

TITLE VII: SEX DISCRIMINATION IN HIGHER EDUCATION

by

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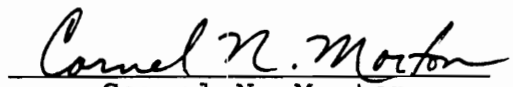
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(ABSTRACT)

Federal employment law designed to assure equal employment opportunity for faculty has only been applicable to higher education since 1972. Prior to 1972, the higher education world, moreover, was immune from the most comprehensive federal employment law, Title VII of the Civil Rights Act of 1964. However, Title VII was amended in 1972 to include education institutions. Ever since the protection of the civil rights law was extended to higher education, faculty employment discrimination litigation has increased. The reality of this phenomenal growth in litigation is clear, the potential for judicial intervention in academic decision-making is undeniable, and reliance on the judicial process is increasingly becoming common. Thus, no institution of higher education may consider itself immune from the possibilities of litigation, nor immune from the decisions handed down by the courts.

The main focus of this study was a legal one, which necessitated a heavy concentration upon the historical and

current state of employment discrimination law, specifically, Title VII of the Civil Rights Act of 1964. The study was conducted by using a combination of legislative analysis and legal research methods. The legal research methods used in this study included the same problem-solving processes as other traditional research methods: (1) collecting data; (2) analysis; and (3) interpretation. The main purpose of this study was to examine, analyze, and summarize legislative history and case law relevant to Title VII, and sex discrimination in higher education.

In summary, although Title VII prohibits discrimination on the basis of race, color, religion, sex and national origin, the issues surrounding women faculty and sex discrimination is probably the fastest growing area of litigation for administrators on the university campus. Therefore, this study was an attempt to examine the employment discrimination issues and developments pertaining to sex discrimination only. College and university administrators may find this study useful for: (1) examining Title VII, and its amendments; (2) examining sex discrimination case law; and (3) utilizing the research for developing procedures, policies and guidelines to minimize potential lawsuits.

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for me with your love, encouragement, emotional support and
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critic, as well as, encouraging and supporting me through all
the times I needed a friend and a "boost".

Dedication

This dissertation is dedicated to my Mother
Mrs. Juanita C. O'Neal
1921-1986

The supreme happiness of life is
the conviction that we are loved.

- Victor Hugo

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Chapter I

Nature and Scope of Study

Introduction

Nondiscrimination in employment practices continues as one of the most important legal issues and problems facing the higher education community. In particular, the employment relationship between women faculty and their institutions have been a central theme in higher education literature and litigation in recent years. An examination of this literature especially that written over the past two decades, reveal that colleges and universities have come under increasing scrutiny and judicial intervention over their employment decisions and practices.

Historically, the law's relationship to nondiscrimination in employment at institutions of higher education was much different than it is now. Federal laws designed to assure equal employment opportunity for faculty have only been applicable to higher education since 1972. Most significantly among these laws was the Equal Employment Opportunity Act of 1972,¹ which amended Title VII of the Civil Rights Act of 1964² by, among other things, extending its coverage to include previously exempted employees of educational institutions. Ever since the protection of the civil rights

employment law was extended to higher education, faculty employment discrimination litigation has mushroomed. It has been suggested a possible cause for the increase in litigation is that the law has opened the door for faculty members with alleged grievances to pursue the judicial system for resolving their employment problems if dissatisfied with the outcome from grievance procedures outlined by the university.³

The extent to which faculty have dramatically increased their dependence on judicial settlements to resolve employment issues is indicated by the following data. Since 1972, college faculty have taken their employing institutions to court in over 300 federal cases, and it is likely that even more cases have been settled out of court. On the other hand, in the years before 1972, only 20 some relevant cases were litigated in the courts.⁴ The reality of this phenomenal growth in litigation is clear, the potential for judicial intervention in academic decision-making is undeniable, and reliance on the judicial process is increasingly becoming common. Thus, no institution of higher education may consider itself immune from the possibilities of litigation, nor immune from the decisions handed down by the courts.

As might be expected, the growing phenomenon of faculty litigation has sparked much controversy in higher education communities. This outcome is not surprising when it is

considered that many of the questions raised in faculty discrimination cases strike at the traditional standards and principles of meritocracy inherent in faculty employment. Over the last decade, many of the parameters outlining a faculty members employment status has been shaped by the number of judicial opinions that have been rendered. As a result of these opinions, colleges and universities may need to increase their initiatives to ensure they execute nondiscriminatory employment practices, and not wait for the courts to determine their internal personnel policies.

In light of expanded legislative activity applicable to higher education, institutions and administrators must recognize the possible impact of their employment decisions as they relate to the anti-discrimination mandates of Title VII. Moreover, they must begin to recognize the legal responses from the courts to the issues that have been raised. The decisions rendered are very important in relationship to decision making; and therefore need to be examined closely for their effect upon the methods of evaluating faculty in the areas of hiring, promotion, tenure, and merit salary increases. With this in mind, the focus of this study was to provide an examination and analysis of the relationship between Title VII, as interpreted in case law pertaining to sex discrimination, and faculty employment.

Problem Statement

Employment discrimination against women began receiving increasing public attention in the 1960's. Accordingly, Dr. Bernice Sandler of the Women's Equity Action League (WEAL) reported it was also in the 1960's that women academicians began to re-examine their status in the nation's colleges and universities, and they were rudely surprised to learn that existing Federal statutes simply did not cover them adequately.⁵

Although female faculty were exempted from coverage under the 1964 Act, the speed with which Congress extended Title VII in 1972 to include educational institutions clearly indicates that Congress was aware of the employment discrimination issues plaguing women in educational institutions. In effect, the enactment of Title VII and its subsequent amendments has led to an increase in charges of sex discrimination in higher education.

In the years preceding 1972, the number of women in the higher education academic market has increased. The passage of the amended Title VII contributed to this increase in number. In addition, the amended equal employment opportunity law has led to an increase in charges of sex discrimination at institutions of higher education. In the past two decades, the legal developments affecting all facets of sex discrimination in higher education has occurred with amazing

rapidity. The intense activity in this area of higher education employment law has made institutions and administrators highly visible targets for a wide range of legal actions, including claims for damages and attorney's fees. The Center for Compliance Information commented: "...rarely has any legislation taken such a marked shift in form and emphasis as the laws applying to sex discrimination and the female worker."⁶ Thus, the legal framework surrounding Title VII will continue to play a major role in the progress of female faculty members in institutions of higher education. For administrators, it may well be, that understanding the implications of Title VII and the judicial decisions resulting from sex discrimination charges and allegations will prove essential to their efforts in developing effective equal employment opportunities that are consistent with the law.

Although Title VII prohibits discrimination on the basis of race, color, religion, sex, and national origin, the issues surrounding sex discrimination is probably the fastest growing area of litigation for administrators on the university campus. Therefore, the problem under consideration for the researcher was to examine the employment discrimination issues and developments pertaining to sex discrimination.

Purpose of the Study

The purpose of this study was to review, synthesize, and summarize the legislative history of Title VII, its subsequent amendments, its implementing regulations, and sex discrimination case law as it relates to Title VII.

These purposes were addressed by utilizing the following approaches: (1) analyzing the legislative history of Title VII, and its amendments; (2) analyzing precedent-setting case law in order to ascertain the legal principles upon which the court decisions were based; (3) determining which federal and state court decisions pertain to sex discrimination in higher education employment; and (4) attempting to utilize the above analysis to summarize the basic principles and form some basic recommendations to assist higher education administrators in developing nondiscrimination policies and procedures relating to sex discrimination.

Significance of the Study

Although a great deal has been written about sex discrimination and nondiscrimination in employment practices in higher education, there is nevertheless, an ongoing need to review, to analyze and to update research in this subject area for its current implications. A review of the literature clearly indicates that this area of employment law as it

affects institutions of higher education is still in a period of rapid development.⁷

Perhaps more noticeable is the evidence that, despite attempts to remedy the problem since the mid-1970's, judicial review of faculty sex discrimination employment disputes has increased dramatically. This increase is a mere reflection of the increase in the general growth of sex discrimination litigation in the United States. Consequently, obvious questions must be addressed: (1) Are administrators properly informed of the legal parameters within which they should be making employment decisions? and; (2) What impact will this phenomenon have on administrative hiring decisions?

William A. Kaplin, a researcher of higher education law commented:

Administrators should be attentive to the increased possibilities for such challenges from faculty and faculty members and applicants. In order to avoid or overcome charges of employment discrimination, administrators should be prepared to do more than provide nondiscriminatory reasons, after the fact, for their employment decisions. Instead, administrators should be aware of the laws, thus endeavoring to assure that legitimate, nondiscriminatory reasons are the actual basis for each employment decision at the time it is made.⁸

This study was an attempt to draw on the considerable body of case law and research pertaining to Title VII. Accordingly, college and university administrators may find this study extremely useful for: (1) examining Title VII legislation; (2) examining sex discrimination case law; and (3)

utilizing the research for developing procedures policies and guidelines to minimize potential lawsuits.

Legal Research Procedures

The main focus of this study was a legal one, which necessitated a heavy concentration upon the historical and current state of employment discrimination law, specifically Title VII. This study was conducted by utilizing a combination of legislative analysis and legal research methods. The research required utilizing as sources: (1) legislative history of Title VII, as amended; and (2) case law interpretation.

The legal research used in this study included the same problem-solving processes as other research methods: (1) collecting data; (2) analysis; and (3) interpretation. The primary source for legal research are decided cases and statutes. This major element which shapes the legal research technique is called stare decisis, the fundamental doctrine that legal precedents should be followed. Thus, to effect competent legal research, the researcher had to locate and analyze the text of the law, specifically, Title VII of the Civil Rights Act of 1964. The next step was to research the judicial opinions or case law which have been interpreted and applied to Title VII, as a means of determining the court's understanding of the law. Since laws and legal principles are

constantly changing, of equal importance was to employ a technique to determine if any recent changes had occurred in the written law, or the principles set forth in the case law. This examination was done by using Shepard's citation system. This system provided a history of reported cases, thus providing an evaluation of any changes in the judicial decisions. Additionally, the system provided a history of Title VII, to ascertain whether the law had been amended, repealed, or superseded by subsequent legislative action or judicial interpretation.

The need for subject access to Title VII of the Civil Rights Act of 1964, its subsequent amendments, the implementing regulations and the judicial interpretations or case law was met by a search of the following legal sources:

American Digest System

General Digest

West Key-Numbered System

U.S. Supreme Court Digest

Federal Digest

A.L.R. Digest

Westlaw Legal Computer System

Corpus Juris Secundum

Black' Law Dictionary

Shepard's Citation's System

Congressional Records

Code of Federal Regulations

State and Regional Digest

U.S.Statutes at Large

U.S. Codes Annotated

Definition of Terms

For purposes of this study, certain legal words and terms will be used throughout the text. In order to provide a more explicit understanding of their content, these words and terms are defined below.

(1) Codes- A systematic collection, compendium or revision of laws, rules, or regulations.⁹

(2) Defendant- The person defending or denying; the party against which relief or recovery is sought in an action or suit.¹⁰

(3) Dissenting Opinion- Contrariety of opinion; refusal to agree with something already stated or adjudged to or an act previously performed. The term is most commonly used to denote the explicit disagreement of one or more judges of a court with the decision passed by the majority upon a case before them. In such an event, the non-concurring judge is reported as "dissenting". A dissent may or may not be accomplished by an opinion.¹¹

(4) Plaintiff- A person who brings an action; the party who complains or sues in a civil action and is so named on record. A person who seeks remedial relief for an injury to rights; it designates a complainant.¹²

(5) Prima Facie Case- Evidence that will suffice until contradicted and overcome by other evidence.¹³

(6) Remand- To send back. The sending by the Appellate Court of the cause back to the same court out of which it came, for the purpose of having some further action taken on it there.¹⁴

(7) Statute- An act of the legislature declaring, commanding, or prohibiting something; a particular law enacted and established by the will of the legislative department of the government; the written will of the legislature, solemnly expressed according to the form necessary to constitute it to the law of the state.¹⁵

(8) Statutory Law- That body of law created by act of legislature in contrast to law generated by judicial opinions and administrative bodies.¹⁶

Delimitations of the Study

This study, which examines the relationship between Title VII, as amended and sex discrimination is delimited by the following considerations:

(1) The study is limited in discussion to those nondiscrimination employment issues and practices related to academic faculty members at institutions of higher education.

(2) The case law material pertaining to discrimination in higher education employment practices is limited in discussion to issues relating to sex discrimination.

(3) This study was prepared by the researcher with two primary objectives: (a) to be of significant and equal value to the practitioner, and other researchers of higher education law; and (b) to be balanced and non-partisan. However, in any research on the topic of employment law, the contents can engender strong partisan viewpoints.

Organization of the Study

The main body of this study is organized into five chapters. A cursory outline describing these chapters are provided below:

Chapter I presents the nature and scope of the study. It includes an introduction, the problem statement, the purpose of the study, the significance of the study, legal research procedures, definition of legal terms, delimitations and chapter overviews.

Chapter II presents a review of the literature. The review includes the legislative history of Title VII of the Civil Rights Act of 1964, The Equal Employment Opportunity Act of 1972 and The Civil Rights Act of 1991. Chapter II also presents an analysis of precedent- setting case law ascertaining the legal

principles interpreted by the courts in relationship to Title VII.

Chapter III presents a historical and current review of higher education sex discrimination case law. This chapter also includes a review of case law principles and developments pertaining to sex discrimination in higher education in the areas of hiring, tenure and salary.

Chapter IV presents a historical and current review of case law and sexual harassment. This chapter also includes a review of sexual harassment case law and its developments in higher education.

Chapter V summarizes the study. This chapter also offers conclusions, recommended guidelines for developing effective employment policies and recommendations for developing sexual harassment policies and procedures.

Chapter I

Endnotes

- 1 Public Law 92-261, 86 Stat. 103 (1972)
- 2 42 U.S.C. §§ 2000(e)-2000(e)-17 (1976)
- 3 Carol H. Shulman, Federal Laws: Nondiscrimination and Faculty Employment (American Association for Higher Education, 1975) Eric/Higher Education Research Report No.4, p 1.
- 4 Westlaw Computer Search -A search of higher education Title VII faculty employment discrimination cases from 1972-1991 and before 1972. Query or key words used in search : DISCRIMINAT! /5 EMPLOYMENT /S COLLEGE UNIVERSIT! "HIGHER EDUCATION" DATA BASE- ALL-FEDS AND SCT-OLD
- 5 Bernice Sandler, Affirmative Action on Campus: Progress, Problems, and Perplexity a written speech which was published in the conference book of speeches Affirmative Action in Employment in Higher Education (Fourth Session): Reactions of Colleges and Universities 1975, p.118
- 6 The Center for Compliance Research, Sex Discrimination in the Workplace edited by Kenneth Lawrence (Aspen Publications), 1978,p.15
- 7 William A. Kaplin,The Law of Higher Education: A Comprehensive Guide to Legal Implications of Administrative Decision-Making, (Jossey-Bass Publishers, 1990) p.118
- 8 Kaplin, The Law of Higher Education, p.163
- 9 Black's Law Dictionary, (West Publishing Company, St. Paul, Minn) 5th ed. 1979 p.233
- 10 Id.at 377
- 11 Id.at 424
- 12 Id.at 1035
- 13 Id.at 1123

14 Id.at 1162

15 Id at 1264-1265

16 Id at 1266

Chapter II

Review of the Literature

Introduction

In 1964, Congress passed Title VII of the Civil Rights Act, which became the first comprehensive Federal law prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin. An examination of the legislative history of the Act clearly indicated Congress enacted Title VII as a principle weapon to eliminate discrimination from the American workplace.

In 1972, during the 92nd Congress, several sweeping amendments were made to Title VII. The amendments were entitled The Equal Employment Opportunity Act. The 1972 amendments made significant changes in Title VII involving coverage and exemptions to the Title. Of significance to this investigation, the 1972 amendments eliminated the 8-year old exemption of educational institutions. As a result, Title VII has been the Federal law used most often to challenge faculty employment discrimination charges, more specifically, sex discrimination charges.

Because of its broad scope and coverage, Title VII has been called the most comprehensive and the most litigated Federal law on employment discrimination. As a result, Title

VII has been the object of extensive judicial interpretation. In the years of 1988-89, the Supreme Court handed down several decisions that drastically altered the scope and effectiveness of some established employment discrimination precedents. After much controversy, these decisions prompted legislative action from Congress to restore the principles and precedents that had been in effect for over 27 years. The Civil Rights Act of 1991 was passed to restore the principles, as well as, to add new provisions to strengthen the existing protections.

The purpose of Chapter II was to: (1) examine and review the legislative history of Title VII and its amendments; (2) to summarize the judicial interpretations, case law, and principles applied to Title VII by the courts; and (3) to summarize the enforcement, coverage, and procedural requirements of Title VII.

Title VII of the Civil Rights Act of 1964

Like much of our social legislation, Title VII of the Civil Rights Act of 1964¹ has roots extending deep in the past. For example, prior to 1964, the Supreme Court ruled that Alabama's "separate but equal" transportation policy was unconstitutional. Eight months after that ruling, reacting to public indignation throughout the country, Congress passed the first civil rights bill in 82 years, The Civil Rights Act of 1957.² Three years later, reacting to publicity over lunch counter sit-ins by black students throughout the South, Congress again responded, this time by passing The Civil Rights Act of 1960.³ Thus, in effect, it appeared the social, economic and political changes and events that culminated prior to the passage of The Civil Rights Act of 1964⁴, were all part of a protest movement that began to take shape in 1956. By 1963, employment discrimination civil rights was not only on the public agenda, but the congressional agenda as well.

For the first half of Kennedy's term, he was accused of not moving swiftly on civil rights legislation, provoking much criticism from legislative proponents and civil rights advocates. However, in response to the growing civil rights movement, racial tensions and political pressures, in June of 1963, Kennedy presented a mild civil rights bill to Congress. In his speech to Congress, Kennedy stressed the importance of the legislation:

[T]he legal remedies [proposed in this bill] are the embodiment of the nation's basic posture of common sense and common justice. They involve every American's rights to vote, to go to school, to get a job and to be served in a public place without arbitrary discrimination-rights which most Americans take for granted.... In short, enactment of The Civil Rights Act of 1963 at this session of Congress is imperative.⁵

For a bill to become a law, it must be passed by both House and Senate. For Kennedy, this task was fragmented by the disparate views of 535 members of Congress, each with one vote. Kennedy's political strategy was to present the bill to the House first, where he thought he could secure the most support. Attorney General Robert Kennedy presented the bill to the House Judiciary Committee. In his plea for support, he said:

With respect to this bill in its entirety, it must be emphasized that racial discrimination has been with us since long before the United States became a nation, and we cannot expect it to vanish through the enactment of laws alone. But we must launch as broad an attack as possible. If we fail to act promptly and wisely at this crucial point in our history, grave doubts will be thrown on the very premise of American democracy. The call to Congress is not merely for a law, nor does it come only from the President. This bill springs from the people's desire to correct a wrong that has been allowed to exist too long in our society. It comes from the basic sense of justice in the hearts of all Americans.⁶

When the bill was presented to the House Judiciary Committee, the Chairman, Emanuel Celler, a strong supporter of civil rights legislation called immediately for a mark-up of the President's proposed bill to make it stronger. Although Democrats outnumbered Republicans on the subcommittee, Celler assured complete bipartisan harmony. The process of marking-up a bill is followed by a set of

parliamentary rules. In brief, the Committee has before it a working document, and as the clerk reads each section aloud, members are allowed to offer amendments, by additions, deletions or revisions.

The Kennedy bill had eight provisions (titles). Among those provisions was Title VII, which permitted the President to establish a Commission on Equal Employment Opportunity- to deal with those firms having government contracts. Title VII of Kennedy's bill was considered by many as a weak provision on equal employment opportunity. Black civil rights leaders lobbied Kennedy and Celler to strengthen the provisions that dealt with employment discrimination. In addition, they suggested adding a new title, authorizing the Justice Department to intervene in cases of alleged discrimination.⁷

Upon opening the floor for amendments to Title VII, proponents of the bill began offering amendments for a much stronger employment practice Title. In a strengthened version, the subcommittee: (1) established the Equal Employment Opportunity Commission; (2) that the EEOC would be established by law, instead of at the President's discretion; (3) that the EEOC be empowered to investigate any U.S. firm with 25 or more employees on charges of discrimination based on race, color, religion, or national origin; and (4) after a hearing, order such practice stopped. The revised version of

Title VII was passed by the House Judiciary Committee.

The next big step for the bill was consideration by the House Rules Committee. The bill was to go through the same debate, mark-up and amendments as before. Celler expected some confrontation, but the crucial point of the battle was whether the bill would retain its strength or substantially be weakened by amendments. As each Title was read, the amendments were debated and recorded. As for Title VII, Celler introduced ten new amendments, designed to bring Title VII into technical conformity with the rest of the bill.⁸ However, Howard Smith, a strong opponent of civil rights legislation objected to the new amendments. Speaking strongly he said:

We were told that this legislation was perfect and did not need any amendments.... We are confronted today with a series of amendments from members of the [Judiciary] committee, who have a preferential right to offer amendments, and who are being recognized while other members, who are not members of the committee, who would like to offer some meritorious amendments, are waiting. I have one and I have been waiting here for a long time to get it before the committee.⁹

Contrary to Smith's strong objection, Celler's amendments were accepted. But, Smith got his chance to offer what has since been considered a very "meritorious" amendment:

After the word 'religion', insert 'sex' on pages 68, 69, 70, and 71 of the bill.¹⁰

The House was shocked by Smith's amendment. By adding the word "sex" to the list of discriminations (race, creed, color, and national origin) prohibited in employment, it would have given

all women-black and white-their first equal job rights with men.¹¹

Smith's move has since been called a brilliant move by the foe of civil rights.¹² Smith counted on the amendment passing, thus making the Title so controversial that eventually it would be voted down either in the House or the Senate. Celler opposed Smith's amendment offering arguments that Smith's amendment to add sex would strike down many state laws that were enacted to protect women workers. Smith objected to his arguments. A group of bipartisan Congresswomen spoke up in support of Smith's amendment. Speaking for the group, Congresswoman St. George from New York said:

I can think of nothing more logical than this amendment at this point....Women do not need any special privileges.... [But] we are entitled to this little crumb of equality.... The addition of the little, terrifying word 's-e-x' will not hurt this legislation in any way....¹³

The House accepted the amendment to add "sex" to the bill. The bill was passed, and in closure, the major provisions of Title VII from the House were as follows:

1. Coverage- Title VII covered all employers and labor unions with 25 or more employees, federal, state and commercial employment agencies, and any training apprenticeship program by employers, labor unions and joint labor-management committees.

2. Prohibited Practices- Employers were prohibited from discriminating in any phase of employment or

union membership on the basis of race, religion, color, sex, and national origin.

3. Enforcement- Title VII created the Equal Employment Opportunity Commission. The EEOC would investigate charges of discrimination, attempt to conciliate, and if conciliation failed could then file suit in federal district court. If the Commission failed to file suit, the individual retained the right to file suit in district court with permission of one member of the commission.

4. Penalties- If the court found that the accused had engaged in an unlawful employment practice, the court could enjoin the accused from continuing such practice and order the accused to take affirmative action, including reinstatement of an employee with or without back pay. No order of the court could require the reinstatement of an individual to a labor organization or the hiring, reinstatement or promotion of an individual by an employer if the labor organization or employer took action for any reason other than discrimination on account of race, color, religion, sex, or national origin.¹⁴

The House expected confrontation from Senate members opposing civil rights legislation. In particular, those opponents argued the bill was unconstitutional, on the grounds

that it included an unreasonably broad definition of the commerce power and too great an expansion of federal power. It was considered the strongest civil rights bill ever in history, thus expecting a Senate filibuster.

Upon receiving the amended House version of the bill, the Senate faced the same parliamentary procedures taken by the House with any new bill introduced. However, after the second reading of the bill, the Senate postponed any action on the bill. The filibuster had begun. In an effort to get the Senate to act on the bill, Senate members Mansfield and Humphrey made speeches to the Senate. Mansfield said: "...the issue of civil rights rights can wait no longer in the Senate....Now it is time and the turn of the Senate...."¹⁵ Humphrey in his plea for action said to the Senate: "...The issue is before us....it is a national issue....it is above all a moral issue, and not merely a political issue...."¹⁶ Whereas it took the House nine days to debate, amend and pass the bill, the Senate had already taken two weeks just debating on a motion whether to consider it.

In particular, because Title VII was one of the most controversial Titles, after the debate began, Senator Dirksen who considered Title VII as the heart of the bill, offered forty amendments to Title VII. He considered the House version too powerful a role for the federal government in Title VII. Other opponents viewed Title VII as: (1) unconstitutional;

(2) an intrusion of the federal government in business activities; and (3) too large a grant of power to the executive branch because the EEOC could institute suits against an employer.¹⁶ Senator Ervin made this indictment of Title VII:

The bill will give the federal government the power to go into any business or industry in the United States having as many as 25 employee and affecting interstate commerce and tell the operator of the business whom he had to hire... whom the employer had to promote...whom he should lay off and whom he should retain in time of fiscal adversity....how he should fix the rates of compensation as between employees.... what the workload of his employee should be....and how many employees he should have....¹⁸

These statements by Ervin basically summarized the sentiments of the Senate. However, after over eight months the Senate came to agree on enough amendments to Title VII to pass it. Although much of the structure remained from the original bill, the Senate in what has been called a "compromise bill" managed to take the enforcement powers from EEOC. In the final version, EEOC had only investigative and conciliatory power. (see Appendix A for a comparative analysis)

After the Senate completed their amendments and sent the bill back to the House, the House released this statement:

Not all the amendments are to our liking. However, we believe that none of the amendments do serious violence to the purpose of the bill. We are of the mind that a conference could fatally delay enactment of this measure.¹⁹

When Congress finally passed Title VII of the Civil Act of 1964, it was the manifest will of Congress to eliminate all employment discrimination based on race, color, religion,

sex and national origin. Of all the anti-discrimination laws prior to 1964, Title VII had the greatest potential for significantly influencing nondiscriminating employment practices because of its broad scope and coverage. The statute's basic prohibition, contained in Section (703)a stated:

It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respects to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex, or national origin.²⁰

The far-reaching significance of the new federal employment practice law was reflected in the year long debates that preceded adoption. The newly enacted federal employment practice law was to affect almost every American workplace, except educational institutions. Section 702 of the Title VII provided an explicit exemption for educational institutions. This exemption specified:

This Title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities or an educational institution with respect to the employment of individuals to perform

work connected with the educational activities of such institution.²¹

The exemption for religious and educational institutions was originally much broader. The language limiting the exemption to the employment of individuals, whose work has to do with the essential nature of the institution-educational or religious- was added by the Dirksen-Mansfield compromise of the House Bill.

One year and 13 days after President Kennedy introduced the first civil rights bill to Congress, President Johnson signed The Civil Rights Act of 1964.²² In a televised signing of the Act, he addressed the nation:

I am about to sign into law the Civil Rights Act of 1964. I want to take this occasion to talk to you about what the law means to every American. We believe that all men are created equal. Yet many are denied equal treatment. We believe that all men have certain unalienable rights. Yet many Americans do not enjoy these rights. We believe that all men are entitled to the blessings of liberty. Yet millions are being deprived of those blessings not because of their own failures, but because of the color of their skin.... But it cannot continue. Our Constitution, the foundation of our Republic, forbids it. Morality forbids it. And the law I will sign tonight forbids it. Its purpose is national, not regional. It's purpose is to promote a more abiding commitment to freedom, a more constant pursuit of justice, and a deeper respect for human dignity. We will achieve these goals because most Americans are law-abiding citizens who want to do what is right....²³

The Equal Employment Opportunity Act of 1972

Despite the commitment of Congress to providing equal employment opportunity through Title VII legislation in 1964, this was not the final word on employment discrimination and

Title VII. Immediately after Congress adopted the Act, pressure began building to give the Equal Employment Opportunity Commission the enforcement powers denied it by the compromise that cleared the way for passage of the Act.

The U.S. Commission on Civil Rights began making yearly reports on the enforcement efforts of EEOC, and by the early 1970s there was mounting evidence to show that the enforcement activities of the agency were not meeting expectations. In 1971 the Commission's Annual Report presented statistics showing the lack of progress of EEOC and detailed the various problems that had been identified in their enforcement effort. The report noted:

EEOC has been crippled in its formative years by organizational and personnel problems....The Commission believes its lack of enforcement power is the principal reason its attempts at conciliation have been frustrated. As evidence it cites the fact that conciliation has been achieved in less than half the cases in which reasonable cause has been found.²⁴

The report concluded that these and other problems resulted in the EEOC taking a passive role in the implementation of Title VII. Greene commented the Commission's Report plainly showed that the federal government's efforts at eliminating job discrimination were inadequate and required some reformation of the law if the effort was to succeed.²⁵

In 1971, seven years after the passage of Title VII, Congress considered several bills that, among other things, would extend enforcement power over Title VII to EEOC. After the failure of several bills introduced, the House and Senate

reached a compromise in 1971, and The Equal Employment Opportunity Act²⁶ was passed in March of 1972.

When Congress began to consider amendments to Title VII of the Civil Rights Act of 1964, the primary objective was to give EEOC enforcement powers. However, the amendments adopted in 1972 went much further. In addition to giving the Commission authority to institute court proceedings to enforce the prohibition against employment discrimination, the new Act made significant changes relating to coverage, and exemptions, record keeping, administration, government contracts and time for filing charges.

As previously noted, under the 1964 Act, there was an exemption for educational institutions. Accordingly, during the 1972 House and Senate debates on the amendments, the subject of discrimination against women and minorities at educational institutions was a topic of much discussion. Congressmen and special interest groups reported their acknowledgment of alleged widespread discrimination within educational institutions:

[T]he existence of discrimination in the employment practices of our Nation's educational institutions is well known, and adequately demonstrated by overwhelming statistical evidence as well as numerous complaints from groups and individuals. Minorities and women continue to be subject to blatant discrimination in these institutions. And yet, despite the existence of this obvious discrimination, this entire segment of our working population has not been provided with adequate Federal relief. The exclusion of educational institutions from the protections offered by Title VII is a major factor in the discrimination which exists in our educational institutions today. There does not appear to be any reason, therefore, why this legislative

oversight should be continued. We must correct this important defect in Title VII immediately, and provide employees of the educational institutions the same protection that we accord the rest of the Nation's workforce.....²⁷

All efforts possible were made to influence Congress to remove the exemption that educational institutions had enjoyed for eight years after Title VII was enacted. Congressional proponents for removal of the exemption noted:

Broadening the exemption instead of eliminating it will serve only to continue existing discriminatory practices against teachers and staff of this nation's educational institutions.... At the present time, there are approximately 2 million teachers and full-time faculty in 120,000 education institutions in our Nation....And yet, under the present law, most of these employees are without an adequate and effective Federal remedy....These 4 million are no different from the other employees in the nation and deserve to be accorded the same protections....To continue the existing exemption for these employees would only continue to work an injustice against this vital segment of our Nation's workforce.²⁸

It was clear from the legislative history of the 1972 congressional hearings on the proposed amendments that Congress intended to end the exemption of colleges and universities as: "...a class of employers, who could pursue employment practices which were otherwise prohibited by the law...."²⁹ In light of the intent of the national policy, the Committee further noted its commitment to extending the protection to educators:

There is nothing in the legislative background of Title VII, nor does any national policy suggest itself to support the exemption of these educational institution employees-primarily teachers from Title VII coverage....It is difficult to imagine a more sensitive area than educational institutions where the youth

of the Nation are exposed to a multitude of ideas and impressions that will strongly influence their future.... Discrimination here would, more than any other area, tend to promote existing misconceptions and stereotyped categorizations which in turn would lead to future patterns of discrimination.³⁰

As in the original debates over Title VII in 1964, the primary justification for the changes in Title VII was the poor economic position of blacks, and now women, in the labor force. That is Title VII was judged in terms of how well it had met the goal of eliminating the maldistribution of blacks and women throughout the labor force.³¹ In an explanation of the proposed changes in the enforcement provisions of Title VII, the House report included the following remarks on discrimination:

During the preparation and presentation of Title VII of the Civil Rights Act of 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, due, for the most part, to the ill-will on the part of some identifiable individual or organization....Employment discrimination, as we know it today, is far more complex and pervasive phenomenon.³²

The amendments have been considered a milestone in employment discrimination for faculty members at institutions of higher education. Although the 1972 EEO amendments extended coverage to include educational institutions, and its basic statute broadly prohibited discrimination, Kaplan noted: "...it did not intend to hamstring institutions of higher education in hiring faculty members on the basis of job qualifications....nor did it intend to distinguish among faculty members on the basis of seniority, merit in pay,

promotion, or tenure policies. He further asserted as institutions of higher education gained coverage under the Title VII, institutions still retained discretion to hire, promote, reward, and terminate faculty as they chose, as long as they did not make distinctions based on race, color, religion, sex, or national origin.³³

The Civil Rights Act of 1991

At the end of its 1988-89 term, the U.S. Supreme Court handed down several civil rights (employment discrimination) decisions that sent shock waves through various groups of civil rights advocates, minorities, women, and certain members of Congress. The significance of the Courts' 1988-89 employment discrimination decisions, in effect, signaled a retreat from earlier Supreme Court interpretations of Congressional intent in enacting fair employment legislation in 1964, and with subsequent legislative amendments.

Since the adoption of Title VII, more than 27 years ago the statute had been the subject of countless judicial decisions. In the 18-year old landmark Supreme Court case Griggs vs. Duke Power,³⁴ the court acknowledged the objective Congress had set for the country in enacting Title VII. Chief Justice Burger, speaking for a unanimous Court said:

The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of

white employees over other employees. Under the Act, practices and procedures, or test neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to freeze the status quo of prior discriminatory employment practices.³⁵

Griggs, thus became the benchmark of equal employment opportunity law. In the years preceding Griggs, and its progeny, the courts fashioned workable and widely accepted legal principles for resolving the problems caused by employment practices. However, in 1989, a five member majority of the Supreme Court drastically cut back on the scope and effectiveness of Griggs. The court's decision in Wards Cove Packing Co. vs. Atonio,³⁶ overturned the major long accepted legal principles governing disparate impact cases established under Griggs and its progeny.

For eighteen years following the unanimous landmark decision in Griggs, Title VII had been construed to place on employers the burden of proving that employment practices with a "disparate impact" (i.e., facially neutral practices that operate to exclude qualified women and minorities disproportionately) were required by business necessity. Instead, under Wards Cove, victims of discrimination must prove that the discriminatory practices are not significantly related to a legitimate business objective. The precedent set in this case was perhaps the most troubling of all the decisions handed down by the Supreme Court during this term, thus prompting legislative action from Congress.

The First Failed Attempt

In February of 1990, Senators Edward Kennedy(D-MA) and Congressman Gus Hawkins (D-CA), introduced the "Civil Rights Act of 1990". The purpose of the bill was to overturn the recent Supreme Court decisions in which they characterized as "shocking" and a "swift retreat" from established principles, and , in effect, the product of a "backward moving" Supreme Court.³⁷ The proposed legislation was an effort to amend the Civil Rights Act of 1964, by : (1) responding to the recent Supreme Court decisions through restoring the civil rights protections that were dramatically limited by those decisions; and (2) to strengthen existing protections and remedies available under federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination.³⁸

Shortly after Kennedy and Hawkins presented their bill, hearings on the legislation began in the House, before the Judiciary Subcommittee. After careful examination of the bill, members of the Committee argued the bill was much more than simply overturning Supreme Court decisions. Opponents of the legislation argued the recent Supreme Court decisions that appeared to have a "devastating" impact for the most part had failed to materialize. They introduced as evidence a study conducted by the Attorney General's office entitled, "The Impact of 1989 Supreme Court Decision's. The study had

been ordered by President Bush to monitor federal cases, after the Supreme Court's recent decisions. In the report, the Attorney General concluded: "...the sky has not fallen in on civil rights....despite dire predictions to the contrary, especially with respect to Wards Cove, plaintiffs can still bring charges and win." The report further concluded in it's findings:

Plaintiffs have been able to present prima facie cases of disparate impact and, where final decisions have been rendered, they have been able to win cases with fact situations like those won prior to Wards Cove. In all, there have been 11 rulings favorable to plaintiffs, including more decisions on the merits after a full application of Wards Cove principles. These decisions demonstrate that legitimate disparate impact claims can still be brought and won.⁴⁰

Using this report to strengthen their argument, opponents of the new legislation, debated the key purpose of the legislation which was to restore the Griggs standard stating:

[N]ot only does the bill fail to restore the Griggs standards....it rewrites the past 20 years of caselaw on disparate impact in a way that can only lead to one result-that employers will be forced to adopt quotas rather than face litigation under the new bill.⁴¹ [emphasis added]

The new bill was hotly debated among two clearly divided groups. Proponents for the new legislation consistently argued their point that the Supreme Court ruling in Wards Cove was a "radical" and "unprecedented" departure from its prior decisions especially in Griggs:

27 years ago this body passed a historic piece of legislation—the Civil Rights Act of 1964. That law reflected the feelings and beliefs of the majority of this Nation. Among other ideals embodied in that legislation was the concept that individuals should not be discriminated against in either their place of work or any where else on the basis of race, color, religion, sex, or national origin For the first time, we had a law that gave meaning and substance to the idea of equal opportunity. The Civil Rights Act gave victims of discrimination a way to address the wrongs that they had suffered.... America and Congress believe they did the right thing. Sadly, over the years, the Supreme Court has undone many aspects of the original bill. So now, in the 1990's we must redo it. Make no mistake....it is needed now as much as it ever was....and Congress must send a clear message that in the United States of America, there is no room for either bigotry or bias.⁴²

In a final vote, the 1990 bill with a few amendments was passed and sent to the President for signature. The President and his supporters openly expressed opposition to the quota affects of the bill. The President vetoed the legislation, and the Senate failed to override the veto. The 1990 bill was not enacted into law.

The Civil Rights Act of 1991

As a result of the Presidential veto, several new bills were presented within the year, including one by the President. In March of 1991, the Judiciary Committee presented a new bill to the full House for mark-up. The purposes outlined in the new bill were very similar in scope as the 1990 bill: (1) to respond to the recent Supreme Courts' decisions by restoring the civil rights protections that were

limited by the new decisions; and (2) to strengthen existing protections and remedies to provide more effective deterrence and to ensure compensation for harm suffered by victims of intention discrimination.⁴³

Committee Chairman Jack Brooks spoke on the bill. In his speech he said:

We affirm the President's requirements for a true civil rights bill: that will provide equal opportunity without resorting to quotas. It must reflect fundamental principles of fairness, it must not encourage litigation or create a lawyer's bonanza....and it must place Congress under the same requirements as they prescribe for others and therefore support the Bush Administrations Civil Rights bill...Because H.R.1 as introduced and reported by the Judiciary Committee fails to embody these principles, we cannot support its passage.⁴⁴

This was the second consecutive session in which legislation to amend Title VII and to make other changes to laws of employment discrimination had come before the Congress and the Committee. Members could not agree on the net effects of the bill, especially the repeated statements concerning Griggs and quotas. This argument was raised on the House floor again by Congresswoman Rosa DeLauro:

[H.R.1] simply restores the law as it existed for 20 years in employment discrimination cases prior to an ill conceived 1989 Supreme Court decision. No one opposing this measure has offered any evidence that the law prior to 1989 disserved the business community or resulted in the arbitrary imposition of quotas in the workplace.⁴⁵

As the political process goes, opposing members of the legislature met to negotiate a "compromise bill". The leading

members of this team were; Senators Danforth and Kennedy. The Congressional Record reported it as the Danforth-Kennedy Substitute Civil Rights Act of 1991. After a series of meetings Senator Kennedy reported to the floor:

[T]his Nation's long struggle to overcome the historical legacy of discrimination has been characterized by difficult battles and by periodic, historic, advances....During the past 24 hours, members of this body have joined with administration representatives to craft a civil rights bill that will restore to all Americans the ability to enforce their rights to equal job opportunity....Today, the U.S. Senate has the opportunity to take one of those great steps forward to advance significantly the cause of equal opportunity for all.⁴⁶

Kennedy went on further to talk about the struggle of the past two years to enact a fair civil rights bill. He expressed the sentiment that this was not only a Democrat effort or a Republican effort, but a national bipartisan effort and cooperation.

Senator Danforth expressed similar support as Kennedy to his supporters:

For nearly two years many of us have been attempting to put together a civil rights bill that would redress problems created by the Supreme Court of 1989....This amendment would do that. It has been put together after painstaking negotiations involving a number of people....We have resolved the problem of legal redress toward discrimination in the workforce....The position that the administration takes is that this is not a quota bill....The significance of this compromise is far greater than the wording of the amendment. The significance is that by entering into this compromise we have taken the race issue out of the political arena, and we have recreated a bipartisan consensus on the issue of civil rights.⁴⁷

The hearings continued throughout October. Many amendments were offered and debated. Although no one expected total agreement, some Senators expressed no support for the bipartisan compromise. For example Senator Coates said:

I rise today to protest a proposal that violates important principles of fairness and leaves employers with little choice, but to hire by the numbers or face endless and costly litigation. I also rise to protest the fact that this is just another in a series of self serving compromises-compromises not primarily aimed at addressing national needs, but directed at protecting this body and its members. The Congress, on this issue and others, has refused to make vital choices between conflicting visions....But now we are presented with a congressional proposal that by its effect would define discrimination in terms of a numerical standard, rather than a criminal act made with intention. It replace individual responsibility with statistical analysis....And further, a bill that is designed to promote fairness is itself inherently unfair....You can call it , this civil rights compromise, anything you want. You can spin it until the rest of use are dizzy, but the effect of this legislation is to hire by the numbers. It is political posturing that tries to cover a bad law with noble intentions.⁴⁸

The final compromise of the civil rights bill came days after the Hill-Thomas sexual harassment hearing.⁴⁹ Many Senators commented the compromise was to appease those groups which lost in the hearings. Coates stated how coincidental that "...just days after the Thomas circus ended, a so-called compromise was reached."⁵⁰ But despite Coates and others strong objections, the Congressional hearing on a compromise bill continued through November, and was voted on and passed by both legislative bodies on November 7, 1991.

The President signed the law into effect on November 21, 1991. In his statement during the signing ceremony, he said:

Today I am pleased to sign into law...the Civil Rights Act of 1991. This historic legislation strengthens the barriers and sanctions against employment discrimination...This Act promotes the goals of ridding the workplace of discrimination on the basis of race,color,sex,religion,national origin and disability; ensuring that employers can hire on the basis of merit and ability without the fear of unwarranted litigation;and ensuring that aggrieved parties have effective remedies. This law will not lead to quotas, which are inconsistent with equal opportunity and merit-based hiring; nor does it create incentives for needless litigation.⁵¹

Summarized Major Supreme Court Decisions of Civil Rights Act of 1991

The two-year legislative struggle to enact the Civil Rights legislation bought significant major provisions. The legislation overturns portions of eight Supreme Court decisions, thereby making it easier for plaintiffs to bring claims of job discrimination to court. Among its major provisions, the new law:

.....Rejects the statement in Wards Cove Packing Co. vs. Antonio,⁵² that appropriate defense to a disparate-impact claim is business justification rather than business necessity, and that the employer does not have the burden of persuasion as to its defense.

.....Overturns Patterson vs. McLean Credit Union⁵³, and makes the Civil Rights Act of 1866 applicable to post-contract-formation conduct.

.....Overturns Martin vs. Wilks⁵⁴, and forbids challenges to consent decrees by individuals who have actual notice of the judgment or decree and a reasonable opportunity to object or whose interest were adequately represented by another

party.

.....Overturns the holding in Price Waterhouse vs. Hopkins⁵⁵ that an employer could avoid liability in mix-motive cases by proving that it would have taken the same action even without the discriminatory motive.

.....Overturns Lorance vs. AT&T Technologies⁵⁶, and permits employees to challenge a seniority system when they are affected by it and not just when the system is adopted.

.....Overturns EEOC vs. Arabian American Oil Co⁵⁷, and extends the coverage of Title VII, as well as the American Disabilities Act, to U.S. citizens employed by American corporations abroad.

.....Overturns West Virginia University Hospitals vs. Casey⁵⁸, and permits the award of expert witness fees as part of the award of attorney's fees in Title VII cases and cases to which the Civil Rights Attorney's Fees Award Act of 1976 applies.

.....Overturns Library of Congress vs. Shaw⁵⁹ and permits the award of interest on back-pay and attorney's fees awards against the United States.

Principle Theories of Discrimination

Probably the most significant developments during the early years of Title VII was the development and definition by the courts of the principle theories of discrimination. They have been labeled by the courts as "disparate treatment" and "disparate impact." These principle theories evolved separately through the courts and legal precedent. The two principles guide employment discrimination, and virtually all Title VII cases fall into one of these two categories.

Disparate Treatment Theory

The most easily recognized form of discrimination occurs when an employer overtly accords different treatment to individuals based exclusively on their race, color, religion, sex, or national origin. The Supreme Courts' conceptual framework for disparate treatment was set forth in McDonnell Douglas Corporation vs. Green.⁶⁰

The McDonnell Douglas case involved a mechanic who sued his employer when it laid him off, began to re-hire new workers, but refused to re-hire him. Green, the plaintiff claimed that the employer refused to re-hire him because of his race; the company claimed that Green's history as a troublemaker led to the refusal to re-hire him.⁶¹

The Supreme Courts' opinion in McDonnell Douglas addressed for the first time the specific guidelines for determining the burden of proof under Title VII of the Civil Rights Act of 1964. The Court responded with a three-step structural approach:

- (1) The plaintiff has the burden of proving by the preponderance of evidence a prima facie case of discrimination;
- (2) If the plaintiff succeeds in proving the prima facie case the burden shifts to the defendant to articulate some legitimate nondiscriminatory reason for the employee's rejection; and
- (3) Should the defendant carry the burden, the plaintiff must then have an opportunity to prove by a preponderance of evidence that the legitimate reason offered by the defendant were not it's true reasons, but were a pretext for the discrimination.⁶²

Prima Facie Case

Accordingly, the Supreme Court articulated those elements which a plaintiff must establish in order to meet the prima facie case burden: Those elements are:

(i) that he belongs to a racial minority [protected class]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.⁶³

The court noted in the McDonnell Douglas case that the facts will vary in Title VII cases, and the specifications of a prima facie proof required from the respondent is not necessarily applicable in every respect to differing factual situations.⁶⁴ In other words, although the elements presented above were meant to establish a standard, or framework for meeting a prima facie case, the elements were not meant to be inflexible.⁶⁵

Although it was established from McDonnell Douglas and its progeny that once a plaintiff has established a prima facie case and the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason" for the employment selection decision, the lower courts still remained unclear as to the precise requirement for a successful employer rebuttal. The issue was addressed by the Supreme Court in Furnco Construction Corporation v. Waters⁶⁶ and in Board of Trustees of Keene State College V. Sweeney⁶⁷. In Sweeney, the appeals court required the defendant university "to prove [the] absence of [a] discriminatory motive." The Supreme Court reaffirmed Furnco and distinguished between 'articulate', 'show', and 'prove'. These two cases made it clear that the

employers burden is not to disprove the existence of discrimination, but to articulate some legitimate, nondiscriminatory reason or reasons for the employment decision.

Nonetheless, the courts still had problems interpreting the opinion given in Sweeney and Furnco. The primary confusion in trying to apply the appropriate standards was with what is appropriate articulation of legitimate reasons for employment decisions. To clarify any speculation that the courts had lightened the employer's burden, the Supreme Court in Texas Department of Community Affairs v. Burdine⁶⁸ addressed the decisions of Sweeney and Furnco. Burdine, dispels the uncertainty left by Sweeney and Furnco. In a unanimous decision the Supreme Court noted:

We have stated consistently that the employee's prima facie case of discrimination will be rebutted if the employer articulates lawful reasons for the action; that is, to satisfy this immediate burden, the employer need only to produce admissible evidence which would allow the trier of the fact rationally to conclude that the employment decision had not been motivated by discriminatory animus. The Court of Appeals would require the defendant to introduce evidence, which, in the absence of any evidence of pretext, would persuade the trier of the fact that the employment action was lawful. This exceeds what can be deemed to satisfy a burden of production.⁶⁹

Thus, the court held that the employer's burden at the second step of McDonnell Douglas is one of production only, and not one of proof or persuasion. This burden was described as:

The [employer] need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the [employer's] evidence raises a genuine issue of fact as to whether if discriminated against the

plaintiff. To accomplish this, the [employer] must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection.⁷⁰

Since Burdine, there has been one alteration in the McDonnell-Burdine structure. In Price Waterhouse vs. Hopkins⁷¹, the Supreme Court held that where an employment decision resulted from a mixture of legitimate and illegitimate motives, the McDonnell Douglas structure is altered and the burden of persuasion shifts to the employer.⁷² In Price Waterhouse, plaintiff Ann Hopkins alleged that her employer, an accounting firm, unlawfully denied her a promotion to partnership because of her sex. Hopkins was denied promotion even though she claimed she had brought the firm more business than any of the 87 men considered for partnership that year. One of the partners involved told her that her professional problems would be solved if she would act more feminine. She was also told that she needed a "course in charm school."⁷³

The district court found that Title VII had been violated because sex discrimination had been a factor in the firm's refusal to promote Hopkins, but ruled that the employer could avoid equitable relief-promotion to partnership-if it could prove that Hopkins would have been denied partnership in the absence of discrimination. The court of appeals took a different approach and ruled that an employer who permitted discrimination to play a role in an employment decision may

escape all liability under Title VII if it could prove by clear and convincing evidence that it would have made the same decision absent discrimination. On appeal to the Supreme Court, one of the issues before them centered on the effect of the employer's evidence that it also had nondiscriminatory reasons for denying partnership to Hopkins, despite the presence of prior discrimination. The courts argued that where an employer who is shown to have acted for a discriminatory reason also proves that it would have taken the same action for a second, lawful reason, that fact should operate only to limit the appropriate remedy, not to permit the employer to escape liability altogether.⁷⁴ The Supreme Court rejected this position. The majority ruled "... when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account."⁷⁵

The courts' holding in Price Waterhouse severely undermined the protection against intentional employment discrimination by allowing mixed motive discrimination to completely escape under Title VII. In an effort to combat this Supreme Court decision, Congress provided legislative relief through the Civil Rights Act of 1991 to overrule this decision. The purpose of the legislative action was to restore the rule

applied by the majority of the circuits before Price Waterhouse, that any discrimination that is actually shown to play a role in a contested employment decision may be subject to liability, and allows the employer to be held liable if discrimination was a motivating factor in causing the harm suffered by the complainant.⁷⁶ The amended subsection provides where a violation is established and where the employer establishes that it would have taken the same action in the absence of discrimination bases on race, color religion, sex or national origin, the complainant is not entitled to reinstatement, backpay, or damages.⁷⁷ In explaining its reasons for taking this action Congress found "...virtually every Title VII disparate treatment case will to some degree entail multiple motives....and if Title VII's ban on discrimination in employment is to be meaningful, proven victims of intentional discrimination must be able to obtain relief, and perpetrators of discrimination must be held liable for their action.⁷⁸

Disparate Impact Theory

The courts have recognized that the principles of Title VII can be violated by employment practices that do not result in overt differential treatment. Additionally, employment policies neutral on their face may deprive individuals of their statutory right to equal employment opportunity. For

example, objective criteria can disqualify minority persons at a disproportionate rate because a history of societal discrimination has prevented many of them from achieving a competitive position in the labor force. The disparate impact theory of discrimination, designed by the courts to address these problems focuses primarily on the discriminatory treatment intent and the impact effects of facially neutral employment policies, rather than, as in disparate treatment cases, the intent underlying the defendant's action.⁷⁹ The Supreme Court addressed the issues of disparate impact in 1971, and set out the method of analyzing such claims. That analysis, which call for balancing the disparate impact of a neutral employment criterion against the employer's business reasons for utilizing the criterion, had become the staple of equal employment law.⁸⁰

Disparate impact cases involve facially neutral selection devices or criteria that disproportionately affect members of a protected group.⁸¹ The benchmark for disparate impact analysis is the Supreme Courts' decision in Griggs vs. Duke Power.⁸² In Griggs:

Black employees challenged the company's requirements for a high school diploma and passing score on two general intelligence test for hiring or promoting employees in four of the five departments within the company.....The appellants proffered evidence demonstrating that blacks were only employed in the fifth department of the facility-the labor department....It alleged that the highest paid of these employees were paid less than the lowest paid workers in the remaining departments.⁸³

The Supreme Court found that the plaintiffs established a prima facie claim of disparate impact. Chief Justice Burger, writing for a unanimous Court, declared, Congress placed on the employer the burden of showing that an employment practice which has a discriminatory effect is justified by business necessity.⁸⁴ Accordingly, proof of discrimination was not necessary because Congress directed the thrust of the Act to the consequences of employment practices, not simply motivation.⁸⁵

Griggs laid the framework for disparate impact analysis, and had an extraordinary impact on the American workplace. In hundreds of cases, federal courts had struck down unnecessary barriers to the full participation of minorities and women in the workplace.⁸⁶ For eighteen years following the Griggs decision, the burden of demonstrating a disparate impact case indisputably bore the burden of demonstrating that a practice shown by a complaining party to have a disparate impact was required by business necessity. The requirements for establishing a prima facie case were initially set forth in Griggs and later refined in Albermarle Paper Company vs. Moody.⁸⁷ Albermarle, like Griggs, involved the employer's use of employment test. The Supreme Court concluded that principles different from those controlling a disparate treatment case should apply. In these cases, the Court indicated that in order to establish a prima facie case of

discrimination "plaintiffs were required to establish only that the test in question, although neutral in their face, caused the selection of applicants for the hire or promotion is a racial pattern significantly or substantially different from the pool of available applicants."⁸⁸

The focus of the theory in Griggs was the effects of the employment policies and practice. It was irrelevant whether the employer intended to discriminate. The Supreme Court, in a 5-4 decision in Wards Cove Packing Company v. Antonio,⁸⁹ reversed the 18-year old precedent first articulated in Griggs, holding that while the employer has the burden of producing evidence justifying an employment practice shown to have a disparate impact, the burden of persuasion remains with the disparate impact plaintiff. In effect, now the plaintiff must both prove a prima facie case and persuade the court that the employer's business justification for his employment practice fails, in a significant way, the legitimate goals of the employer.⁹⁰

However, before Wards Cove, in 1988, the Supreme Court addressed the question of whether disparate impact analysis could apply only to the objective employment criteria. In Watson vs. Fort Worth Bank & Trust Company,⁹¹ the majority of the Court held that the disparate impact theory of employment discrimination under Title VII was applicable to subjective employment criteria.⁹² The majority opinion written by

Justice O'Conner placed emphasis on the relative burdens of plaintiffs and defendants in much the same way that disparate treatment burdens had been articulated in Burdine.

In Watson, the courts placed a substantial burden of proof on the plaintiff challenging employment practices. The plaintiff carries the burden to identify the specific criterion challenged and must establish proof of the disparate effect of the discreet criterion or practice utilized by the employer."⁹³ Furthermore, if the employer meets the burden to rebut a prima facie case, the ultimate burden of proof rest with the plaintiff, who must prove that discrimination against a protected group has been caused by a specific employment practice."⁹⁴

The new evidential standards for disparate impact analysis, introduced in the majority decisions in Watson, were affirmed in Wards Cove, thus redefining and broadening the scope of the disparate impact doctrine in Griggs. Wards Cove was considered by most legal scholars as a controversial precedent-setting case because of its significant changes in Griggs. In Wards Cove:

The plaintiffs in Wards Cove constituted a class of nonwhite salmon cannery workers who alleged that racial stratification of the work force was caused by the employer's hiring and promotion practices, including a re-hire preference, lack of objective hiring criteria, separate hiring channels for cannery and non-cannery workers, and a practice of not promoting from within. These non-white workers charged employment discrimination on the basis of race, in violation of Title VII and filed disparate impact treatment claims.⁹⁵

The district court, ruled in favor of the company, rejecting the disparate treatment claims, and held that the subjective employment criteria utilized by the employer were not subject to challenge under the disparate impact theory. On appeal, the Ninth Circuit affirmed the district court decision.⁹⁶

On writ of certiorari to the Supreme Court, the majority held that:

[R]acial imbalances in one segment of an employer's workforce was insufficient to establish a prima facie case of disparate impact with respect to the selection of workers for the employers other positions....[A]nd concluded the comparison between the percentage of cannery workers who are nonwhite and the percentage of non-cannery who are non-white did not make out a prima facie disparate impact claim.⁹⁷

In delivering the majority opinion in Wards Cove, the court indicated they were guided by the majority opinion in Watson:

Subjective employment criteria are within judicial scrutiny under a disparate impact theory, but the plaintiff's burden in establishing a prima facie case goes beyond a showing of statistical disparities in a segment of the employer's workforce.⁹⁸

The new precedent set by Wards Cove was widely criticized by civil rights activists and other legal scholars. In an effort to overrule the Supreme Court decision, Congress passed legislative amendments to Title VII of the Civil Rights Act of 1964. The purpose of the 1991 civil rights amendment was to restore the to the employer the burden of justifying practices shown to have a disparate impact. Under the Civil Rights Act of

1991, a complaining party makes out a prima facie case of disparate impact when he or she identifies a particular selection practice and demonstrates that the practice has caused a disparate impact on the basis of race, color religion, sex, or national origin. The burden of proof then shifts to the respondent to demonstrate that the practice is justified by business necessity. It is then open to the complaining party to rebut that defense by demonstrating the availability of an alternative selection practice, comparable in cost and equally effective in measuring job performance or achieving the respondent's legitimate employment goals, that will reduce the disparate impact, and that the respondent refuses to adopt such alternatives.⁹⁹

In attempting to overrule the Supreme Court's decision in Wards Cove, the legislature emphasized the practical reason for placing the burden of proving business necessity on the employer; the employer has control over the employment process, and selects the practices used to make an employment decision. The committee also noted that placing the burden of proof on employers to establish business necessity in disparate impact cases is not inconsistent with the allocation set forth in McDonnell Douglas Corp. vs. Green,¹⁰⁰ and Texas Dept. of Community Affairs vs. Burdine.¹⁰¹

Burden of Proof in Disparate Impact Cases
Outlined by the Civil Rights Act of 1991

Section 703 of the Civil Rights Act of 1964 was amended by adding at the end of the following new subsection:

(k)(1)(A) An unlawful employment practice based on disparate impact is established under this title only if---

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (c) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision-making process are not capable of separation for analysis, the decision-making process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.¹⁰²

Administration of Title VII Implementing Regulations and Procedures

EEOC

The most fundamental changes made in the 1972 amendments of Title VII related to the enforcement powers of the Equal Employment Opportunity Commission (EEOC). In 1964, Section 705(a) of Title VII, created the agency. The five-member Commission is appointed by the President and confirmed by the Senate. The Commission, with a national office, ten regional offices, and thirty-four district offices-investigates complaints of individual discrimination that may be filed by an individual employee, one of the Commissioners, or by an organization on the behalf of another person. In addition, the Equal Employment Opportunity Act gave the Commission new authority to investigate and act upon pattern and practice complaints filed by or on the behalf of an aggrieved employee or by a Commission member.¹⁰³ Such complaints allege pervasive discrimination occurs in the employing organization. The charge must be filed within 180 days of

the alleged discriminatory practice, but where an employer continues an alleged discriminatory practice the date of the charge is considered the last date of the practice, and so the filing date for the complaint may be extended.¹⁰⁵ The EEOC must notify the employer of the charge within 10 days after it is filed, giving the date, place, and circumstances of the charge. The EEOC may withhold the name of the charging party from the employer, and the names of parties involved in the case are not made public unless the case goes to court.

Upon receipt of a charge, EEOC must determine its legal and jurisdictional sufficiency and will either refer it to a State Fair Employment Practice Agency or give it to an investigator. If given to a state agency, EEOC will withhold its processing of the complaint for 60 days, after which it may choose to process the complaint, or leave it with the state agency. The EEOC's investigation may include on-site review, testimony, and the copying of pertinent documents. This investigation can be wide-ranging in its review of an employer's personnel practices. Sape points out the EEOC investigators:

[A]re not limited to the specific allegations of the charge and may ask for a very broad and seemingly unrelated range of materials. The rationale behind the breadth of these investigations lies in the general proposition that discrimination is by its nature systemic, and may involve a class action. Therefore, in order to properly evaluate the discriminatory effect of particular practice, the investigator must look to general employer practices and their relationship to the existing charge to determine what constitutes the violative behavior.¹⁰⁴

If an investigation shows that there is reasonable cause to believe discrimination has occurred, the EEOC initiates a conciliation process between the charging party and the employer. The conciliation process is a private and confidential attempt at charge resolution, involving the charging party, the employer, and an EEOC conciliator. By law, this process remains confidential. If the parties cannot reach an agreement during the conciliation process, the EEOC will terminate it. The commission then determines whether it should bring the case to trial. The EEOC's ability to litigate was granted by the 1972 amendments, Section 706(f)(1), and considered a very powerful tool for EEOC.¹⁰⁵

In addition to this process, Title VII permits an individual complainant to initiate a private lawsuit after specific actions have occurred. The employee must request a "right to sue" letter from EEOC before filing suit if any of the following conditions are met: (1) a suit is brought by EEOC or the Justice Dept. that involves the employee; (2) the EEOC dismisses the employee's charge; (3) 180 days have elapsed since the charge was filed; and (4) the complainant is not satisfied with the conciliation agreement.

Remedies Under Title VII

The remedies available to a successful plaintiff under Title VII are spelled out in Section 706(g).¹⁰⁶ Those remedies

include judicial orders requiring hiring or reinstatement of employees, awarding back pay and seniority injunctions against unlawful employment practices, and such affirmative action as may be appropriate. Section 706(k) provides that the court, in its discretion may award legal fees to a prevailing party other than EEOC or the United States.¹⁰⁷

Back Pay

As noted, Section 706(g) states that the court may award back pay to a successful plaintiff.¹⁰⁸ There are, however, some limitations on back-pay orders spelled out by that section. It provides that no back-pay order shall extend to a period prior to two years before the date of filing of a complaint with the EEOC. Section 706(g) also provides that interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back-pay otherwise allowable.¹⁰⁹ That section imposes a duty to mitigate damages upon the plaintiff. While Section 706(g) states that a court may award back-pay, it does not require that such an award always be made. The principles that guide the court on the issue of whether to award back-pay were discussed in Albermarle Paper Company vs. Moody.¹¹⁰ The touchstone of Title VII remedies was outlined by the Court to "make persons whole for injuries suffered on account of unlawful employment discrimination".¹¹¹

Remedial Seniority

In Teamsters vs. United States¹¹², the courts held that a bona fide seniority system is protected by Section 703(h), even when it perpetuates the effects of prior discrimination.¹¹³ In Frank vs. Bowman Transportation Company¹¹⁴, the Supreme Court held that remedial seniority may be awarded to the victims of prior discrimination to overcome the effects of discrimination perpetuated by the bona fide seniority system. The court stated that:

[T]he denial of seniority relief to victims of illegal employment discrimination in hiring is permissible, only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination.¹¹⁵

The granting of remedial seniority is necessary to place victims of discrimination in the position they would have been in had there been no illegal discrimination.

Legal Fees

Section 706(k) provides that the court, in its discretion may award "reasonable attorney's fees" under Title VII.¹¹⁶ The section also states that the United States or the EEOC may not recover legal fees if they prevail, but shall be liable for the cost "the same as a private person" if they do not prevail. Under the Civil Rights Act of 1991, Section 15 authorizes the recovery of reasonable expert witness fee by prevailing parties. The provision is intended to allow recovery for work

done in preparation of trial as well as after trial has begun. In exercising its discretion, the court should ensure that fees are kept within reasonable bounds. Fees should never exceed the amount actually paid to the expert, or the going rate for such work, whichever is lower.¹¹⁷

Class Actions

The rule of procedure for the federal courts to allow an individual plaintiff to sue on behalf of a whole class of individuals allegedly suffering the same harm is Rule 23 of the Federal Rules of Civil Procedure.¹¹⁸ It allows such suits, known as "class actions" when several conditions are met: (1) the number of members of the class is so numerous that it would be "impracticable" to have them individually join the suit; (2) there must be issues of the fact or law common to the claims of all members; (3) the claims of the individual seeking to represent the entire class must be typical of the claims of members of the class; and (4) the individual representative must fairly and adequately protect the interest of the class.¹¹⁹

When such conditions are met, the court may certify that suit as a "class action suit" on behalf of all members of the class. Individuals challenging employment discrimination under Title VII may sue on behalf of all individuals affected by the alleged discrimination by complying with the

requirements of Rule 23.

The EEOC need not seek certification as a class representative under Rule 23 in order to seek class-wide remedies under Title VII, according to the Supreme Court decision in General Telephone v. EEOC.¹²⁰ The EEOC, said the court, "...acts to indicate public policy and not just to protect personal interest."¹²¹

Affirmative Action

Title VII does not require employers to enact affirmative action plans, however, the courts have often ordered affirmative action when the employer has been found in violation of Title VII. The courts have consistently held that remedial affirmative action plans are plans set up to remedy prior illegal discrimination. Thus, such plans may be necessary to overcome the effects of the employer's prior illegal discrimination.

Affirmative action has been an intensely controversial concept in many areas of American life. It has been pointed out that while the ongoing debate on affirmative action regarding faculty employment is intense, it is even more controversial because it is more crowded with Federal regulations and requirements. However, the principles applied from affirmative action court cases have been applied to post-secondary institutions.

Compensatory and Punitive Damages Under Title VII

Before the Civil Rights Act of 1991, persons alleging discrimination could not recover damages under Title VII. However, a new provision under Section 102 of the Act makes compensatory and punitive damages available for intentional violations of Title VII. These compensatory and punitive damages are in addition to the equitable remedies (back pay and injunctive relief) previously available under Title VII. Section 102 provides, however, that these damages are not available in disparate impact cases.¹²² The damage provisions appear as an amendment to 42 U.S.C. § 1981, rather than as an amendment to Title VII. Section 1981 prohibits discrimination on the basis of race in the making of and enforcement of contracts. Therefore, complaining parties, including the Commission and the Attorney General, will make their claims for damages under that statute and not directly under Title VII.¹²³

Determination of Punitive Damages

A complaining party may recover punitive damages under Title VII against a respondent if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practice with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

Limitations

The sum of the amount of compensatory damages awarded under Title VII for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amounts of the punitive damages awarded under this section, shall not exceed, for each complaining party. However, there is no limitation for damage awards under 42 U.S.C. § 1981.

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201.....\$100,000;

(C) in the case of a respondent who has more than 200 and fewer than 501.....\$200,000;

(D) in the case of a respondent who has more than 500 employees.....\$300,000.¹²³

Chapter II

Summary

Historically, the federal interest in nondiscriminatory treatment in employment may have had its origins in post-Civil War laws that required equal application of the laws to all citizens. However, it was not until the passage of Title VII of the Civil Rights Act of 1964 that Congress distinctly focused on the concepts of unlawful discrimination and equal employment opportunity. The wording of Title VII reflected Congress' belief that the problems of employment discrimination was a major national concern and one that must be attacked with written principles of nondiscriminatory law. The far-reaching significance of the federal employment law was reflected in the year long bitter debates held to achieve principal agreement and eventually passage.

The passage of Title VII in 1964 signaled a momentous change in the way employers could conduct their employment practices. By its terms, Title VII prohibits discrimination against any individual based on race, color, religion, sex, or national origin. In fact, one form of employment discrimination-sex discrimination, was thrown into the bill at the last minute as a "joke", but as it has turned out, Title

VII's ban on sex discrimination has probably revolutionized employment practices more than any other Title VII prohibition.

It appeared faculty members at institutions of higher education would not reap the benefits of the most comprehensive federal law, however, when Congress began to consider amendments to the Title, it was clear from the legislative history that upon recognition of the widespread discrimination reported plaguing women and minorities, members sought to end the disparity in the application of the law. Thus, all attempts were made to end the exemption of colleges and universities as a class of employers who could pursue employment practices which were otherwise prohibited by the law. The exemption was removed in 1972, and subsequently, considered a milestone in equal employment opportunities for faculty members.

Since the passage of Title VII in 1964, the federal government and the courts have rather consistently continued to define and re-define the principles and purposes of the Act through subsequent amendments and through judicial interpretation. In view of the fact Title VII, has had such significance in defining the principles and policies of sex discrimination in higher education; an examination of the legislative history, the judicial interpretations and the procedural requirements was extremely important to this

Chapter II

Endnotes

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- 4 42 U.S.C. §§ 2000(e)-2000(e)
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- 7 Whalen and Whalen; The Longest Debate, p. 26
- 8 House Proceedings: Congressional Records. February 8, 1964, Part 2 pp 2548-2616
- 9 Ibid at 2550
- 10 Ibid at 2553
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- 21 42 U.S.C.§2000-(e)-(a)
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Chapter III

Sex Discrimination

Early Case Law

The legislative history of Title VII is unmistakable as to the legislative intent to subject academic institutions to its requirements. However, in spite of the manifest Congressional will to apply the full force of the amended Title VII to academic employment; in the decade that followed, federal courts proceeded to shield higher education from its anti-discrimination mandate.¹ The judicial reluctance to apply Title VII to academic jobs became so pronounced in the 1970's, the Court's practice came to be referred to in higher education case law as the "hands-off" policy or doctrine.

In the years preceding 1972, more charges of sex discrimination were filed against institutions of higher education than in any other industry in the country.² Sandler reported in 1973, 1 out of every 40 charges filed were against an institution of higher learning.³ Although a number of courts addressed the issues of sex discrimination in higher education employment, they were however, reluctant to hold that the hiring, promotion, tenure and merit salary decisions made by academic institutions amounted to illegal discrimination under Title VII.⁴

As early as 1974, in one of the first federal cases to address a sex-related tenure decision, Faro vs. New York University⁵, the Second Circuit Court supported that non-interventionist policy. In a precedent-setting opinion, in which many courts were to follow, the court stated:

[O]f all fields, in which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision....⁶

The majority of the courts followed the early reasoning in Faro, thus restricting judicial intervention in faculty selection, tenure and salary decisions. The courts adhered to a general rule that employment decisions of colleges and universities should be upheld by the courts, when those decisions are reached by fair procedure and supported by substantial evidence.⁷ In Green vs. Board of Regents⁸ the Fifth Circuit Court concluded:

This court is powerless to substitute its judgments for that of the university....The judiciary is not qualified to evaluate academic performance. The courts do not possess the expert knowledge or have the academic experience which should enlighten an academic committee's decisions.⁹

The decisions rendered, in effect, held that the judiciary was not the appropriate forum for the resolution of such matters,¹⁰ and that the decisions made by the university were not within the scope of judicial expertise; thus they were best left to the university decision-making.¹¹

This general insensitivity to higher education

discrimination charges was particularly evident with sex discrimination claims. The opinion written by the Judge of the Second Circuit Court in Faro, was illustrative of the insensitivity. Ridiculing both the plaintiff and her efforts, the court stated:

Dr. Faro in effect envisions herself as a modern Jeanne d' Arc fighting for the rights of embattled womanhood on an academic battleground, facing a solid phalanx of males and male faculty prejudice.¹²

The hostility of the courts to female plaintiffs alleging sex as a motive for the discrimination was more pronounced than with male plaintiffs. This observation was evident from Faro and from a reading of other reported opinions since 1974. Vladeck and Young reported in 1974 the hostility appeared to be based on three generally prevalent problems: (1) first, the court's are unfamiliar with academic employment practices; (2) second, a negative attitude generally exists towards sex discrimination cases, and (3) third, less clear, but more difficult to overcome, there is the sense that the decisions of employers are based on a desire for excellence and are made by individuals with extensive expertise.¹³ Vladeck and Young thus concluded that due to these problematic areas, the decisions were therefore immunized from challenges under the law.¹⁴

Although judicial non-intervention had been the prevailing policy with regard to academic institutions for almost a decade four years after Faro, the Second Circuit Court

in a precedent-setting case gave hope for future education litigation. In Powell vs. Syracuse University,¹⁵ citing the danger that judicial abnegation would nullify congressional policy to rectify employment bias in the academic setting, the court stated:

In recent years many courts have cited the *Faro* opinion for the broad proposition that courts should exercise minimal scrutiny of college and university employment practices. Other courts, while not citing *Faro*, have concurred in its sentiments. This anti-interventionist policy has rendered colleges and universities virtually immune to charges of employment bias at least when the bias is not expressed overtly....We fear, however, that the common sense position we took in *Faro* namely that courts must be ever mindful of relative institutional competence has been pressed beyond all reasonable limits and may be employed to undercut the explicit legislative intent of the Civil Rights Act....*Faro*, does not, and was never intended to indicate academic freedom as freedom to discriminate....We cannot shirk the responsibility placed on us by Congress....¹⁶

In Powell, the court took exception to the previous doctrines and began to relax the traditional "hands-off" policies from previous decisions. As a result of the opinion written in Powell, the court declared that because it upheld the university's decision, doesn't mean the court should never intervene in an academic institutions personnel decision.¹⁷

Nevertheless, after Powell, there appeared to be a gradual change in the attitude of the courts regarding academic discrimination charges especially sex-related claims. In 1980, in another ground-breaking higher education sex discrimination case, the First Circuit Court indicated:

[W]e voice misgivings over one theme recurrent in prior opinions; the notion that courts should keep "hands-off" the salary, promotion, and hiring decisions of colleges and universities....We caution against permitting judicial deference to result in judicial abdication of a responsibility entrusted to the courts by Congress. That responsibility is simply to provide a forum for the litigation of complaints in institutions of higher learning as readily as for other Title VII suits....¹⁸ [emphasis added]

In Kunda vs Muhlenburg¹⁹, the plaintiff alleged sex discrimination because she was not awarded tenure. The university responded that she lacked the necessary academic credentials, because she had not received her master's degree. In her trial, Kunda was able to prove that some of the men had been promoted without terminal degrees. Kunda used the faculty handbook as evidence to show that the requirements listed were a terminal degree or it's equivalent. The trial court held that the college had intentionally discriminated against Kunda because of her sex. On appeal, the appellate court upheld the trial courts decision finding that the reasons the defendants articulated at the trial-the lack of a terminal degree was not the real reasons, only a pretext for discrimination.²⁰ Of significance in this case, the court decided Kunda was subjected to intentional disparate treatment and awarded her: (1) reinstatement of her position; (2) back pay; (3) promotion to rank of assistant professor; and (4) the opportunity to complete the requirements for a master's degree and upon completion she would be granted tenure.²¹

The next early case to establish precedent in sex-related discrimination was Sweeney vs. Board of Trustees of Keene State College.²² The plaintiff Sweeney had been a professor in the Education department since 1969. She applied for tenure in 1974. She received support from the department Advisory Committee of Promotions, however, the Dean was reluctant to consider her. In his explanation for denial, he wrote this *pro forma* explanation that she had:

[N]ot fulfilled the qualifications as stated in the Faculty Manual namely that your teaching and research has not been 'marked by the perspective of maturity experience', or by some creative attribute generally recognizable in the academic world as a special asset to a faculty.²³

The Faculty Appeals Committee urged Sweeney to request more specific reasons for the adverse decision. Sweeney was then told these reasons by the Dean; (1) she personalized professional matters; (2) she was rigid; (3) she was narrow-minded; (4) inflexible; (5) intolerant of student views; and (6) old-fashioned.²⁴ Sweeney brought these reasons out in the trial.

From the beginning Sweeney sought to prove her claim of sex discrimination by the methods set out in McDonnell Douglas Corp. vs. Green.²⁵ Thus, she needed to establish a *prima facie* case of discrimination; requiring the defendant to "articulate" a legitimate nondiscriminatory reason for the adverse action. To prevail Sweeney needed to prove the reasons given were a pretext for discrimination. On remand

from the Supreme Court, the district court concluded that Sweeney had met her burden of proof:

[Sweeney] proved to my satisfaction that the basic reason for the failure to promote her was because of her sex, that the reasons advanced by the defendants were pretextual and that plaintiff would have been promoted in academic year 1974-75 but for the fact that she was a women.²⁶

Since Kunda and Sweeney, sex discrimination in higher education has been the subject of a plethora of legal literature, as well as judicial decisions. Schofeld and Zirkel reported in their empirical analysis of sex discrimination cases charged by female faculty-Title VII violations were by far the most frequently claimed and decided in higher education employment discrimination.²⁷ They concluded the use of Title VII was attributable to its broad employment scope, which covers virtually all adverse institutional actions.²⁸

The analysis of the case law presented in this Chapter is designed to provide information on the employment practices of institutions of higher education. The analysis is not to serve as an unerring guide, but as a compendium of instances in which institutional procedures and practices were scrutinized by the courts, and a legal standard was adopted. However, administrators should keep in mind, the courts are not arbitrators of standards for professional practices in higher education, but the judicial opinions only serve to contribute to an understanding of what constitutes legally sound, fair

and reasonable policy in cases involving sex discrimination.²⁹

Hiring

Many employers, in particular, higher education institutions rely on objective criteria to select persons for hiring. The most common objective criteria in higher education faculty employment is educational level, experience, and performance. In addition, the court has decided a university has the right to maintain high standards of competence and to demand that each of its faculty members has an ability to teach, to relate to students and to otherwise manage their classes.³⁰ The Fourth Circuit Court in Kovich vs. Mansfield College³¹ also decided educational institutions may impose certain requirements with respect to the employment of faculty in order to maintain accreditation.³²

Under the Equal Employment Opportunities Subchapter of the Civil Rights Act of 1964,³³ the general principles concerning disparate impact are applicable to educational requirements imposed by an employer; and educational requirements with a disparate impact are illegal unless they are justified by business necessity.³⁴ College degrees, doctorates and other educational prerequisites have been sustained as job related for college instructors. In Campbell vs. Ramsey³⁵ the Eighth Circuit Court held that the

doctorate requirements were justified by business necessity. Campbell filed a sex discrimination suit claiming the doctorate degree requirement had a disparate (adverse) impact on women. Although she was able to demonstrate the requirements did have an adverse impact on the women at the university, the court held it was justified by business necessity. In making its decision, the court addressed the concept of business necessity in an academic setting:

Mrs. Campbell was an excellent teacher, and a Ph.D could not have taught her courses any better than she she did. Those courses were mainly freshman level, and included many students without much background in Mathematics. In this sense, it was not "necessary" to replace her with a Ph.D. If she had been kept on the students in her courses would not have been hurt, and the University would still be standing. The concept of business necessity, however, is not so narrow....A Ph.D can teach the same course plaintiff did and more. The department gets greater flexibility in faculty assignments, hiring a teacher with a doctorate. In addition, it's prestige and drawing power are increased among it's members. As Dr. Mary Jane Gates, a member of the UALR department of Math testified, a Ph.D is necessary to be "competitive" in the academic world....³⁶ [emphasis added]

As adequately demonstrated in similar sex discrimination cases, the Ph.D as an educational requirement for hire and advancement beyond the assistant professorship has been held by the courts as a business necessity.³⁷

Tenure

In higher education institutions, tenure has been defined as a faculty appointment for an indefinite period of time.

Once the tenure status is granted (usually after a probationary period) it protects the faculty member from dismissal, except for serious misconduct or incompetence. Upon granting tenure, the university is making a commitment for employment, which is normally expected to continue until retirement.

Eligibility for tenure at some institutions of higher education is governed by statutes. In 1940, the Association of American Colleges and the American Association of University Professors agreed upon a Statement of Principles on Academic Freedom and Tenure. In regards to tenure, in part it states:

(a) After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their services should be terminated only for adequate cause, except in the case of retirement for age or under extraordinary circumstances because of financial exigencies.³⁸

In the interpretation of this principle it is understood that the following represents acceptable academic practice:

(1) The precise terms and conditions of every appointment should be stated in writing and be in the possession of both institution and teacher before the appointment is consummated.

(2) Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period should not exceed seven years, including within this period full-time service in all institutions of higher education, but subject to the proviso that when-after a term of probationary service of more than three years in one or more institutions-a teacher is called to another institution, it may be agreed in writing that his new appointment is for a probationary period of not more than

four years, even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years. Notice should be given at least one year prior to the expiration of the probationary period if the teacher is not to be continued in service after the expiration of that period. ³⁹

Procedures for granting tenure vary significantly from institution to institution. The typical criteria for granting tenure is: (1) terminal degree; (2) teaching effectiveness; (3) research and publications ;(4) professional activities; (5) service to the academic community; and (6) participation in community affairs associated with the members area of professional competence.⁴⁰ Grounds for challenging tenure decisions will vary. When tenure litigation is initiated, the question usually before the court is not whether the tenure decision of the university is correct, but whether procedural violations have incurred. For many years the federal circuit courts have been split on the issues of whether plaintiffs can challenge subjective hiring and promotion criteria under the disparate impact theory first articulated in Griggs vs. Duke Power Co.⁴¹ The U.S. Supreme Court ruled that plaintiffs may challenge subjective practices under this theory in Watson vs. Fort Bank and Trust Co.⁴² Under Watson, a class of faculty denied promotion or tenure could attack the subjective criteria often used to make these decisions, such as "excellence" in teaching.⁴³ The most challenged cases are usually based on specific and objectively established procedural deficiencies, such as failure to timely terminate a

probationary employee prior to attaining tenure. Beyond these types of claims, faculty members otherwise are compelled to maintain the decision was arbitrary and capricious.⁴⁴

In Lieberman vs. Gant,⁴⁵ the plaintiff, Lieberman bought suit against the university for the denial of tenure after teaching in the English Department in a non-tenured status for a probationary period of six years. She alleged the decision not to promote her to a tenured position was made in retaliation for her political activities on the behalf of women, and that it was motivated by sexual bias and was carried out in contravention of the procedures prescribed by the University for evaluating faculty members.⁴⁶

The defendant university claim she was denied tenure because of the perceived deficiencies in her scholarship. The evidence presented proved the decision to refuse tenure to the plaintiff was made in good faith and in conformance with the appropriate procedures and was not infected with sexual or political bias.⁴⁷ Although the case involved multiple allegations from the plaintiff, the court found that the plaintiff failed to meet her burden of proof as to any of the allegations. The court also stated that a decision about tenure is subjective and what is close to a life-long commitment by a university affords institutions discretion.⁴⁸

In Rajender vs. University of Minnesota⁴⁹ the plaintiff

Rajender was denied a tenure track post in Chemistry Department at the University of Minnesota in 1973. She filed a suit alleging sex discrimination that was eventually certified as a class action. The facts in the case are as follows: When Rajender applied for a tenured position at the university, the department was recruiting to fill nine positions. The search produced 150 applicants. Of the 150, 13 were interviewed, and only 2 were women. The department hired 5 of the applicants. Rajender was ranked by the department as only suitable for a temporary position.⁵⁰ However, Rajender had been sought after by other universities, because of the number of women graduated with chemistry degrees in the United States.

Rajender began to research the hiring practices at UM and found in the 102-year history of the department, only 1 woman had been tenured, and this was in the 1940's during World War II.⁵¹ She also found similar hiring practices existed in other departments on the campus. Rajender overheard a conversation at lunch in which one of her male colleagues commented: "...hiring a woman would ruin the departments' image....lower the department's quality...."⁵²

It was also during this time UM had embarked on an affirmative action campaign to hire more women and minorities to achieve a reasonable balance.⁵³ The Chairman of the Chemistry Department responded to the campaign with this

statement:

[I]n the face of the situation in Chemistry, where so few applications are received from women, and after broadcasting of existence of these positions, we do not see where we can take any further affirmative action.⁵⁴

Rajender eventually requested a right-to-sue letter from EEOC and through investigation a class action suit was initiated. The investigation found the university guilty of sex discrimination and ordered the university placed under a consent decree until 1989.⁵⁵ The court imposed a quota for hiring women, and appointed a special master to resolve all past and future sex discrimination grievances at the university. The master was empowered to award cash damages and faculty positions, including tenured post. Rajender was awarded a \$100,000 settlement.

This case has significance for many reasons. LaNoue and Lee commented the case has had an enormous impact not only on UM, but on academic discrimination law. Since the Rajender case, similar class action sex discrimination cases have been initiated, for example, Craik vs. Minnesota State University⁵⁶, in which women faculty won salary and promotion issues for all the regional public institutions in the University of Minnesota system.⁵⁷ In Lamphere vs. Brown University,⁵⁸ an unsuccessful female candidate for a chaired faculty position charged that she was denied the position because the selection criteria discriminated against women.

The selection committee rated the plaintiff as unsuitable in part because she had never held a tenured position at a major university. The plaintiff filed suit for sex discrimination, using data demonstrating that fewer women than men held tenured faculty positions. Brown University was placed under a consent decree to increase the number of female tenured senior faculty as a result of this case. And finally, a \$7.5 million settlement was signed between the members of the female class action suit and the City University of New York in 1984 for sex discrimination.⁵⁹ In all of the consent decree cases, the Rajender case was cited as influencing the courts decision.

In the case of Lynn vs. Board of Regents⁶⁰, Lynn a specialist on the influence of women in the development of French literature was denied tenure and sued claiming sex discrimination. The district court dismissed her charge on the grounds that the university had articulated legitimate and nondiscriminatory reasons for the decision. However, the court of appeals ruled that Lynn had in fact established a *prima facie case* of sex discrimination and that the university had withheld documents from her that were pertinent to the case.⁶¹ The court stated: "...A disdain for women's issues, and a diminished opinion of those who concentrate on those issues, is evidence of discriminatory attitudes towards women...."⁶²

Accordingly in Zahorik vs. Cornell University⁶³ this case

involved a suit by four female professors who alleged they were denied tenure because of their sex. In this case the court articulated five factors in which they felt distinguished tenure decisions from other employment decisions, thus making Title VII tenure claims difficult to establish and review:

- (1) The lifelong commitment by the university that tenure entails accentuates the importance of colleague-ship among professors.
- (2) Tenure decisions are often non-competitive. An award of tenure to one individual does not necessarily preclude the tenure of another, whereas in other areas of employment a decision to hire one person means a decision not to hire another.
- (3) Tenure decisions are unusually decentralized and there is greater deference given to the department's position than in most employment decision making processes.
- (4) There are numerous factors that a school considers in tenure deliberations that are peculiar to the university setting.
- (5) Tenure decisions are often a source of unusually great disagreement, and because opinions of a candidate are solicited from students, faculty members and outside persons, tenure files are frequently composed of irreconcilable evaluations.⁶⁴

After articulating these factors, the court expressed its reluctance to review the merits of tenure decisions. However, the court said that it would ensure that any reason asserted by the University for denying the plaintiffs tenure was not merely a pretext for discrimination; and to also scrutinized Cornell's decision procedures and methods, to ensure that they were not inherently discriminatory.⁶⁵

In another case Hooker vs. Tufts University⁶⁶, Hooker was

denied tenure and sued on the grounds of sex discrimination. The university alleged she was denied tenure because she lacked the degree of scholarship and teaching aptitude necessary for tenure.⁶⁷ Hooker claimed she was denied tenure because of a new undisclosed policy of the administration to limit or cease tenure in the Physical Education Department. The court initially stated that Hooker failed to establish a *prima facie case* of discrimination under Title VII.⁶⁸

However, instead of dismissing her claim, the court scrutinized the university's asserted reasons for denying her tenure to ensure that they were not a pretextual mask for discrimination.⁶⁹ During the opening statement, the court stated that it was neither appropriate nor necessary for it to make an independent evaluation of the plaintiff's qualifications for tenure....it's task was to examine the school's evaluation of the plaintiff and to discern whether it was both procedurally fair and substantially reasonable.⁷⁰ The court additionally suggested that in analyzing the reasonableness of the university's action, the court would give university decision makers latitude in exercising their professional judgment.⁷¹

In applying the above principles to the facts of the case, the court determined that Hooker lacked scholarship and teaching ability for tenure and rejected her defense of comparison of her qualifications with those of a male athletic

coach who had been granted tenure.⁷² Ironically in this case, the Physical Education Department and a subcommittee of the university's tenure review body recommended her for tenure, but the dean, provost and president recommended that she be denied tenure.⁷³

In another sex-related tenure decision, Langland vs. Vanderbilt University⁷⁴ the English Department after some disagreement over whether Langland's scholarship was competent, voted 15-5 to recommend her for tenure. Vanderbilt required a tenure candidate to demonstrate teaching, scholarship, and service to be qualified for tenure.⁷⁵ Two professors dissented and the Dean expressed reservations over her scholarship. The Dean invited members of the English Dept. to respond to his concerns, but despite the positive responses, he formally refused to concur in the department's tenure recommendations.⁷⁶

Langland alleged the dean's decision was sexually biased and that he evaluated her scholarship by a "stricter standard" than applied to other candidates. The court rejected this claim, on the basis of the outlined standards of merit necessary to award tenure at Vanderbilt.⁷⁷ The court decided that it was proper to defer to the opinions of those who drafted the standards, namely the dean, regarding the method of its application.⁷⁸ The dean ranked the number and quality of works accepted for publication to measure the amount of

competent scholarship produced. The court accepted the method as proper, but because of the university's subjective criteria for competent scholarship, the court reviewed nine tenure files presented by Langland for comparison, to prove the Dean's decision was sex-biased.⁷⁹ The court did not find any discrepancies that indicated that the dean evaluated the plaintiff's tenure file under a more rigorous standard than the others.⁸⁰ In addition, the court rejected Langland's claim that the dean had demonstrated his sex-bias by giving less weight to her scholarship in the field of women's studies.

In another case, Brown vs. Trustees of Boston University.⁸¹ Brown was an Assistant Professor of English at Boston University. She received a unanimous recommendation from her department and positive recommendations from outside evaluators, however, she was denied tenure by the University President. She filed charges for denial of tenure on the basis of sex discrimination. The court noted that her peers had judged her to be qualified and that the President's sexist remarks about the English Department showed evidence of gender bias.⁸² The university raised the case of academic freedom to challenge the court's award of tenure on the basis that it infringed upon the First Amendment Right to determine who may teach. The appellate court denied that awarding tenure violated the institutions' academic freedom noting that "... the First Amendment could not insulate the university against

civil rights violations."⁸³

The issue of when, or whether, it is appropriate for a court to order tenure as a remedy for discrimination was first addressed in Kunda. Since Kunda, there have been several decisions with different opinions. Two U.S. Court of Appeals for the Sixth Circuit while ruling in favor of the plaintiffs claiming sex discrimination in tenure and reappointment decisions, refused to reinstate the plaintiffs with tenure. In the first case, Gutzwiller vs. Fenik⁸⁴ the court remanded the issue of reinstatement to the district court noting: "...court-awarded tenure should be provided in only the most exceptional cases....only when the court is convinced that a plaintiff reinstated to her former faculty position could not receive fair reconsideration of her tenure application."⁸⁵ The district court, awarded Gutzwiller back pay, reinstated her without tenure for the 1989-90 academic year and ordered that a new tenure review be conducted under the court's supervision within the next year.⁸⁶ The judge also ordered that the plaintiff be given front pay for 1989-90 at the level she would have received had she received tenure during the 1983-84 academic year. The university conducted a tenure review during the 1989-90 academic year and awarded Gutzwiller tenure.

In the second case, Ford vs. Nicks⁸⁷ the court reversed a trial court's award of reinstatement as a tenured full

professor. The plaintiff argued that only reinstatement as a tenured full professor would make Ford whole, the goal of Title VII remedies. The Sixth Circuit Court disagreed with that argument, stating her limited teaching experience, and therefore no judgment could be made as to her qualifications for tenure much less for full professor. The appellate court remanded the case to the trial court, citing Gutzwiller, with instructions that "...reinstatement with tenure should be reserved for exceptional cases."⁸⁸

Plaintiffs charging sex discrimination in a tenure related decision often request the right to present the files of other faculty members who did receive promotions or tenure during the same year or earlier. The issue has been addressed in many courts and the decisions had been inconsistent. For example in Jackson vs. Harvard University⁸⁹ the judge denied access to files of faculty, stating: "...the academic unit was, in effect, the employer for discovery purposes...." Similarly, in Rosenburg vs. University of Cincinnati,⁹¹ the court ruled that the decentralized personnel decision-making system at the university negated the plaintiffs' claim that the university-wide class certification in the sex discrimination lawsuit was appropriate. In its finding the court said, that the department was the employer and its recommendations on the merits of faculty performances were deferred to their better judgment.

However, the right of an institution or a faculty member to protect confidential peer evaluation information has been sharply limited by a Supreme Court ruling. In University of Pennsylvania vs. EEOC⁹², the court denied that either the First Amendment or a common law "academic freedom privilege" permitted the University to withhold from a plaintiff alleging sex discrimination in a tenure denial the confidential peer evaluations for her and five male faculty.⁹³

In this case the university denied tenure to a female Asian-American associate professor. She filed a complaint with EEOC, alleging that she was a victim of discrimination on the basis of sex, national origin and race. She also charged that her department chair had sexually harassed her, and after she declined his advances, he wrote a negative letter for the committee which denied her tenure. A majority of the faculty in the department supported her application for tenure and claimed her scholarly qualifications were equal or superior to five male faculty members who received equal or superior treatment.⁹⁴

She further alleged that although she had been given a reason for the committee's denial of tenure, she learned that its decision was based on the grounds that "... The Wharton School is not interested in China-related research...."⁹⁵ She alleged that this statement constituted a pretext for discrimination, and that the committee was actually stating

that they did not want a Chinese-American, Oriental, woman in their school.⁹⁶

During the investigation EEOC requested the release of tenure review materials for the plaintiff and five male faculty members. The university refused and EEOC issued a subpoena. After the university continued to withhold the subpoenaed materials, EEOC sought enforcement from the US District Court.⁹⁷ On appeal the Third Circuit Court affirmed the district court's enforcement order, relying upon an earlier opinion in EEOC vs. Franklin and Marshall College⁹⁸. In Franklin and Marshall, the court rejected the university's claim that policy considerations and first amendment principles of academic freedom required the recognition of a qualified privilege or the adoption of a balancing test which would require the EEOC to demonstrate some particularized need, beyond a showing of relevance, to gain access to confidential peer review materials.⁹⁹

The university then requested a *writ of certiorari*. The Supreme Court accepted the case because of the importance of the compelling disclosure issue, and to resolve the disparate results in the other circuits courts.¹⁰⁰ Justice Harry Blackmon writing for a unanimous court noted that:

"... Title VII contained no language excluding peer evaluations from discovery, and the EEOC's need for relevant information was not diminished simply because the defendant in

the case was a university....We are not so ready as petitioner seems to be to assume the worst about those in the academic community. Although it is possible that some evaluators may become less candid as the possibility of disclosure increases, others may simply ground their evaluations in specific examples and illustrations in order to deflect potential claims of bias or unfairness. Not all academicians will hesitate to stand up and be counted when they evaluate their peers."¹⁰¹

Salary

The subject of salary equity for female college faculty has spawned quite a bit of controversy and litigation in the courts. Salary decisions like hiring, promotion and tenure decisions are subject to the same evaluation of faculty to determine a starting salary or salary increases. These decisions are often based upon subjective evaluations of performances or upon abstract notions of what a person trained in a certain discipline is "worth" in a marketplace.¹⁰² Hendrickson and Lee commented, unlike decisions about promotion or tenure, however, where administrators and faculty at many colleges have recognized the need for consistent and carefully documented procedures; the procedures used to make salary determinations are frequently unwritten, ad hoc, and inconsistent from one department to

another and from one year to the next.¹⁰³

Female faculty members that alleges discrimination in salary on the basis of sex may seek redress under Title VII and the Equal Pay Act of 1963.¹⁰⁴ However, Title VII's protections are broader than those of the Equal Pay Act, thus most claims are filed under Title VII. The plaintiff alleging salary discrimination on the basis of sex under Title VII need not prove that she performs identically equal work, as required by the Equal Pay Act. Under Title VII, a plaintiff may succeed in her claim if she can demonstrate that the job used for comparison is comparable. Furthermore, under Title VII, she must establish a prima facie case that provides evidence that the discrimination was the real intent for the difference in salary; thus requiring the defending university to prove that the salary difference is a result in discrimination. In Grace Vs. Board of Trustees for State College,¹⁰⁵ the court decided it is within the sound discretion of university officials to determine the amount of merit increases it pays a faculty member.¹⁰⁶ In Keyes vs. Lenoir Rhyne¹⁰⁷, although the plaintiffs offered evidence to show that, despite comparable degrees and experience, women received less pay than men. The college advanced various reasons for the individual differences, and the court accepted those reasons as nondiscriminatory.¹⁰⁸ Another court ruled that a university's defense for salary differences among faculty were based on

personal evaluations and differences in experience and credentials.¹⁰⁹

However, in Marshall vs. Georgia Southwestern College¹¹⁰, the court ruled that Georgia Southwestern had discriminated against six women faculty members on the basis of sex in salary related decisions. The university's defense was that salary disparities were due to differences in merit and differences in supply and demand for specialist in different fields. The judge responded to the university's defense by ruling that "... mentally and physically the effort required of all teaching faculty members is substantially the same."¹¹¹

In Spaulding vs. Washington¹¹² the Ninth Circuit Court of Appeals ruled that using "market factors" to set wages for jobs which attract predominantly women or men does not violate Title VII under either the disparate treatment or disparate impact.¹¹³ In Spaulding, a group of nursing faculty charged that the fact that their pay was less than that of faculty in comparable disciplines constituted sex discrimination. The appellate court affirmed the lower court decision that the salary setting practices of the University of Washington, although they did result in lower salaries for nursing faculty, were not illegal. Furthermore, the court noted that the nursing faculty was probably underpaid, but it was only unfair not unlawful.¹¹⁴

In Ottaviani vs. SUNY¹¹⁵ this Title VII sex

discrimination in salary suit was brought by the full-time academic rank female faculty members at the State University of New York. The plaintiffs alleged that between 1973 and 1984, the University discriminated against female faculty members on the basis of gender in three categories: (1) placement in initial faculty rank at the university; (2) promotion into higher rank; and (3) salary. The plaintiffs used a statistical multiple regression analysis in an attempt to prove that females were placed at lower academic rank and promoted slower than their male counterparts. They presented a salary study to demonstrate the differences in salaries between males and females. The statistical study incorporated the following variables: (1) number of years of full time teaching experience prior to hire; (2) number of years teaching experience in academic rank at the University; (3) possession of a doctorate degree; (4) number of years since obtaining the doctorate degree; (5) number of publications; and (6) other experiences prior to hire at the University.

The burden of persuasion was on the plaintiffs to prove by a preponderance of the evidence that there was a pattern or practice of discrimination at SUNY. The plaintiffs failed to meet that burden, and the court found their case was without merit. On appeal, the U.S. Court of Appeals for the Second Circuit held that the ruling was not clearly erroneous; that even though the plaintiffs evidence was persuasive, it was not

dispositive.¹¹⁶

Nonetheless, several women alleging sex discrimination in pay were successful. In Denny vs. Westfield¹¹⁷ the court cited the plaintiffs evidence of intentional salary discrimination as well as the defendants inability to explain the salary discrepancies on the basis of rational criteria such as discipline performance and market factors were the main reasons for its decision.¹¹⁸

Summary of Cases

<u>Year</u>	<u>Case</u>	<u>Plaintiff Issue</u>	<u>Winning Party</u>
1971	Green vs. Board of Regents	Tenure	University
1973	Faro vs. New York University	Tenure/Promotion	University
1976	Keyes vs. Lenoir Rhyne	Salary	University
1977	Lamphere vs. Brown University	Tenure	Plaintiff
1977	Keddie vs. Univ. of Pennsylvania	Tenure/Promotion	University
1978	Sweeney vs. Bd. of Trustees of Keene State	Tenure	University
1978	Rajender vs. Univ. of Minnesota	Tenure/Promotion	Plaintiff
1978	Kunda vs. Muhlenburg College	Tenure	Plaintiff
1978	Powell vs. Syracuse University	Tenure	University
1979	Ottaviani vs. SUNY (New Paltz)	Salary/Other	University
1979	Fisher vs. Flynn (Bridgewater College)	Sex Harassment	University
1979	Smith vs. University of North Carolina	Tenure	University
1980	Marshall vs. Georgia Southwestern College	Salary	Plaintiff
1980	Campbell vs. Ramsey (Univ. of Arkansas)	Tenure/Promotion	University

<u>Year</u>	<u>Case</u>	<u>Plaintiff Issue</u>	<u>Winning Party</u>
1980	Lieberman vs. Gant (Univ. of Connecticut)	Tenure	University
1981	Denny vs. Westfield State College	Salary	University
1981	Lynn vs. Board of Regents (Univ. of Calif.)	Tenure	Plaintiff
1982	Spaulding vs. University of Washington	Salary	Plaintiff
1983	Zahorik vs. Cornell University	Tenure	University
1983	Hooker vs. Tufts University	Tenure	University
1984	Craik vs. Minnesota State Univ.	Tenure	Plaintiff
1984	Langland vs. Vanderbilt University	Tenure	University
1984	Ford vs. Nicks	Tenure	Plaintiff
1986	Rosenburg vs. University of Cincinnati	Tenure	University
1986	Jackson vs. Harvard University	Tenure	University
1986	EEOC vs. Franklin and Marshall	Salary	Plaintiff
1987	Grace vs. Bd. of Regents	Salary	University
1988	Gutzwiller vs. Fenik	Tenure	Plaintiff
1990	Brown vs. Trustees of Boston University	Tenure	Plaintiff
1990	University of Pennsylvania vs. EEOC	Salary/Peer Review Records	Plaintiff

Chapter III

Summary

The addition of "sex " as a protected class under Title VII in 1964 and the subsequent Equal Employment Opportunity Act of 1972 can be considered a milestone in equal employment opportunity law for women in academia. In the past two decades the number of women in higher education has increased significantly. Just as well, the number of allegations and charges of sex discrimination has increased. While initially the courts tried to ignore the Congressional mandate of the 1972 amendments; it is clear two decades later the courts are willing to scrutinize the employment decisions of higher educational institutions with the same forcefulness as business and industry.

Women faculty members are taking their employing institutions to courts on a variety of sex discrimination related issues. However, a review of the case law indicate there are three areas in which women faculty are alleging a higher degree of discrimination. They are: (1) hiring, (2) tenure decisions, and (3) salary. The review of the case law indicates that while it is generally understood that a university may use subjective and objective criteria in making employment decisions, such criteria cannot not be used to shield the university from the reach of Title VII. In

addition, such criteria cannot be used as a "pretext for discrimination", when the person's sex is really at issue.

Although women are taking their employing institutions to court in increasing numbers, they also carry a heavy burden to prove the existence of discrimination. For administrators it may well be that understanding the implications of Title VII and judicial decisions resulting from sex discrimination allegations and charges will prove essential in their efforts to ensuring nondiscriminatory hiring, tenure and salary procedures and policies. If not the result, may be some external forces making internal personnel decisions.

Chapter III

Endnotes

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Chapter IV

Sexual Harassment

Introduction

As early as 1972, women began trying to use Title VII as a means of obtaining redress for sexual harassment by a superior, that resulted in the termination of employment.¹ However, it was not until 1975, that this form of sex discrimination was given a name.² After a series of initial defeats, sexual harassment that negatively affected the terms and conditions of a woman's employment was recognized by the courts as sex discrimination in employment.

It took five years to win legal recognition of sexual harassment as employment discrimination. After the first victories, which provided protection from the most generally understood manifestation of sexual harassment-termination of employment opportunities for refusing to accede to a supervisor's sexual demands; the legal definitions of what constitutes impermissible sexual harassment expanded at a rapid pace.³ Consequently, in 1980, EEOC issued guidelines intended to reaffirm that sexual harassment was unlawful employment discrimination, and to clarify the nature and extent of the employer's responsibility for eradicating it in the workplace.

The principles developed for dealing with sexual harassment in the workplace equally apply to sexual harassment in the academic setting. As sexual harassment at colleges and universities gain more widespread attention and legal recognition; university administrators must develop means to address the problems on their campuses.

Early History

In 1975, the issue of sexual harassment began to emerge publicly. It was during this time women's groups began to make it clear they considered sexual harassment to be discrimination as much as systematic denial of promotions to women or giving women lower pay than men doing similar jobs. Using this argument, women's groups attempted to establish that sexual harassment was a violation of Title VII's ban on sex bias in employment. In the beginning, they met with little success in the lower courts. In Corne vs. Bausch and Lomb,⁴ the first reported sexual harassment case under Title VII, the plaintiffs alleged they were forced to resign their positions because their supervisors verbal and physical sexual advances made their jobs intolerable. They also claimed that other women who complied with the supervisor's demands, enjoyed enhanced employment status.⁵ The court dismissed the action on the basis that the plaintiffs had failed to state a claim under Title VII noting: "... that discriminatory conduct in

other Title VII sex discrimination cases arose out of company policies, rather than the 'personal proclivity', 'peculiarity' or 'mannerism' of a supervision." ⁶

Similar in Williams vs. Saxbe,⁷ the plaintiff alleged she was terminated in retaliation for her refusal to submit to the sexual advances of her supervisor. On the grounds that submission to the sexual advances was an artificial barrier placed before female employees, the plaintiff stated a claim of sex discrimination under Title VII. The defendant argued that the issue involved an isolated personal incident that should not be of concern to the court.⁸ However, on that argument, the court ruled that because such submission to the supervisor was exclusively placed before one gender and not the other, the conduct violated Title VII.⁹ Nonetheless, the court took no action under Title VII in Williams.

In 1977, the legal tide began to turn. That year saw the first federal court ruling articulating Title VII does protect female employees from retaliation for rejecting sexual advances from supervisory personnel.¹⁰ The DC Circuit Appeals Court ruled in Barnes vs. Costle,¹¹ that an employer violated Title VII when one of its supervisors abolished a female subordinates job because she refused to sleep with him.¹² The court concluded the plaintiff had been sexually harassed in violation of Title VII; and stated:

But for her womanhood....her participation in sexual activity would never have been solicited. To say, then, that she was victimized in her employment simply because she declined the invitation is to ignore the asserted fact that she was invited only because she was a women subordinate to the inviter in the hierarchy of agency personnel. Put it another way, she became the target of her supervisor's sexual desires because she was a woman and was asked to bow to his demands as the price for holding her job. The circumstances imparting high visibility to the role of gender in the affair is that no male employee was susceptible to such an approach by appellant advocates, and that formulation advances a prima facie case off sex discrimination within the purview of Title VII.¹³

Conte commented the court in Barnes drew from the legislative history of the 1972 amendments to the Civil Rights Act of 1964 and Title VII precedents to conclude that the alleged conduct was discrimination based on sex.¹⁴

However, in a subsequent case after Barnes, Saxbe and Corne, namely, Tomkins vs. Public Service Electric & Gas Co.¹⁵ another plaintiff faced the choice between submitting to sexual advances or suffering adverse job consequences. The district court found that sexual harassment and sexually motivated assault do not constitute sex discrimination under Title VII. The court stated:

Title VII was enacted in order to remove those artificial barriers to full employment which are based on unjust and long-encrusted prejudice.... It is not intended to provide federal tort remedy for what amounts to physical attack motivated by sexual desire on the part of a supervisor and which happened to occur in a corporate corridor rather than in a back alley....While sexual desire animated the parties, or at least one of them, the gender of each

is incidental to the claim of abuse. Similarly, the pleadings in this case aver that the supervisor's advances were spurned. Had they been accepted, however, and plaintiff thereby preferred, could co-workers be heard to complain in federal court as well? It is clear that such a claim is simply without the scope of the Act. The abuse of authority of supervisors of either sex for personal purposes is an unhappy and recurrent feature of our social experience. Such conduct is frequently illegal under the penal statutes of the relevant jurisdiction. Such conduct might well give rise to a civil action in tort. It is not, however, sex discrimination within the meaning of Title VII even when the purpose is sexual.¹⁶

The Court of Appeals, however, reversed the district court's ruling, finding that because the employee's "status as a female was the motivating factor in the supervisor's conditioning her continued employment on compliance with his sexual demands, *quid pro quo* sexual harassment had occurred."¹⁷

We conclude that Title VII is violated when a supervisor, with the actual or constructive knowledge of the employer, makes sexual advances or demands toward a subordinate employee and conditions that employee's job status-evaluation, continued employment, promotion, or other aspects of career development-on a favorable response to those advances or demands, and the employer does not take prompt and appropriate remedial action after acquiring such knowledge. We do not agree with the district court that finding a Title VII violation on these facts will result in an unmanageable number of suits and a difficulty in differentiating between spurious and meritorious claims. The congressional mandate that the federal courts provide relief is strong; it must not be thwarted by concern for judicial economy. More significantly, however, this decision in no way relieves the plaintiff of a burden of proving the facts alleged to establish the required elements of a Title VII violation. Although any theory of liability may be used in vexatious or bad faith suits, we are confident that traditional judicial mechanisms

will separate the valid from the invalid complaints.¹⁸

The Tompkins case established a two-part analysis for sexual harassment claims: (1) that a term or condition of employment has been imposed; and (2) that it has been used by the employer, either directly or vicariously in a sexually discriminatory fashion.¹⁹

In 1979, on appeal, the Ninth Circuit Court in Miller vs. Bank of America²⁰, was the first court to impose liability on employers for sexual harassment, thus extending on various variations of previous decisions. In the district court, the plaintiff Miller alleged her supervisor promised her a better job if she would be sexually cooperative. She was fired when she refused his advances. She charged that the Bank of America in policy and in practice permitted men in supervisory positions, in particular her supervisor, to demean women's dignity, and that his sexual advances were a part of this pattern."²¹ In defense, The Bank of America claimed that it had a policy expressly condemning this type of misconduct. In this courts opinion: "...the existence of such a policy undercut employer responsibility for the incident, especially since the plaintiff had neither complained nor requested an investigation under the existing policy...."²² The district court dismissed the complaint on the basis the employers company policy did not impose or permit a consistent, as distinguished from isolated, sex-based claim on a definable

employee group.²³

However, on appeal, the Ninth Circuit reversed the district court decision, holding that even though the supervisor's conduct allegedly violated bank policy, the bank was liable for the alleged conduct. The court stated:

Title VII and § 1981 define wrongs that are a type of tort, for which an employer may be liable. There is nothing in either act which even hints at a congressional intention that the employer is not liable if one of its employees, acting in the course of his employment, commits the tort. Such a rule would create an enormous loophole in the statutes.... We conclude that respondeat superior, does apply here, where the action complained of was that of a supervisor, authorized to hire, fire, discipline or promote, or at least to participate in or recommend such actions, even though what the supervisor is said to have done violates company policy.²⁴

EEOC Guidelines

After Miller, which affirmed the legal position that sexual harassment in employment violates Title VII, the EEOC published guidelines on sexual harassment. The guidelines were intended to reaffirm that sexual harassment was an unlawful employment practice and to clarify the nature and extent of the employer's responsibility for eradicating it in the workplace.

Although EEOC guidelines generally do not have force of the law, the Supreme Court has said that they are "...entitled to great deference...."²⁵ The portion of the Guidelines on Discrimination Because of Sex that deals with sexual harassment specifically states:

1604.11 Sexual Harassment

(a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and the totality of the circumstances, such as as the nature of the sexual advances and the context in which the alleged incidents occurred, The determination of the legality of a particular action will be made from the facts, on a case by case basis.

(c) Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization [hereinafter referred to as "employer"] is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual in determining whether an individual acts in either a supervisory or agency capacity.

(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

(e) An employer may be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

(f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual

harassment from occurring, expressing strong disapproval, developing appropriate sanctions, informing employees of their rights to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

(g) Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.²⁶ (Complete text in Appendix D)

The issue of liability was very inconsistent with the courts after Miller. However, in 1981, the DC Circuit Court rendered a landmark sexual harassment opinion in Bundy vs. Jackson.²⁷ The Court held that the victim of sexual harassment need not lose a tangible job benefit nor be forced to resign in order to obtain protection from Title VII. In Bundy, the plaintiff charged that several supervisors made continued sexual advances and propositions. Her complaints were ignored and eventually she received poor work performance evaluations, thus blocking her bid for promotion. The court concluded that a discriminatory work environment violates Title VII. The court noted its opinion was drawn from other Title VII precedents set in racial, religious, and national origin cases relative to "discriminatory environment".

[P]oisoning the atmosphere of employment violates Title VII....and creates Title VII liability.... especially when the employer takes no employment action against a non-compliant employee.²⁸

Although Bundy provided expansive legal precedent for liability determination, it was nevertheless, in 1982 the

Eleventh Circuit Court who provided the analytical framework for hostile environment sexual harassment determinations. In Henson vs. Dundee²⁹ the plaintiff alleged she resigned under duress, because the Police Chief had subjected her to sexual harassment, creating a hostile and offensive working environment.³⁰ The court held that under certain circumstances, "...the creation of an offensive hostile work environment due to sexual harassment can violate Title VII irrespective of whether the plaintiff suffers tangible job detriment."³¹ The court stated:

Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets. A pattern of sexual harassment inflicted upon an employee because of her sex is a pattern of behavior that inflicts disparate treatment upon a member of one sex with respect to terms, conditions, or privileges of employment. There is no requirement that an employee subjected to such disparate treatment prove in addition that she has suffered tangible job detriment.³²

The court modified the traditional *prima facie* elements to require in a claim:

- (1) The employee was a member of a protected group.
- (2) The employee was subjected to unwelcome sexual advances.
- (3) The harassment was based on sex.
- (4) The harassment affected a "term, condition, or privilege" of employment.

- (5) The harassment was either actively or constructively known by the employer who failed to take prompt remedial action.³³

The court explained the difference in liability between quid pro quo and hostile environment actions:

The environment in which an employee works can be rendered offensive in an equal degree by the acts of supervisors, co-workers, or even strangers to the workplace. The capacity of any person to create a hostile or offensive environment is not necessarily enhanced or diminished by any degree of authority which the employer confers upon that individual. When a supervisor gratuitously insults an employee, he generally does so for his own reasons and by his own means. He thus acts outside the actual or apparent scope of the authority he possesses as a supervisor. His conduct cannot automatically be imputed to the employer any more than can the conduct of an ordinary employee.³⁴

Similar, in Katz vs. Dole³⁵ the Fourth Circuit further refined the analytical framework of Henson:

Although a claim of sexual harassment might be analyzed under the familiar Title VII disparate treatment formula, we think a somewhat different order of proof is appropriate....We believe that in a "condition of work" case the plaintiff must demonstrate that the employer had actual or constructive knowledge of the existence of a sexually hostile working environment and took no prompt and adequate remedial action....The plaintiff may do this by proving that complaints were lodged with the employer or that the harassment was so pervasive that employer awareness may be inferred. Thus, we posit a two step analysis:

- (1) the plaintiff must make a prima facie showing that sexually harassing actions took place, and if this is done, the employer may rebut the showing either directly, by proving that the events did not take place, or indirectly, by showing that they were isolated or trivial.

(2) the plaintiff must show that the employer knew or should have known of the harassment, and took no effectual action to correct the situation. This showing can also be rebutted by the employer directly, or by pointing to prompt remedial action reasonably calculated to end the harassment.³⁶

Title VII is not a clean language act, and it does not require employers to extirpate all signs of centuries-old prejudice. But to avoid liability under Title VII, an employer on notice of sexual harassment must do more than indicate the existence of an official policy against such harassment. Where, as here, the employer's supervisory personnel manifested unmistakable acquiescence in or approval of the harassment, the burden on the employer seeking to avoid liability is especially heavy.³⁷

The Supreme Court Speaks

Meritor Savings Bank vs. Vinson

By the time the EEOC guidelines were published and after several years of lower court decisions rejecting sexual harassment; then case law firmly establishing that sexual advances constitutes sex discrimination under Title VII, the Supreme Court finally addressed the unaddressed and highly charged issues of sexual harassment in the 1986 landmark case Meritor Savings Bank vs. Vinson.³⁸ In an opinion written by Justice Rehnquist, the Court unanimously held that

"...without question, sexual harassment is a form of sex discrimination and that hostile environment as well as *quid pro quo* harassment violates Title VII...."³⁹ This landmark Supreme Court decision was an important step towards legitimizing thus far such an elusive area of law for complainants and for putting employees and harassers on notice that unwelcome sexual conduct will not be tolerated in the workplace.

The summarized facts in Meritor are as follows:

Michelle Vinson was hired in 1974 as a teller trainee for Meritor Savings Bank. For the first four years of her employment, she received merit-based promotions consistently under her supervisor Taylor, to teller, head teller and assistant branch manager. In 1978, Vinson took an indefinite sick leave. Two months later she was discharged for excessive use of that leave. However, before the termination, Vinson brought an action against the bank and her supervisor, charging that during her 4 years at the bank she had been constantly sexually harassed by Taylor in violation of Title VII. She alleged he made no sexual advances during her probationary period, but he started making repeated sexual advances shortly thereafter. At first she refused, but she admitted to submitting to having 40-50 instances of sexual intercourse, and fondling, because she feared dismissal.⁴⁰ She even accused him of rape on several occasions. Vinson

acknowledged that Taylor displayed similar touching and fondling behavior to other employees and claimed she did not report his behavior to his supervisor or use the bank's complaint procedure because she was afraid of Taylor; he had threatened her life.

Taylor denied all accusations, claiming it was a business-related dispute that prompted the charges. The bank denied the charges also, claiming that Vinson's allegations of sexual harassment by Taylor was unknown to the bank and engaged in without its consent and approval. The district court denied Vinson's claim for relief. (injunction, compensatory and punitive damages and attorney's fees) The court found that the relationship between Vinson and Taylor was a voluntary one and the bank would not have been liable anyway, given its express policy against discrimination and its ignorance of the alleged behavior.⁴¹

On remand, the Court of Appeals for the District of Columbia, reversed and remanded the case finding on the basis that the district court had failed to consider whether the defendants had created a hostile or abusive work environment in violation of Title VII.⁴² The court noted Eundy, the first case to address hostile environment sexual harassment. In doing so the court re-emphasized sexual harassment did not require a woman to "waive her Title VII rights by her sartorial or whimsical proclivities."⁴³

Thus, the court held that an employer is strictly liable for sexual harassment by supervisors, whether or not the employer knew or should have known about the misconduct. The court stated that ...a supervisor is an agent of his or her employer for purposes of Title VII, regardless of whether the supervisor has the authority to hire, fire, or promote....⁴⁴

The mere existence-or even the appearance-of a significant degree of influence in vital job decisions gives any supervisor the opportunity to impose on employees. That opportunity is not dependent solely upon the supervisor's authority to make personnel decisions;the ability to direct employees in their work, to evaluate their performances and to recommend personnel actions carries attendant power to coerce,intimidate and harass.⁴⁵

The court noted that its decision on liability was based on the statutory intent and judicial construction of Title VII, rather than on the common law theory of respondeat superior; as the limitations imposed by that doctrine "...have no place in the enforcement of the congressional will underlying Title VII....⁴⁶

The United States Supreme Court affirmed the Court of Appeals holding that hostile environment sexual harassment is a violation of Title VII.⁴⁷ The Court also held that the complainant's voluntary participation in sexual conduct is not an absolute defense to a sexual harassment suit under Title VII, but is relevant to a determination of whether harassment has occurred.⁴⁸

After Meritor, and drawing from the large body of case law that had developed, again in 1988, the EEOC issued further policy guidelines. The Policy Guidance on Current Issues of Sexual Harassment, was developed to help define sexual harassment and various issues of employer liability.⁴⁹ (full text found in Appendix E)

Sexual Harassment in Higher Education

Introduction

There are two federal statutes that apply to sexual harassment in higher education institutions: Title VII⁵⁰, Civil Rights Act of 1871 Section 1981⁵¹ and Title IX of the Higher Education Amendments of 1972.⁵² However, more faculty harassment cases are decided under Title VII, partly because it has been in effect longer and partly because the incentives to pursue a private action are better under Title VII than under the other Acts.

Although none of the cases previously presented interpreting and defining sexual harassment was decided in the context of an educational institution, the principles they stand for are nevertheless relevant to harassment of a college or university faculty member.

The Hidden Issue in Higher Education

The Project on the Status and Education of Women wrote the first nationally distributed report on sexual harassment in higher education in 1979. In the report they referred to sexual harassment as a "hidden issue" on the college campus.⁵³ Swecker reported while evidence indicated that sexual harassment was a serious and widespread problem on the university campus; the majority of instances went unreported.⁵⁴ It has been suggested women faculty are concerned that any action they take of a formal nature to counter sexual harassment will harm their careers because they will be labeled "boatrockers".⁵⁵ Instead women faculty facing specific problems of sexual harassment are more likely to ask advice from friends and colleagues or attempt to deal with the problems themselves; rather than bring it to the attention of the appropriate authorities.

Dzeich and Weiner suggested it is possible women faculty do not report incidents of sexual harassment because they feel their status within the institution is so precarious that any kind of advocacy for sexual harassment could endanger the good will needed for reappointment, tenure, salary increases and professional support. Furthermore, the woman professor depend on men for her continued survival in the institution, the same men she would have to confront about sexual harassment.⁵⁶

Dzeich and Weiner further concluded this dependence can create enormous confusion and ambiguity when the issues of harassment arises. The few sexual harassment cases that have been publicly reported demonstrate the ambiguity and confusion that pervade the issue. For example, in 1979, in one of the first higher education sexual harassment cases reported, Fisher vs. Flynn,⁵⁷ the courts failed to rule sexual harassment was a violation of Title VII. Fisher, an assistant professor at Bridgewater State College alleged her department chairperson had sexual harassed her. Fisher alleged that the termination of her employment at Bridgewater was based in part upon her refusal to accede to the romantic advances of her department chairman. The district court granted the college's motion to dismiss the plaintiff's claim, because: (1) she had failed to allege factually that the department chairman had the authority to terminate her, or recommend termination, or otherwise took part in the decision regarding her termination; and (2) that the defendant's college officials were aware of the alleged romantic advances and the plaintiffs responses.⁵⁸

On appeal, the court held that although the Federal Rules of Civil Procedure normally permit, to some extent, conclusory pleadings, complaints based upon civil rights violations must at least outline the factual basis for an alleged violation. The court further held the charges to be insufficient in the

absence of some factual allegations establishing some connection between the department chairman and persons with authority to terminate the plaintiff's employment. Such allegations must at least indicate that the department chairman "had some input in the termination decision."⁵⁹

In the absence of such factual allegations, the court held, the trial court cannot make any determinations whether the claim is based on alleged sexual advances of a purely personal nature, or advances which might have employment repercussions and which, in the latter instances, might be actionable under Title VII of the Civil Rights Act of 1964.⁶⁰

Higher education is, in many ways, a microcosm of the larger society. Thus, in 1979, when this case was decided, the federal courts had just begun to recognize sexual harassment as sex discrimination in employment. Therefore, the courts failure to rule on the issue of whether or not sexual harassment could constitute violation of Title VII was reflective of the courts general insensitivity to the issue at the time.

In 1980, another sexual harassment allegation in education gained much public attention, although it was not decided in court, the issues surrounding the allegations hold great significance for higher education.⁶¹ The facts in the case were reported as followed by Dzeich and Weiner:

In 1980, Ximena Bunster was a visiting professor at Clark University. Bunster alleged her department head at the time, Sidney Peck, harassed her with unwanted sexual advances and propositions, and promised her academic support in exchange for sex.

Bunster and another female faculty member Stanko who had experienced similar harassment by the same department head filed sexual harassment discrimination complaints against Clark University with the EEOC. The university moved to have the charges dismissed. During the same month, Peck filed a complaint with the National Labor Relations Board. Because Clark is a private college with collective bargaining, the NLRB has jurisdiction over labor disputes. Peck claimed that he was being investigated because of his politics and his role in negotiating faculty pay raises.⁶²

The lawyers representing Bunster and Stanko declined to further participate in the legal proceedings, claiming they objected to Clark's handling of the case and its treatment of the complainants. They charged that the women were not permitted to call witnesses on their own behalf, to receive a copy of the decision or to comment on the composition of the hearing board. They also objected to the school alleged refusal to address the problems of sexual harassment and its failure to hold hearings adequate to resolve the women's complaints.

The university finally signed a settlement with Peck. He agreed not to serve as a department chairman of any department at Clark and to take a leave of absence for the rest of the year and a half year sabbatical at full pay. After the settlement was signed with Peck and the university, the next week Peck filed a defamation of character suit against Bunster and Stanko for \$23.7 million dollars. Bunster and Stanko countersued for \$1.3 million each for alleged sexual harassment.

Finally, in July of 1982, Clark University announced that all parties Bunster, Stanko and Peck had agreed to an end to all legal proceedings related to previous complaints filed with the EEOC under Title VII....In addition, all parties....agreed not to file new charges or claims against each other with respect to the matter previously in dispute, and Clark....agreed to pay for a portion of the legal fees incurred by Bunster and Stanko. No money damages were paid by Clark University, and all claims against the university were withdrawn.

In reviewing this case Dzeich and Weiner reported the women involved in this incident were adamant about the professional and personal cost to their lives. Their concerns centered around not being granted tenure at Clark in the future and the effect Peck's defamation suit might have on other victims of sexual harassment.

After the EEOC defined sexual harassment as a form of sex discrimination in 1980, many campuses began adopting sex harassment policies. The EEOC guidelines suggest that colleges and universities as employers should take steps to prevent harassment, but do not require them to establish policies. As a result, colleges and universities have taken broadly different approaches on this issues, from detailed explicit written policies, to a one line sentence mixed in with other policies.

Nevertheless, sexual harassment continues to be a troublesome issue on campus. Leatherman suggest while many institutions are becoming more aggressive about attacking the problem, there is still a reluctance of victims to file complaints-let alone go through the process of resolving them-and this still remains a stumbling block.⁶³ Paludi even suggested while promulgation of policy and good educational effort on sexual harassment are effective responses to sexual harassment, they don't increase the likelihood that complaints will be bought out.⁶⁴ It has also been suggested these types of issues are particularly stressful for women faculty, who are conscious of the toll it may have on them in the professoriate.⁶⁵

Paludi further commented women faculty in general tend to believe that it is part of their professional task to cope with such problems informally on their own.⁶⁵ Others report, "it

takes courage of high order and perhaps just plain grit to take on personally the established male hierarchies of academic life.⁶⁶

Unlike the other areas of sex discrimination (i.e., hiring, tenure, salary) researched for this study, very little case law existed in the area of sexual harassment. Although it has been documented through studies, and interviews, that sexual harassment is a major problem in higher education; it has also been suggested the biggest obstacle that colleges face is finding ways to encourage victims to come forward.⁶⁷ Lee reported claims by faculty are rarely litigated.⁶⁸ This could be attributed to the fact that complainants do not file charges or complaints are resolved at the university level in order to avoid negative publicity.

However, of the cases reviewed, two cases of significance will be discussed here. In Howard University vs. Best⁶⁹, a terminated faculty member brought action against the university and other faculty members alleging: (1) breach of contract, (2) sex discrimination, (3) intentional infliction of emotional distress due to sexual harassment, (4) defamation, and (5) sexual harassment. Dr. Marie Best was a professor and chairperson of the Department of Pharmacy Practice at Howard University from 1976 to 1979. In December of 1979, she was notified that at the end of her three-year appointment (June 30, 1979), she would not be recommended for

reappointment. She file suit in December of 1979 against the university and several named individuals. Dr. Best alleges that the Dean interfered with her responsibilities as Chair of the Department and subjected her to unwanted sexual harassment, causing emotional distress.

In establishing a prima facie case of sexual harassment Best needed to prove that the unwelcome verbal/or physical advances of a sexual nature was directed at her in the workplace, and resulted in a hostile or abusive working environment. Once established, the defendant must then prove in defense that the alleged instances of sexual harassment was isolated or trivial. Upon hearing both sides of evidence the trier of the facts in making a decision would consider the amount and nature of conduct, employer response to the conduct and the relationship between the harassing party and employee.⁷⁰

The trial court decided Best made a prima facie showing, which was demonstrated by the dean's repeated conduct in and out of the scope of employment, and that many of the incidents occurred during faculty, administrative and other professional meetings attended by Best and the dean in their professional capacities. Best was awarded \$851,000, and the university appealed against the excessive damages amounts awarded. On appeal, the district court decided the university was held liable for the sexual harassment and Best was awarded

\$375,000.⁷¹ Although the case consisted of multiple allegations, the courts made it clear sexual harassment that creates a hostile environment is nonetheless discrimination in terms, condition, or privilege of employment.

In the second case, King vs. Board of Regents of University of Wisconsin Systems⁷², an Assistant Professor who was denied contract renewal brought sexual harassment charges against the university and several employees. The facts in the case are as follows: Katherine King was hired in 1980 as an Assistant Professor at UWM. Her appointment consisted of a three-year term, renewable for a second three-year term, renewable again for either a tenure career appointment or a one-year, terminal appointment. Her contract was renewed for the second three-year term, but a unanimous committee voted not to renew her contract for a seventh year. Subsequent to her non-renewal, King sued alleging that during her employment at UWM, various members of the faculty sexually harassed or sexually discriminated against her. King alleged, Sonstein, the assistant dean began making suggestive innuendos as well as leered at her in a sexually suggestive fashion. She alleged he did these things when he met with her to discuss the difficulty new faculty have in the department.⁷³ King alleged the behavior got progressively bolder and offensive, for example, he would from time to time touch her, rub against her, place objects between her legs, and comment

on various parts of her body. She alleged she requested him to stop treating her like that, and he ignored her request.⁷⁴ After an incident where he followed her in the bathroom she discussed the problem with him again and for three months he refrained from touching her. In Feb. of 1982 he (Sonstein) accused her of using UWM's photocopying equipment for personal use. This accusation was quite serious and came right before her renewal hearing. She was cleared of all charges, but by then she had filed a complaint with the University EEO office against him for sexual harassment. This charge was settled and as a part of the settlement Sonstein was abstained from voting on matters relating to King's appointment. King had also made allegations against another faculty member, that he subjected her to salary and workload disparities, mistreated her at faculty meetings and limited her research time.⁷⁵

The committee voted not to renew her contract on the basis of lack of endeavor in the area of: (1) scholarly research publications, (2) lack of commitment in presenting theoretical clinical research papers, (3) inability to make use of research time, and (4) a lack of activity in professional associations.⁷⁶ King sued under 42 U.S.C. § 1983, and Title VII. The jury found, in a special verdict that Sonstein subjected her to sexual harassment, in addition, found UWM liable for the sex discrimination, deprivation of property interest without due process, and failure to protect

her from sexual discrimination.⁷⁷ She was awarded; (1) \$65,000 for past compensation; (2) \$150,000 for loss of future earning capacity; and (3) \$60,000 in pain and suffering. In addition, she was awarded \$30,000 against Sonstein for punitive damages and \$40,000 in punitive damages against other faculty members.⁷⁸ On appeal, the university was granted a new trial for all charges except the sexual harassment charges against Sonstein. The district court found that Sonstein sexually harassed King, and created an abusive working environment for King in violation of Title VII.⁷⁹

Summarized Analysis of a Sexual Harassment Charge

Who Can Be Charged As A Harasser?

Under Title VII, the term employer included "agents" of the complainant's employer. In addition, the EEOC Guidelines states that according to the general Title VII principles, an employer, employment agency, joint apprenticeship committee, or labor organization is responsible for its acts and the acts of its agents and supervisors.⁸⁰

Supervisors

In cases involving *quid pro quo* sexual harassment, the courts look at the supervisor's capacity to make personnel decisions. A supervisor need not have direct authority to carry out a personnel decision, however, the capacity to make recommendations for or otherwise have influence regarding

positions may be sufficient. Meritor, held that employees are not strictly liable for the conduct of the employee's supervisors, however, notice of the sexual harassment to upper management, may determine their liability.⁸¹

Co-workers

The harassment of one worker by a co-worker does not violate Title VII unless the act of discrimination is attributable to the employer.⁸² Under the Guidelines, an employer is responsible for the conduct of fellow employees when the employer or its agents or supervisors knew or should have known of the conduct, unless it can be shown that immediate and appropriate corrective action was taken.

Non-Employees

Sexual harassment by non-employees, for example may involve the conduct of clients or customers. The Guidelines state that in such cases of harassment by non-employees, EEOC will consider the extent of the employer's control and any other legal responsibility the employer may have with respect to the conduct of such parties.⁸³

What is Harassment?

The EEOC defines sexual harassment as: (1) unwelcome sexual advances; (2) request for sexual favors; and (3) other verbal or physical conduct of a sexual nature.

Sexual Advances

Sexual advances have been generally viewed as invitations to participate in sexual activity and may form the basis of either a quid pro quo or hostile environment charge. A plaintiff must establish that the conduct was in fact based on sex. Sexual advances must be unwelcome to be unlawful.⁸⁴

Verbal or Physical Conduct

A plaintiff can demonstrate sexual harassment by showing that the employer subjected her to unwelcome verbal or physical conduct of a sexual nature and that the conduct affected a term, condition, or privilege of employment.⁸⁵

Verbal conduct sexual harassment, for example, may include making sexual slurs, propositions, or persistent comments about a woman's body. In addition, harassing telephone calls, boasting of sexual conquests, and threats have been considered sexual harassment. Wrongful physical conducts have included, fondling touching, massaging, kissing, and assault.⁸⁶

Offensive conduct may include, taking unwelcome photographs, making arrangements to be alone with a woman employee for the purpose of making sexual advances, indecent exposure, entering restrooms unannounced, or dropping trousers.⁸⁷

The physical work environment can be found offensive when; (1) sexually explicit photographs are displayed, (2)

literature, cartoons, calendars; and (3) women employers are required to wear revealing uniforms or act in a provocative manner in order to attract business.⁸⁸

Quid Pro Quo Harassment

In quid pro quo sexual harassment the employee alleges that the way in which he or she was treated differently was based on gender and that sexual activity or conduct suggestive in a sexual nature was requested as a prerequisite to obtaining the position, promotion, training or other job advancements.⁸⁹ The plaintiff must demonstrate that she was otherwise qualified to receive the relevant job benefit, and that the job benefit was actually withheld or altered.

Hostile Environment Harassment

In hostile environment sexual harassment, one employee makes sexual request, gesture, remarks, etc., to another employee and thereby creates a hostile environment in which the target employee must work.⁹⁰

Consensual Relationships

Consenting amorous relationships that occur in the context of the workplace present serious ethical concerns. It creates an environment charged with conflict of interest and susceptible to exploitation. Employees should be aware that any such involvement make them liable for formal action if a complaint is initiated against them.

Chapter IV

Summary

Chapter IV has presented a review of the case law and literature surrounding sexual harassment. The review of the cases were illustrative of the fact that the courts recognize sexual harassment as a form of sex discrimination violative of Title VII. The decisions also indicate an increasing willingness on the part of the courts to redress complainants of sexual harassment in any areas of employment, as well as in educational institutions. Sexual harassment affects both men and women. It has no place in educational employment practices. All employees have the right to work and learn in a harassment free environment.

In summary, the EEOC reported the number of sexual harassment charges increased by 71% in 1990 since the Hill-Thomas sexual harassment hearings. This increase is 50% more than the previous year. EEOC stress to employers the importance of having policies in place as: (1) preventive measures; and (2) to inform employees what is harassing behavior. Recommendations for developing a policy in higher education institutions will be discussed in Chapter V. Administrators may find these recommendations useful for: (1) assistance in confronting the problems of sexual harassment; and (2) developing an effective institution-wide policy.

Chapter IV

Endnotes

¹ Sprogis vs United Airlines 444 F.2d 1194(7th Cir.1971), *cert. denied*, 404 U.S.991 (1971)

² The Working Women's Institute a national resource and research center. They started in the early 1970's to define sexual harassment based on the experiences of women in the workplace.

³ Vemuelem, J.(1978) Women's Rights Law Reporter, Preparing Sexual Harassment Litigation Under Title VII, Vol 7 No 4 New Jersey.

⁴ Corne vs Bausch and Lomb 390 F.Supp.161 (D.Ariz.1975) *vacated on procedural grounds*, 562 F.2d 55 (9th Cir.1977).

⁵ *Id.* at 161

⁶ *Id.* at 163-164

⁷ Williams vs. Saxbe 413 F.Supp.654 (D.D.C.1976), *rev'd on other grounds*, Williams vs. Bell, 587 F.2d 1240 (D.D.C.Cir.1978).

⁸ *Id.* at 653

⁹ *Id.* at 651-658

¹⁰ Barnes vs. Costle 561 F.2d 983 (D.C.Cir.1971)

¹¹ *Id.* at 989

¹² *Id.* at 991

¹³ *Id.* at 990

¹⁴ *Id.* at 995

¹⁵ Tompkins vs. Public Service Electric & Gas Co. 422 F.2d 553 (D.N.J. 1976).

- 16 Id. at 556
- 17 Tompkins 568 F.2d 1047-49
- 18 Id. at 1048-49
- 19 Id. at 1047
- 20 Miller vs. Bank of America 600 F.2d 211 (9th Cir. 1979)
at 213
- 21 Id. at 234
- 22 Id. at 233
- 23 Id. at 236
- 24 Id. at 211-213
- 25 401 U.S. 423 at 433-34
- 26 29 C.F.R. § 1604.11 (1980).
- 27 Bundy vs. Jackson 19 Fair Empl.Prac.Case (BNA) 828
D.D.C.(1979), *rev'd* 641 F.2d 934 (D.D.Cir.1981).
- 28 Id. at 946
- 29 Henson vs. City of Dundee 682 F.2d 897 (11th Cir.1982).
- 30 Id. at 898-895
- 31 Id. at 899-901
- 32 Id. at 902
- 33 Id at 903-905
- 34 Id. at 910
- 35 Katz vs Dole 709 F.2d 251 (4th Cir 1983).
- 36 Id. at 254-255

37 Id at 254-255

38 Meritor Savings Bank vs. Vinson 477 U.S 57 (1986)

39 Id.at 67

40 Id. at 146

41 Meritor Id at 62

42 Vinson Id at 145

43 Id at 146

44 Id. at 141

45 Id. at 150

46 Meritor Id. at 72

47 Id. at 66

48 Id. at 69

49 EEOC Policy Guidance on Current Issues of Sexual Harassment (Oct. 25, 1988).

50 42 U.S.C.§ 2000(e)-2000(e)-17

51 42 U.S.C.§ 1981

52 Title IX - 20 U.S.C.§ 1681 (1982)

53 Sandler,B. (1978) Project on the Status and Education of Women, "Sexual Harassment" A Hidden Issue. Association of American Colleges Washington, DC.

54 Swecker, J.(1985) Straightening Out the Power Curves: Eliminating Sexual Harassment in Institutions in Ivory Power: Sexual Harassment on Campus.p 10.

55 Paludi, M.A.(ED) Ivory Power: Sexual Harassment On Campus SUNY Press: New York 1990,p.245.

56 Dziech, B.W. & Weiner, L. *The Lecherous Professor : Sexual Harassment of Campus* Beacon Press: Boston. 1984 p 45

57 Fisher vs. Flynn 598 F.2d 663 (1st Cir. 1979).

58 *Id.* at 664-666.

59 *Id.* at 670.

60 *Id.* at 668.

61 Dziech & Weiner *The Lecherous Professor*: Dziech and Weiner followed this case from reported news articles and press coverage. pp. 34-35 The case was reported as EEOC case NO. 80-5088 Mass Superior Ct. Middlesex City.

62 *Id.* at 35

63 Leatherman, C. *The Chronicle of Higher Education*, "Sexual Harassment in Higher Education. December 4, 1991 p.A-1

64 Paludi, M. *Ivory Power*, p 245.

65 *Id.* at 251

66 *Id.* at 250

67 *Id.* at 200.

68 Kaplin W., & Lee, B. *The Law of Higher Education* 1985-1990 Update NACUA 1990 p. 61-62.

69 Howard University vs. Best 484 A. 2d 958 (D.C.Cir. 1984)

70 *Id.* at 961

71 *Id.* 975-978

72 King vs. Board of Regents of University of Wisconsin Systems 898 F.2d 533 (7th Cir. 1990).

73 *Id.* at 535-36

74 *Id.* at 538

75 Id. at 539

76 Id. at 541

77 Id. at 540-43

78 Id. at 552

79 Id. at 560

80 29 C.F.R. § 1604.11 (c) 1988

81 Meritor at 73

82 29 C.F.R. § 1604.11 (a) 1988

83 Id. at (e)

84 Id. at (a)

85 Id at (a)

86 Id at (b)

87 Id at (c)

88 Id at (d)

89 Id at (e)

90 Id at (f)

Chapter V

Discussion

Title VII of the Civil Rights Act of 1964 and its subsequent amendments have been considered the most comprehensive and most litigated Federal law on employment discrimination. The legislative history of Title VII clearly indicate Congress enacted the law as a principle means of eliminating discrimination on the basis of race, color, religion, sex, or national origin in America's workplaces, including institutions of higher education.

The main thrust of Title VII is providing equal employment opportunity for all employees. Equal employment opportunity means that each individual has a right to be fully considered for any job for which he or she is qualified. In addition, it means that each employee has the right to be treated equally in all job related matters, and that all employment decisions should be based on the abilities of the individual and the requirements of the job.

Title VII has only been applicable to higher education institutions since 1972. Prior to 1972, higher education institutions were exempted from the Federal law. In 1972, Congress amended the law to give enforcement to the EEOC, and, in addition, to remove the 8-year old exemption of educational institutions. When Congress took legislative action to amend

the 1964 law, it's clear intent was to end the reported widespread and pervasive discrimination against women and minorities in educational institutions.

Ever since Title VII's application to higher education institutions, the equal employment opportunity law has increased the number of faculty members pursuing employment discrimination litigation, especially charges alleging sex discrimination. For almost a decade preceding Title VII's enforcement to higher education, the courts were reluctant to interfere with the employment decisions made by an institutions. In one of the first federal higher education cases, the courts stated: "... of all the fields in, which the federal courts should hesitate to invade and take over, education and faculty appointments at a university level are probably the least suited for federal court supervision...."¹

It was also during this decade women faculty members began to exercise their legal rights to challenge discriminating employment decisions. It was reported more charges of sex discrimination were filed against institutions of higher education during the 1970's than in any other employment industry in the United States.² It took the courts almost a decade to recognize the legal right of women faculty members to challenge employment decisions under Title VII.

Despite decades of legislative activity and litigation,

women in academia still face formidable obstacles in the academic world. Achieving status and equity in employment opportunities, as well as, terms and conditions of employment has been painfully slow. It has been concluded from this study, that although female faculty members face numerous perceived inequities, there are 4 main areas most often discussed:

(1) Female faculty members still face the "old-by" discriminatory network. This network refers to the patterns of hiring at the university based upon special connections, consideration, and friendship ties among male colleagues.

(2) Female faculty members face inequities in salaries. All available data have shown women continue to be paid less than men on faculties.

(3) Female faculty members continue to face discrimination in securing promotions and the awarding of tenure.

(4) Female faculty members are increasingly experiencing sexual harassment.

The developing issues, allegations and body of case law surrounding sex discrimination in higher education institutions is enormous, varied, and continues to grow. The rapid development of these issues in higher education have made colleges and universities highly visible targets for a

wide range of legal actions and in some instances, very substantial damage claims and legal cost. In addition, in many of these cases, governing boards, presidents, administrators and faculty members have been named individually as defendants in the legal actions along with the institution itself.

The reality of this phenomenal growth in litigation is clear, the potential for judicial intervention in sex discrimination charges is undeniable, and reliance on the judicial process is increasingly becoming common. The level of judicial scrutiny applicable to a college or university sex discrimination charge will vary. The courts are unlikely to interfere when the negative employment decision is based upon criteria that is reasonably related to the job requirements and free from intentional discrimination. In other words, if the decisions made by administrators are reached by proper procedures and supported by substantial evidence, the courts are unlikely to interfere. However, if administrators do not have reasonable ascertainable reasons for making adverse employment decisions, or if they fail to apply reasonable standards in a particular employment decision, the consequences may result in a legal challenge.

Women faculty members charging sex discrimination carry a heavy burden of proof. The charges are applicable to the principles and precedents set forth by the courts for the requirements of a burden of proof. The requirements for a Title

VII discrimination cases have been outlined by the courts and modified for academic cases. The legal requirements for a female faculty member challenging an employment decision as discriminatory are as follows:

First, the plaintiff must establish a prima facie case of discrimination:

- (1) that she belongs to a class protected by Title VII;
- (2) that the plaintiff sought and was qualified for the reappointment, promotion, tenure, or whatever is at issue;
- (3) that the plaintiff was not reappointed, promoted, or awarded tenure; and
- (4) that, in hiring, or reappointment cases, the college sought applicants with qualifications similar to the plaintiffs to fill the plaintiffs' position, or in the case of promotion or tenure the employer promoted or awarded tenure to other persons possessing similar qualifications.³

Second, the defendant's burden (the college or university) in a Title VII case requires that the institution "articulate some legitimate nondiscriminatory reason" for denying the promotion, tenure or, reappointment to the plaintiff. The U.S. Supreme Court has stated that it is not necessary for the defendant to prove complete absence of a

discriminatory motive in reaching the negative employment decision. The courts have decided the college or university needs only to show that a neutral reason, such as inadequacies in the plaintiff's scholarship, teaching, or college service, was the factor in the decision.

Third, once the college has carried its burden, the burden then shifts back to the plaintiff. The plaintiff must then show that the "legitimate, nondiscriminatory reason" articulated by the defending college or university was actually a pretext and the actual motivation for the decision was a discriminatory one, in particular, her sex.

Institutions of higher education should want to avoid costly employee litigation. In order to do so they must establish so policies, procedures and some uniform guidelines for making employment decisions. These policies should serve as prevention methods, and to assure that each applicant and employee receives fair and unbiased consideration.

The researcher offers these recommendations to administrators as guidelines for possibly minimizing potential allegations and legal challenge.

Recommendations

An institutions' hiring, promotion, tenure and salary process, as well as, all terms and conditions of employment should fall within the purview of Title VII's

nondiscrimination mandate. In addition, the institution need to be able to justify the employment decisions they make. It would be unreasonable to suggest that written policies, uniform guidelines or even careful documentation of employment decisions will eliminate sex discrimination in decision making. However, to avoid costly legal challenges, an administrator should regard such policies, procedures and guidelines as: (1) prevention-as means of preventing complaints from accruing; and (2) ensuring legality-being legally in compliance to ensure themselves and the institution in a legal challenge.

Hiring

(1) Administrators should make sure the make-up of the search committee is diverse, not limited to either one sex or one race. In addition, the search committee should be sensitized to the departments needs, as well as, the institutions concerns and need for recruiting more females to faculty positions.

(2) Administrators should ensure that search committees recruiting for faculty positions are knowledgeable as to the criteria to be used to select the candidates. In addition, the criteria should be clearly related to the duties of the position.

(3) Administrators should ensure that during the hiring of female faculty, they should inform them of criteria for promotion and tenure and the weight given to each criterion.

(4) Administrators should develop recruitment plans that will target identifying prospective female employees.

(5) Administrators should ensure that when determining fringe benefits for the female faculty member, the benefits are based on legal criteria, and not based solely on the basis of gender or age.

Promotion or Tenure

(1) Administrators, department chairperson, or a delegated senior faculty member should evaluate probationary faculty annually, or at regular intervals, to give feedback on weaknesses and strengthens of work performance.

(2) Administrators should document all meetings and evaluations, or reviews related to the employment decision.

(3) Tenure decisions vary from institution to institution, however, administrators should perhaps follow the AAUP policies and guidelines regarding tenure. In addition, administrators should develop some uniform departmental guidelines for awarding tenure to the members in that specific department. These guidelines should outline expectations of accomplishments over a certain period of time. These guidelines should be communicated to all faculty members in the department. Administrators may be wise to meet with female faculty members at various intervals to discuss the guidelines and to discuss their progress towards meeting the expectations. Although uniform guidelines for each department is recommended, there are however, guidelines set by the university, therefore, the guidelines set by the department should somewhat show some uniformity.

(4) In addition to following some type of uniform procedures and guidelines for making tenure decisions, administrators should try to ensure a diverse faculty review committee. The members of the committee making peer reviews should have extensive knowledge of the female faculty members area of profession, as well as,

knowledge of their academic performance in and out of the classroom.

(5) Administrators should provide mentorship and peer support for junior faculty to maximize long-term success and retention at the university.

(6) Administrators should encourage research to junior faculty, as well as, provide opportunities to them through making them aware of various funding sources, and decreasing time demands on classroom teaching and advisement.

Salary

(1) Salaries vary from institution to institution, departmental wise, by rank, and by a variety of other factors. However, it is recommended since this area is so elusive, departmental administrators should develop some written guidelines for setting initial salaries, as well as, guidelines for deciding salary merit increases and regular salary increases.

Sexual Harassment

Title VII prohibits discrimination because of the gender of a person. The law has been amended and guidelines have been issued to provide guidance for protection from sex discrimination in the workplace. In the early 1970's women began trying to use Title VII as a means to address sexual harassment as sex discrimination under Title VII. After a series of initial defeats, sexual harassment that negatively affected the terms and conditions of a woman's employment was recognized by the courts as sex discrimination in employment.

As a result, sexual harassment once considered a "hidden issues" appears to be one of the most rapidly growing areas of employment litigation. Cases such as the 1986 Supreme Court ruling in Meritor Savings Bank v. Vinson⁴ makes it clear that employers can be held liable for the sexual harassment of an employee and have a large responsibility in assuring an unbiased working environment for female employees. (Sexual harassment affects both men and women, however, most often it affects women).

Sexual harassment of female faculty members is still somewhat a "hidden issue" on the university campus. Although sexual harassment has been reported as a serious problem for female faculty members, the majority of the instances go

unreported. It has been suggested female faculty members are concerned that any action they take of a formal nature to address the problem, will harm their careers. They are also concerned that any action taken against their male colleagues will block favorable reviews and consideration for promotions, tenure, and salary increases.

Nevertheless, higher education is in many ways a microcosm of the larger society, and as sexual harassment continues to be a troublesome issue in the American workforce, it is a troublesome issue on the university campus. As a result, some colleges and universities have taken the initiative to develop and adopt sexual harassment policies. The EEOC guidelines suggest that colleges and universities as employers should take steps to develop policies to prevent harassment.

Policy

Institutions of higher education should have a written policy on sexual harassment. The policy should clearly communicate to all employees that sexual harassment will not be tolerated and that it is a violation of Title VII. Having a policy in itself will not guarantee women faculty members protection against sexual harassment, however, it shows a good faith effort to prevent and eliminate sexual harassment at the university.

In addition, more is required than simply announcing a policy against sexual harassment. Such a policy will have no effect unless it is reinforced with education and training programs for administrators. Administrators play a key role in avoiding allegations and costly harassment suits. However, unless administrators know what the law is, they may inadvertently violate it, or let other employees continue with unacceptable behavior. Training administrators in the basics of sexual harassment law and how to deal with harassment complaints can help to avoid such situations. It is recommended administrators, as well as, faculty members be required to attend workshops, seminars, or training sessions for a sexual harassment sensitivity course. The training sessions should include a clear definition of sexual harassment and the varied forms it may take.

The EEOC Guidelines specifically state that prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring.

Recommended Policy Guidelines

on

Sexual Harassment

(1) The policy statement should clearly condemn sexual harassment on the university campus. It is recommended the

governing board, the president and the chief administrator for faculty (i.e., provost) speak openly and articulate a strong personal commitment to achieving this objective.

(2) The policy should state clear definitions of sexual harassment. It is recommended policies illustrate examples of what constitutes sexual harassment. In addition, it is recommended to state that sexual harassment is a violation of Title VII, as well as, Title IX and Section 1981.

(3) The policy should state clear procedures for reporting sexual harassment complaints. It is recommended the policy outline: (a) informal procedures; and (b) a formal grievance procedures.

(4) The policy should state clearly that disciplinary action will be taken against those persons found guilty of sexual harassment.

(5) The policy should state clearly the procedures for investigating the complaint.

(6) The policy should express complete confidentiality to the person lodging complaints.

(7) The policy should outline available resources for victims of sexual harassment. (i.e., counseling)

(8) The policy should inform victims of sexual harassment of their rights and responsibilities. It is recommended to included information on the phone number and name of the office or contact person on campus to receive further information.

(i.e., EEO/AA office)

(9) The policy should also offer or suggest to administrators who and where they can call to ask for training sessions for their department members.

(10) The policy should clearly state actionable disciplinary action will be taken against pursuing retaliation tactics against the person charging sexual harassment.

Summary Implication for Administrators

The university, its governing board, the president, and administrators are responsible for the adoption and implementation of policies and procedures which adequately cover the legalities under Title VII. The university legal counsel, in addition, should review those policies and procedures, as well as, the faculty handbook to assure that all applicants and employees are not deprived of any Title VII civil rights. Legal counsel should continuously examine and monitor the above mentioned to assure conformity to changes in Title VII through legislative actions, judicial decisions, or new regulations.

Although university counsel share some involvement in assuring nondiscriminatory employment practices for female faculty members, the ultimate responsibility will fall on administrators responsible for making daily employment decisions. Therefore, because of this responsibility, administrators have a need to understand the law, its legal requirements, and how the courts have interpreted them in sex discrimination charges.

Most importantly, administrators need to be aware of the procedures they should establish to ensure equal employment

challenges. As stated before, administrators have been held potentially liable under Title VII. Moreover, under the broad remedy provisions of Title VII, this could mean extensive damage awards and legal fees.

It is recommended that administrators receive training, via, seminars, classes, or workshops on the basics of equal employment opportunity, Title VII and sex discrimination. The law of equal employment opportunity as it affects sex discrimination is still a rapid period of development. Administrators need to be at least familiar with the law in order to make sure their employment decisions are within the framework of the purviews of Title VII, thus avoiding unlawful discrimination.

Chapter V

Endnotes

¹ Faro vs. New York University, 502 F.2d 1229 (2d Cir.1974) at 1231-32

² Sandler, B. Affirmative Action on Campus, p.118

³ Smith vs. University of North Carolina, 632 F.2d 316 (4th Cir. 1980) at 340

⁴ Meritor, 477 U.S.57 (1986)

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Appendix A

Comparative Analysis of Senate and House Bills

After the final passage of the Civil Rights Act of 1964, Senator Dirksen introduced into the Congressional Record a comparative analysis of the House version and the Senate version. The comparative analysis was printed in the Congressional Records of July 6, 1964, at pages 15453-8 (volume 110). Appendix A is the comparative analysis of Title VII.

TITLE VII - EQUAL EMPLOYMENT OPPORTUNITY

1. Employers having 25 or more employees, labor organizations having 25 or more members, and commercial employment agencies are prohibited from discriminating against any individual in any phase of employment or union membership (including advertisement for employment) on the ground of race, color, religion, sex or national origin. (During the first year after the effective date of the act, only employers and labor organizations having 100 or more employees or members, respectively, shall be covered; during the second year only 75 or more employees, or members, respectively; and during the third year only 50 or more employees or members, respectively.)

Excluded from coverage are: (1) The United States, a corporation wholly owned by the Government of the United States, or a State or political subdivision thereof; (2) a bona fide private membership club (other than a labor organization). The U.S. Employment Service is covered, however, as well as the system of State and local employment services receiving Federal assistance.

2. Discrimination is also prohibited in apprenticeship or other training or retraining programs, including on-the-job training, by employers, labor organizations or joint labor-management committees.

3. Exemptions or limitations.

(a) The title shall not apply to the employment of aliens outside any State or employment by a religious corporation, association or society of individuals of a particular religion to perform work connected with the carrying on of religious activities.

3. (b) It shall not be an unlawful employment practice for an employer to advertise or employ employees of a particular religion, sex or national origin where such is a bona fide occupational qualification reasonably necessary to the normal operation of a particular business.

(c) It shall not be an unlawful employment practice for an institution of learning to hire or employ employees of a particular religion if such institution is owned, supported, controlled or managed by a particular religion or a particular religious organization, or if the curriculum of such institution is directed toward the "propagation" of a particular religion.

(d) It shall not be an unlawful employment practice for an employer to refuse to employ any person who holds atheistic practices and beliefs.

(e) The title shall not apply to any employment practice of an employer, labor organization, employment agency or joint labor-management committee with respect to an individual who is a member of the Communist Party or other subversive organization.

1. Same except that an employer will only be covered if he has 25 or more employees for each working day in each of 20 or more calendar weeks in a current or preceding calendar year. In addition, a labor organization is covered if it operates a hiring hall, while Indian tribes are excluded from coverage. But, it is provided that it shall be the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of race, color, religion, sex or national origin and the President shall utilize his existing authority to effectuate this policy.

2. Same.

3.

(a) Same. In addition, the title shall not apply to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.

3. (b) Same. In addition, labor organizations, employment agencies, and joint labor-management committees controlling apprenticeship or other training or retraining programs are granted the same exemption.

(c) Same.

(d) Deleted.

(e) Same.

12. In a case filed in court, where the pleadings present issues of fact, the court may appoint a master to hear the facts, issue a report, and recommend an order.
13. In any court action or proceeding under this title, the Commission shall be liable for costs if it loses the case.
14. Where a State or local agency has been established to end discrimination in employment and the Commission determines that such agency is effectively taking action, it shall seek written agreements with such agency under which the Commission and persons aggrieved shall refrain from bringing civil actions in the State.
15. The Commission may, with the consent and cooperation of State and local agencies charged with the administration of State fair employment practices laws, utilize the services of the State and local agencies, and reimburse them for their services, in aiding the Commission in carrying out its duties.
16. Every employer, employment agency, labor organization, and joint labor-management committee, subject to this title, shall make and keep such records and make such reports as the Commission may prescribe by regulation, after a public hearing. If any such requirement might result in undue hardship, the party affected may apply to the Commission or bring an action in a U.S. district court for an exemption or other appropriate relief.
17. The Commission is extended subpoena power.
18. The Commission is granted investigatory authority, at reasonable times, to have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question.
19. State or local fair employment laws shall not be preempted or superseded by the enactment of this title.
20. The Commission is granted the authority to issue procedural regulations in conformity with the standards and limitations of the Administrative Procedure Act.
21. There is authorized to be appropriated not to exceed \$2,500,000 for the administration of this title by the Commission during the first year after its enactment, and not to exceed \$10 million for such purposes during the second year after such date.
12. Deleted.
13. In any court action or proceeding under this title, the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, reasonable attorney's fees and costs.
14. Same.
15. Same.
16. Same, except that the provisions shall not apply with respect to matters occurring in any State or political subdivision thereof which has a fair employment law, to which the employer, employment agency, labor organization, or joint labor-management committee is subject, except that the Commission may require such notations on records which these parties are required to keep (under the State or local law) as are necessary because of differences in coverage or methods of enforcement between the State or local law and the provisions of this title. Moreover, where an employer is required to file reports relating to his employment practices with any Federal agency or committee pursuant to Executive Order 10926 or other Executive orders, prescribing fair employment practices for Government contractors and subcontractors, the Commission shall not require the employer to file additional reports.
17. Same, although the manner of enforcing the subpoena power is altered in form, but not in substance.
18. The Commission is granted investigatory authority, at reasonable times, to have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to an unlawful employment practice covered by this title and is relevant to the charge under investigation.
19. Same.
20. Same.
21. Deleted. (See general authorization provision in sec. 1105 or title XI.)

TITLE VII—EQUAL EMPLOYMENT OPPORTUNITY—Continued

House version

Senate version

8. —

8. — If within 30 days after the Commission investigates a charge (whether the Commission receives the charge directly because there is no State or local law or whether it receives the charge after initial reference to a State or political subdivision thereof) the Commission has been unable to obtain voluntary compliance, it shall notify the aggrieved party. Within 30 days thereafter the aggrieved party may bring a civil action against the respondent named in the charge in a U.S. district court. Upon application, the court may appoint an attorney to represent the party aggrieved if the court believes it necessary. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in the civil action if he certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay proceedings for up to 60 days pending the termination of State or local proceedings (when they occur) or the efforts of the Commission to obtain voluntary compliance.

Irrespective of the above provisions, whenever the Attorney General has reasonable cause to believe that a person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of the rights secured by this title, the Attorney General may bring a civil action in a U.S. district court. The Attorney General may request the convening of a three-judge district court to hear the case if he certifies that it is of general public importance.

In any case in which an employer, employment agency or labor organization fails to comply with an order of the court issued in a civil action brought by the party aggrieved, the Commission may commence proceedings to compel compliance with such order.

9. An action may be brought either in the judicial district in which the unlawful employment practice occurred or in which the accused has his principal office.

9. An action may be brought in the judicial district in which the unlawful employment practice occurred; in the judicial district in which relevant employment records are maintained and administered; or in the judicial district in which the plaintiff would have worked except for the alleged unlawful practice, but, if the respondent is not found within such district, the action may be brought within the judicial district in which respondent has his principal office.

10. If the court finds that the accused has engaged in or is engaging in an unlawful employment practice, the court may enjoin the accused from continuing such practice and may order the accused to take affirmative action, including the reinstatement or hiring of employees with or without back pay.

10. If the court finds that the accused has intentionally engaged in or is intentionally engaging in an unlawful employment practice, the court may enjoin the accused from continuing such practice and may order such affirmative action as may be appropriate, including the reinstatement or hiring of employees with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be).

11. No order of court shall require the admission or reinstatement of an individual to a labor organization or the hiring, reinstatement, promotion of an individual by an employer if the labor organization or employer took action for any reason other than discrimination on account of race, color, religion, or national origin.

11. Same, except "sex" was included. (This had been unintentionally omitted in House bill). Also, court action in this regard was prohibited where an individual opposed, made a charge, testified, assisted, or participated in an investigation, hearing or proceeding of an unlawful employment practice of an employer, employment agency, or labor organization.

5. The Commission shall have authority to:
- (a) Cooperate with and utilize the services of regional, State, local and other agencies, public and private, and individuals.
 - (b) Furnish persons subject to this title technical assistance, upon request, to further their compliance with the title.
 - (c) Where employees of an employer refuse or threaten to refuse to cooperate in carrying out the provisions of the title, to assist an employer, upon his request, to effectuate such cooperation through conciliation or other remedial action.
 - (d) Make technical studies to effectuate the purposes and policies of the title.
 - (e) Cooperate with other departments and agencies in carrying out educational and promotional activities.
 - (f) No such provision.
6. A charge may be filed with the Commission by or on behalf of an aggrieved person, or by a member of the Commission where he has reasonable cause to believe that a violation of the title has occurred. The Commission shall furnish the accused with a copy of the charge and shall conduct an investigation.
7. If two or more members of the Commission determine, after an investigation, that reasonable cause exists to believe that the charge is true, the Commission shall endeavor to end the unlawful employment practice through conference, conciliation and persuasion, and if appropriate, to obtain from the respondent a written agreement describing particular practices which the respondent agrees to refrain from committing.

- (a) Same, except that cooperation may only be extended upon request.
- (b) Same.
- (c) Same, except that assistance may also be extended to labor organizations.
- (d) Same.
- (e) Same.

(f) Refer matters to the Attorney General with recommendations for intervention in a civil action brought by an aggrieved party, or for the institution of a civil action by the Attorney General, and to advise, consult, and assist the Attorney General on such matters.

6. Same, except that a charge may not be filed on behalf of an aggrieved person, and that the charge may not be made public by the Commission.

7. If the Commission determines, after an investigation, that reasonable cause exists to believe that the charge is true, the Commission shall endeavor to end the unlawful employment practice through conference, conciliation and persuasion. Nothing said or done during such endeavors shall be made public by the Commission without the written consent of the parties. (The authority to investigate and attempt conciliation is dependent upon requirements set out in paragraph 8 below.)

8. If voluntary methods fail:
The Commission may institute a civil action within 90 days in a U.S. district court, unless it has determined that the public interest would not be served by bringing the action.
If the Commission fails to institute a civil action within 90 days, the party aggrieved may bring an action in a U.S. district court, if one member of the Commission gives permission in writing.
No action may be based on an unlawful employment practice occurring more than 6 months prior to the filing of the charge.

Where an unlawful employment practice occurs in a State, or political subdivision thereof, which has a State or local law prohibiting the unlawful practice and providing for legal redress, a party aggrieved may not file a complaint with the Commission before the expiration of 60 days after proceedings have been commenced under State or local law, unless such proceedings have been earlier terminated. (The period of abeyance shall be 120 days during the first year after enactment of a State or local law.)
Where such State or local law exists and where a charge is filed by a member of the Commission, the Commission shall take no action for at least 60 days after referral of the charge to the appropriate agency of a State or political subdivision. (Referral shall be made for at least 120 days during the first year after enactment of a State or local law.)

A charge must be filed with the Commission within 90 days after it occurs, except that where a party aggrieved has first filed the charge with a State or political subdivision thereof, the charge must be filed with the Commission within 210 days or within 30 days after receiving notice that the State or local agency has terminated the proceedings, whichever is earlier.

TITLE VII—EQUAL EMPLOYMENT OPPORTUNITY—Continued

House version

Senate version

(f) No such provision.

(f) It shall not be an unlawful employment practice for an employer to refuse to hire or to discharge an individual; or for a labor organization or employment agency to fail or refuse to refer an individual for employment if the position to be filled requires a Government security clearance and the individual has not obtained such clearance.

(g) No such provision.

(g) It shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment, pursuant to a bona fide seniority or merit system, to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.

3. (h) No such provision.

3. (h) It shall not be an unlawful employment practice for an employer to give and act upon the results of any professionally developed ability test—provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin.

(i) No such provision.

(i) It shall not be an unlawful employment practice for an employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid to or to be paid to employees of the employer if the differentiation is authorized by the provisions of the Fair Labor Standards Act.

(j) No such provision.

(j) The title shall not apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which preferential treatment is given to an Indian living on or near a reservation.

(k) No such provision.

(k) The title shall not be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee to grant preferential treatment to any individual or to any group because of race, color, religion, sex, or national origin 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 an employer, referred or classified for employment by an employment agency or 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.

4. Same.

4. To carry out the objective of the title, there is created an Equal Employment Opportunity Commission, composed of five members, not more than three of whom shall be the same political party.

Appendix B

Text

of

Title VII of the Civil Rights Act of 1964

APPENDIX B: TITLE VII

Title VII

An Act

To enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Civil Rights Act of 1964".

Title VII—Equal Employment Opportunity**Definitions**

SEC. 701. For the purposes of this Title—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, associations, corporations legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code

of 1954, except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972, or (B) fifteen or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization rec-

ognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means 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, and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's, religious observance or practice without undue hardship on the conduct of the employer's business.

"(k) The terms, 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion."

Exemption

SEC. 702. This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

Discrimination Because of Race, Color, Religion, Sex, or National Origin

SEC. 703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) To limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) it shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or applicants for membership or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management

committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other education institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) As used in this title, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the

Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, or shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such

differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

(i) Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group 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.

Other Unlawful Employment Practices

SEC 704. (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified,

assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

(b) It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

Equal Employment Opportunity Commission

SEC 705. (a) There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party. Members of the Commission shall be appointed by the President by and with the advice and consent of the Senate for a term of five years. Any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed, and all members of the Commission shall continue to serve until their successors are appointed and qualified, except that no such member of the Commission shall continue to serve (1) for more than sixty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjourn-

ment sine die of the session of the Senate in which such nomination was submitted. The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman. The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and except as provided in subsection (b), shall appoint, in accordance with the provisions of title 5, United States Code, governing appointments in the competitive service, such officers, agents, attorneys, hearing examiners, and employees as he deems necessary to assist it in the performance of its functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, relating to classification and General Schedule pay rates: Provided, That assignment, removal, and compensation of hearing examiners shall be in accordance with sections 3105, 3344, 5362, and 7521 of title 5, United States Code.

(b) (1) There shall be a General Counsel of the Commission appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel shall have responsibility for the conduct of litigation as provided in sections 706 and 707 of this title. The General Counsel shall have such other duties as the Commission may prescribe or as may be provided by law and shall concur with the Chairman of the Commission on the appointment and supervision of regional attorneys. The General Counsel of the Commission on the effective date of this Act shall continue in such position and perform the functions specified in this subsection until a successor is appointed and qualified.

(2) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court, provided that the Attorney General shall conduct all litigation to which the Commission is a party in the Supreme Court pursuant to this title.

(c) A vacancy in the Commission shall not impair the right of the remaining members to exercise all the powers of

the Commission and three members thereof shall constitute a quorum.

(d) The Commission shall have an official seal which shall be judicially noticed.

(e) The Commission shall at the close of each fiscal year report to the Congress and to the President concerning the action it has taken; the names, salaries, and duties of all individuals in its employ and the moneys it has disbursed; and shall make such further reports on the cause of and means of eliminating discrimination and such recommendations for further legislation as may appear desirable.

(f) The principal office of the Commission shall be in or near the District of Columbia, but it may meet or exercise any or all its powers at any other place. The Commission may establish such regional or State offices as it deems necessary to accomplish the purpose of this title.

(g) The Commission shall have power—

(1) to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals;

(2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;

(3) to furnish to persons subject to this title such technical assistance as they may request to further their compliance with this title or an order issued thereunder;

(4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this title, to assist in such effectuation by conciliation or such other remedial action as is provided by this title;

(5) to make such technical studies as are appropriate to effectuate the purposes and policies of this title and to make the results of such studies available to the public;

(6) to intervene in a civil action brought under section 706 by an aggrieved party against a respondent

other than a government, governmental agency, or political subdivision.

(h) The Commission shall, in any of its educational or promotional activities, cooperate with other departments and agencies in the performance of such educational and promotional activities.

(i) All officers, agents, attorneys, and employees of the Commission shall be subject to the provisions of section 9 of the Act of August 2, 1939, as amended (the Hatch Act), notwithstanding any exemption contained in such section.

Prevention of Unlawful Employment Practices:

SEC. 706. (a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title.

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or

local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than \$1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) from the date upon which the Commission is authorized to take action with respect to the charge.

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have

been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(f) (1) If within thirty days after a charge is filed with the Commission or within the thirty days after expiration

of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has notified a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved, or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the

payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28

of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a mem-

ber of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

(h) The provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U.S.C. 101-115), shall not apply with respect to civil actions brought under this section.

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

(j) Any civil action brought under this section and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, title 28, United States Code.

(k) In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person. SEC. 707.

(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an ap-

plication for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of

the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

(c) Effective two years after the date of enactment of the Equal Employment Opportunity Act of 1972, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9, of title 5, United States Code, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

(d) Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

(e) Subsequent to the date of enactment of the Equal Employment Opportunity Act of 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 706 of this Act.

Effect on State Laws

SEC 708. Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which

would be an unlawful employment practice under this title.

Investigation, Inspections, Records, State Agencies

SEC 709. (a) In connection with any investigation of a charge filed under section 706, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy and evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this title and is relevant to the charge under investigation.

(b) The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this title and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out this title. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this title.

(c) Every employer, employment agency, and labor organization subject to this title shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for

such periods, and (3) make such reports therefrom, as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this title or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this title which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purpose of this title, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and to furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, and, if such application for an exemption is denied, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.

(d) In prescribing requirements pursuant to subsection (c) of this section,

the Commission shall consult with other interested State and Federal agencies and shall endeavor to coordinate its requirements with those adopted by such agencies. The Commission shall furnish upon request and without cost to any State or local agency, charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection.

(e) It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this title involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than \$1,000, or imprisoned not more than one year.

Investigatory Powers

SEC. 710. For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 11 of the National Labor Relations Act (49 Stat. 455; 29 U.S.C. 161) shall apply.

Notices to be Posted

SEC. 711. (a) Every employer, employment agency, and labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by

the Commission setting forth excerpts from, or summaries of, the pertinent provisions of this title and information pertinent to the filing of a complaint.

(b) A willful violation of this section shall be punishable by a fine of not more than \$100 for each separate offense.

Veterans' Preference

SEC. 712. Nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

Rules and Regulations

SEC. 713. (a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this title. Regulations issued under the section shall be in conformity with the standards and limitations of the Administrative Procedure Act.

(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this title if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this title regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this title.

Forcibly Resisting the Commission or its Representatives

SEC. 714. The provisions of sections 111 and 1114 title 18, United States Code, shall apply to officers, agents, and employees of the Commission in the performance of their official duties. Notwithstanding the provisions of sections 111 and 1114 of title 18, United States Code, whoever in violation of the provisions of section 1114 of such title kills a person while engaged in or on account of the performance of his official functions under this Act shall be punished by imprisonment for any term of years or for life.

Transfer of Authority

Administration of the duties of the Equal Employment Opportunity Coordinating Council was transferred to the Equal Employment Opportunity Commission effective July 1, 1978, under the President's Reorganization Plan No. 1 of 1978.

Equal Employment Opportunity Coordinating Council

SEC. 715. There shall be established an Equal Employment Opportunity Coordinating Council (herein after referred to in this section as the Council) composed of the Secretary of Labor, the Chairman of the Equal Employment Opportunity Commission, the Attorney General, the Chairman of the United States Civil Service Commission, and the Chairman of the United States Civil Rights Commission, or their respective delegates. The Council shall have the responsibility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies. On or before July 1 of each year, the Council shall transmit to the President and to the Congress a report of its activities, together with such recommendations for legislative or administrative changes as it concludes are de-

sirable to further promote the purposes of this section.

Effective Date

SEC. 716. (a) This title shall become effective one year after the date of its enactment.

(b) Notwithstanding subsection (a), sections of this title other than sections 703, 704, 706, and 707 shall become effective immediately.

(c) The President shall, as soon as feasible after the enactment of this title, convene one or more conferences for the purpose of enabling the leaders of groups whose members will be affected by this title to become familiar with the rights afforded and obligations imposed by its provisions, and for the purpose of making plans which will result in the fair and effective administration of this title when all of its provisions become effective. The President shall invite the participation in such conference or conferences of (1) the members of the President's Committee on Equal Employment Opportunity, (2) the members of the Commission on Civil Rights, (3) representatives of State and local agencies engaged in furthering equal employment opportunity, (4) representatives of private agencies engaged in furthering equal employment opportunity, and (5) representatives of employers, labor organizations, and employment agencies who will be subject to this title.

Transfer of Authority

Enforcement of Section 717 was transferred to the Equal Employment Opportunity Commission from the Civil Service Commission (Office of Personnel Management) effective January 1, 1979 under the President's Reorganization Plan No. 1 of 1978.

Nondiscrimination in Federal Government Employment

SEC. 717. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in section

105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of dis-

crimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to—

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a com-

plaint of discrimination based on race, color, religion, sex, or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) The provisions of section 706(f) through (k), as applicable, shall govern civil actions brought hereunder.

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employ-

ment opportunity in the Federal Government.

Special Provisions with Respect to Denial, Termination, and Suspension of Government Contracts

SEC. 718. No Government contract, or portion thereof, with any employer, shall be denied, withheld, terminated, or suspended, by any agency or officer of the United States under any equal employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the Government for the same facility within the past twelve months without first according such employer full hearing and adjudication under the provisions of title 5, United States Code, section 554, and the following pertinent sections: Provided, That if such employer has deviated substantially from such previously agreed to affirmative action plan, this section shall not apply: Provided further, That for the purposes of this section an affirmative action plan shall be deemed to have been accepted by the Government at the time the appropriate compliance agency has accepted such plan unless within forty-five days thereafter the Office of Federal Contract Compliance has disapproved such plan.

Appendix C

Text
of
The Civil Rights Act of 1991

APPENDIX C: CIVIL RIGHTS ACT OF 1991

Civil Rights Act of 1991

Following is the text of the Civil Rights Act of 1991, which provides for compensatory and punitive damages and jury trials in cases of sex, religious, and disability bias, and reverses several 1989 and 1991 U.S. Supreme Court cases adverse to the interests of victims of employment discrimination. Approved by Congress on November 7, 1991, the Act amends Title VII of the Civil Rights Act of 1964, Sec. 1981 of the Civil Rights Act of 1866, the Attorney's Fees Awards Act of 1976, the Americans With Disabilities Act of 1990, and the Age Discrimination in Employment Act of 1967. The Act also sets up a "glass ceiling" commission, provides for coverage of Senate and presidential staffs by the major civil rights laws, and requires EEOC to carry out educational and outreach activities and to establish a Technical Assistance Training Institute.

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S. 1745

Sec. 1. Short Title

This Act may be cited as the "Civil Rights Act of 1991".

Sec. 2. Findings

The Congress finds that—

(1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace;

(2) the decision of the Supreme Court in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections; and

(3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

Sec. 3. Purposes

The purposes of this Act are—

(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;

(2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989);

(3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); and

(4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

**TITLE I—FEDERAL CIVIL
RIGHTS REMEDIES**

Sec. 101. Prohibition Against all Racial Discrimination in the Making and Enforcement of Contracts

Section 1977 of the Revised Statutes (42 U.S.C. 1981) is amended—

(1) by inserting "(a)" before "All persons within"; and

(2) by adding at the end the following new subsections:

"(b) For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

"(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."

Sec. 102. Damages in Cases of Intentional Discrimination

The Revised Statutes are amended by inserting after section 1977 (42 U.S.C. 1981) the following new section:

“Sec. 1977A. Damages in Cases of Intentional Discrimination in Employment

‘(a) Right of Recovery.—

‘(1) Civil rights.—In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3), and provided that the complaining party cannot recover under section 1977 of the Revised Statutes (42 U.S.C. 1981), the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

‘(2) Disability.—In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 505(a)(1) of the Rehabilitation Act of 1973 (29 U.S.C. 794a(a)(1)), respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791) and the regulations implementing section 501, or who violated the requirements of section 501 of the Act or the regulations implementing section 501 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

‘(3) Reasonable accommodation and good faith effort.—In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 or regulations implementing section 501 of the Rehabilitation Act of 1973, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

“(b) Compensatory and Punitive Damages.—

“(1) Determination of punitive damages.—A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

“(2) Exclusions from compensatory damages.—Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964.

“(3) Limitations.—The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

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“(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$50,000;

“(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$100,000; and

“(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$200,000; and

“(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$300,000.

“(4) Construction.—Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1977 of the Revised Statutes (42 U.S.C. 1981).

“(c) Jury Trial.—If a complaining party seeks compensatory or punitive damages under this section—

“(1) any party may demand a trial by jury; and

“(2) the court shall not inform the jury of the limitations described in subsection (b)(3).

“(d) Definitions.—As used in this section:

“(1) **Complaining party.**—The term ‘complaining party’ means—

“(A) in the case of a person seeking to bring an action under subsection (a)(1), the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

“(B) in the case of a person seeking to bring an action under subsection (a)(2), the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 505(a)(1) of the Rehabilitation Act of 1973 (29 U.S.C.

794a(a)(1), or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.).

“(2) **Discriminatory practice.**—The term ‘discriminatory practice’ means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a).

Sec. 103. Attorney’s Fees

The last sentence of section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by inserting “, 1977A” after “1977”.

Sec. 104. Definitions

Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e) is amended by adding at the end the following new subsections:

“(1) The term ‘complaining party’ means the Commission, the Attorney General, or a person who may bring an action or proceeding under this title.

“(m) The term ‘demonstrates’ means meets the burdens of production and persuasion.

“(n) The term ‘respondent’ means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 717.”

Sec. 105. Burden of Proof in Disparate Impact Cases

(a) Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) is amended by adding at the end the following new subsection:

“(k)(1)(A) An unlawful employment practice based on disparate impact is established under this title only if—

“(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the

challenged practice is job related for the position in question and consistent with business necessity; or

“(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

“(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent’s decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

“(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

“(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of ‘alternative employment practice’.

“(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this title.

“(3) Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of Federal law, shall be consid-

ered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.”.

(b) No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove—Business necessity/cumulation/alternative business practice.

Sec. 106. Prohibition Against Discriminatory Use of Test Scores

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by section 105) is further amended by adding at the end the following new subsection:

“(1) It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.”.

Sec. 107. Clarifying Prohibition Against Impermissible Consideration of Race, Color, Religion, Sex, or National Origin in Employment Practices

(a) In General.—Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by sections 105 and 106) is further amended by adding at the end the following new subsection:

“(m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”.

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(b) Enforcement Provisions.—Section 706(g) of such Act (42 U.S.C. 2000e-5(g)) is amended—

(1) by designating the first through third sentences as paragraph (1);

(2) by designating the fourth sentence as paragraph (2)(A) and indenting accordingly; and

(3) by adding at the end the following new subparagraph:

“(B) On a claim in which an individual proves a violation under section 703(m) and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

“(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney’s fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m); and

“(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).”.

Sec. 108. Facilitating Prompt and Orderly Resolution of Challenges to Employment Practices Implementing Litigated or Consent Judgments or Orders

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by sections 105, 106, and 107 of this title) is further amended by adding at the end the following new subsection:

“(n)(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

“(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws—

“(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had—

“(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

“(II) a reasonable opportunity to present objections to such judgment or order; or

“(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

“(2) Nothing in this subsection shall be construed to—

“(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

“(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

“(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

“(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

“(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be

brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28, United States Code."

Sec. 109. Protection of Extraterritorial Employment

(a) Definition of Employee.—Section 701(f) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(f)) and section 101(4) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111(4)) are each amended by adding at the end the following: "With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States."

(b) Exemption.—

(1) Civil rights act of 1964.—Section 702 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1) is amended—

(A) by inserting "(a)" after "Sec. 702.;" and

(B) by adding at the end the following:

"(b) It shall not be unlawful under section 703 or 704 for an employer (or a corporation controlled by an employer), labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining (including on-the-job training programs) to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation), such organization, such agency, or such committee to violate the law of the foreign country in which such workplace is located.

"(c)(1) If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by section 703 or 704 engaged in by such corporation shall be presumed to be engaged in by such employer.

"(2) Sections 703 and 704 shall not apply with respect to the foreign operations of an employer that is a foreign

person not controlled by an American employer.

"(3) For purposes of this subsection, the determination of whether an employer controls a corporation shall be based on—

"(A) the interrelation of operations;

"(B) the common management;

"(C) the centralized control of labor relations; and

"(D) the common ownership or financial control, of the employer and the corporation."

(2) Americans with disabilities act of 1990.—Section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112) is amended—

(A) by redesignating subsection (c) as subsection (d); and

(B) by inserting after subsection (b) the following new subsection:

"(c) Covered Entities in Foreign Countries.—

"(1) In general.—It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

"(2) Control of corporation.—

"(A) Presumption.—If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

"(B) Exception.—This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

"(C) Determination.—For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on—

"(i) the interrelation of operations;

"(ii) the common management;

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“(iii) the centralized control of labor relations; and

“(iv) the common ownership or financial control, of the employer and the corporation.”.

(c) Application of Amendments.—The amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act.

Sec. 110. Technical Assistance Training Institute

(a) Technical Assistance.—Section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4) is amended by adding at the end the following new subsection:

“(j)(1) The Commission shall establish a Technical Assistance Training Institute, through which the Commission shall provide technical assistance and training regarding the laws and regulations enforced by the Commission.

“(2) An employer or other entity covered under this title shall not be excused from compliance with the requirements of this title because of any failure to receive technical assistance under this subsection.

“(3) There are authorized to be appropriated to carry out this subsection such sums as may be necessary for fiscal year 1992.”.

(b) Effective Date.—The amendment made by this section shall take effect on the date of the enactment of this Act.

Sec. 111. Education and Outreach

Section 705(h) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4(h)) is amended—

(1) by inserting “(1)” after “(h)”; and

(2) by adding at the end the following new paragraph:

“(2) In exercising its powers under this title, the Commission shall carry out educational and outreach activities (including dissemination of information in languages other than English) targeted to—

“(A) individuals who historically have been victims of employment discrimina-

tion and have not been equitably served by the Commission; and

“(B) individuals on whose behalf the Commission has authority to enforce any other law prohibiting employment discrimination, concerning rights and obligations under this title or such law, as the case may be.”.

Sec. 112. Expansion of Right To Challenge Discriminatory Seniority Systems

Section 706(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(e)) is amended—

(1) by inserting “(1)” before “A charge under this section”; and

(2) by adding at the end the following new paragraph:

“(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.”.

Sec. 113. Authorizing Award of Expert Fees

(a) Revised Statutes.—Section 722 of the Revised Statutes is amended—

(1) by designating the first and second sentences as subsections (a) and (b), respectively, and indenting accordingly; and

(2) by adding at the end the following new subsection:

“(c) In awarding an attorney’s fee under subsection (b) in any action or proceeding to enforce a provision of sections 1977 or 1977A of the Revised Statutes, the court, in its discretion, may include expert fees as part of the attorney’s fee.”.

(b) Civil Rights Act of 1964.—Section 706(k) of the Civil Rights Act of 1964 (42

U.S.C. 2000e-5(k)) is amended by inserting "(including expert fees)" after "attorney's fee".

Sec. 114. Providing for Interest and Extending the Statute of Limitations in Actions Against the Federal Government

Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16) is amended—

(1) in subsection (c), by striking "thirty days" and inserting "90 days"; and

(2) in subsection (d), by inserting before the period " and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties."

Sec. 115. Notice of Limitations Period Under the Age Discrimination in Employment Act of 1967

Section 7(e) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626(e)) is amended—

(1) by striking paragraph (2);

(2) by striking the paragraph designation in paragraph (1);

(3) by striking "Sections 6 and" and inserting "Section"; and

(4) by adding at the end the following: "If a charge filed with the Commission under this Act is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 11(a) against the respondent named in the charge within 90 days after the date of the receipt of such notice."

Sec. 116. Lawful Court-Ordered Remedies, Affirmation Action, and Conciliation Agreements Not Affected

Nothing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law.

Sec. 117. Coverage of House of Representatives and the Agencies of the Legislative Branch

(a) Coverage of the House of Representatives.—

(1) In general.—Notwithstanding any provision of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) or of other law, the purposes of such title shall, subject to paragraph (2), apply in their entirety to the House of Representatives.

(2) Employment in the house.—

(A) Application.—The rights and protections under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) shall, subject to subparagraph (B), apply with respect to any employee in an employment position in the House of Representatives and any employing authority of the House of Representatives.

(B) Administration.—

(i) In general.—In the administration of this paragraph, the remedies and procedures made applicable pursuant to the resolution described in clause (ii) shall apply exclusively.

(ii) Resolution.—The resolution referred to in clause (i) is the Fair Employment Practices Resolution (House Resolution 558 of the One Hundredth Congress, as agreed to October 4, 1988), as incorporated into the Rules of the House of Representatives of the One Hundred Second Congress as Rule LI, or any other provision that continues in effect the provisions of such resolution.

(C) Exercise of rulemaking power.—The provisions of subparagraph (B) are enacted by the House of Representatives as an exercise of the rulemaking power of the House of Representatives, with full recognition of the right of the House to change its rules, in the same manner, and to the same extent as in the case of any other rule of the House.

(b) Instrumentalities of Congress.—

(1) In general.—The rights and protections under this title and title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) shall, subject to paragraph (2),

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apply with respect to the conduct of each instrumentality of the Congress.

(2) Establishment of remedies and procedures by instrumentalities.—The chief official of each instrumentality of the Congress shall establish remedies and procedures to be utilized with respect to the rights and protections provided pursuant to paragraph (1). Such remedies and procedures shall apply exclusively, except for the employees who are defined as Senate employees, in section 301(c)(1).

(3) Report to Congress.—The chief official of each instrumentality of the Congress shall, after establishing remedies and procedures for purposes of paragraph (2), submit to the Congress a report describing the remedies and procedures.

(4) Definition of instrumentalities.—For purposes of this section, instrumentalities of the Congress include the following: the Architect of the Capitol, the Congressional Budget Office, the General Accounting Office, the Government Printing Office, the Office of Technology Assessment, and the United States Botanic Garden.

(5) Construction.—Nothing in this section shall alter the enforcement procedures for individuals protected under section 717 of title VII for the Civil Rights Act of 1964 (42 U.S.C. 2000e-16).

Sec. 118. Alternative Means of Dispute Resolution

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, mini-trials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

TITLE II—GLASS CEILING

Sec. 201. Short Title

This title may be cited as the "Glass Ceiling Act of 1991".

Sec. 202. Findings and Purpose

(a) Findings.—Congress finds that—

(1) despite a dramatically growing presence in the workplace, women and minorities remain underrepresented in management and decisionmaking positions in business;

(2) artificial barriers exist to the advancement of women and minorities in the workplace;

(3) United States corporations are increasingly relying on women and minorities to meet employment requirements and are increasingly aware of the advantages derived from a diverse work force;

(4) the "Glass Ceiling Initiative" undertaken by the Department of Labor, including the release of the report entitled "Report on the Glass Ceiling Initiative", has been instrumental in raising public awareness of—

(A) the underrepresentation of women and minorities at the management and decisionmaking levels in the United States work force;

(B) the underrepresentation of women and minorities in line functions in the United States work force;

(C) the lack of access for qualified women and minorities to credential-building developmental opportunities; and

(D) the desirability of eliminating artificial barriers to the advancement of women and minorities to such levels;

(5) the establishment of a commission to examine issues raised by the Glass Ceiling Initiative would help—

(A) focus greater attention on the importance of eliminating artificial barriers to the advancement of women and minorities to management and decisionmaking positions in business; and

(B) promote work force diversity;

(6) a comprehensive study that includes analysis of the manner in which management and decisionmaking positions are filled, the developmental and skill-enhancing practices used to foster the necessary qualifications for advance-

ment, and the compensation programs and reward structures utilized in the corporate sector would assist in the establishment of practices and policies promoting opportunities for, and eliminating artificial barriers to, the advancement of women and minorities to management and decisionmaking positions; and

(7) a national award recognizing employers whose practices and policies promote opportunities for, and eliminate artificial barriers to, the advancement of women and minorities will foster the advancement of women and minorities into higher level positions by—

(A) helping to encourage United States companies to modify practices and policies to promote opportunities for, and eliminate artificial barriers to, the upward mobility of women and minorities; and

(B) providing specific guidance for other United States employers that wish to learn how to revise practices and policies to improve the access and employment opportunities of women and minorities; and

(b) Purpose.—The purpose of this title is to establish—

(1) a Glass Ceiling Commission to study—

(A) the manner in which business fills management and decisionmaking positions;

(B) the developmental and skill-enhancing practices used to foster the necessary qualifications for advancement into such positions; and

(C) the compensation programs and reward structures currently utilized in the workplace; and

(2) an annual award for excellence in promoting a more diverse skilled work force at the management and decision-making levels in business.

Sec. 203. Establishment of Glass Ceiling Commission

(a) In General.—There is established a Glass Ceiling Commission (referred to in this title as the "Commission"), to

conduct a study and prepare recommendations concerning—

(1) eliminating artificial barriers to the advancement of women and minorities; and

(2) increasing the opportunities and developmental experiences of women and minorities to foster advancement of women and minorities to management and decisionmaking positions in business.

(b) Membership.—

(1) Composition.—The Commission shall be composed of 21 members, including—

(A) six individuals appointed by the President;

(B) six individuals appointed jointly by the Speaker of the House of Representatives and the Majority Leader of the Senate;

(C) one individual appointed by the Majority Leader of the House of Representatives;

(D) one individual appointed by the Minority Leader of the House of Representatives;

(E) one individual appointed by the Majority Leader of the Senate;

(F) one individual appointed by the Minority Leader of the Senate;

(G) two Members of the House of Representatives appointed jointly by the Majority Leader and the Minority Leader of the House of Representatives;

(H) two Members of the Senate appointed jointly by the Majority Leader and the Minority Leader of the Senate; and

(I) the Secretary of Labor.

(2) Considerations.—In making appointments under subparagraphs (A) and (B) of paragraph (1), the appointing authority shall consider the background of the individuals, including whether the individuals—

(A) are members of organizations representing women and minorities, and other related interest groups;

(B) hold management or decisionmaking positions in corporations or other

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business entities recognized as leaders on issues relating to equal employment opportunity; and

(C) possess academic expertise or other recognized ability regarding employment issues.

(3) Balance.—In making the appointments under subparagraphs (A) and (B) of paragraph (1), each appointing authority shall seek to include an appropriate balance of appointees from among the groups of appointees described in subparagraphs (A), (B), and (C) of paragraph (2).

(c) Chairperson.—The Secretary of Labor shall serve as the Chairperson of the Commission.

(d) Term of Office.—Members shall be appointed for the life of the Commission.

(e) Vacancies.—Any vacancy occurring in the membership of the Commission shall be filled in the same manner as the original appointment for the position being vacated. The vacancy shall not affect the power of the remaining members to execute the duties of the Commission.

(f) Meetings.—

(1) Meetings prior to completion of report.—The Commission shall meet not fewer than five times in connection with and pending the completion of the report described in section 204(b). The Commission shall hold additional meetings if the Chairperson or a majority of the members of the Commission request the additional meetings in writing.

(2) Meetings after completion of report.—The Commission shall meet once each year after the completion of the report described in section 204(b). The Commission shall hold additional meetings if the Chairperson or a majority of the members of the Commission request the additional meetings in writing.

(g) Quorum.—A majority of the Commission shall constitute a quorum for the transaction of business.

(h) Compensation and Expenses.—

(1) Compensation.—Each member of the Commission who is not an employee of the Federal Government shall receive compensation at the daily equivalent of the rate specified for level V of the Executive Schedule under section 5316 of title 5, United States Code, for each day the member is engaged in the performance of duties for the Commission, including attendance at meetings and conferences of the Commission, and travel to conduct the duties of the Commission.

(2) Travel expenses.—Each member of the Commission shall receive travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, for each day the member is engaged in the performance of duties away from the home or regular place of business of the member.

(3) Employment status.—A member of the Commission, who is not otherwise an employee of the Federal Government, shall not be deemed to be an employee of the Federal Government except for the purposes of—

(A) the tort claims provisions of chapter 171 of title 28, United States Code; and

(B) subchapter I of chapter 81 of title 5, United States Code, relating to compensation for work injuries.

Sec. 204. Research on Advancement of Women and Minorities to Management and Decisionmaking Positions in Business

(a) Advancement Study.—The Commission shall conduct a study of opportunities for, and artificial barriers to, the advancement of women and minorities to management and decisionmaking positions in business. In conducting the study, the Commission shall—

(1) examine the preparedness of women and minorities to advance to management and decisionmaking positions in business;

(2) examine the opportunities for women and minorities to advance to

management and decisionmaking positions in business;

(3) conduct basic research into the practices, policies, and manner in which management and decisionmaking positions in business are filled;

(4) conduct comparative research of businesses and industries in which women and minorities are promoted to management and decisionmaking positions, and businesses and industries in which women and minorities are not promoted to management and decisionmaking positions;

(5) compile a synthesis of available research on programs and practices that have successfully led to the advancement of women and minorities to management and decisionmaking positions in business, including training programs, rotational assignments, developmental programs, reward programs, employee benefit structures, and family leave policies; and

(6) examine any other issues and information relating to the advancement of women and minorities to management and decisionmaking positions in business.

(b) Report.—Not later than 15 months after the date of the enactment of this Act, the Commission shall prepare and submit to the President and the appropriate committees of Congress a written report containing—

(1) the findings and conclusions of the Commission resulting from the study conducted under subsection (a); and

(2) recommendations based on the findings and conclusions described in paragraph (1) relating to the promotion of opportunities for, and elimination of artificial barriers to, the advancement of women and minorities to management and decisionmaking positions in business, including recommendations for—

(A) policies and practices to fill vacancies at the management and decisionmaking levels;

(B) developmental practices and procedures to ensure that women and minori-

ties have access to opportunities to gain the exposure, skills, and expertise necessary to assume management and decisionmaking positions;

(C) compensation programs and reward structures utilized to reward and retain key employees; and

(D) the use of enforcement (including such enforcement techniques as litigation, complaint investigations, compliance reviews, conciliation, administrative regulations, policy guidance, technical assistance, training, and public education) of Federal equal employment opportunity laws by Federal agencies as a means of eliminating artificial barriers to the advancement of women and minorities in employment.

(c) Additional Study.—The Commission may conduct such additional study of the advancement of women and minorities to management and decisionmaking positions in business as a majority of the members of the Commission determines to be necessary.

Sec. 205. Establishment of the National Award for Diversity and Excellence in American Executive Management

(a) In General.—There is established the National Award for Diversity and Excellence in American Executive Management, which shall be evidenced by a medal bearing the inscription “Frances Perkins-Elizabeth Hanford Dole National Award for Diversity and Excellence in American Executive Management”. The medal shall be of such design and materials, and bear such additional inscriptions, as the Commission may prescribe.

(b) Criteria for Qualification.—To qualify to receive an award under this section a business shall—

(1) submit a written application to the Commission, at such time, in such manner, and containing such information as the Commission may require, including at a minimum information that demonstrates that the business has made substantial effort to promote the opportuni-

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ties and developmental experiences of women and minorities to foster advancement to management and decisionmaking positions within the business, including the elimination of artificial barriers to the advancement of women and minorities, and deserves special recognition as a consequence; and

(2) meet such additional requirements and specifications as the Commission determines to be appropriate.

(c) Making and Presentation of Award.—

(1) Award.—After receiving recommendations from the Commission, the President or the designated representative of the President shall annually present the award described in subsection (a) to businesses that meet the qualifications described in subsection (b).

(2) Presentation.—The President or the designated representative of the President shall present the award with such ceremonies as the President or the designated representative of the President may determine to be appropriate.

(3) Publicity.—A business that receives an award under this section may publicize the receipt of the award and use the award in its advertising, if the business agrees to help other United States businesses improve with respect to the promotion of opportunities and developmental experiences of women and minorities to foster the advancement of women and minorities to management and decisionmaking positions.

(d) Business.—For the purposes of this section, the term 'business' includes—

(1)(A) a corporation, including non-profit corporations;

(B) a partnership;

(C) a professional association;

(D) a labor organization; and

(E) a business entity similar to an entity described in subparagraphs (A) through (D);

(2) an education referral program, a training program, such as an apprenticeship or management training program or a similar program; and

(3) a joint program formed by a combination of any entities described in paragraph 1 or 2.

Sec. 206. Powers of the Commission

(a) In General.—The Commission is authorized to—

(1) hold such hearings and sit and act at such times;

(2) take such testimony;

(3) have such printing and binding done;

(4) enter into such contracts and other arrangements;

(5) make such expenditures; and

(6) take such other actions; as the Commission may determine to be necessary to carry out the duties of the Commission.

(b) Oaths.—Any member of the Commission may administer oaths or affirmations to witnesses appearing before the Commission.

(c) Obtaining Information from Federal Agencies.—The Commission may secure directly from any Federal agency such information as the Commission may require to carry out its duties.

(d) Voluntary Service.—Notwithstanding section 1342 of title 31, United States Code, the Chairperson of the Commission may accept for the Commission voluntary services provided by a member of the Commission.

(e) Gifts and Donations.—The Commission may accept, use, and dispose of gifts or donations of property in order to carry out the duties of the Commission.

(f) Use of Mail.—The Commission may use the United States mails in the same manner and under the same conditions as Federal agencies.

Sec. 207. Confidentiality of Information

(a) Individual Business Information.—

(1) In general.—Except as provided in paragraph (2), and notwithstanding section 552 of title 5, United States Code, in carrying out the duties of the Commission, including the duties described in

sections 204 and 205, the Commission shall maintain the confidentiality of all information that concerns—

(A) the employment practices and procedures of individual businesses; or

(B) individual employees of the businesses.

(2) Consent.—The content of any information described in paragraph (1) may be disclosed with the prior written consent of the business or employee, as the case may be, with respect to which the information is maintained.

(b) Aggregate Information.—In carrying out the duties of the Commission, the Commission may disclose—

(1) information about the aggregate employment practices or procedures of a class or group of businesses; and

(2) information about the aggregate characteristics of employees of the businesses, and related aggregate information about the employees.

Sec. 208. Staff and Consultants

(a) Staff.—

(1) Appointment and compensation.—The Commission may appoint and determine the compensation of such staff as the Commission determines to be necessary to carry out the duties of the Commission.

(2) Limitations.—The rate of compensation for each staff member shall not exceed the daily equivalent of the rate specified for level V of the Executive Schedule under section 5316 of title 5, United States Code for each day the staff member is engaged in the performance of duties for the Commission. The Commission may otherwise appoint and determine the compensation of staff without regard to the provisions of title 5, United States Code, that govern appointments in the competitive service, and the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, that relate to classification and General Schedule pay rates.

(b) Experts and Consultants.—The Chairperson of the Commission may obtain such temporary and intermittent

services of experts and consultants and compensate the experts and consultants in accordance with section 3109(b) of title 5, United States Code, as the Commission determines to be necessary to carry out the duties of the Commission.

(c) Detail of Federal Employees.—On the request of the Chairperson of the Commission, the head of any Federal agency shall detail, without reimbursement, any of the personnel of the agency to the Commission to assist the Commission in carrying out its duties. Any detail shall not interrupt or otherwise affect the civil service status or privileges of the Federal employee.

(d) Technical Assistance.—On the request of the Chairperson of the Commission, the head of a Federal agency shall provide such technical assistance to the Commission as the Commission determines to be necessary to carry out its duties.

Sec. 209. Authorization of Appropriations

There are authorized to be appropriated to the Commission such sums as may be necessary to carry out the provisions of this title. The sums shall remain available until expended, without fiscal year limitation.

Sec. 210. Termination

(a) Commission.—Notwithstanding section 15 of the Federal Advisory Committee Act (5 U.S.C. App.), the Commission shall terminate 4 years after the date of the enactment of this Act.

(b) Award.—The authority to make awards under section 205 shall terminate 4 years after the date of the enactment of this Act.

TITLE III—GOVERNMENT EMPLOYEE RIGHTS

Sec. 301. Government Employee Rights Act of 1991

(a) Short Title.—This title may be cited as the “Government Employee Rights Act of 1991”.

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(b) Purpose.—The purpose of this title is to provide procedures to protect the right of Senate and other government employees, with respect to their public employment, to be free of discrimination on the basis of race, color, religion, sex, national origin, age, or disability.

(c) Definitions.—For purposes of this title:

(1) Senate employee.—The term “Senate employee” or “employee” means—

(A) any employee whose pay is disbursed by the Secretary of the Senate;

(B) any employee of the Architect of the Capitol who is assigned to the Senate Restaurants or to the Superintendent of the Senate Office Buildings;

(C) any applicant for a position that will last 90 days or more and that is to be occupied by an individual described in subparagraph (A) or (B); or

(D) any individual who was formerly an employee described in subparagraph (A) or (B) and whose claim of a violation arises out of the individual’s Senate employment.

(2) Head of employing office.—The term “head of employing office” means the individual who has final authority to appoint, hire, discharge, and set the terms, conditions or privileges of the Senate employment of an employee.

(3) Violation.—The term “violation” means a practice that violates section 302 of this title.

Sec. 302. Discriminatory Practices Prohibited

All personnel actions affecting employees of the Senate shall be made free from any discrimination based on—

(1) race, color, religion, sex, or national origin, within the meaning of section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

(2) age, within the meaning of section 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a); or

(3) handicap or disability, within the meaning of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791) and sections 102-104 of the Americans with

Disabilities Act of 1990 (42 U.S.C. 12112-14).

Sec. 303. Establishment of Office of Senate Fair Employment Practices

(a) In General.—There is established, as an office of the Senate, the Office of Senate Fair Employment Practices (referred to in this title as the “Office”), which shall—

(1) administer the processes set forth in sections 305 through 307;

(2) implement programs for the Senate to heighten awareness of employee rights in order to prevent violations from occurring.

(b) Director.—

(1) In general.—The Office shall be headed by a Director (referred to in this title as the “Director”) who shall be appointed by the President pro tempore, upon the recommendation of the Majority Leader in consultation with the Minority Leader. The appointment shall be made without regard to political affiliation and solely on the basis of fitness to perform the duties of the position. The Director shall be appointed for a term of service which shall expire at the end of the Congress following the Congress during which the Director is appointed. A Director may be reappointed at the termination of any term of service. The President pro tempore, upon the joint recommendation of the Majority Leader in consultation with the Minority Leader, may remove the Director at any time.

(2) Salary.—The President pro tempore, upon the recommendation of the Majority Leader in consultation with the Minority Leader, shall establish the rate of pay for the Director. The salary of the Director may not be reduced during the employment of the Director and shall be increased at the same time and in the same manner as fixed statutory salary rates within the Senate are adjusted as a result of annual comparability increases.

(3) Annual budget.—The Director shall submit an annual budget request

for the Office to the Committee on Appropriations.

(4) Appointment of director.—The first Director shall be appointed and begin service within 90 days after the date of enactment of this Act, and thereafter the Director shall be appointed and begin service within 30 days after the beginning of the session of the Congress immediately following the termination of a Director's term of service or within 60 days after a vacancy occurs in the position.

(c) Staff of the Office.—

(1) Appointment.—The Director may appoint and fix the compensation of such additional staff, including hearing officers, as are necessary to carry out the purposes of this title.

(2) Detailees.—The Director may, with the prior consent of the Government department or agency concerned and the Committee on Rules and Administration, use on a reimbursable or nonreimbursable basis the services of any such department or agency, including the services of members or personnel of the General Accounting Office Personnel Appeals Board.

(3) Consultants.—In carrying out the functions of the Office, the Director may procure the temporary (not to exceed 1 year) or intermittent services of individual consultants, or organizations thereof, in the same manner and under the same conditions as a standing committee of the Senate may procure such services under section 202(i) of the Legislative Reorganization Act of 1946 (2 U.S.C. 72a(i)).

(d) Expenses of the Office.—In fiscal year 1992, the expenses of the Office shall be paid out of the Contingent Fund of the Senate from the appropriation account Miscellaneous Items. Beginning in fiscal year 1993, and for each fiscal year thereafter, there is authorized to be appropriated for the expenses of the Office such sums as shall be necessary to carry out its functions. In all cases, expenses shall be paid out of the Contingent

Fund of the Senate upon vouchers approved by the Director, except that a voucher shall not be required for—

(1) the disbursement of salaries of employees who are paid at an annual rate;

(2) the payment of expenses for telecommunications services provided by the Telecommunications Department, Sergeant at Arms, United States Senate;

(3) the payment of expenses for stationery supplies purchased through the Keeper of the Stationery, United States Senate;

(4) the payment of expenses for postage to the Postmaster, United States Senate; and

(5) the payment of metered charges on copying equipment provided by the Sergeant at Arms, United States Senate. The Secretary of the Senate is authorized to advance such sums as may be necessary to defray the expenses incurred in carrying out this title. Expenses of the Office shall include authorized travel for personnel of the Office.

(e) Rules of the Office.—The Director shall adopt rules governing the procedures of the Office, including the procedures of hearing boards, which rules shall be submitted to the President pro tempore for publication in the Congressional Record. The rules may be amended in the same manner. The Director may consult with the Chairman of the Administrative Conference of the United States on the adoption of rules.

(f) Representation by the Senate Legal Counsel.—For the purpose of representation by the Senate Legal Counsel, the Office shall be deemed a committee, within the meaning of title VII of the Ethics in Government Act of 1978 (2 U.S.C. 288, et seq.).

Sec. 304. Senate Procedure for Consideration of Alleged Violations

The Senate procedure for consideration of alleged violations consists of 4 steps as follows:

(1) Step I, counseling, as set forth in section 305.

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(2) Step II, mediation, as set forth in section 306.

(3) Step III, formal complaint and hearing by a hearing board, as set forth in section 307.

(4) Step IV, review of a hearing board decision, as set forth in section 308 or 309.

Sec. 305. Step I: Counseling

(a) In General.—A Senate employee alleging a violation may request counseling by the Office. The Office shall provide the employee with all relevant information with respect to the rights of the employee. A request for counseling shall be made not later than 180 days after the alleged violation forming the basis of the request for counseling occurred. No request for counseling may be made until 10 days after the first Director begins service pursuant to section 303(b)(4).

(b) Period of Counseling.—The period for counseling shall be 30 days unless the employee and the Office agree to reduce the period. The period shall begin on the date the request for counseling is received.

(c) Employees of the Architect of the Capitol and Capitol Police.—In the case of an employee of the Architect of the Capitol or an employee who is a member of the Capitol Police, the Director may refer the employee to the Architect of the Capitol or the Capitol Police Board for resolution of the employee's complaint through the internal grievance procedures of the Architect of the Capitol or the Capitol Police Board for a specific period of time, which shall not count against the time available for counseling or mediation under this title.

Sec. 306. Step II: Mediation

(a) In General.—Not later than 15 days after the end of the counseling period, the employee may file a request for mediation with the Office. Mediation may include the Office, the employee, and the employing office in a process involving meetings with the parties separately or jointly for the purpose of resolving

the dispute between the employee and the employing office.

(b) Mediation Period.—The mediation period shall be 30 days beginning on the date the request for mediation is received and may be extended for an additional 30 days at the discretion of the Office. The Office shall notify the employee and the head of the employing office when the mediation period has ended.

Sec. 307. Step III: Formal Complaint and Hearing

(a) Formal Complaint and Request for Hearing.—Not later than 30 days after receipt by the employee of notice from the Office of the end of the mediation period, the Senate employee may file a formal complaint with the Office. No complaint may be filed unless the employee has made a timely request for counseling and has completed the procedures set forth in sections 305 and 306.

(b) Hearing Board.—A board of 3 independent hearing officers (referred to in this title as "hearing board"), who are not Senators or officers or employees of the Senate, chosen by the Director (one of whom shall be designated by the Director as the presiding hearing officer) shall be assigned to consider each complaint filed under this section. The Director shall appoint hearing officers after considering any candidates who are recommended to the Director by the Federal Mediation and Conciliation Service, the Administrative Conference of the United States, or organizations composed primarily of individuals experienced in adjudicating or arbitrating personnel matters. A hearing board shall act by majority vote.

(c) Dismissal of Frivolous Claims.—Prior to a hearing under subsection (d), a hearing board may dismiss any claim that it finds to be frivolous.

(d) Hearing.—A hearing shall be conducted—

(1) in closed session on the record by a hearing board;

(2) no later than 30 days after filing of the complaint under subsection (a), ex-

cept that the Office may, for good cause, extend up to an additional 60 days the time for conducting a hearing; and

(3) except as specifically provided in this title and to the greatest extent practicable, in accordance with the principles and procedures set forth in sections 554 through 557 of title 5, United States Code.

(e) Discovery.—Reasonable prehearing discovery may be permitted at the discretion of the hearing board.

(f) Subpoena.—

(1) Authorization.—A hearing board may authorize subpoenas, which shall be issued by the presiding hearing officer on behalf of the hearing board, for the attendance of witnesses at proceedings of the hearing board and for the production of correspondence, books, papers, documents, and other records.

(2) Objections.—If a witness refuses, on the basis of relevance, privilege, or other objection, to testify in response to a question or to produce records in connection with the proceedings of a hearing board, the hearing board shall rule on the objection. At the request of the witness, the employee, or employing office, or on its own initiative, the hearing board may refer the objection to the Select Committee on Ethics for a ruling.

(3) Enforcement.—The Select Committee on Ethics may make to the Senate any recommendations by report or resolution, including recommendations for criminal or civil enforcement by or on behalf of the Office, which the Select Committee on Ethics may consider appropriate with respect to—

(A) the failure or refusal of any person to appear in proceedings under this or to produce records in obedience to a subpoena or order of the hearing board; or

(B) the failure or refusal of any person to answer questions during his or her appearance as a witness in a proceeding under this section. For purposes of section 1365 of title 28, United States Code, the Office shall be deemed to be a committee of the Senate.

(g) Decision.—The hearing board shall issue a written decision as expeditiously as possible, but in no case more than 45 days after the conclusion of the hearing. The written decision shall be transmitted by the Office to the employee and the employing office. The decision shall state the issues raised by the complaint, describe the evidence in the record, and contain a determination as to whether a violation has occurred.

(h) Remedies.—If the hearing board determines that a violation has occurred, it shall order such remedies as would be appropriate if awarded under section 706 (g) and (k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5 (g) and (k)), and may also order the award of such compensatory damages as would be appropriate if awarded under section 1977 and section 1977A (a) and (b)(2) of the Revised Statutes (42 U.S.C. 1981 and 1981A (a) and (b)(2)). In the case of a determination that a violation based on age has occurred, the hearing board shall order such remedies as would be appropriate if awarded under section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)). Any order requiring the payment of money must be approved by a Senate resolution reported by the Committee on Rules and Administration. The hearing board shall have no authority to award punitive damages.

(i) Precedent and Interpretations.—Hearing boards shall be guided by judicial decisions under statutes referred to in section 302 and subsection (h) of this section, as well as the precedents developed by the Select Committee on Ethics under section 308, and other Senate precedents.

Sec. 308. Review by the Select Committee on Ethics

(a) In General.—An employee or the head of an employing office may request that the Select Committee on Ethics (referred to in this section as the "Committee"), or such other entity as the Senate may designate, review a decision under

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section 307, including any decision following a remand under subsection (c), by filing a request for review with the Office not later than 10 days after the receipt of the decision of a hearing board. The Office, at the discretion of the Director, on its own initiative and for good cause, may file a request for review by the Committee of a decision of a hearing board not later than 5 days after the time for the employee or employing office to file a request for review has expired. The Office shall transmit a copy of any request for review to the Committee and notify the interested parties of the filing of the request for review.

(b) Review.—Review under this section shall be based on the record of the hearing board. The Committee shall adopt and publish in the Congressional Record procedures for requests for review under this section.

(c) Remand.—Within the time for a decision under subsection (d), the Committee may remand a decision no more than one time to the hearing board for the purpose of supplementing the record or for further consideration.

(d) Final Decision.—

(1) Hearing board.—If no timely request for review is filed under subsection (a), the Office shall enter as a final decision, the decision of the hearing board.

(2) Select Committee on Ethics.—

(A) If the Committee does not remand under subsection (c), it shall transmit a written final decision to the Office for entry in the records of the Office. The Committee shall transmit the decision not later than 60 calendar days during which the Senate is in session after the filing of a request for review under subsection (a). The Committee may extend for 15 calendar days during which the Senate is in session the period for transmission to the Office of a final decision.

(B) The decision of the hearing board shall be deemed to be a final decision, and entered in the records of the Office as a final decision, unless a majority of the Committee votes to reverse or remand

the decision of the hearing board within the time for transmission to the Office of a final decision.

(C) The decision of the hearing board shall be deemed to be a final decision, and entered in the records of the Office as a final decision, if the Committee, in its discretion, decides not to review, pursuant to a request for review under subsection (a), a decision of the hearing board, and notifies the interested parties of such decision.

(3) Entry of a final decision.—The entry of a final decision in the records of the Office shall constitute a final decision for purposes of judicial review under section 309.

(e) Statement of Reasons.—Any decision of the Committee under subsection (c) or subsection (d)(2)(A) shall contain a written statement of the reasons for the Committee's decision.

Sec. 309. Judicial Review

(a) In General.—Any Senate employee aggrieved by a final decision under section 308(d), or any Member of the Senate who would be required to reimburse the appropriate Federal account pursuant to the section entitled "Payments by the President or a Member of the Senate" and a final decision entered pursuant to section 308(d)(2)(B), may petition for review by the United States Court of Appeals for the Federal Circuit.

(b) Law Applicable.—Chapter 158 of title 28, United States Code, shall apply to a review under this section except that—

(1) with respect to section 2344 of title 28, United States Code, service of the petition shall be on the Senate Legal Counsel rather than on the Attorney General;

(2) the provisions of section 2348 of title 28, United States Code, on the authority of the Attorney General, shall not apply;

(3) the petition for review shall be filed not later than 90 days after the entry in the Office of a final decision under section 308(d);

(4) the Office shall be an "agency" as that term is used in chapter 158 of title 28, United States Code; and

(5) the Office shall be the respondent in any proceeding under this section.

(c) **Standard of Review.**—To the extent necessary to decision and when presented, the court shall decide all relevant questions of law and interpret constitutional and statutory provisions. The court shall set aside a final decision if it is determined that the decision was—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;

(2) not made consistent with required procedures; or

(3) unsupported by substantial evidence. In making the foregoing determinations, the court shall review the whole record, or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. The record on review shall include the record before the hearing board, the decision of the hearing board, and the decision, if any, of the Select Committee on Ethics.

(d) **Attorney's Fees.**—If an employee is the prevailing party in a proceeding under this section, attorney's fees may be allowed by the court in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

Sec. 310. Resolution of Complaint

If, after a formal complaint is filed under section 307, the employee and the head of the employing office resolve the issues involved, the employee may dismiss the complaint or the parties may enter into a written agreement, subject to the approval of the Director.

Sec. 311. Costs of Attending Hearings

Subject to the approval of the Director, an employee with respect to whom a hearing is held under this title may be reimbursed for actual and reasonable costs of attending proceedings under sections 307 and 308, consistent with Sen-

ate travel regulations. Senate Resolution 259, agreed to August 5, 1987 (100th Congress, 1st Session), shall apply to witnesses appearing in proceedings before a hearing board.

Sec. 312. Prohibition of Intimidation

Any intimidation of, or reprisal against, any employee by any Member, officer, or employee of the Senate, or by the Architect of the Capitol, or anyone employed by the Architect of the Capitol, as the case may be, because of the exercise of a right under this title constitutes an unlawful employment practice, which may be remedied in the same manner under this title as is a violation.

Sec. 313. Confidentiality

(a) **Counseling.**—All counseling shall be strictly confidential except that the Office and the employee may agree to notify the head of the employing office of the allegations.

(b) **Mediation.**—All mediation shall be strictly confidential.

(c) **Hearings.**—Except as provided in subsection (d), the hearings, deliberations, and decisions of the hearing board and the Select Committee on Ethics shall be confidential.

(d) **Final Decision of Select Committee on Ethics.**—The final decision of the Select Committee on Ethics under section 308 shall be made public if the decision is in favor of the complaining Senate employee or if the decision reverses a decision of the hearing board which had been in favor of the employee. The Select Committee on Ethics may decide to release any other decision at its discretion. In the absence of a proceeding under section 308, a decision of the hearing board that is favorable to the employee shall be made public.

(e) **Release of Records for Judicial Review.**—The records and decisions of hearing boards, and the decisions of the Select Committee on Ethics, may be made public if required for the purpose of judicial review under section 309.

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Sec. 314. Exercise of Rulemaking Power

The provisions of this title, except for sections 309, 320, 321, and 322, are enacted by the Senate as an exercise of the rulemaking power of the Senate, with full recognition of the right of the Senate to change its rules, in the same manner, and to the same extent, as in the case of any other rule of the Senate. Notwithstanding any other provision of law, except as provided in section 309, enforcement and adjudication with respect to the discriminatory practices prohibited by section 302, and arising out of Senate employment, shall be within the exclusive jurisdiction of the United States Senate.

Sec. 315. Technical and Conforming Amendments

Section 509 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12209) is amended—

- (1) in subsection (a)—
 - (A) by striking paragraphs (2) through (5);
 - (B) by redesignating paragraphs (6) and (7) as paragraphs (2) and (3), respectively; and
 - (C) in paragraph (3), as redesignated by subparagraph (B) of this paragraph—
 - (i) by striking “(2) and (6)(A)” and inserting “(2)(A)”, as redesignated by subparagraph (B) of this paragraph; and
 - (ii) by striking “(3), (4), (5), (6)(B), and (6)(C)” and inserting “(2)”; and
- (2) in subsection (c)(2), by inserting “, except for the employees who are defined as Senate employees, in section 201(c)(1) of the Civil Rights Act of 1991” after “shall apply exclusively”.

Sec. 316. Political Affiliation and Place of Residence

(a) In General.—It shall not be a violation with respect to an employee described in subsection (b) to consider the—

- (1) party affiliation;
- (2) domicile; or

(3) political compatibility with the employing office, of such an employee with respect to employment decisions.

(b) Definition.—For purposes of this section, the term “employee” means—

- (1) an employee on the staff of the Senate leadership;
- (2) an employee on the staff of a committee or subcommittee;
- (3) an employee on the staff of a Member of the Senate;
- (4) an officer or employee of the Senate elected by the Senate or appointed by a Member, other than those described in paragraphs (1) through (3); or
- (5) an applicant for a position that is to be occupied by an individual described in paragraphs (1) through (4).

Sec. 317. Other Review

No Senate employee may commence a judicial proceeding to redress discriminatory practices prohibited under section 302 of this title, except as provided in this title.

Sec. 318. Other Instrumentalities of the Congress

It is the sense of the Senate that legislation should be enacted to provide the same or comparable rights and remedies as are provided under this title to employees of instrumentalities of the Congress not provided with such rights and remedies.

Sec. 319. Rule XLII of the Standing Rules of the Senate

(a) Reaffirmation.—The Senate reaffirms its commitment to Rule XLII of the Standing Rules of the Senate, which provides as follows:

“No Member, officer, or employee of the Senate shall, with respect to employment by the Senate or any office thereof—

- “(a) fail or refuse to hire an individual;
- “(b) discharge an individual; or
- “(c) otherwise discriminate against an individual with respect to promotion, compensation, or terms, conditions, or privileges of employment on the basis of

such individual's race, color, religion, sex, national origin, age, or state of physical handicap."

(b) Authority To Discipline.—Notwithstanding any provision of this title, including any provision authorizing orders for remedies to Senate employees to redress employment discrimination, the Select Committee on Ethics shall retain full power, in accordance with its authority under Senate Resolution 338, 88th Congress, as amended, with respect to disciplinary action against a Member, officer, or employee of the Senate for a violation of Rule XLII.

Sec. 320. Coverage of Presidential Appointees

(a) In General.—

(1) Application.—The rights, protections, and remedies provided pursuant to section 302 and 307(h) of this title shall apply with respect to employment of Presidential appointees.

(2) Enforcement by administrative action.—Any Presidential appointee may file a complaint alleging a violation not later than 180 days after the occurrence of the alleged violation, with the Equal Employment Opportunity Commission, or such other entity as is designated by the President by Executive Order, which, in accordance with the principles and procedures set forth in sections 554 through 557 of title 5, United States Code, shall determine whether a violation has occurred and shall set forth its determination in a final order. If the Equal Employment Opportunity Commission, or such other entity as is designated by the President pursuant to this section, determines that a violation has occurred, the final order shall also provide for appropriate relief.

(3) Judicial review.—

(A) In general.—Any party aggrieved by a final order under paragraph (2) may petition for review by the United States Court of Appeals for the Federal Circuit.

(B) Law applicable.—Chapter 158 of title 28, United States Code, shall apply to a review under this section except that the Equal Employment Opportunity Commission or such other entity as the President may designate under paragraph (2) shall be an "agency" as that term is used in chapter 158 of title 28, United States Code.

(C) Standard of review.—To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law and interpret constitutional and statutory provisions. The court shall set aside a final order under paragraph (2) if it is determined that the order was—

(i) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;

(ii) not made consistent with required procedures; or

(iii) unsupported by substantial evidence. In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(D) Attorney's fees.—If the presidential appointee is the prevailing party in a proceeding under this section, attorney's fees may be allowed by the court in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

(b) Presidential Appointee.—For purposes of this section, the term "Presidential appointee" means any officer or employee, or an applicant seeking to become an officer or employee, in any unit of the Executive Branch, including the Executive Office of the President, whether appointed by the President or by any other appointing authority in the Executive Branch, who is not already entitled to bring an action under any of the statutes referred to in section 302 but does not include any individual—

(1) whose appointment is made by and with the advice and consent of the Senate;

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(2) who is appointed to an advisory committee, as defined in section 3(2) of the Federal Advisory Committee Act (5 U.S.C. App.); or

(3) who is a member of the uniformed services.

Sec. 321. Coverage of Previously Exempt State Employees

(a) Application.—The rights, protections, and remedies provided pursuant to section 302 and 307(h) of this title shall apply with respect to employment of any individual chosen or appointed, by a person elected to public office in any State or political subdivision of any State by the qualified voters thereof—

(1) to be a member of the elected official's personal staff;

(2) to serve the elected official on the policymaking level; or

(3) to serve the elected official as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

(b) Enforcement by Administrative Action.

(1) In General.—Any individual referred to in subsection (a) may file a complaint alleging a violation, not later than 180 days after the occurrence of the alleged violation with the Equal Employment Opportunity Commission, which, in accordance with the principles and procedures set forth in sections 554 through 557 of title 5, United States Code, shall determine whether a violation has occurred and shall set forth its determination in a final order. If the Equal Employment Opportunity Commission determines that a violation has occurred, the final order shall also provide for appropriate relief.

(2) Referral to State And Local Authorities.—

(A) Application.—Section 706(d) of the Civil Rights Act of 1964 (42 U.S.C. 20003-5(d)) shall apply with respect to any proceeding under this section.

(B) Definition.—For purposes of the application described in subparagraph (A), the term 'any charge filed by a mem-

ber of the Commission alleging an unlawful practice' means a complaint filed under this section.

(c) Judicial Review.—Any party aggrieved by a final order under subsection (b) may obtain a review of such order under chapter 158 of title 28, United States Code. For the purpose of this review, the Equal Employment Opportunity Commission shall be an "agency" as that term is used in chapter 158 of title 28, United States Code.

(d) Standard of Review.—To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law and interpret constitutional and statutory provisions. The court shall set aside a final order under subsection (b) if it is determined that the order was—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;

(2) not made consistent with required procedures; or

(3) unsupported by substantial evidence. In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(e) Attorney's Fees.—If the individual referred to in subsection (a) is the prevailing party in a proceeding under this subsection, attorney's fees may be allowed by the court in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

Sec. 322. Severability

Notwithstanding section 401 of this Act, if any provision of section 309 or 320(a)(3) is invalidated, both sections 309 and 320(a)(3) shall have no force and effect.

Sec. 323. Payments by the President or a Member of the Senate

The President or a Member of the Senate shall reimburse the appropriate Federal account for any payment made on

his or her behalf out of such account for a violation committed under the provisions of this title by the President or Member of the Senate not later than 60 days after the payment is made.

Sec. 324. Reports of Senate Committees

(a) Each report accompanying a bill or joint resolution of a public character reported by any committee of the Senate (except the Committee on Appropriations and the Committee on the Budget) shall contain a listing of the provisions of the bill or joint resolution that apply to Congress and an evaluation of the impact of such provisions on Congress.

(b) The provisions of this section are enacted by the Senate as an exercise of the rulemaking power of the Senate, with full recognition of the right of the Senate to change its rules, in the same manner, and to the same extent, as in the case of any other rule of the Senate.

Sec. 325. Intervention and Expedited Review of Certain Appeals

(a) Intervention.—Because of the constitutional issues that may be raised by section 309 and section 320, any Member of the Senate may intervene as a matter of right in any proceeding under section 309 for the sole purpose of determining the constitutionality of such section.

(b) Threshold Matter.—In any proceeding under section 309 or section 320, the United States Court of Appeals for the Federal Circuit shall determine any issue presented concerning the constitutionality of such section as a threshold matter.

(c) Appeal.—

(1) In general.—An appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order issued by the United States Court of Appeals

for the Federal Circuit ruling upon the constitutionality of section 309 or 320.

(2) Jurisdiction.—The Supreme Court shall, if it has not previously ruled on the question, accept jurisdiction over the appeal referred to in paragraph (1), advance the appeal on the docket and expedite the appeal to the greatest extent possible.

TITLE IV—GENERAL PROVISIONS

Sec. 401. Severability

If any provision of this Act, or an amendment made by this Act, or the application of such provision to any person or circumstances is held to be invalid, the remainder of this Act and the amendments made by this Act, and the application of such provision to other persons and circumstances, shall not be affected.

Sec. 402. Effective Date

(a) In General. — Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.

(b) Certain Disparate Impact Cases. — Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.

TITLE V—CIVIL WAR SITES ADVISORY COMMISSION

Sec. 501. Civil War Sites Advisory Commission

Section 1205 of Public Law 101-628 is amended in subsection (a) by--

(1) striking "Three" in paragraph (4) and inserting "Four" in lieu thereof; and

(2) striking "Three" in paragraph (5) and inserting "Four" in lieu thereof.

Appendix D

Text
of

EEOC: Sex Discrimination Guidelines

APPENDIX D:

EEOC: Sex Discrimination Guidelines

Following is the text of the Equal Employment Opportunity Commission's guidelines on sex discrimination. Codified as 29 CFR 1604, the guidelines read as amended by 45 FR 74676, effective November 10, 1980. Questions and Answers on the Pregnancy Discrimination Act of 1978 appear as an Appendix to Section 1604.10.

**PART 1604 — GUIDELINES ON
DISCRIMINATION BECAUSE OF
SEX**

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**APPENDIX— QUESTIONS AND ANSWERS
ON THE PREGNANCY DISCRIMINATION
ACT, PUB. L. 95-555, 92 STAT. 2076 (1978)**

AUTHORITY: Sec. 713(b), 78 Stat. 265, 42 U.S.C. 2000e-12.

Sec. 1604.1. General Principles

(a) References to "employer" or "employers" in this Part 1604 state principles that are applicable not only to employers but also to labor organizations and to employment agencies insofar as their action or inaction may adversely affect employment opportunities.

(b) To the extent that the views expressed in prior Commission pronouncements are inconsistent with the views expressed herein, such prior views are hereby overruled.

(c) The Commission will continue to consider particular problems relating to

sex discrimination on a case-by-case basis.

Sec. 1604.2. Sex as a Bona Fide Occupational Qualification

(a) The Commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. Labels -- "Men's jobs" and "Women's jobs" -- tend to deny employment opportunities unnecessarily to one sex or the other.

(1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:

(i) The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.

(ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

(iii) The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers except as covered specifically in paragraph (a)(2) of this section.

(2) Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress.

(b) Effect of sex-oriented State employment legislation.

(1) Many States have enacted laws or promulgated administrative regulations with respect to the employment of females. Among these laws are those which prohibit or limit the employment of females, e.g., the employment of females in certain occupations, in jobs requiring the lifting or carrying of weights exceeding certain prescribed limits, during certain hours of the night, for more than a specified number of hours per day or per week, and for certain periods of time before and after childbirth. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and, therefore, discriminate on the basis of sex. The Commission has concluded that such laws and regulations conflict with and are superseded by Title VII of the Civil Rights Act of 1964. Accordingly, such laws will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.

(2) The Commission has concluded that State laws and regulations which discriminate on the basis of sex with regard to the employment of minors are in conflict with and are superseded by Title VII to the extent that such laws are more restrictive for one sex. Accordingly, restrictions on the employment of minors of one sex over and above those imposed on minors of the other sex will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.

(3) A number of States require that minimum wage and premium pay for overtime be provided for female employees. An employer will be deemed to have engaged in an unlawful employment practice if:

(i) It refuses to hire or otherwise adversely affects the employment opportunities of female applicants or employees

in order to avoid the payment of minimum wages or overtime pay required by State law; or

(ii) It does not provide the same benefits for male employees.

(4) As to other kinds of sex-oriented State employment laws, such as those requiring special rest and meal periods or physical facilities for women, provision of these benefits to one sex only will be a violation of Title VII. An employer will be deemed to have engaged in an unlawful employment practice if:

(i) It refuses to hire or otherwise adversely affects the employment opportunities of female applicants or employees in order to avoid the provision of such benefits; or

(ii) It does not provide the same benefits for male employees. If the employer can prove that business necessity precludes providing these benefits to both men and women, then the State law is in conflict with and superseded by Title VII as to this employer. In this situation, the employer shall not provide such benefits to members of either sex.

(5) Some States require that separate restrooms be provided for employees of each sex. An employer will be deemed to have engaged in an unlawful employment practice if it refuses to hire or otherwise adversely affects the employment opportunities of applicants or employees in order to avoid the provision of such restrooms for persons of that sex.

Sec. 1604.3. Separate Lines of Progression and Seniority Systems

(a) It is an unlawful employment practice to classify a job as "male" or "female" or to maintain separate lines of progression or separate seniority lists based on sex where this would adversely affect any employee unless sex is a bona fide occupational qualification for that job. Accordingly, employment practices are unlawful which arbitrarily classify jobs so that:

(1) A female is prohibited from applying for a job labeled "male," or for a job

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in a "male" line of progression; and vice versa.

(2) A male scheduled for layoff is prohibited from displacing a less senior female on a "female" seniority list; and vice versa.

(b) A Seniority system or line of progression which distinguishes between "light" and "heavy" jobs constitutes an unlawful employment practice if it operates as a disguised form of classification by sex, or creates unreasonable obstacles to the advancement by members of either sex into jobs which members of that sex would reasonably be expected to perform.

Sec. 1604.4. Discrimination Against Married Women

(a) The Commission has determined that an employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by Title VII of the Civil Rights Act. It does not seem to us relevant that the rule is not directed against all females, but only against married females, for so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex.

(b) It may be that under certain circumstances, such a rule could be justified within the meaning of section 703(e)(1) of Title VII. We express no opinion on this question at this time except to point out that sex as a bona fide occupational qualification must be justified in terms of the peculiar requirements of the particular job and not on the basis of a general principle such as the desirability of spreading work.

Sec. 1604.5. Job Opportunities Advertising

It is a violation of Title VII for a help-wanted advertisement to indicate a preference, limitation, specification, or discrimination based on sex unless sex is a bona fide occupational qualification for the particular job involved. The placement of an advertisement in columns

classified by publishers on the basis of sex, such as columns headed "Male" or "Female," will be considered an expression of a preference, limitation, specification, or discrimination based on sex.

Sec. 1604.6. Employment Agencies

(a) Section 703(b) of the Civil Rights Act specifically states that it shall be unlawful for an employment agency to discriminate against any individual because of sex. The Commission has determined that private employment agencies which deal exclusively with one sex are engaged in an unlawful employment practice, except to the extent that such agencies limit their services to furnishing employees for particular jobs for which sex is a bona fide occupational qualification.

(b) An employment agency that receives a job order containing an unlawful sex specification will share responsibility with the employer placing the job order if the agency fills the order knowing that the sex specification is not based upon a bona fide occupational qualification. However, an employment agency will not be deemed to be in violation of the law, regardless of the determination as to the employer, if the agency does not have reason to believe that the employer's claim of bona fide occupational qualification is without substance and the agency makes and maintains a written record available to the Commission of each such job order. Such record shall include the name of the employer, the description of the job and the basis for the employer's claim of bona fide occupational qualification.

(c) It is the responsibility of employment agencies to keep informed of opinions and decisions of the Commission on sex discrimination.

Sec. 1604.7. Pre-employment Inquiries as to Sex

A pre-employment inquiry may ask "Male _____, Female _____"; or "Mr. Mrs. Miss," provided that the inquiry is made in good faith for a nondiscriminatory purpose. Any pre-employment in-

quiry in connection with prospective employment which expresses directly or indirectly any limitation, specification, or discrimination as to sex shall be unlawful unless based upon a bona fide occupational qualification.

Sec. 1604.8. Relationship of Title VII to the Equal Pay Act

(a) The employee coverage of the prohibitions against discrimination based on sex contained in Title VII is co-extensive with that of the other prohibitions contained in Title VII and is not limited by Section 703(h) to those employees covered by the Fair Labor Standards Act.

(b) By virtue of Section 703(h), a defense based on the Equal Pay Act may be raised in a proceeding under Title VII.

(c) Where such a defense is raised the Commission will give appropriate consideration to the interpretations of the Administrator, Wage and Hour Division, Department of Labor, but will not be bound thereby.

Sec. 1604.9. Fringe Benefits

(a) "Fringe benefits," as used herein, includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.

(b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.

(c) Where an employer conditions benefits available to employees and their spouses and families on whether the employee is the "head of the household" or "principal wage earner" in the family unit, the benefits tend to be available only to male employees and their families. Due to the fact that such conditioning discriminatorily affects the rights of women employees, and that "head of household" or "principal wage earner" status bears no relationship to job performance, benefits which are so conditioned will be found a prima facie viola-

tion of the prohibitions against sex discrimination contained in the Act.

(d) It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees; or to make available benefits for the wives of male employees which are not made available for female employees; or to make available benefits to the husbands of female employees which are not made available for male employees. An example of such an unlawful employment practice is a situation in which wives of male employees receive maternity benefits while female employees receive no such benefits.

(e) It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other.

(f) It shall be an unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex, or which differentiates in benefits on the basis of sex. A statement of the General Counsel of September 13, 1968, providing for a phasing out of differentials with regard to optional retirement age for certain incumbent employees is hereby withdrawn.

Sec. 1604.10 Employment Policies Relating to Pregnancy and Childbirth

(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy, childbirth or related medical conditions is in prima facie violation of Title VII.

(b) Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions, under any health or disability insurance or sick

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leave plan available in connection with employment. Written or unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy, childbirth or related medical conditions on the same terms and conditions as they are applied to other disabilities. Health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term or where medical complications have arisen from an abortion, are not required to be paid by an employer; nothing herein, however, precludes an employer from providing abortion benefits or otherwise affects bargaining agreements in regard to abortion.

(c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity.

(d)(1) Any fringe benefit program, or fund, or insurance program which is in effect on October 31, 1978, which does not treat women affected by pregnancy, childbirth, or related medical conditions the same as other persons not so affected but similar in their ability or inability to work, must be in compliance with the provisions of §1604.10(b) by April 29, 1979. In order to come into compliance with the provisions of 1604.10(b), there can be no reduction of benefits or compensation which were in effect on October 31, 1978, before October 31, 1979 or the expiration of a collective bargaining agreement in effect on October 31, 1978, whichever is later.

(2) Any fringe benefit program implemented after October 31, 1978, must com-

ply with the provisions of 1604.10(b) upon implementation.

Sec. 1604.11. Sexual Harassment

(a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. * Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

(c) Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual

*The principles involved here continue to apply to race, color, religion or national origin.

acts in either a supervisory or agency capacity.

(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

(e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

(f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

(g) Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit. (Sec. 1604.11 reads as amended by 45 FR 74676, eff. Nov. 10, 1980) *The following questions and answers, with an introduction, are added to 29 CFR Part 1604 as an appendix:*

APPENDIX — QUESTIONS AND ANSWERS ON THE PREGNANCY DISCRIMINATION ACT,

PUB. L. 95-555, 92 STAT. 2076 (1978)

INTRODUCTION

On October 31, 1978, President Carter signed into law the *Pregnancy Discrimination Act* (Pub. L. 95-955). The Act is an amendment to Title VII of the Civil Rights Act of 1964 which prohibits, among other things, discrimination in employment on the basis of sex. The *Pregnancy Discrimination Act* makes it clear that "because of sex" or "on the basis of sex", as used in Title VII, includes "because of or on the basis of pregnancy, childbirth or related medical conditions." Therefore, Title VII prohibits discrimination in employment against women affected by pregnancy or related conditions.

The basic principle of the Act is that women affected by pregnancy and related conditions must be treated the same as other applicants and employees on the basis of their ability or inability to work. A woman is therefore protected against such practices as being fired, or refused a job or promotion, merely because she is pregnant or has had an abortion. She usually cannot be forced to go on leave as long as she can still work. It other employees who take disability leave are entitled to get their jobs back when they are able to work again, so are women who have been unable to work because of pregnancy.

In the area of fringe benefits, such as disability benefits, sick leave and health insurance, the same principle applies. A woman unable to work for pregnancy-related reasons is entitled to disability benefits or sick leave on the same basis as employees unable to work for other medical reasons. Also, any health insurance provided must cover expenses for pregnancy-related conditions on the same basis as expenses for other medical conditions. However, health insurance for expenses arising from abortion is not required except where the life of the mother would be endangered if the fetus were carried to term, or where medical

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complications have arisen from an abortion.

Some questions and answers about the *Pregnancy Discrimination Act* follow. Although the questions and answers often use only the term "employer," the Act — and these questions and answers — apply also to unions and other entities covered by Title VII.

1. Q. What is the effective date of the Pregnancy Discrimination Act?

A. The Act became effective on October 31, 1978, except that with respect to fringe benefit programs in effect on that date, the Act will take effect 180 days thereafter, that is, April 29, 1979.

To the extent that Title VII already required employers to treat persons affected by pregnancy-related conditions the same as persons affected by other medical conditions, the Act does not change employee rights arising prior to October 31, 1978, or April 29, 1979. Most employment practices relating to pregnancy, childbirth and related conditions — whether concerning fringe benefits or other practices — were already controlled by Title VII prior to this Act. For example, Title VII has always prohibited an employer from firing, or refusing to hire or promote, a woman because of pregnancy or related conditions, and from failing to accord a woman on pregnancy-related leave the same seniority retention and accrual accorded those on other disability leaves.

2. Q. If an employer had a sick leave policy in effect on October 31, 1978, by what date must the employer bring its policy into compliance with the Act?

A. With respect to payment of benefits, an employer has until April 29, 1979, to bring into compliance any fringe benefit or insurance program, including a sick leave policy, which was in effect on October 31, 1978. However, any such policy or program created after October 31, 1978, must be in compliance when created.

With respect to all aspects of sick leave policy other than payment of benefits, such as the terms governing retention

and accrual of seniority, credit for vacation, and resumption of former job on return from sick leave, equality of treatment was required by Title VII without the Amendment.

3. Q. Must an employer provide benefits for pregnancy-related conditions to an employee whose pregnancy begins prior to April 29, 1979, and continues beyond that date?

A. As of April 29, 1979, the effective date of the Act's requirements, an employer must provide the same benefits for pregnancy-related conditions as it provides for other conditions, regardless of when the pregnancy began. Thus, disability benefits must be paid for all absences on or after April 29, 1979, resulting from pregnancy-related temporary disabilities to the same extent as they are paid for absences resulting from other temporary disabilities. For example, if an employee gives birth before April 29, 1979, but is still unable to work on or after that date, she is entitled to the same disability benefits available to other employees. Similarly, medical insurance benefits must be paid for pregnancy-related expenses incurred on or after April 29, 1979.

If an employer requires an employee to be employed for a predetermined period prior to being eligible for insurance coverage, the period prior to April 29, 1979, during which a pregnant employee has been employed must be credited toward the eligibility waiting period on the same basis as for any other employee.

As to any programs instituted for the first time after October 31, 1978, coverage for pregnancy-related conditions must be provided in the same manner as for other medical conditions.

4. Q. Would the answer to the preceding question be the same if the employee became pregnant prior to October 31, 1978?

A. Yes.

5. Q. If, for pregnancy-related reasons, an employee is unable to perform the

functions of her job, does the employer have to provide her an alternative job?

A. An employer is required to treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition in the same manner as it treats other temporarily disabled employees, whether by providing modified tasks, alternative assignments, disability leaves, leaves without pay, etc. For example, a woman's primary job function may be the operation of a machine, and, incidental to that function, she may carry materials to and from the machine. If other employees temporarily unable to lift are relieved of these functions, pregnant employees also unable to lift must be temporarily relieved of the function.

6. Q. What procedures may an employer use to determine whether to place on leave as unable to work a pregnant employee who claims she is able to work or deny leave to a pregnant employee who claims that she is disabled from work?

A. An employer may not single out pregnancy-related conditions for special procedures for determining an employee's ability to work. However, an employer may use any procedure used to determine the ability of all employees to work. For example, if an employer requires its employees to submit a doctor's statement concerning their inability to work before granting leave or paying sick benefits, the employer may require employees affected by pregnancy-related conditions to submit such statement. Similarly, if an employer allows its employees to obtain doctor's statements from their personal physicians for absences due to other disabilities or return dates from other disabilities, it must accept doctor's statements from personal physicians for absences and return dates connected with pregnancy-related disabilities.

7. Q. Can an employer have a rule which prohibits an employee from returning to work for a predetermined length of time after childbirth?

A. No.

8. Q. If an employee has been absent from work as a result of a pregnancy-related condition and recovers, may her employer require her to remain on leave until after her baby is born?

A. No. An employee must be permitted to work at all times during pregnancy when she is able to perform her job.

9. Q. Must an employer hold open the job of an employee who is absent on leave because she is temporarily disabled by pregnancy-related conditions?

A. Unless the employee on leave has informed the employer that she does not intend to return to work, her job must be held open for her return on the same basis as jobs are held open for employees on sick or disability leave for other reasons.

10. Q. May an employer's policy concerning the accrual and crediting of seniority during absences for medical conditions be different for employees affected by pregnancy-related conditions than for other employees?

A. No. An employer's seniority policy must be the same for employees absent for pregnancy-related reasons as for those absent for other medical reasons.

11. Q. For purposes of calculating such matters as vacations and pay increases, may an employer credit time spent on leave for pregnancy-related reasons differently than time spent on leave for other reasons?

A. No. An employer's policy with respect to crediting time for the purpose of calculating such matters as vacations and pay increases cannot treat employees on leave for pregnancy-related reasons less favorably than employees on leave for other reasons. For example, if employees on leave for medical reasons are credited with the time spent on leave when computing entitlement to vacation or pay raises, an employee on leave for pregnancy-related disability is entitled to the same kind of time credit.

12. Q. Must an employer hire a woman who is medically unable, because of pregnancy-related condition, to perform a necessary function of a job?

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A. An employer cannot refuse to hire a woman because of her pregnancy-related condition so long as she is able to perform the major functions necessary to the job. Nor can an employer refuse to hire her because of its preferences against pregnant workers or the preferences of co-workers, clients, or customers.

13. Q. May an employer limit disability benefits for pregnancy-related conditions to married employees?

A. No.

14. Q. If an employer has an all female workforce or job classification, must benefits be provided for pregnancy-related conditions?

A. Yes. If benefits are provided for other conditions, they must also be provided for pregnancy-related conditions.

15. Q. For what length of time must an employer who provides income maintenance benefits for temporary disabilities provide such benefits for pregnancy-related disabilities?

A. Benefits should be provided for as long as the employee is unable to work for medical reasons unless some other limitation is set for all other temporary disabilities, in which case pregnancy-related disabilities should be treated the same as other temporary disabilities.

16. Q. Must an employer who provides benefits for long-term or permanent disabilities provide such benefits for pregnancy-related conditions?

A. Yes. Benefits for long-term or permanent disabilities resulting from pregnancy-related conditions must be provided to the same extent that such benefits are provided for other conditions which result in long-term or permanent disability.

17. Q. If an employer provides benefits to employees on leave, such as installment purchase disability insurance, payment of premiums for health, life or other insurance, continued payments into pension, saving or profit sharing plans, must the same benefits be provided for

those on leave for pregnancy-related conditions?

A. Yes, the employer must provide the same benefits for those on leave for pregnancy-related conditions as for those on leave for other reasons.

18. Q. Can an employee who is absent due to a pregnancy-related disability be required to exhaust vacation benefits before receiving sick leave pay or disability benefits?

A. No. If employees who are absent because of other disabling causes receive sick leave pay or disability benefits without any requirement that they first exhaust vacation benefits, the employer cannot impose this requirement on an employee absent for a pregnancy-related cause.

18(A). Q. Must an employer grant leave to a female employee for childcare purposes after she is medically able to return to work following leave necessitated by pregnancy, childbirth or related medical conditions?

A. While leave for childcare purposes is not covered by the Pregnancy Discrimination Act, ordinary Title VII principles would require that leave for childcare purposes be granted on the same basis as leave which is granted to employees for other non-medical reasons. For example, if an employer allows its employees to take leave without pay or accrued annual leave for travel or education which is not job related, the same type of leave must be granted to those who wish to remain on leave for infant care, even though they are medically able to return to work.

19. Q. If state law requires an employer to provide disability insurance for a specified period before and after childbirth, does compliance with the state law fulfill the employer's obligation under the Pregnancy Discrimination Act?

A. Not necessarily. It is an employer's obligation to treat employees temporarily disabled by pregnancy in the same manner as employees affected by other temporary disabilities. Therefore, any

restrictions imposed by state law on benefits for pregnancy-related disabilities, but not for other disabilities, do not excuse the employer from treating the individuals in both groups of employees the same. If, for example, a state law requires an employer to pay a maximum of 26 weeks benefits for disabilities other than pregnancy-related ones but only six weeks for pregnancy-related disabilities, the employer must provide benefits for the additional weeks to an employee disabled by pregnancy-related conditions, up to the maximum provided other disabled employees.

20. Q. If a State or local government provides its own employees income maintenance benefits for disabilities, may it provide different benefits for disabilities arising from pregnancy-related conditions than for disabilities arising from other conditions?

A. No. State and local governments, as employers, are subject to the Pregnancy Discrimination Act in the same way as private employers and must bring their employment practices and programs into compliance with the Act, including disability and health insurance programs.

21. Q. Must an employer provide health insurance coverage for the medical expenses of pregnancy-related conditions of the spouses of male employees? Of the dependents of all employees?

A. Where an employer provides no coverage for dependents, the employer is not required to institute such coverage. However, if an employer's insurance program covers the medical expenses of spouses of female employees, then it must equally cover the medical expenses of spouses of male employees, including those arising from pregnancy-related conditions.

But the insurance does not have to cover the pregnancy-related conditions of other dependents as long as it excludes the pregnancy-related conditions of the dependents of male and female employees equally.

22. Q. Must an employer provide the same level of health insurance coverage

for the pregnancy-related medical conditions of the spouses of male employees as it provides for its female employees?

A. No. It is not necessary to provide the same level of coverage for the pregnancy-related medical conditions of spouses of male employees as for female employees. However, where the employer provides coverage for the medical conditions of the spouses of its employees, then the level of coverage for pregnancy-related medical conditions of the spouses of male employees must be the same as the level of coverage for all other medical conditions of the spouses of female employees. For example, if the employer covers employees for 100 percent of reasonable and customary expenses sustained for a medical condition, but only covers dependent spouses for 50 percent of reasonable and customary expenses for their medical conditions, the pregnancy-related expenses of the male employee's spouse must be covered at the 50 percent level.

23. Q. May an employer offer optional dependent coverage which excludes pregnancy-related medical conditions or offers less coverage for pregnancy-related medical conditions where the total premium for the optional coverage is paid by the employee?

A. No. Pregnancy-related medical conditions must be treated the same as other medical conditions under any health or disability insurance or sick leave plan *available in connection with employment*, regardless of who pays the premiums.

24. Q. Where an employer provides its employees a choice among several health insurance plans, must coverage for pregnancy-related conditions be offered in all of the plans?

A. Yes. Each of the plans must cover pregnancy-related conditions. For example, an employee with a single coverage policy cannot be forced to purchase a more expensive family coverage policy in order to receive coverage for her own pregnancy-related condition.

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25. Q. On what basis should an employee be reimbursed for medical expenses arising from pregnancy, childbirth or related conditions?

A. Pregnancy-related expenses should be reimbursed in the same manner as are expenses incurred for other medical conditions. Therefore, whether a plan reimburses the employees on a fixed basis, or a percentage of reasonable and customary charge basis, the same basis should be used for reimbursement of expenses incurred for pregnancy-related conditions. Furthermore, if medical costs for pregnancy-related conditions increase, reevaluation of the reimbursement level should be conducted in the same manner as are cost reevaluations of increases for other medical conditions.

Coverage provided by a health insurance program for other conditions must be provided for pregnancy-related conditions. For example, if a plan provides major medical coverage, pregnancy-related conditions must be so covered. Similarly, if a plan covers the cost of a private room for other conditions, the plan must cover the cost of a private room for pregnancy-related conditions. Finally, where a health insurance plan covers office visits to physicians, pre-natal and post-natal visits must be included in such coverage.

26. Q. May an employer limit payment of costs for pregnancy-related medical conditions to a specified dollar amount set forth in an insurance policy, collective bargaining agreement or other statement of benefits to which an employee is entitled?

A. The amounts payable for the costs incurred for pregnancy-related conditions can be limited only to the same extent as are costs for other conditions. Maximum recoverable dollar amounts may be specified for pregnancy-related conditions if such amounts are similarly specified for other conditions, and so long as the specified amounts in all instances cover the same proportion of actual costs. If, in addition to the scheduled

amount for other procedures, additional costs are paid for, either directly or indirectly, by the employer, such additional payments must also be paid for pregnancy-related procedures.

27. Q. May an employer impose a different deductible for payment of costs for pregnancy-related medical conditions than for costs of other medical conditions?

A. No. Neither an additional deductible, an increase in the usual deductible, nor a larger deductible can be imposed for coverage for pregnancy-related medical costs, whether as a condition for inclusion of pregnancy-related costs in the policy or for payment of the costs when incurred. Thus, if pregnancy-related costs are the first incurred under the policy, the employee is required to pay only the same deductible as would otherwise be required had other medical costs been the first incurred. Once this deductible has been paid, no additional deductible can be required for other medical procedures. If the usual deductible has already been paid for other medical procedures, not additional deductible can be required when pregnancy-related costs are later incurred.

28. Q. If a health insurance plan excludes the payment of benefits for any conditions existing at the time the insured's coverage becomes effective (pre-existing condition clause), can benefits be denied for medical costs arising from a pregnancy existing at the time the coverage became effective?

A. Yes. However, such benefits cannot be denied unless the pre-existing condition clause also excludes benefits for other pre-existing conditions in the same way.*

* In the October 9, 1979 Federal Register (44 FR 58073), EEOC clarified the Commission's enforcement position with regard to Answers to Questions 29 and 30. EEOC formally took the position that in all charges which allege that an employer who provided extended benefit coverage for pregnancy but who failed to provide extended benefits for medical conditions other than pregnancy before October 31, 1979, or the later expiration of an applicable existing

29. Q. If an employer's insurance plan provides benefits after the insured's employment has ended (i.e. extended benefits) for costs connected with pregnancy and delivery where conception occurred while the insured was working for the employer, but not for the costs of any other medical condition which began prior to termination of employment, may an employer (a) continue to pay these extended benefits for pregnancy-related medical conditions but not for other medical conditions, or (b) terminate these benefits for pregnancy-related conditions?

A. Where a health insurance plan currently provides extended benefits for other medical conditions on a less favorable basis than for pregnancy-related medical conditions, extended benefits must be provided for other medical conditions on the same basis as for pregnancy-related medical conditions. Therefore, an employer can neither continue to provide less benefits for other medical conditions nor reduce benefits currently paid for pregnancy-related medical conditions.

30. Q. Where an employer's health insurance plan currently requires total disability as a prerequisite for payment of extended benefits for other medical conditions but not for pregnancy-related costs, may the employer now require total disability for payment of benefits for pregnancy-related medical conditions as well?

A. Since extended benefits cannot be reduced in order to come into compliance with the Act, a more stringent prerequisite for payment of extended benefits for pregnancy-related medical conditions, such as a requirement for total disability, cannot be imposed. Thus, in this instance, in order to comply with the Act, the employer must treat other medical conditions as pregnancy-related conditions are treated.

collective bargaining agreement, the Commission will issue a determination that there is no reasonable cause to believe that discrimination had occurred.

31. Q. Can the added cost of bringing benefit plans into compliance with the Act be apportioned between the employer and employee?

A. The added cost, if any, can be apportioned between the employer and employee in the same proportion that the cost of the fringe benefit plan was apportioned on October 31, 1978, if that apportionment was nondiscriminatory. If the costs were not apportioned on October 31, 1978, they may not be apportioned in order to come into compliance with the Act. However, in no circumstance may male or female employees be required to pay unequal apportionments on the basis of sex or pregnancy.

32. Q. In order to come into compliance with the Act, may an employer reduce benefits or compensation?

A. In order to come into compliance with the Act, benefits or compensation which an employer was paying on October 31, 1978 cannot be reduced before October 31, 1979 or before the expiration of a collective bargaining agreement in effect on October 31, 1978, whichever is later.

Where an employer has not been in compliance with the Act by the times specified in the Act, and attempts to reduce benefits, or compensation, the employer may be required to remedy its practices in accord with ordinary Title VII remedial principles.

33. Q. Can an employer self-insure benefits for pregnancy-related conditions if it does not self-insure benefits for other medical conditions?

A. Yes, so long as the benefits are the same. In measuring whether benefits are the same, factors other than the dollar coverage paid should be considered. Such factors include the range of choice of physicians and hospitals, and the processing and promptness of payment of claims.

34. Q. Can an employer discharge, refuse to hire or otherwise discriminate against a woman because she has had an abortion?

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A. No. An employer cannot discriminate in its employment practices against a woman who has had an abortion.

35. Q. Is an employer required to provide fringe benefits for abortions if fringe benefits are provided for other medical conditions?

A. All fringe benefits other than health insurance, such as sick leave, which are provided for other medical conditions, must be provided for abortions. Health insurance, however, need be provided for abortions only where the life of the woman would be endangered if the fetus were carried to term or where medical complications arise from an abortion.

36. Q. If complications arise during the course of an abortion, as for instance excessive hemorrhaging, must an employer's health insurance plan cover the additional cost due to the complications of the abortion?

A. Yes. The Plan is required to pay those additional costs attributable to the complications of the abortion. However, the employer is not required to pay for the abortion itself, except where the life of the mother would be endangered if the fetus were carried to term.

37. Q. May an employer elect to provide insurance coverage for abortions?

A. Yes. The Act specifically provides that an employer is not precluded from providing benefits for abortions whether directly or through a collective bargaining agreement, but if an employer decides to cover the costs of abortion, the employer must do so in the same manner and to the same degree as it covers other medical conditions. (As amended by 44 FR 23805, eff. April 20, 1979.)

Appendix E:

Text
of

EEOC: Policy Guide on Sexual Harassment

APPENDIX E:

Sexual Harassment

POLICY GUIDE

Sexual harassment, while not specifically included in the prohibited behavior outlined in Title VII, has become generally recognized by courts as a form of sex discrimination. EEOC defines sexual harassment as “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature,” when “(1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.” (See EEOC’s Guidelines on Sexual Harassment, issued in 1980, at 401:185.)

Court cases dealing with sexual harassment generally fall within one of two broad categories:

- ▶ Those in which the employee is threatened with or suffers a tangible job detriment in retaliation for refusing to accede to sexual demands (“quid pro quo” cases); and

- ▶ Those in which no tangible job loss occurs, but where the harassment creates an offensive or abusive environment (“hostile environment” cases).

The U.S. Supreme Court, in its first decision on sexual harassment, *Meritor Savings Bank v. Vinson* (1986, 40 FEP Cases 1822), made the following points:

- ▶ Title VII forbids sexual harassment in situations where no economic detriment is suffered by the employee, i.e., in “hostile environment” cases, since the law covers “terms, conditions, or privileges of employment.”

- ▶ The EEOC guidelines, which make it clear that “hostile environment” sexual harassment is a form of sex discrimination, are a correct interpretation of Title VII.

- ▶ In order to constitute sexual harassment, the conduct must be sufficiently severe or pervasive to alter the conditions of the victim’s employment, and to create an abusive working environment.

- ▶ *Voluntariness* is not a defense to a sexual harassment charge; rather, the crucial question is whether the sexual advances are *unwelcome*.

- ▶ A complainant’s sexually provocative speech or dress may be relevant in determining whether she regarded sexual advances as unwelcome; testimony of this kind may be admitted at the discretion of the trial court.

▶ While employers are not automatically liable for sexual harassment by supervisors, depending on the circumstances of the case, the absence of notice to an employer does not necessarily insulate it from liability.

▶ An employer may be liable for sexual harassment even if the company has a policy against discrimination and a grievance procedure, especially if the policy does not specifically cover sexual harassment, or if the grievance procedure requires the complainant first to go to her supervisor, who in many instances may be the harasser.

GROUND RULES

Employers should try to stop sexual harassment before it starts, for at least three reasons:

▶ Sexual harassment lawsuits can be extremely costly, both in time and money:

▶ Sexual harassment in the workplace can cause interpersonal conflict and tension, as well as low employee morale; and

▶ Individual careers and reputations can be severely damaged in sexual harassment situations, and the emotional toll on employees and their families can be enormous.

Recognizing Sexual Harassment

Serious problems often stem from the fact that many employers and supervisors simply do not know what sexual harassment is. A strong company policy and a training program for managers at all levels is therefore essential. Equally important, all employees should be made aware that there is a sexual harassment policy and what the enforcement procedures are. An effective sexual harassment policy — which should be published in the employees' handbook and in the supervisors' policy and procedures manual — should contain:

▶ a strong statement that sexual harassment will not be tolerated;

▶ a definition of sexual harassment; and

▶ a statement that violation of the policy will result in discipline up to and including discharge. (See material on policy statements and training programs beginning at 443:637.)

In addition to the more obvious examples of sexual harassment, such as offensive and unwanted touching, and a pattern of obscene and suggestive comments, there are other situations that may seem perfectly normal, but which may in fact add up to sexual harassment:

▶ *Jokes, graffiti, and posters* — Jokes in themselves do not necessarily constitute harassment. If, however, an employee complains about the offensive nature of jokes that are told within her hearing, the jokes can be said to contribute to a hostile or offensive working environment, and should

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be stopped. Similarly, if workers complain that sexually explicit graffiti, posters, or calendars contribute to an abusive atmosphere, they should be removed. (See *Arnold v. City of Seminole*, USDC EOkla, 1985, 40 FEP Cases 1539.)

► *Behavior at off-premises social events* — If a supervisor approaches a worker at an employer-sponsored social event, and the worker accedes to sexual advances out of fear of losing her job, or with the hope of advancing in her career, a sexual harassment claim ultimately may ensue.

“Quid pro Quo” and “Hostile Environment” Cases

As discussed in the Policy Guide above, sexual harassment cases usually belong to one of two categories: “*quid pro quo*” and “hostile environment.” Several courts have spelled out the elements that a complainant must prove in each type of case. For example, the U.S. Court of Appeals at Atlanta, in *Henson v. City of Dundee* (CA 11, 1982, 29 FEP Cases 787), said that in a hostile environment case, a complainant must prove that:

- The employee belongs to a protected group; i.e., his or her sex.
- The employee was subject to sexual harassment that was unwelcome, in the sense that the employee did not solicit or invite it, and that she regarded it as undesirable or offensive.
- The harassment complained of was based upon sex, that is, the complainant must show that but for the fact of her sex, she would not have been the object of harassment.
- The harassment complained of affected a “term, condition, or privilege” of employment, and it must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment. A state of psychological well-being has been held to be a “term, condition, or privilege” of employment within the meaning of Title VII; whether or not the harassment is sufficiently severe and persistent to affect an employee’s psychological well-being is determined under the circumstances of the particular case.
- The misconduct of supervisors or co-workers was known to the employer. (The question of strict employer liability for supervisory misconduct in hostile environment cases was left unanswered in the U.S. Supreme Court’s decision in *Meritor Savings Bank v. Vinson*, 1986, 40 FEP Cases 1822. See discussion below in Application of Policy.)

A *quid pro quo* case, the *Henson* court said, is one which establishes the principle that an employer may not require sexual consideration as a *quid pro quo* for job benefits. In this kind of case, the complainant must prove the first three elements of a hostile environment case, listed above, and in addition, must prove:

- *Loss of job benefit* — The employee’s reaction to the harassment complained of affected tangible aspects of her compensation, terms, conditions, or privileges of employment. The employee must prove, therefore, that she

was deprived of a job benefit that she was otherwise qualified to receive, because of the employer's use of a prohibited criterion in making the employment decision.

► *Employer responsibility* — An employer is held liable, even without knowledge, for the discriminatory actions of its supervisors which affect tangible job benefits of employees, unless the employer took definite and prompt action to stop the harassment. (It appears that the Supreme Court's decision in the *Vinson* case has made no change in the status of employer's strict liability in *quid pro quo* cases.)

APPLICATION OF POLICY

Sexual harassment cases generally fall within one of two broad categories: those in which the employee suffers a tangible job detriment in retaliation for refusing to accede to sexual demands ("*quid pro quo*" cases); and those in which no tangible loss or detriment occurs but where an offensive or abusive atmosphere is created due to the harassment ("hostile environment" cases).

In its first decision on sexual harassment, the Supreme Court cited the EEOC guidelines in ruling that sexual harassment that creates a hostile environment is a violation of Title VII. The language of Title VII, the Court said, is not limited to "economic" or "tangible" discrimination, but shows a congressional intent to "strike at the entire spectrum of disparate treatment of men and women." (*Meritor Savings Bank v. Vinson*, US SupCt, 1986, 40 FEP Cases 1822)

Employer Liability for Supervisors' Misconduct

The Supreme Court, in the *Vinson* decision, did not rule on whether, in hostile environment cases, employers are strictly liable for sexual harassment by supervisors — that is, whether employers are liable for supervisory misconduct about which they have no knowledge or reason to know. In the absence of such a ruling, therefore, lower courts remain divided on the issue. In *quid pro quo* cases, in which most courts that have ruled on the issue have found strict employer liability, it

appears that the *Vinson* opinion has had no effect.

● In a case involving elements of both hostile environment and *quid pro quo*, the U.S. Court of Appeals at Atlanta discussed the difference in the standards required to establish employer liability: in a hostile environment case, the court reasoned, supervisors, co-workers, or even strangers to the workplace can render a work environment offensive, and a person's capacity to create the hostile or offensive environment "is not necessarily enhanced or diminished by any degree of authority which the employer confers upon that individual." But when the employment is in some way conditioned on the employee's acquiescence to a supervisor's sexual demands, the court said, the supervisor is relying upon his apparent or actual authority to extort the employee's sexual consideration, using the means furnished to him by the employer to accomplish his purposes. Under such circumstances, the court concluded, the supervisor's conduct fairly can be imputed to the source of authority, i.e., the employer. (*Henson v. City of Dundee*, CA 11, 1982, 29 FEP Cases 787)

● A supervisor and the employer should be considered as one entity with respect to determining liability for illegal harassment, even if the firm has no knowledge of the supervisor's actions, ruled the U.S. Court of Appeals at Chicago. Approving EEOC's guidelines imposing strict liability on employers for ac-

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tions committed by supervisors, the court ruled that firing a woman employee for refusing her supervisor's sexual advances was a violation of Title VII. Where "the supervisory employee is given absolute authority to hire and fire, and uses this authority to extort sexual favors from employees, the supervisor is, for all intents and purposes, the company." (*Horn v. Duke Homes*, CA 7, 1985, 37 FEP Cases 228)

● The U.S. Court of Appeals at Philadelphia found that Title VII was violated when a supervisor, with actual or constructive knowledge of the employer, made sexual advances toward a subordinate employee and conditioned that employee's job status — evaluation, continued employment, promotion, or other aspects of career development — on a favorable response to those advances, and the employer did not take prompt and appropriate remedial action after acquiring such knowledge. (*Tomkins v. Public Service E & G Co.*, CA 3, 1977, 16 FEP Cases 22. See also *Garber v. Saxon Business Products*, CA 4, 1977, 15 FEP Cases 344)

Co-Worker Sexual Harassment

An employer is liable for an employee's harassment by a co-worker, according to EEOC guidelines, when the employer (or its agents or supervisors) knows or should have known of the specific conduct complained about, and fails to take "immediate and appropriate corrective action." Moreover, that conduct must itself reach a certain level of offensiveness to place the employer at risk.

● A government agency that allowed a pattern of "sexual insult and innuendo" to continue, even after it was reported to supervisors, was liable for illegal sexual harassment, the U.S. Court of Appeals at Richmond ruled. Although the employee reported what the court termed "extremely vulgar and offensive sexually related epithets" to her supervisor and then to his supervisor, the harassment continued. The agency had "an articulat-

ed policy" against sexual harassment, the court added, but it "was known not to be effective" by agency supervisory personnel. (*Katz v. Dole*, CA 4, 1983, 31 FEP Cases 1521)

● An employer that failed to stop a "malevolent and outrageous" campaign of sexual harassment against a female employee by her co-workers — behavior that included three years of abusive language, posting drawings of sexually explicit behavior, and incidents of indecent exposure — violated Title VII, a federal district court ruled. The fact that management took remedial steps after the worker filed a complaint with EEOC, the court said, demonstrated that the employer could have acted to stop the harassment at any time, but failed to do so. (*Zabkowicz v. West Bend Co.*, USDC EWis, 1984, 35 FEP Cases 610)

Hostile Working Environment

Employers who condone, or fail to take action to change, a hostile or abusive workplace atmosphere have been found liable for sexual harassment.

● A public employer that failed to have a written sexual harassment policy and that ignored a worker's complaints of sexual harassment for over three years was guilty of sex discrimination in violation of the equal protection clause of the Fourteenth Amendment, the U.S. Court of Appeals at Chicago decided. Finding that "sexual harassment was the general, on-going, and accepted practice" at a city fire department, the court ruled that "creating abusive conditions for female employees and not for male employees is discrimination." (*Bohen v. City of East Chicago, Ind.*, CA 7, 1986, 41 FEP Cases 1108)

● Taking a different point of view, however, another court found that posters of nude women on workplace walls and a supervisor's vulgar language did not constitute sexual harassment. The complainant failed to prove that the posters and vulgarity "interfered with her job performance," said the U.S. Court of Appeals at Cincinnati. The court added

that in the context of a society that condones "open displays of written and pictorial erotica," the vulgar language and posters did not result in an "intimidating, hostile or offensive" working environment. (*Rabidue v. Osceola Refining Co.*, CA 6, 1986, 42 FEP Cases 631)

Retaliatory Firing

Title VII prohibits retaliatory treatment of an employee who has filed a discrimination charge against the employer.

- A former employee was the victim of retaliatory firing after she filed a charge of sexual harassment with EEOC, the U.S. Court of Appeals at St. Louis decided. Several months after the woman charged her supervisor with touching and grabbing her, as well as making sexually suggestive remarks, the supervisor placed her under "surveillance," and eventually fired her. Since her performance had been considered acceptable until she filed her complaint, the court said, the supervisor's claims of the worker's poor performance were "highly suspect," leading to the conclusion that the firing was a "pretext," and therefore retaliatory. (*Mays v. Williamson & Sons*, CA 8, 1985, 39 FEP Cases 106)

Dress Requirements

Courts have found employers liable for Title VII violations when female employees are required to wear clothing that is clearly sexually suggestive and that the worker finds demeaning.

- An employer's requirement that a female lobby attendant wear a sexually provocative work uniform violated Title VII, a federal district court ruled. The court observed that the employer did not have "unfettered discretion" to require the woman to wear a revealing uniform that encouraged lewd comments and sexual propositions from the public. Moreover, the court said, in requiring such attire, the employer made the woman's "acquiescence in sexual harassment" by the public "a prerequisite of her employ-

ment." (*EEOC v. Sage Realty Corp.*, USDC SNY, 1981, 24 FEP Cases 1521)

- A female employee established a violation of Title VII by demonstrating that a restaurant owner demoted her from full-time permanent employment as a cocktail lounge waitress because she refused to comply with his request to wear "something low-cut and slinky" for work, a federal district court ruled. (*Priest v. Rotary*, USDC NDCalif., 1986, 40 FEP Cases 208)

Sexual Favoritism: Non-beneficiaries

Sexual favoritism — granting an employment benefit to an employee who submits to requests for sexual favors and denying the benefit to another employee — constitutes sex discrimination, some courts have ruled:

- An employer violated Title VII by denying a promotion to a nurse who was more qualified than the younger employee who got the position, decided the U.S. Court of Appeals for the District of Columbia, finding that the nurse who got the job was having a sexual relationship with the doctor that made the promotion decision. Ruling that the non-beneficiary established her sex bias claim by presenting evidence that open sexual conduct between the doctor and the nurse he promoted — kisses and other amorous behavior — played a substantial role in the selection, the court said that requiring direct proof that the sexual relationship had been consummated "would establish a patently absurd legal principle." (*King v. Palmer*, CA DC, 1985, 39 FEP Cases 877)

- Ruling a different way, however, the U.S. Court of Appeals at New York decided that a manager's manipulating the requirements for a job opening so that he could hire his paramour did not discriminate against other applicants on the basis of sex. Title VII's sex discrimination prohibition encompasses only gender-based disparate treatment, the court said, and the law does not extend to favoritism based on sexual attraction or voluntary romantic relationships. The

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meaning of "sex" under Title VII should not be expanded to include "sexual liaisons" and "sexual attractions," the court observed, because such an interpretation "would involve the EEOC and the federal courts in the policing of intimate relationships." (*DeCintio v. Westchester County Medical Center*, CA 2, 1986, 42 FEP Cases 921)

Background Checks

Some courts have limited the inquiries employers may make into the backgrounds of employees who complain of sexual harassment. For example:

- A federal district court ruled that an employee's psychological records cannot be used to prove that her sexual harassment complaints were caused by emotional problems and not actual harassment. The court denied the employer's request to subpoena records of a psychologist to whom it had referred the woman in defending itself against her claims. The company argued that it needed the records to support its contention that the employee's concerns about sexual harassment were caused by her emotional problems. But the court said that whether the employer's actions constituted sexual harassment and whether those actions unreasonably interfered with the woman's ability to do the job were questions that could be answered without violating the worker's confidences to the psychologist. (*Jennings v. D.H.L. Airlines*, USDC NIll, 1984, 34 FEP Cases 1423)

- An employer may not inquire about the sexual history of a worker who files sexual harassment charges, another federal district court ruled, stressing that allowing employers to pursue this line of questioning "might intimidate, inhibit, or discourage" sexual harassment complainants from pursuing their Title VII claims. Without protection from the courts from these intrusions, the court pointed out, "employees whose intimate lives are unjustifiably and offensively intruded upon in the workplace might face the Catch-22 of invoking their statutory

remedy only at the risk of enduring further intrusions into irrelevant details of their personal lives in discovery and, presumably, in open court." (*Priest v. Rotary*, USDC NCalif, 1983, 32 FEP Cases 1064)

Sexual Harassment by Labor Unions

A labor union and its officers may be held liable for sexual harassment, under the same standards as are applied to employers:

- A union might be held responsible for sexual harassment committed by one of its officials, a California appeals court held, affirming a lower court's order that a union local and its top officer were liable for damages to two waitresses for "intentional infliction of emotional distress." The damages award resulted from the union officer's conditioning the women's obtaining union work on their willingness to accept jobs "having sex with men, women, and animals," engaging in sex for pay, traveling to sex parties, and being on call for sexual services. The union official's actions, the appeals court said, taken within the scope of his authority, even if it was not ratified by the local, "became the act of the union." (*Seritis v. Hotel and Restaurant Employees and Bartenders Union, Local 28*, Calif CtApp, 1985, 37 FEP Cases 1501)

Sexual Harassment and RICO

- Prolonged sexual harassment of employees by union officials can violate the federal Racketeering Influenced and Corrupt Organizations Act (RICO), according to a federal district court. It decided to allow a construction worker to pursue her claim that she was driven from her job as the result of continual sexual harassment by union officials. The court ruled that the union officers she charged with the harassment could be held liable under RICO, which allows "any person injured in his business or property" by a "pattern of racketeering activity" to recover treble damages — three times the amount usually allowed.

(Hunt v. Weatherbee, USDC DMass, 1986, 39 FEP Cases 1469)

Sexual Harassment and State Law

While Title VII generally limits awards to back pay, reinstatement, and attorneys' fees, successful complainants have been awarded compensatory and punitive damages by state courts in lawsuits against employers for such common law offenses as assault and battery, invasion of privacy, and intentional infliction of emotional distress, as well as for violations of state antidiscrimination laws.

- A woman who brought suit under Title VII against an employer for sexual harassment was properly permitted to bring state law tort claims against him, too, the U.S. Court of Appeals at Atlanta ruled. The woman was awarded under \$3,000 to cover her Title VII wage loss, but a jury awarded her \$10 for common law battery and \$25,000 in compensatory damages for invasion of privacy, under the state law. The appeals court, approving a lower court's decision to entertain the state law claims in addition to the Title VII claim, pointed out that if the lower court had refused to do so, as the employer argued it should have, there would have been substantially duplicative proceedings in federal and state courts. (Phillips v. Smalley Maintenance Services, Inc., CA 11, 1983, 32 FEP Cases 975)

- However, in a case that limited a complainant's avenues of redress, the U.S. Court of Appeals at Philadelphia ruled that because the Pennsylvania Human Rights Act provides a remedy for sexual harassment claims, a complainant could not bring a state action based on common law tort theory. Therefore, the court refused to permit a wrongful discharge suit by a woman who claimed that her firing was the result of her refusal to submit to the sexual demands of her supervisor. (Wolk v. Saks Fifth Avenue, CA 3, 1984, 34 FEP Cases 193)

- An employer in South Carolina could be found liable under state law for

a supervisor's sexual harassment of a female employee, once management was aware of the conduct but took no corrective action, the U.S. Court of Appeals at Richmond decided. Pointing to a manager's admission that he took no action after seeing the supervisor pat the employee on the posterior, the court ruled that the employer could be held responsible for the supervisor's conduct dating from that time. The court's decision gave the employee a chance to prove her claims for assault and battery and battery and intentional infliction of emotional distress. (Davis v. U.S. Steel Corp., CA 4, 1985, 39 FEP Cases 955)

- A California woman whose employer threatened her with a razor and then fired her because she would not accede to his sexual demands was awarded \$52,000 in damages and back pay by the state's Fair Employment and Housing Commission. The commission ruled that the employee suffered "oppressive" working conditions not shared by male colleagues and "extreme and outrageous intentional invasions" of her "mental and emotional tranquility." The woman was awarded \$25,000 in punitive damages, \$15,000 in compensatory damages, \$11,350 in back pay, and \$788 in interest. (Department of Fair Employment v. Ambylou Enterprises, Inc., Case No. FEP 80-81, FEHC Decision No. 82-06)

- A worker sued her employer for invasion of privacy, infliction of emotional distress, and assault and battery, which are recognized as common-law torts in the District of Columbia, where she worked. She requested \$500,000 in compensatory and punitive damages. The court found that the woman was entitled to pursue her claims before a jury, which could then decide the issue of damages. (Rogers v. Loews L'Enfant Plaza Hotel, USDC DC, 1982, 29 FEP Cases 828)

- In what it described as a "precedential decision," the California Fair Employment and Housing Commission found that an employer condoned a manager's sexual harassment of four female

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workers and ordered him to pay \$135,000 in compensatory damages, \$40,000 in punitive damages, and back pay to the women. Stressing that the harassment made the women's working conditions "oppressive and intolerable," the commission held that the resignations of three of the women amounted to constructive discharges and awarded them compensatory damages.

The commission also decided that the complainants were entitled to punitive damages, finding that the manager's "persistence in engaging in or continuing deeply offensive conduct after clear requests to stop, and in particular doing so from a position of authority and power over a victim, shows strong and inexcusable malice." It is also clear that the owner was "aware and knew of" the manager's harassment of the women, the commission said, pointing out that "instead of investigating their claims of harassment, he intentionally elected to ignore the situation and did not further investigate or implement his employee grievance procedure." Concluding that the owner violated his "duty to provide a harassment free work environment," the commission awarded each woman \$10,000 in punitive damages. (*DFEH v. Hart and Starkey, Inc.*, Case No. 84-23)

- An employer's tolerance of a "hostile and intimidating work environment" in which two female workers were sexually harassed by a coworker for three years violated the state's antidiscrimination law, the Washington State Supreme Court decided. The court asserted that "sexual harassment as a working condition unfairly handicaps an employee against whom it is directed in his or her work performance and as such is a barrier to sexual equality in the workplace." (*Glasgow v. Georgia-Pacific Corp.*, Wash SupCt, No. 50179-0, Jan. 10, 1985)

- An employer's delay in acting on a worker's sexual harassment complaint made it liable for intentional infliction of emotional distress under state tort law, the Arizona Supreme Court ruled. The

company took over a year to investigate and take action on an employee's complaint of harassment by her supervisor, who had pursued her at a company picnic, and restrained her in a chokehold with one hand while running his other hand over her body. Before the employer finally took action, the employee developed high blood pressure and other symptoms of stress, and even attempted suicide.

Finding that the company should bear responsibility for the emotional distress the employee suffered, the court said that the company's delay in acting on the worker's complaint made it "nearly certain" that "emotional distress would in fact occur." In addition, the court pointed out, although the employer had a specific policy for handling sexual harassment complaints, it "recklessly" disregarded its own policies. (*Ford v. Revlon*, Ariz SupCt, 1987, 43 FEP Cases 213)

Sexual Harassment Victims and Unemployment Compensation

Employees who have quit their jobs because of sexual harassment have been held to be entitled to unemployment benefits in certain cases:

- A woman who quit because of sexual harassment was entitled to unemployment compensation benefits even though she voluntarily left her job, the Washington State Court of Appeals ruled. Observing that there was no doubt that the worker was subjected to severe sexual harassment, the court said that any prudent person would have quit in similar circumstances. In light of the conduct of the harassers, "a genuine apprehension would have been created in the mind of an ordinarily prudent woman," the court decided, awarding the worker unemployment benefits and attorneys' fees. (*Hussa v. Employment Security Department*, Wash CtApp, No. 4944-III-2, June 7, 1983)

- A sexual harassment victim who quit her job is entitled to unemployment compensation benefits under state law, the Minnesota Supreme Court ruled.

Finding that the employer knew or should have known that the woman was being harassed, the court held that the woman was entitled to UC benefits because she quit her job with good cause. The court pointed out that the woman, a meatcutter, complained to her immediate supervisor, her union steward, and a night manager that she was being hit and verbally and physically harassed by other workers, but, despite her complaints, management did nothing to alleviate the situation. Noting that Minnesota law requires that notice be given to management of harassment in order to establish eligibility for unemployment benefits, the court said that the woman fulfilled this requirement. (*McNabb v. Cub Foods*, Minn SupCt, No. CX-83-957, July 10, 1984)

Homosexual Harassment

A supervisor's unwelcome homosexual advances toward a male employee are prohibited under Title VII, according to

a federal district court. In the sex discrimination suit of a male employee who claimed that he had been discharged from employment for refusing the sexual propositions of a male supervisor, a federal district court in Illinois rejected the employer's argument that Title VII does not cover homosexual harassment, noting that homosexual harassment "presents the obverse of the coin" of heterosexual harassment, which is prohibited under Title VII. Because heterosexual harassment cases "are predicated on the notion that making a demand of a female employee that would not be made of a male employee involves sex discrimination," the court ruled that the male employee's sex discrimination suit could proceed under Title VII because it involves an "alleged demand of a male employee that would not be directed to a female." (*Wright v. Methodist Youth Services, Inc.*, USDC NI11, 1981, 25 FEP Cases 563)

Vita

Barbara Jean O'Neal

Education

Doctor of Education
Higher Education Administration
Cognate Area- Human Resource Management
Virginia Polytechnic Institute and State University
Blacksburg, Virginia

Master of Science -December 1985
Education Administration
North Carolina Agricultural and State University
Greensboro, North Carolina

Bachelor of Science - May 1976
Early Childhood Education
Winston-Salem State University
Winston-Salem, North Carolina

Professional Experiences

Graduate Project Assistant - 1988 to Present
College of Education- Tomorrow's Teachers Program
Virginia Tech - Blacksburg, Virginia

The Tomorrow's Teachers Program is a partnership collaboration between the College of Education and the Roanoke Virginia business community to provide scholarships for the recruitment of minorities for careers in teaching. Students selected to participate in the program are awarded full scholarships to attend Virginia Tech in a teacher education curriculum. In exchange, students agree to return to the Roanoke City schools to teach for four years.

Acting as the Assistant to the Project Director my role included:

- recruiting and counseling students
- providing and developing career awareness programs and seminars
- serve as liaison and resource person for parents, students and counselors
- academic advising
- developed, published and served as editor of newsletter
- assisting with research, identification, and writing proposals for funding sources
- coordinating campus visits
- providing multicultural counseling
- assisting with locating summer work experiences

Graduate Administrative Internship – 1990–91

Office of Assistant to the President/Director of Affirmative Action
Virginia Tech – Blacksburg, Virginia

Served as an Administrative Assistant to the Assistant to the President to expand administrative skills and acquire relevant work experience.

As Administrative Assistant my role included:

- organized and coordinated Black Student / Faculty Mentor Program
- organized and served as co-presenter for campus climate workshops for faculty
- assisted in investigating EEO/AA complaints and grievances
- planned and coordinated speakers for Breakfast With Program...
(Speakers addressed issues on diversity, multiculturalism, gender, etc)
- participated in planning Black History Month Committee, Campus Climate Committee, and the EEO/AA Committee
- assisted with developing training materials and seminars to address multiculturalism and diversity

Admissions Counselor – 1986–1988

Winston-Salem State University
Winston-Salem, North Carolina

- recruited and counseled students and parents on admissions requirements
- traveled extensively to high schools and community colleges for College Day presentations and programs
- Served as liaison person for institution and high school counselors
- reviewed applications and made admissions decisions
- coordinated alumni recruitment programs
- collected, prepared and analyzed market data reports
- coordinated and planned open house programs and campus visits

Sales Representative – 1980–1984

Johnson and Johnson Company
W.B. Saunders Textbook Publishers
Baton Rouge, Louisiana and Dallas, Texas

Employed as a Sales and Marketing Representative for Fortune 500 companies.

- sales and marketing of company products in territory
- coordinated and planned sales presentations to major accounts
- analyzed and prepared market data reports
- extensive travel and public relations
- coordinated and executed consumer promotional projects and display
- served as a liaison for company to consumer outlets
- located and developed new markets and accounts

Teaching Experience – 1976–1980 / 1984–86

Winston-Salem/Forsyth County Schools
Loudoun County Schools

- Teacher of elementary grades
- Primary reading teacher (part-time)

Barbara J. O'Neal