAT. ANN. §§ 23-332-33 (West 1964); PA. STAT. ANN. tit. 43, § 107 (Purdon 1976-77 Supp.).

> ment that the legislature consciously elected *not* to mandate such rest periods for men.[16]

Since, even at its best, extension produces undesirable results, the doctrine should be abandoned except where specifically provided for by the federal statute.[17]

Some of the more interesting recent developments in sex discrimination law have been in the area of health and welfare benefits for pregnant employees. This topic, in addition to other benefits, privileges and conditions of employment, is treated extensively in chapter 8. Professor Larson has taken a position contrary to that of the EEOC and six federal courts of appeals on the question of whether employment-connected health and welfare plans which exclude pregnancy from coverage are violative of Title VII.[18] His views were confirmed by the Supreme Court's decision in *General Electric Co. v. Gilbert*,[19] which held that a private employer may exclude pregnancy and related disabilities from coverage under a sickness and accident plan without violating Title VII.

The final chapter in volume 1 examines the specialty area of labor union responsibility under the various sex discrimination laws. This examination runs the gamut from a union's duty of fair representation under the Labor-Management Relations Act[20] to direct discrimination and union liability for damages under the Equal Pay Act.[21]

II.

Volume 2 considers the broad areas of procedure and remedies. The procedures which aggrieved parties and counsel must follow in order to have a discrimination claim adjudicated by the EEOC or a court are treated in chapter 10. Once again, this treatment includes not only Title VII claims but actions under state laws, the Equal Pay Act and section 1983 as well. A

16. 1 EMPLOYMENT DISCRIMINATION § 21.00, at 5-33 to 5-34 (footnote omitted) (emphasis in original); *see* Burns v. Rohr Corp., 346 F. Supp. 994 (S.D. Cal. 1972).

17. 1 EMPLOYMENT DISCRIMINATION § 21.00, at 5-35. Extension applies under the Equal Pay Act of 1963 because of the following section of the Fair Labor Standards Act, of which the Equal Pay Act is a part:

> No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter . . . .

29 U.S.C. § 218 (1970); *see* 1 EMPLOYMENT DISCRIMINATION § 21.00, at 5-36 to 5-38. The Equal Pay Act is treated extensively in chapter 7.

18. *See* 1 EMPLOYMENT DISCRIMINATION § 38.21, at 8-39 to 8-40.

19. 97 S. Ct. 401 (1976). A number of state courts have held that health and welfare plans which exclude pregnancy benefits violate state fair employment practice laws. *See, e.g.*, Cedar Rapids Community School Dist. v. Parr, — Iowa —, 227 N.W.2d 486 (1975); Brooklyn Union Gas Co. v. New York State Human Rights Appeal Bd., 41 N.Y.2d 84, 359 N.E.2d 393 (1976); Ray-O-Vac, Div. of E.S.B., Inc. v. Wisconsin Dep't of Indus., Labor & Human Relations, 70 Wis. 2d 919, 236 N.W.2d 209 (1975).

20. 29 U.S.C. §§ 141 *et seq.* (1970).

21. *Id.* § 206(d).

thorough examination of the myriad remedies which a court has at its disposal once an employment practice is found to be illegal is undertaken by Professor Larson in chapter 11. Volume 2 contains the "nuts and bolts" of what a practitioner must know in order to handle a sex discrimination case—joinder of parties, election of remedies, etc. These procedural questions are exhaustively treated with respect to all forms of prohibited discrimination (not sex alone).

Even though the subject matter of Volume 2 is inherently less conducive to scholarly commentary, Professor Larson succeeds in providing appropriate theoretical discussion where necessary to clarify areas of confusion or uncertainty. One such area is that relating to proof of discrimination, particularly in cases involving professional or academic employees. The disproportionate male dominance of top executive, professional, and university faculty jobs is well documented, and lawsuits pursuant to Title VII are becoming more and more common in reaction to this particular form of sex discrimination. Under the standards set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*,[22] the qualifications required for a given job are an important part of the private litigant's prima facie case in a Title VII action. As Larson observes, however, "how do you state objectively the qualifications of a lawyer to be hired by Sullivan and Cromwell? It is not enough to say that he or she 'is a qualified lawyer,' . . . [since] not every qualified lawyer . . . can meet the standards [which] this firm has set for itself."[23] Professor Larson's suggested solution to this problem is but one example of his many contributions, seen throughout the treatise, to the field of sex discrimination law. The right of a professional to bring a Title VII action within the framework of the *McDonnell Douglas* formula is reconciled with the right of the employer to set high standards for determining which professionals will be hired or promoted.

The plaintiff in a sex discrimination case, after identifying herself as a member of a class protected under Title VII, must proceed to establish her qualifications for the job or position for which she applied. In the professional and academic areas, however, the only issue should be what those qualifications *are*—not what they *ought to be*. As Professor Larson points out, "[t]he Budapest String Quartet, is entitled to have more rigorous standards than the Clayborn College String Quartet, and it is not the function of Title VII to disturb any such obvious right."[24] Perhaps the best method

22. 411 U.S. 792 (1973). In *Green*, the Supreme Court announced rules governing burdens of proof and presumptions in private suits under Title VII. In order to make out a prima facie case, the plaintiff must show (1) that he belongs to a protected class, such as a particular sex; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that, despite his qualifications, he was rejected; and (4) that the position remained open after his rejection, and the employer continued to seek applications from persons of the plaintiff's qualifications. *Id.* at 802. The burden then shifts to the employer to show a legitimate nondiscriminatory reason for the rejection. *Id.* In the event that such a showing can be made, the burden shifts back to the plaintiff to prove that the reason given by the employer was a mere pretext for sex discrimination. *Id.* at 804.

23. 2 EMPLOYMENT DISCRIMINATION § 50.21(a), at 10-151.

24. *Id.* § 50.21(c), at 10-160.

for demonstrating the qualifications required is to utilize the qualifications of others who have been accepted for the position involved. For example, a female lawyer rejected by a Wall Street law firm could make a prima facie case by showing that males with lower grades from the same school and lower LSAT scores were hired by the firm.[25] The burden then shifts under the *McDonnell Douglas* formula to the employer, who must prove a nondiscriminatory reason for rejecting the female plaintiff. Courts generally accord considerable latitude for professional judgment to employers in such a situation when weighing the intangible qualities of the plaintiff against whatever standards have been set.[26] Using the same Wall Street law firm hypothetical, the firm could meet its burden of proof by arguing that plaintiff's "writings were superficial, her personal interviews unimpressive, her academic record more that of a bookworm than of a promising practitioner, and her general prospects of becoming the kind of lawyer this firm needs for its particular kind of practice not good."[27] The plaintiff would then be given the opportunity, under the *McDonnell Douglas* formula, to show that the employer's nondiscriminatory reason was a mere pretext. She might, for example, make use of statistics revealing a suspiciously small proportion of female employees in relation to the available supply of qualified persons.[28]

III.

While this review of *Employment Discrimination* has thus far been confined to the positive aspects of the treatise, one criticism is in order. A conspicuous weakness of the treatise is the lack of coverage given by Professor Larson to discrimination in federal employment.[29] Title VII was amended by the Equal Employment Opportunity Act of 1972[30] to reach federal employees who are discriminated against. The number of EEOC suits on federal district court dockets in the area of federal employment is a strong indication of the growing importance of this amendment. There is a need for a comprehensive treatment of the special problems encountered under federal employment discrimination laws, a need which *Employment Discrimination* unfortunately does not meet. For example, the procedures which federal employees must follow in order to obtain an agency-level adjudication of discrimination claims are entirely different from the proce-

25. *See id.* § 50.22(a), at 10-163.

26. *See, e.g.*, Faro v. New York Univ., 502 F.2d 1229 (2d Cir. 1974); Green v. Board of Regents, 474 F.2d 594, 596 (5th Cir. 1973).

27. 2 EMPLOYMENT DISCRIMINATION § 50.22(a), at 10-163.

28. There are problems involved, however, in using statistics to prove pretextuality. For example, what constitutes the available supply of qualified persons? *See generally id.* § 50.23(b).

29. Professor Larson's book contains a short section on "Public Employment Remedies Under Federal Law." *Id.* § 63.00. The brevity of this section precludes an adequate treatment of the complex area of federal employment discrimination.

30. Act of Mar. 24, 1972, Pub. L. No. 92-261, 86 Stat. 111 (codified at 42 U.S.C. § 2000e-16 (Supp. IV 1974)).

dures followed by an individual in the private sector. Numerous other important procedural and substantive questions in the federal employment sphere remain unanswered. Undoubtedly, Professor Larson will treat extensively the aspect of employment in the federal sector in future supplements to *Employment Discrimination*.

IV.

Employment Discrimination is a valuable addition to the field of labor law. In terms of clarity of thought and completeness in coverage, the treatise is unrivaled. The aspiration of every author is to produce a living creation—a work that will transcend the printed page, consist of more than the sum total of its chapters, and bring enjoyment and knowledge to future generations of readers. That aspiration has been achieved by very few authors of legal treatises; the Willistons and Wigmores of this life are few and far between. It appears that in the case of Professor Larson, the goal has been realized. From the perception of the active labor bar, Mr. Larson's contribution to the field of employment discrimination is great indeed. His treatise is a genuinely useful tool for the practitioner, and it represents a solid contribution to legal scholarship.