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Civil Rights - Job Discrimination by Sex

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Recent Decisions

CIVIL RIGHTS—JOB DISCRIMINATION BY SEX—The United States District Court for the Western District of Pennsylvania has held that failure to hire or promote women to positions for which they are otherwise qualified, on the basis of sex, is a violation of Title VII of the Civil Rights Act of 1964, despite any provision of Pennsylvania law regulating hours of work for women.

Kober v. Westinghouse Electric Corporation, 325 F. Supp. 467 (W.D. Pa. 1971).

Plaintiff, Catherine Kober, sued her employer, Westinghouse Electric Corporation, seeking damages and injunctive relief under Title VII of the Civil Rights Act of 1964.[1] The federal district court had jurisdiction under the provisions of the Act.[2] The court found that the employer in the litigation was a member of the class coming within the meaning of the Act.[3] The complaint alleged that the plaintiff was discriminated against with respect to her classification of employment on the basis of sex. She was classified as a Class A Peripheral Machine Operator, Job Class 11, and applied for an opening as Console Computer Operator, Job Class 12. A male employee with less seniority was promoted to fill the vacancy. The defendant stated that it could not have promoted plaintiff without violating the Pennsylvania Women's Labor Law[4] which limits the number of hours which women can work. Defendant argued that the Pennsylvania law regulating hours of employment for women established a bona fide occupational qualification exception under Title VII of the Civil Rights Act of 1964 justifying the employer's refusal to promote plaintiff. The district court held that the paramount provisions of the federal statute prevailed by reason of the supremacy clause, over any state statute.[5]

While the court in *Kober* does not explain its use of the supremacy clause, the reasons are related to the interpretations of the bona fide occupational qualification exception by the Equal Employment Opportunity Commission (EEOC). The bona fide occupational quali-

1. §§ 701-716, 42 U.S.C. §§ 2000e-2000h (1970) [hereinafter cited as Title VII].
2. Title VII, § 706, 42 U.S.C. § 2000e-5(f).
3. *Id.* § 701, 42 U.S.C. § 2000e.
4. PA. STAT. ANN. tit. 43, § 101 *et seq.* (1969).
5. Kober v. Westinghouse Electric Corporation, 325 F. Supp. 467, 474, (W.D. Pa. 1971).

fication is an exception to the requirement of Title VII that employers shall not discriminate against any employee because of the employee's race, color, religion, sex, or national origin.[6] The exception in Title VII provides:

> Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire or employ employees . . . 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. . . .[7]

The EEOC was created by Congress and charged with administrative responsibility for Title VII.[8] The EEOC possesses elaborate procedural mechanisms[9] to prevent unlawful employment practices. The commission, therefore, has the responsibility of determining when a bona fide occupational qualification exists.

In fulfilling its responsibility, the EEOC has the authority to publish guidelines[10] concerning Title VII. The guidelines covering the bona fide occupational qualification changed significantly between 1966 and 1969, particularly with respect to the compatibility of state "protective" statutes and the Act. The alteration was caused by the EEOC's attempt to reconcile the provisions of Title VII with various state protective legislative enactments regarding the working conditions of women. In the 1966 guidelines, the commission established two classifications for state protective legislation.[11] State legislation which benefited women

6. Title VII, § 703(a), 42 U.S.C. § 2000e-2(a) (1970).
7. *Id.* § 703(e), 42 U.S.C. § 2000e-2(e).
8. *Id.* § 705, 42 U.S.C. § 2000e-4.
9. *Id.* § 706, 42 U.S.C. § 2000e-5. When a charge has been filed, the commission gives the respondent a copy and investigates the charge. If the commission determines that there is reasonable cause to believe the charge to be true, it notifies the respondent and seeks to end the unlawful employment practice through informal conferences, conciliation, and persuasion. If these methods fail, the EEOC notifies the parties, and the injured party can file a complaint within thirty days in a district court.
10. *Id.* § 713, 42 U.S.C. § 2000e-12.
11. 29 C.F.R. § 1604.1(b) (1966) provides:

> The Commission believes that some state laws and regulations with respect to the employment of women, although originally for valid protective reasons, have ceased to be relevant to our technology or to the expanding role of the woman worker in our economy. We shall continue to study the problems posed by these laws and regulations in particular factual contexts, and to cooperate with other appropriate agencies in achieving a regulatory system more responsive to the demands of equal opportunity in employment.

Id. § 1604.1(c) provides:

> The Commission does not believe that Congress intended to disturb such laws and regulations which are intended to, and have the effect of, protecting women against exploitation and hazard . . . However, in cases where the clear effect of a law in

by establishing rest periods or minimum wages would not be permitted to be used by an employer to justify a refusal to hire or promote.[12] On the other hand, an employer could refuse to hire or promote women if state legislation prohibited the type of work required, because it presented a hazard to women by having them lift weights over certain amounts or work more than a specified number of hours each week.[13] Thus, the 1966 guidelines upheld the validity of certain types of state protective legislation.

In 1968, similar guidelines were published.[14] But in 1969, the commission adopted a different position regarding state protective legislation, stating that many state laws regulate the employment of women[15] and that these state laws, being in conflict with Title VII, cannot be used to defend otherwise unfair labor practices or to provide the basis for bona fide occupational qualification exceptions to Title VII.[16] In its 1969 guidelines, the EEOC particularly noted that many of the so-called protective state enactments do not take into account the individuality of women workers and tend, rather than protecting women, to discriminate against them in the labor market.[17]

Most of the state legislation designed to protect women was passed during the first part of the twentieth century when labor conditions

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current circumstances is not to protect-women but to subject them to discrimination, the law will not be considered a justification for discrimination.

12. *Id.* § 1604.1(a)(3)(i).

13. *Id.* § 1604.1(a)(3)(ii).

14. 29 C.F.R. § 1604.1(c) (1968).

The Commision does not believe that the Congress intended to disturb such laws and regulations which are intended to, and have the effect of, protecting women against exploitation and hazard. Accordingly, the Commision will consider limitations or prohibitions imposed by such state laws or regulations as a basis for application for a bona fide occupational exception.

15. 29 C.F.R. § 1604.1(b)(1) (1970).

16. *Id.* § 1604.1(b)(2).

The Commission believes that such state laws and regulations, although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect. Accordingly, the Commission has concluded that such laws and regulations conflict with Title VII of the Civil Rights Act of 1964 and 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.

17. For a fuller discussion of state protective legislation and the Civil Rights Act of 1964, *see* Lamber, *Equal Rights for Women: The Need for a National Policy*, 46 IND. L.J. 373 (1970); Oldham, *Sex Discrimination and State Protective Laws*, 44 DENVER L.J. 344 (1967); Pressman, *The Quiet Revolution*, 4 FAMILY L.Q. 31 (1970); Rawalt, *Litigating Sex Discrimination Cases*, 4 FAMILY L.Q. 44 (1970); Comment, *The Mandate of Title VII of the Civil Rights Act of 1964: To Treat Women as Individuals*, 59 GEO. L.J. 221 (1970). *See also* L. KRANOWITZ WOMEN AND THE LAW (1970).

were deplorable.[18] For example, forty-one states have laws establishing maximum daily or weekly work hours for women,[19] twenty states prohibit or regulate night-time employment of women,[20] twelve states have weight-lifting limits,[21] and twenty-six states have limitations on the types of jobs women may perform.[22] These laws may be said to discriminate against women as a group by closing certain occupations to them. Another group of state protective laws actually discriminates in favor of women by requiring benefits which men do not necessarily enjoy. This group of laws include requiring rest areas and extra break-time for women. The Pennsylvania statute requires, for example, one seat for every three women employed, wash and dressing rooms, exhaust fans and lunch rooms for certain establishments, and reasonable efforts to supply drinking water (for which the employer may not levy a charge).[23]

Title VII does not provide that the state protective laws will continue to be valid. In only two sections of the Act are state laws mentioned, in the context of saving state fair employment statutes.[24] The saving clause in section 2000e-7 specifically makes inoperative any state law which requires or permits an unfair employment practice. Although the bill which passed through the congressional hearings in 1964 did not contain a sex provision in Title VII,[25] the brief House debate on the sex amendment, added after the bill left the committee, reveals that those representatives who spoke in behalf of or against the amendment believed that the amendment would impliedly repeal these state protective laws.[26] Nevertheless, the legislative history on the question is too brief to be conclusive, in light of the bona fide occupational qualification in Title VII which was interpreted by the EEOC for three years to permit some state protective legislation to exempt certain women workers from the anti-discrimination provisions of the Act.

One case decided during the 1967 to 1969 period also supports the

18. *See* Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 HARV. L. REV. 353 (1916); Hand, *Due Process of Law and the Eight Hour Day*, 21 HARV. L. REV. 495 (1908).
19. Buschmann, *Sex Discrimination: State Protective Laws v. Title VII of the Civil Rights Act of 1964*, 1968 U. ILL. L.F. 418.
20. *Id.* at 419.
21. *Id.*
22. *Id.*
23. PA. STAT. ANN. tit. 43, §§ 101, 103, 105, 107-112 (1969).
24. Title VII, §§ 706 708, 42 U.S.C. § 2000e-5(b) to (d), and § 2000e-7 (1964).
25. *See* 1964 *U.S. Code Cong. and Ad. News*, 2355 et seq.
26. Buschmann, *supra* note 19, at 422.

early EEOC interpretation of the bona fide occupational qualification exception. In *Bowe v. Colgate-Palmolive Company*,[27] the United States District Court for the Southern District of Indiana permitted Colgate to limit weights to be lifted by women in generic terms because it would be extremely difficult for the employer to determine individually those female employees who could lift weights above the state maximum. The court specifically allowed the enforcement under the bona fide occupational qualification exception of Title VII.[28]

Other cases decided during this period attempted to reconcile state protective legislation and the bona fide occupational qualification with the other provisions of Title VII by construing the bona fide occupational qualification narrowly and then making the employer meet that burden in order to win. In *Weeks v. Southern Bell Telephone and Telegraph Company*,[29] protective state legislation was invoked as a bona fide occupational qualification to prevent promoting a woman. The Fifth Circuit Court of Appeals said that the employer had the burden of proving that there was a reasonable factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved in order to establish the bona fide occupational qualification exception.[30] The court held that Bell had not met that burden by saying that the job was too strenuous for a woman. The use of such stereotyped sexual characterizations were deemed too vague to meet the employer's burden.[31] In *Cheatwood v. South Central Bell Telephone and Telegraph Company*,[32] the *Weeks* test was applied with similar results.

In *Rosenfeld v. Southern Pacific Company*,[33] the court anticipated the 1969 change in the EEOC guidelines by its decision. The plaintiff had been refused a promotion. Her duties in the new job would have violated California's weights and hours legislation.[34] The court concluded that refusal to assign plaintiff to the position constituted discrimination solely because of sex[35] and held the employer's action

27. 272 F. Supp. 332 (S.D. Ind. 1967), *modified* 416 F.2d 711 (7th Cir. 1969). The modification required Colgate to allow each female worker to qualify, regardless of state laws.
28. 272 F. Supp. at 365.
29. 408 F.2d 228 (5th Cir. 1969).
30. *Id.* at 235.
31. *Id.* at 235-36.
32. 303 F. Supp. 754 (M.D. Ala. 1969).
33. 293 F. Supp. 1219 (C.D. Cal. 1968).
34. CAL. LABOR CODES §§ 251-1252 (West 1971).
35. 293 F. Supp. at 1224.

invalid as against the sex provision of Title VII.[36] Such state legislation is contrary to the supremacy clause of the Constitution.[37] Another case, however, decided in 1968 in the same district, *Mengelkoch v. Industrial Welfare Commission*,[38] upheld the state weights and hours legislation. In each case the supremacy clause was in issue because of the constitutional precedents relating to the authority of the states to establish minimum hours for workers under their police power. In 1908, in *Muller v. Oregon*,[39] the Supreme Court upheld an Oregon statute setting maximum working hours for women. The *Mengelkoch* decision followed this precedent. But, the court in *Rosenfeld* refused to follow *Muller;* instead, it held Title VII to control, and overturned the California statutes by using the supremacy clause.

The *Rosenfeld* decision is very similar to the decision in *Kober.* The courts in both instances used the supremancy clause to void state legislation relating to the number of hours women may work. *Rosenfeld* was decided before the EEOC 1969 guidelines, and so could not rely on them to invalidate protective state legislation. Instead, the court in *Rosenfeld* stated that to the extent the guidelines were inconsistent with the court's holding, they were void.[40] The court in *Kober* had the 1969 guidelines before it, as well as the *Rosenfeld* decision. Although in *Kober,* the court did not explain why it invoked the supremacy clause, it may be that it simply followed the *Rosenfeld* holding because of the factual similarities between the two cases.

Under the supremacy clause, a state law which contravenes a valid law of the United States is void.[41] A regulation lawfully made by a federal officer or board under authority granted by Congress becomes part of the supreme law of the land which under the federal Constitution is superior to state constitutions and laws.[42] Many employers have found themselves in the position of having to choose between state and federal laws when confronted with the provisions of Title VII and state protective legislation. But, a state law is superseded by a federal

36. *Id.*
37. *Id.*
38. 284 F. Supp. 950 (C.D. Cal. 1968).
39. 208 U.S. 412 (1908). In *Lochner v. New York,* 198 U.S. 45 (1905), the Court held that state laws establishing maximum hours of work for male bakery workers was not a valid exercise of the state's police power.
40. 293 F. Supp. at 1224.
41. Gibbons v. Ogden, 22 U.S. (9 Wheat.) (1824). *See* 16 Am. Jur. 2d, *Conflict of Laws* § 8 (1964).
42. Glover v. Mitchell, 319 Mass. 1, 64 N.E.2d 648 (1946).

law only to the extent that the two laws are inconsistent.[43] The purpose of Title VII is to prevent employment discrimination based on false assumptions about race, sex, religion, or national origin.[44] Those protective state laws which benefit women by providing for safe and healthy working conditions, minimum wages, and maximum hours do not discriminate against women. Rather, men should be entitled to the same treatment. As to these state laws, there is no inconsistency with Title VII. Its purpose could be carried out by extending the application of the beneficial state legislation to all employees, male and female, so that employers would not have the opportunity of shutting women out of jobs because of their reluctance to provide women with the benefits that state laws accord them. If employers had to provide the same benefits for all employees, one type of Title VII issue would disappear.

Other state laws, however, are used by employers to keep female employees in lower-paying and menial jobs. Laws prohibiting women from particular occupations, and those which set weight-lifting restrictions are illustrative. These restrictions are unrealistic when the comparable non-work activities of women are considered. Since this type of law would never be applied to men (for example, men being prohibited from carrying more than fifteen pounds), women should not have to comply with these laws either, but should be permitted, as men are, to decide what their physical and social well-being will tolerate. Substituting free choice for protectionism would give women the equality envisioned by Title VII without forcing upon them the hardships of enforced "equality."

Under this scheme, the EEOC guideline which rejects discriminatory state legislation as a bona fide occupational qualification exception to an otherwise unlawful employment practice could stand, but the bona fide occupational qualification exception could be applied to those few instances where sex is a reasonable necessity to the particular business. For example, actors and actresses, male and female washroom attendants, male and female fashion models, and similar jobs would be the exception to the rule. In this way, the use of the supremacy clause could be avoided when attempting to resolve the minimal inconsistencies between state legislation and Title VII. Since the purposes of state protective legislation and Title VII are compatible, the inconsistency

43. *See* Pennsylvania v. Nelson, 350 U.S. 497 (1956); Hines v. Davidowitz, 312 U.S. 52 (1941).

44. *See* Oldham, *supra* note 17.

necessary to invoke the supremacy clause will rarely exist. Alternative methods which have been suggested for correcting discrimination because of sex, especially use of the equal protection clause of the fourteenth amendment or the proposed amendment to the Constitution, could give women the equality under the law, Title VII's goal, without forcing courts to make use of questionable statutory constructions.

Following this reasoning, the *Kober* case would have been decided similarly but by a different rationale. If the court had explained the importance of determining the beneficial or discriminatory character of the state law in each case in order to determine whether the bona fide occupational qualification would be applicable, then *Kober* could have provided the direction needed to unravel the sex provisions of Title VII.

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CORPORATIONS—SECTION 10(b) AND RULE 10(b)-(5) OF THE SECURITIES EXCHANGE ACT OF 1934—The Second Circuit Court of Appeals has held that a prima facie case has not been presented under section 10(b) and rule 10(b)-(5) when an apparent fraudulent scheme did not collectively infect two separate transactions, nor affect the securities exchange market and/or the investing public.

Drachman v. Harvey, No. 35077 (2d Cir., July 21, 1971).

Plaintiffs brought a derivative cause of action under section 10(b) of the Securities Exchange Act of 1934[1] and rule 10(b)-(5).[2] On behalf of

1. 48 Stat. 891, 15 U.S.C. § 78j(b) (1970) [hereinafter cited as Act]:
It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.
2. 17 C.F.R. § 240.10b-5 (1971):
Employment of Manipulative and Deceptive Devices
It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mail or of any facility of any national securities exchange,
(a) To employ any device, scheme, or artifice to defraud,
(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or