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Cynthia M. Guizzetti

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YOU CAN'T GO HOME AGAIN: A RELUCTANT RETURN TO TRADITIONAL GENDER ROLES IN POST-REUNIFICATION GERMANY

CYNTHIA M. GUIZZETTI*

A REVERSAL OF FORTUNES? WOMEN, WORK AND CHANGE IN EAST GERMANY. By Rachel Alsop. New York: Berghahn Books. 2000. Pp. 196.

Abstract: As unemployment rates rapidly rose during the immediate post-reunification period of Germany, women undeniably bore the brunt of the economic downturn in East Germany. Rachel Alsop thoroughly discusses this aspect of the ambiguous nature of German reunification in her book, *A Reversal of Fortunes? Women, Work and Change in East Germany*. However, she does not suggest solutions to the unemployment problem. This Book Review discusses positive action law, or affirmative action law, as one solution for women trying to break out of traditional gender roles and find new jobs.

*The general opinion is that everyone should have work as long as possible, but when unemployment is unavoidable, then the opinion is: it affects women less. (According to the motto: men become unemployed; women become housewives).*¹

In her book, *A Reversal of Fortunes? Women, Work and Change in East Germany*, Rachel Alsop² chronicles the rapidly increased and unequally distributed unemployment of women as compared to men in post-reunification East Germany.³ Since reunification in October of

* Staff Writer, BOSTON COLLEGE THIRD WORLD LAW JOURNAL (2000–2001).

¹ RACHEL ALSOP, *A REVERSAL OF FORTUNES? WOMEN, WORK AND CHANGE IN EAST GERMANY* 95 (2000) (citing GERDA JASPER, *TENDENZEN DER VERÄNDERUNG IN DER ARBEITSMARKT- UND LEBENSLAGE DER FRAUEN IN DEN NEUEN BUNDESLÄNDERN* 13 (1991)).

² Rachel Alsop is a Lecturer in Gender Studies at the University of Hull.

³ See ALSOP, *supra* note 1, at 1. Much of what Alsop writes relies on statistics or examples. See *generally id.* This Book Review is one interpretation of her book, drawing on what this author perceived to be the most relevant points. See *generally id.*

The official name of East Germany was the German Democratic Republic; the official name of West Germany was the Federal Republic of Germany. DR. DON B. BRADLEY III, SMALL BUS. ADVANCEMENT NAT'L CTR., GERMANY, at <http://www.sbaer.uca.edu/docs/>

1990, this “defeminization” of the work force resulted not only from the rapid downturn of East Germany’s economy that led to overall increased unemployment, but also from pre-existing sex segregation at work.⁴ The unification of the East and West German currencies at a one-to-one exchange rate and the equalization of wage levels east to west caused increased unemployment across all industries and across the entire German state by rendering East German businesses less competitive.⁵ At the same time, the privatization of East German businesses and the introduction of technology made women uncompetitive in the workplace, regardless of skill level, position, or seniority.⁶ The resulting increased efficiency through each of these economic factors, combined with the conservative politics of the Christian Democratic Union—the party in power at the time of reunification—shut women out of fields traditionally dominated by men in the west.⁷

The unavoidable consequence of the increased unemployment of women and the impact of western conservative politics on the east was that East German women were forced to return to traditional gender roles.⁸ While women under the Socialist regime had never shed the role of mother and housewife, they were still expected to work full-time for the state.⁹ This duty of employment helped women to forge identities beyond the home.¹⁰ They came to identify themselves through their jobs and their incomes.¹¹ As a result of unemployment, women suffered a loss of identity, self-esteem, and social

publications/pub00221.txt (last visited Feb. 14, 2000). The Federal Republic of Germany now refers to the unified states. *Id.*

⁴ See ALSOP, *supra* note 1, at 94.

⁵ See *id.* at 48–52, 91, 111, 116.

⁶ See *id.* Alsop offers the textile and garment industries as contrasting examples of the ability of women to gain and retain employment. See *id.* at 117. Prior to reunification, over two-thirds of workers employed in the textile and garment industries were women. See *id.* at 118. However, the increased technology of textile plants and the need for highly qualified workers transformed the textile industry from a female to a mixed-sex industry. See *id.* at 150. In contrast, women continued to dominate the garment industry. See *id.* Alsop suggests that because wages in the garment industry were low, it was not a field that men wanted to enter. See *id.* at 151. As a result, women were able to keep their jobs. See *id.*

⁷ See *id.* at 60–61. The conservative politics of the Christian Democratic Union reflected an attitude that women should either stay at home or perform traditional “women’s work.” See *id.*; see also *infra* note 15 (discussing three examples of conservative, family-based legislation).

⁸ See ALSOP, *supra* note 1, at 169–71.

⁹ See *id.* at 35, 155.

¹⁰ See *id.* at 182.

¹¹ See *id.*

contact.¹² Consequently, East German women had no choice but to return to the home and resume the role of housewife and mother.¹³ Indeed, Alsop suggests that private businesses made it clear to women that men were a more desirable source of labor because of women's greater familial obligations.¹⁴ This message was reinforced by western sexual politics that encouraged women to interrupt their careers to become mothers.¹⁵ In fact, it is widely perceived by all Germans that the position of East German women, both legal and actual, decreased after reunification.¹⁶

Alsop concludes her discussion of the defeminization of the workplace by noting that "women's participation in the economic sphere is an integral part of creating greater gender equality."¹⁷ However, she does not discuss how women should increase their participation. Instead, she catalogues women's increased unemployment without considering a solution. This Book Review picks up where Alsop left off by outlining opportunities for women in post-reunification Germany. This Book Review evaluates women's legal position in employment by examining opportunities available through German positive action, or affirmative action, law and European Community equality law. In particular, this Book Review reports recent developments and proposals in Germany that give new hope to women facing gender discrimination in employment.

¹² See *id.*

¹³ See ALSOP, *supra* note 1, at 169–71.

¹⁴ See *id.* at 95–96. Alsop discusses the overall desirability of men in employment, but relates, in particular, the experiences of women in the recruitment process because preferences for men are more readily apparent in that context. See *id.* at 85–96. Questions frequently asked of women in job interviews focus on familial obligations that might make a female employee less productive than a male employee. See *id.* at 96.

¹⁵ See *id.* at 63. Following are three examples of family-related legislation. First, while the traditional "housewife model" of law that directed women into housework and childcare was reformed, the "housewife marriage" remained as a result of public opinion and existing conditions, such as lack of childcare facilities. See Anita Grandke, *Equal Rights—Compatibility of Family and Career—Legal Comparison: East Germany (GDR) and Federal Republic of Germany Today*, 3 CARDOZO WOMEN'S L.J. 287, 301–02 (1996). Second, even tax law favors "housewife and gainfully employed husband" households. See Dr. Ninon Colneric, *Making Equality Law More Effective: Lessons from the German Experience*, 3 CARDOZO WOMEN'S L.J. 229, 250 (1996). Finally, legislation provides parents with a three-year baby leave. See ALSOP, *supra* note 1, at 63. Parents are entitled to take a three-year leave of absence to raise a child with the assurance that they will be able to return to their previous jobs at the end of the three years. See *id.* Despite the availability of the baby leave to both parents, however, many provisions focus on the mother's responsibility for childcare. See *id.*

¹⁶ See *id.* at 179; Grandke, *supra* note 15, at 306–07.

¹⁷ ALSOP, *supra* note 1, at 196.

Part I of this Book Review provides a brief discussion of positive action law in Germany and limitations on positive action law within the German legal system. Part II discusses first the outer boundaries set on German positive action laws by the Equal Treatment Directive of the European Community (EC) and then *Kruger v. Kreiskrankenhaus Ebersberg*,¹⁸ a 1999 decision by the European Court of Justice (ECJ or the Court)¹⁹ that expands the equality of women in private enterprise through an employment provision of the European Community Treaty. This decision, by affirming an earlier case, indicates the willingness of the Court to maintain its stance on the right of women to receive equal pay for equal work. Finally, this Book Review provides a summary of the status of women in East Germany and looks ahead at proposals aimed to promote the equality of women in Germany.

I. THE STATE OF POSITIVE ACTION LAW IN GERMANY

Germany has strived for the equality of men and women since its inception through an equality provision in the German Constitution.²⁰ Individual German states have gone one step further by enacting positive action statutes that encourage, and at times require, the advancement of women.²¹ Yet, it is undeniable that these statutes and constitutional mandates have failed to protect women from discriminatory practices in East Germany in all aspects of employment, including hiring, training, and retention.²² The following is a brief overview of the status of positive action law in Germany, including some of its limitations and failures.

A. *General Methodology of German Positive Action Law*

German positive action law is founded in constitutional law, which guarantees the equality of men and women.²³ In fact, as part of

¹⁸ See Case C-281/97, *Kruger v. Kreiskrankenhaus Ebersberg*, 1999 E.C.R. I-5127.

¹⁹ The European Court of Justice is the highest court presiding over European Community law and is binding on all member states. See ANTHONY ARNULL, *THE EUROPEAN UNION AND ITS COURT OF JUSTICE* 21 (1999).

²⁰ See GRUNDGESETZ [GG][Constitution] art. 3 (F.R.G.), reprinted in ANNE PETERS, *WOMEN, QUOTAS, AND CONSTITUTIONS: A COMPARATIVE STUDY OF AFFIRMATIVE ACTION FOR WOMEN UNDER AMERICAN, GERMAN, EC, AND INTERNATIONAL LAW* 138 (1999).

²¹ See PETERS, *supra* note 20, at 130–36.

²² See ALSOP, *supra* note 1, at 94; PETERS, *supra* note 20, at 130–36, 138.

²³ See GRUNDGESETZ [GG][Constitution] art. 3 (F.R.G.), reprinted in PETERS, *supra* note 20, at 138. The pertinent articles read as follows: Article 3(2): “Men and women shall have equal rights. The State promotes the factual realisation of equal rights of women and men and works towards the abolition of existing disadvantages.” *Id.* Article 3(3): “No one may

the constitutional review process that took place during reunification, the equality provisions were amended in 1994 to strengthen the positive action position of the now unified Germany.²⁴ The amendment mandated the nation to work affirmatively to remove the existing disadvantages that women suffer in employment.²⁵

The practical effect of positive action law takes place through state specific statutes.²⁶ Most statutes impose either quotas or binding goals on hiring and promotional processes.²⁷ A “soft” quota requires preferential hiring for women with equal or “equivalent” qualifications.²⁸ A “hard” quota requires preferences for less qualified women who meet formal requirements, often taking into account non-traditional skills when evaluating the quality of candidates.²⁹ A binding goal is a strong preference for women with the “necessary” qualifications.³⁰ The functional difference between quotas and goals is that there is no legal obligation to hire women over men in a state that only uses goals rather than quotas.³¹

B. *Limited Scope of German Positive Action Law*

German positive action law affects only the public sector.³² The basic principles found in the German Constitution do not bind private parties.³³ Currently, the only form of positive action applied to the private sector is the use of incentives—subsidies—to private employers who voluntarily put in place positive action plans.³⁴ Only three of the sixteen German states provide such incentives.³⁵

Though it has chosen not to, the federal government has the ability to mandate positive action legislation that affects the private

be disadvantaged or favoured because of his gender, his parentage, his race, his language, his homeland and origin, his faith, or his religious or political opinions. No one may be disadvantaged because of his disability.” *Id.*

²⁴ See PETERS, *supra* note 20, at 178–80.

²⁵ See *id.* at 178.

²⁶ See *id.* at 129–36.

²⁷ See *id.*

²⁸ See *id.* at 132.

²⁹ See PETERS, *supra* note 20, at 134, 211.

³⁰ See *id.* at 134.

³¹ See *id.* at 208.

³² See *id.* at 129.

³³ See *id.* On a constitutional level, private actors are both protected by laws ensuring entrepreneurial freedom and obliged to promote the objective value order of the constitution. See *id.* at 129–30, 218.

³⁴ See PETERS, *supra* note 20, at 213.

³⁵ See *id.* at 129.

sector.³⁶ German statutory law does require private sector employers to provide equal access to employment, but this statute has been ineffective in producing actual results.³⁷ Since the federal government has not yet legislated any effective positive action obligations for private employers, only public actors are bound to follow positive action statutes imposed by the states.³⁸

The immediate resulting effect on East German women after reunification was devastating.³⁹ While under the Socialist regime women were duty bound by the state to work full-time, these women are now confronted with an inability to participate successfully in the labor market.⁴⁰ The privatization of East German businesses not only left women unemployed, but also left them unable to rely on positive action laws to ensure gender-blind procedures in seeking a new position in the private sector.⁴¹

C. *An Exception to German Positive Action Law*

It is noteworthy that at least one exception to German positive action law still exists.⁴² This exception is based on the realization of "natural" or biological gender differences that are absolutely necessary conditions to employment.⁴³ Biological differences include, among others, motherhood and physical strength.⁴⁴ For example, valid provisions under German law exist that discriminate against women on the basis that the job requires the ability to carry heavy loads.⁴⁵ While these differences in law must be absolutely necessary to fit the biological abilities of one gender to be constitutional, these restrictions based on sex seem short-sighted in that they are determined by the sex of a person rather than by his or her actual ability.⁴⁶ The experience of women in East Germany demonstrates this short-

³⁶ See *id.* at 214.

³⁷ See Colneric, *supra* note 15, at 233.

³⁸ See PETERS, *supra* note 20, at 213.

³⁹ See ALSOP, *supra* note 1, at 1. This effect was almost universal, as over ninety percent of East German women were unemployed by 1989. See *id.* at 19.

⁴⁰ See *id.* at 1, 155.

⁴¹ See *id.* at 1; PETERS, *supra* note 20, at 129.

⁴² See PETERS, *supra* note 20, at 158.

⁴³ See *id.* at 158-59.

⁴⁴ See *id.* at 159. Sexuality is another biological difference. See *id.* Sexuality is not discussed, however, as it is beyond the scope of this Book Review.

⁴⁵ See KLAUS BERTELSMANN & URSULA RUST, EQUALITY IN LAW BETWEEN MEN AND WOMEN IN THE EUROPEAN COMMUNITY: GERMANY 17 (1995).

⁴⁶ See *id.* at 18, 41.

sightedness, as many women in pre-unification East Germany were required to perform jobs that required physical strength and were traditionally dominated by men, such as blue-collar jobs.⁴⁷ By assuming a general lack of capacity because of gender and not recognizing the individual abilities of women, German positive action law fails to support the gains made in women's employment in East Germany.⁴⁸

Given the rates of female unemployment in post-reunification Germany, it is obvious that German positive action law failed to provide East German women with employment protection during the economic transition of the two nations.⁴⁹ The functionally limited scope of positive action law and the existence of exceptions to employment equality reveal the inadequacies of the system.⁵⁰ Despite its shortcomings, however, German positive action law has been increasingly effective in promoting the employment of women.⁵¹

II. EUROPEAN COMMUNITY LAW APPLIED TO GERMAN POSITIVE ACTION STATUTES

European Community law can declare the laws of member states invalid.⁵² Because of this veto power, it is important to review the ECJ's rulings on German statutes.⁵³ In the context of German statutes, the European Equal Treatment Directive has particular ramifications for positive action quotas that require the preferential treatment of women.⁵⁴ In particular, these quotas *prima facie* conflict with the EC Equal Treatment Directive, which requires in Article 2(1) that "there shall be no discrimination whatsoever on grounds of sex either di-

⁴⁷ See ALSOP, *supra* note 1, at 31. Alsop cites the mining and energy sectors as examples of such blue-collar jobs. *See id.*

⁴⁸ *See id.* at 31, 87-88.

⁴⁹ See Colneric, *supra* note 15, at 229-30.

⁵⁰ See *Consideration of Reports of States Parties: Germany*, U.N. Comm. on the Elimination of Discrimination Against Women, 22nd Sess. (2000), at <http://www.un.org/womenwatch/daw/cedaw/gerclu.htm> [hereinafter *U.N. Report*].

⁵¹ *See id.* At the same time, however, the U.N. has noted that women in East Germany continue to lag behind women in West Germany. *See id.* Despite this internal imbalance, however, Germany is considered to be a model for other European countries. *See id.* The purpose of this section of the Book Review is to expose areas that could be strengthened. *See id.*

⁵² See PETERS, *supra* note 20, at 231.

⁵³ *See id.*

⁵⁴ See Council Directive 76/207/EEC, 1976 O.J. (L 39) 40; Case C-409/95, Marschall v. Land Nordrhein-Westfalen, 1997 E.C.R. I-6363, [1998] 1 C.M.L.R. 547 (1997); Case C-450/93, Kalanke v. Freie Hansestadt Bremen, 1995 E.C.R. I-3051, [1996] 1 C.M.L.R. 175 (1995); Kendall Thomas, *The Political Economy of Recognition: Affirmative Action Discourse and Constitutional Equality in Germany and the U.S.A.*, 5 COLUM. J. EUR. L. 329, 350-63 (1999).

rectly or indirectly.”⁵⁵ Article 2(1), however, must be balanced by Article 2(4), which authorizes “measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women’s opportunities.”⁵⁶ Case law has determined that Article 2(4) covers some quotas, but not all.⁵⁷ In terms of providing hope for women seeking employment, the Equal Treatment Directive, as interpreted by the ECJ, has been less aggressive than German positive action law and has required German states to relax hiring preferences.⁵⁸ At the same time, the ECJ has been moving forward in the direction of providing for equality in the workplace once employment has been secured.⁵⁹

A. *Previous Cases Based on Articles 2(1) and 2(4) of the European Council’s 1976 Equal Treatment Directive*

Two recent cases have had great impact on positive action law in Germany, specifically on its quota system.⁶⁰ The 1995 *Kalanke* case concerned a quota provision for recruitment and promotion in a state’s civil service.⁶¹ The state, Bremen, enacted a soft quota, requiring that in public sectors in which women did not make up fifty percent of the employees, women with equal qualifications were to be given absolute priority over men.⁶² Eckhard Kalanke complained to the Court that he had been passed over for a promotion in favor of a woman, and that the Bremen law encouraged reverse discrimination.⁶³ The ECJ ruled that, because this statute gave an automatic preference for women, it violated Article 2(1) of the Equal Treatment Directive.⁶⁴ The Court held that this law did not fall under the Article 2(4) exception to Article 2(1) because the law sought to establish

⁵⁵ See Council Directive 76/207/EEC, art. 2(1), *supra* note 54; PETERS, *supra* note 20, at 234.

⁵⁶ See Council Directive 76/207/EEC, arts. 2(1), 2(4), *supra* note 54; PETERS, *supra* note 20, at 234.

⁵⁷ See PETERS, *supra* note 20, at 235.

⁵⁸ See Thomas, *supra* note 54, at 357.

⁵⁹ See *id.* at 363.

⁶⁰ See Case C-409/95, *Marschall v. Land Nordrhein-Westfalen*, 1997 E.C.R. I-6363, [1998] 1 C.M.L.R. 547 (1997); Case C-450/93, *Kalanke v. Freie Hansestadt Bremen*, 1995 E.C.R. I-3051, [1996] 1 C.M.L.R. 175 (1995); Thomas, *supra* note 54, at 351.

⁶¹ See *Kalanke*, 1995 E.C.R. at I-3051.

⁶² See *id.*

⁶³ See *id.*

⁶⁴ See Council Directive 76/207/EEC, art. 2(1), *supra* note 54; *Kalanke*, 1995 E.C.R. at I-3051.

equality of representation, rather than just equality of opportunity.⁶⁵ Furthermore, the Court held that the Bremen law encroached upon the individual right of a man in an absolute sense, and therefore was contrary to the directive not to discriminate on any grounds.⁶⁶ The Court concluded by striking down the Bremen positive action statute on the ground that it discriminated against men on the basis of sex.⁶⁷

The 1997 *Marschall* case concerned a "flexible" soft quota statute in North Rhine-Westphalia that gave promotional preferences to women with equal skills unless there were specific reasons to promote a specific male candidate over a woman.⁶⁸ Helmutt Marschall brought this case, alleging that he was denied a position at a school in favor of a woman based only on sex-related factors.⁶⁹ The Court distinguished *Marschall* from *Kalanke* because of the existence of an escape clause in the law, which provided that men could be promoted over women in individual cases.⁷⁰ The Court also posited that "male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life."⁷¹ The Court went on to say that "the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances."⁷² The Court departed from *Kalanke* by this factual realization that reliance on formal equality is insufficient to protect women.⁷³ The Court therefore upheld the North Rhine-Westphalian statute because it fell within the measures authorized by Article 2(4) of the Equal Treatment Directive.⁷⁴ The Court recognized enough of the individual impact of discriminatory practices on women to allow this positive action law to stand in *Marschall*.⁷⁵ However, the Court is still a step away from

⁶⁵ See Council Directive 76/207/EEC, art. 2(1), 2(4), *supra* note 54; *Kalanke*, 1995 E.C.R. at I-3051; Thomas, *supra* note 54, at 357.

⁶⁶ See Thomas, *supra* note 54, at 362-63.

⁶⁷ See *Kalanke*, 1995 E.C.R. at I-3051.

⁶⁸ See Case C-409/95, *Marschall v. Land Nordrhein-Westfalen*, 1997 E.C.R. I-6363, [1998] 1 C.M.L.R. 547 (1997).

⁶⁹ See *id.*

⁷⁰ See *id.*

⁷¹ See *id.* The Court recognized also that employers are reluctant to hire women for fear of familial commitments. See *id.*

⁷² See *id.*

⁷³ See Thomas, *supra* note 54, at 361.

⁷⁴ See Council Directive 76/207/EEC, art. 2(4), *supra* note 54; *Marschall*, 1997 E.C.R. at I-6363.

⁷⁵ See Thomas, *supra* note 54, at 361-62, 363.

recognizing the inherent over-identification of the workplace with men.⁷⁶

These two cases demonstrate the current view of the ECJ on positive action law in Germany.⁷⁷ The ECJ is willing to allow Germany to provide for positive action on the behalf of women, but it is not as aggressive as it could be.⁷⁸ If "flexible" soft quotas are the most aggressive positive action laws that are still valid under EC law, then women are still subject to the subjective nature of hiring.⁷⁹ Only hard quotas or strict soft quotas, like that struck down in *Kalanke*, provide women with the assurance that discriminatory hiring practices will not be used, at least until the terms of the quota are met.⁸⁰

B. *The Kruger v. Kreiskrankenhaus Ebersberg Case, Based on Article 119 of the European Community Treaty*

The greatest effect of EC law on German positive action law has been the introduction of the concept of indirect discrimination, which applies mostly to part-time work.⁸¹ The ECJ issued a judgment in 1986 in *Bilka*, a German case, establishing the concept that laws that negatively affect a greater number of women than men constitute indirect discrimination on the basis of sex, unless the company can show that the law was based on objectively justified factors unrelated to discrimination on the basis of sex.⁸²

In the recent case, *Kruger v. Kreiskrankenhaus Ebersberg*, Andrea Kruger was a full-time nurse at the Kreiskrankenhaus Ebersberg, a public sector employer.⁸³ After the birth of her child, she took childcare leave as allowed by law, but decided to work part-time for the hospital during the first year of her childcare leave.⁸⁴ As the end of the year approached, she requested that she be paid a year-end bonus,

⁷⁶ See *id.*

⁷⁷ See *id.* at 351.

⁷⁸ See *id.* at 363.

⁷⁹ See PETERS, *supra* note 20, at 210-11.

⁸⁰ See *id.* In Germany, claimants have no right to discovery from their employer or from any other organization, making proving a case of discrimination very difficult. See BERTELSMANN & RUST, *supra* note 45, at 111-12. As such, unless the actual hiring process is assured to be equitable from the outset, there is no guarantee that a woman could enforce her rights after being denied a job. See *id.*

⁸¹ See Colneric, *supra* note 15, at 233-34.

⁸² See Case 170/84, *Bilka-Kaufhaus GmbH v. Weber Von Hartz*, 1986 E.C.R. 1607, [1986] 2 C.M.L.R. 701 (1986); Colneric, *supra* note 15, at 233-34.

⁸³ See Case C-281/97, *Kruger v. Kreiskrankenhaus Ebersberg*, 1999 E.C.R. I-5127.

⁸⁴ See *id.*

which she had received during her full-time employment with the hospital under a collective agreement.⁸⁵ The hospital refused on the basis that the bonus, available through her collective agreement, did not apply to part-time workers.⁸⁶ Andrea Kruger brought this claim to receive payment of the year-end bonus under the collective agreement.⁸⁷

The pertinent question the ECJ considered was whether Article 119 should be interpreted to mean that exclusion from the year-end bonus on the basis of part-time rather than full-time work is indirect discrimination against women, when the exclusion affects a considerably larger percentage of women than men.⁸⁸ The Court began its analysis by reiterating the principle behind Article 119 that women should receive equal pay for equal work.⁸⁹ The Court followed established case law by interpreting this principle to preclude not only directly discriminatory provisions based on sex, but also provisions that, while indifferent to sex as applicable to objective criteria, result in "differences of treatment . . . not attributable to objective factors unrelated to sex discrimination."⁹⁰

The Court recognized that Article 119 does have an escape clause principle that permits an exception if based on objective reasons unrelated to sex discrimination.⁹¹ The Court went on to say that if the German court found that exclusion from the year-end bonus in the collective agreement affected women disproportionately as compared to men, the German court would be required to conclude that the exclusion constitutes indirect discrimination within the meaning of Article 119.⁹²

The German Labor Court had already answered this question.⁹³ In presenting this question to the ECJ, the German Labor Court had concluded that the collective agreement provision related to the year-end bonus affected women more than men, as over ninety percent of

⁸⁵ See *id.*

⁸⁶ See *id.*

⁸⁷ See *id.*

⁸⁸ See TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 7, 1997, O.J. (C 340) 173 (1997), available at http://europa.eu.int/eurllex/en/treaties/dat/ec_cons_treaty_en.pdf [hereinafter E.C. TREATY]. Article 119, now Article 141, states the principle of equal pay for male and female workers for equal work. See *id.*; Kruger, 1999 E.C.R. at I-5127.

⁸⁹ See Kruger, 1999 E.C.R. at I-5127.

⁹⁰ See *id.*

⁹¹ See *id.*

⁹² See *id.*

⁹³ See *id.*

those who receive benefits under this collective agreement were women.⁹⁴ Therefore, this provision constituted indirect discrimination on the basis of sex and was invalid under EC law.⁹⁵

Most important to the development of positive action plans in Germany, however, is the determination by the Court that Article 119, which prohibits discrimination based on sex, applies to all collective agreements that regulate employment, and not just public authorities.⁹⁶ While this statement was implicit in *Bilka*, the Court in *Kruger* explicitly stated the mandatory nature of Article 119 over municipal laws.⁹⁷ Therefore, Article 119 might provide a basis for claims of sex discrimination in private employment in Germany by providing a route other than the German Constitution or Articles 2(1) and 2(4) of the EC Directive, none of which have been successful legal bases for claims of indirect sex discrimination brought by women before the ECJ.⁹⁸

This remedy may be unsatisfactory to women who are not as concerned with fighting to receive equal pay for equal work as they are with overcoming the initial hurdle of finding work in Germany during the immediate post-reunification period.⁹⁹ Nevertheless, these cases do reveal the apparent awareness of the ECJ that discrimination does occur in the workplace, even when the discrimination might be initially unclear.¹⁰⁰ The ECJ still needs to recognize that discrimination can occur even when it is not apparent, as do states with flexible soft quotas.¹⁰¹ The logical extension of this recognition would be the validation of positive action laws that provide creative solutions to the employment discrimination problem.¹⁰²

⁹⁴ See *Kruger*, 1999 E.C.R. at I-5127.

⁹⁵ See *id.*

⁹⁶ See *id.*

⁹⁷ See *id.*

⁹⁸ See GRUNDGESETZ [GG][Constitution] art. 3 (F.R.G.), reprinted in PETERS, *supra* note 20; E.C. TREATY, art. 119 (now article 141), *supra* note 88; Council Directive 76/207/EEC, *supra* note 54; Case C-409/95, *Marschall v. Land Nordrhein-Westfalen*, 1997 E.C.R. I-6363, [1998] 1 C.M.L.R. 547 (1997); Case C-450/93, *Kalanke v. Freie Hansestadt Bremen*, 1995 E.C.R. I-3051, [1996] 1 C.M.L.R. 175 (1995); see also discussion *supra* Part II.A.

⁹⁹ See *Kruger*, 1999 E.C.R. at I-5127; ALSOP, *supra* note 1, at 103, 193.

¹⁰⁰ See *Kruger*, 1999 E.C.R. at I-5127.

¹⁰¹ See PETERS, *supra* note 20, at 210.

¹⁰² See Thomas, *supra* note 54, at 363.

CONCLUSION

In her book, *A Reversal of Fortunes? Women, Work and Change in East Germany*, Rachel Alsop carefully records the disproportionate unemployment women suffered after the reunification of Germany at the hands of the privatized businesses that controlled the new East German economy.¹⁰³ Throughout East Germany the common perception is that the position of women worsened after reunification.¹⁰⁴ Women wanted to be able to return to work and resented the political pressure to remain at home.¹⁰⁵ Furthermore, women who found work often had to endure worse working conditions than they had previously experienced.¹⁰⁶ In general, women considered the high level of unemployment as a distinct problem of reunification.¹⁰⁷

The purpose of positive action law is to provide equal opportunities for women.¹⁰⁸ However, what seem to be aggressive German positive action laws have limited actual effect.¹⁰⁹ The ECJ has held invalid, or at least restricted, several German state statutes through the application of EC law.¹¹⁰ Furthermore, these statutes govern hiring practices only in the public sector, as the federal government has not yet mandated quotas in the private sector.¹¹¹ As a result, many women have been forced to return to traditional gender roles.¹¹² The combined factors of limited access to employment, West German policies that promote the family by encouraging domesticity of the mother, and the lack of adequate childcare facilities reveal the inadequacies of German equality law in the protection of women.¹¹³ These inadequacies become even more apparent because of the limiting effect of EC law on German positive action statutes.¹¹⁴ Both the *Kalanke* and the

¹⁰³ See ALSOP, *supra* note 1, at 85–154.

¹⁰⁴ See *id.* at 179; Grandke, *supra* note 15, at 306–07.

¹⁰⁵ See Grandke, *supra* note 15, at 307.

¹⁰⁶ See *id.*

¹⁰⁷ See *id.* at 306–07.

¹⁰⁸ See Thomas, *supra* note 54, at 350.

¹⁰⁹ See Case C-409/95, *Marschall v. Land Nordrhein-Westfalen*, 1997 E.C.R. I-6363, [1998] 1 C.M.L.R. 547 (1997); Case C-450/93, *Kalanke v. Freie Hansestadt Bremen*, 1995 E.C.R. I-3051, [1996] 1 C.M.L.R. 175 (1995); Thomas, *supra* note 54, at 350–63.

¹¹⁰ See *Marschall*, 1997 E.C.R. at I-6363; *Kalanke*, 1995 E.C.R. at I-3051; Thomas, *supra* note 54, at 350–63.

¹¹¹ See PETERS, *supra* note 20, at 213–14.

¹¹² See ALSOP, *supra* note 1, at 169–71.

¹¹³ See *id.* at 61.

¹¹⁴ See *Marschall*, 1997 E.C.R. at I-6363; *Kalanke*, 1995 E.C.R. at I-3051; Thomas, *supra* note 54, at 350–63.

Marschall cases evidence the reluctance of the ECJ to use Article 2(4) to expand the ability of states to enact positive action laws.¹¹⁵

However, the *Kruger* case has firmly established the mandatory effect of Article 119 on the member states of the European Union.¹¹⁶ As a result, both public and private employers are required to follow the provisions of Article 119, which requires equal pay for equal work.¹¹⁷ A comparison of the use of Article 119 in monetary equality cases with the use of Articles 2(1) and 2(4) in equal opportunity cases reveals the constricted nature of the analysis the ECJ is willing to undergo.¹¹⁸ On the issue of monetary equality, the ECJ has clearly held that men and women must be treated equally.¹¹⁹ But on the issues of hiring and promotion that must be evaluated through Articles 2(1) and 2(4) of the Equal Treatment Directive, the ECJ is less willing to support efforts by member states to promote the advancement of women through positive action.¹²⁰

Despite these limitations, women's unemployment in Germany today is relatively better than it was during the immediate post-unification period.¹²¹ The unemployment rate for women in East Germany is declining.¹²² At the beginning of 2000 the rate was 20.7%, as compared to 22.5% in 1997.¹²³ More importantly, however, the rate of unemployed women as compared to men has decreased.¹²⁴ Today women comprise about fifty-five percent of the unemployed, whereas in 1997 they made up about sixty-six percent.¹²⁵

¹¹⁵ See Council Directive 76/207/EEC, *supra* note 54; *Marschall*, 1997 E.C.R. at I-6363; *Kalanke*, 1995 E.C.R. at I-3051; Thomas, *supra* note 54, at 350-63.

¹¹⁶ See EC TREATY, art. 119 (now article 141), *supra* note 88; *Kruger v. Kreiskrankenhaus Ebersberg*, 1999 E.C.R. I-5127.

¹¹⁷ See EC TREATY, art. 119 (now article 141), *supra* note 88; *Kruger*, 1999 E.C.R. at I-5127.

¹¹⁸ See EC TREATY, art. 119 (now article 141), *supra* note 88; Council Directive 76/207/EEC, *supra* note 54; *Kruger*, 1999 E.C.R. at I-5127; *Marschall*, 1997 E.C.R. at I-6363; *Kalanke*, 1995 E.C.R. at I-3051.

¹¹⁹ See *Kruger*, 1999 E.C.R. at I-5127; Colneric, *supra* note 15, at 233-34.

¹²⁰ See Council Directive 76/207/EEC, *supra* note 54; *Marschall*, 1997 E.C.R. at I-6363; *Kalanke*, 1995 E.C.R. at I-3051; Thomas, *supra* note 54, at 350-63.

¹²¹ See *U.N. Report*, *supra* note 50.

¹²² See *id.*

¹²³ See Dr. Edith Niehuis, Speech Delivered on the Occasion of the Presentation of the Second, Third and Fourth National Reports to the Committee on the Elimination of Discrimination Against Women, available at http://www.germany-info.org/UN/un_state_02_01_00.htm (Feb. 1, 2000).

¹²⁴ See *id.*

¹²⁵ See *id.*

Yet these improved unemployment rates are not necessarily the result of positive action laws.¹²⁶ It seems as though the German government feels these measures are still inadequate.¹²⁷ Germany recently outlined new proposals to supplement its positive law program through their "Woman and Work" program to the United Nations Committee on the Elimination of Discrimination Against Women.¹²⁸ This program explicitly recognizes the gender stereotyping of labor laws, the over-representation of women in part-time jobs, the concentration of women in very few occupational groups, and the absence of women in top management positions.¹²⁹ Having taken this first step to recognize that all women suffer in traditional gender roles, Germany promises to address this problem by the promotion of women both in the workforce and in society.¹³⁰ It remains to be seen not only how effective these new measures will be, but also if they will pass the strict equality standard of the EC Equal Treatment Directive.¹³¹

East German women take their careers seriously.¹³² In a recent poll, they ranked career at least as important as family in their list of priorities.¹³³ Such findings evidence the importance to women of returning to work, and explain their resistance to returning to traditional gender roles.¹³⁴ After having enjoyed the right to work under state socialism in East Germany, women are now living the familiar truism: you can't go home again.¹³⁵

¹²⁶ See *U.N. Report*, *supra* note 50; Niehuis, *supra* note 123.

¹²⁷ See *id.*

¹²⁸ See Niehuis, *supra* note 123.

¹²⁹ See *id.*

¹³⁰ See *id.*

¹³¹ See Council Directive 76/207/EEC, *supra* note 54; Niehuis, *supra* note 123.

¹³² See Grandke, *supra* note 15, at 306-07.

¹³³ See *id.* at 307.

¹³⁴ See *id.*

¹³⁵ See *id.*

