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ANITA JOHNSTON

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APPROVED BY

ROBERT BIBENS

GERALD KIDD

GENE PINGLETON

OMER RUPIPER

DISSERTATION COMMITTEE

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DEDICATION

This dissertation is dedicated

to my husband

Dr. J. Mike Johnston

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LITAGATION BEARING UPON WOMEN IN SECONDARY AND HIGHER EDUCATION

CHAPTER I

American law, whether in the form of the United States Constitution, legislation, court decisions, or administrative action, continues to accord men and women different treatment solely because of their sex. Such discriminatory practices affect women in all ways of life and at every educational level. According to Timpano (1973), sex discrimination is an abuse of the law and a misuse of people, and it is propagating itself because much of it is unconscious and unconsidered.

Women educators, who are seeking fair and equitable treatment in initial employment, promotion, tenure, and arbitrary maternity leave, now have new legal avenues to obtain redress. This legislation concerning the rights of women took 200 years to obtain. The United States Constitution did not mention them for more than a century, and the Constitutional Amendments were silent on the subject of women. For instance, the First Constitutional Amendment prohibited Congress from abridging the freedoms of speech and press. The Fifth Amendment stated that no person shall be punished without due process of law. And the Fourteenth Amendment, written in 1868 on behalf of black

males who were being granted citizenship, covered all persons with equal protection under the law. In none of these amendments were women named, except they were not excluded, as they had been in the Declaration of Independence which holds that all men are created equal (Goldin, 1976).

To get the word "male" out of the Constitution cost women many years of campaigning. After 1865, there were several forceful organizations devoted to the crusade of women. The most important of these were the National Women's Suffrage Association (NWSA) and the American Women's Suffrage Association (AWSA). A decade later the Congressional Union was established, which became the National Women's Party (NWP). The National Women's Party opposed President Wilson's re-election in 1916, and, foremost, the United States entrance into World War I on the grounds that democracy should begin at home (Women's Law Caucus, 1976). Perseverance by these groups and the collaboration of others sensitive to the cause finally brought about passage of the Nineteenth Amendment which was proposed by Congress on June 5, 1919, and ratified August 26, 1920. It reads as follows:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. Congress shall have the power to enforce this article by appropriate legislation (Babcock, Freedman, Norton, 1975).

Still other groups supported the suffrage movement. Working women supported the right to vote as a means to an end. That is, they sought political power to improve their economic plight. Upper and middle class women, on the other hand, tended to fight for suffrage as an end. For these, women suffrage represented the only right to which they aspired and had not yet won. Even with the passage of the Nineteenth Amendment, the right to vote was at best an inefficient tool. There remained those limitations in the law pertaining to jury service, property rights, marriage, divorce, and work that were yet to be eradicated. Women were not treated fairly. As an example, it was not until February 7, 1966, in White v. Crook, 251 F. Supp. 401 (N.D.Ala. 1966), that women were not excluded from jury service. In effect the vote had not eliminated sex discrimination in American life.

Statement of the Problem

The problem for this investigation was to analyze litigation and to examine its implications for the employment of women in secondary and higher educational professions. This study was an attempt to answer the following questions:

1. What influence have recent court decisions had on traditional hiring practices?
2. What were the general categories or areas of concern that have prompted litigation?
3. What court rulings were antagonistic toward women's rights?

4. What fundamental issues were presented in litigation regarding rights for women?
5. What relationships existed between positions in secondary and higher education for women and litigation as an avenue for change?
6. What role did state and Federal legislation play in the litigation procedure?

Scope and Limitations

Women's quest for equality in the world of secondary and higher education has precipitated an attempt through court litigation to minimize discriminatory practices. Although court cases were cited in countless studies involving women, no studies reported systematic analysis of cases with respect to content. In order to visualize how women may achieve equality and increased opportunity in education, an understanding of the significance in the evidence presented within pertinent court cases is necessary.

Due to the massive quantity of materials dealing with women, a comprehensive study was difficult. The following limitations were therefore imposed upon the available research, literature, and litigation concerning women:

1. The research and literature studied related only to historical-legal matters dealing with women in or seeking positions in education.
2. Judicial decisions analyzed were those in the United States District Courts and state and Federal Appellate

Courts, including the United States Supreme Court as reported in the National Reporter System.

Statement of Purposes

The need for this study arose from the increasing importance for educators to understand the relationship of court decisions regarding women and the applications of women seeking employment or employed in secondary and higher education. The purposes of this study were:

1. To clarify the relationship between litigation and the employment of women.
2. To investigate whether women were justified in exercising their complaints within the courts.
3. To examine the influence of litigation and legislation regarding women in the hiring practices of educational institutions.
4. To identify the type of discrimination most prevalent in litigation.
5. To discover an avenue of change in regard to women and employment.
6. To identify aspects of the court rulings which presented problems to women.

"The amount and extent of discrimination against women in education has only begun to be discovered, challenged, and corrected" (Cronin, 1973, p. 138). Lawsuits dealing with women in education can be separated into several divisions. This study documented four categories: (1) tenure and promotion, (2) appointment, (3) dismissal, and (4) pregnancy.

Court cases involving each area were collected and studied. Each case cited basically the same laws, but had circumstances that were different and unique. However, court decisions and passage of laws alone were not enough for a successful solution to the problem. Through a thorough inquiry into all phases of the litigations which dealt with women in secondary and higher education, educators, laymen, and all those involved in the area of women's rights may benefit from the results of this study.

Definition of Terms

For purposes of this investigation important terms were defined in the following manner:

Civil Rights. "Civil rights are such as belong to every citizen of the state or country, or, in a wider sense, to all its inhabitants or administration of government. They include the rights of property, marriage, protection by the laws, freedom of contract, trial by jury, etc." (Winnett v. Adams, 71 Neb. 817, 99 N.W. 681).

Discrimination. "In general, a failure to treat all equally; favoritism" (Mische v. Kaminski, 127 Pa. Super. 66, 193, A.410, 416).

Litigation. "Contest in a court of justice for the purpose of enforcing a right" (Summerour v. Fortson, 174 Ga. 862, 164 S.E. 809).

Procedure

Judicial decisions resulting from suits brought under provisions of the United States Constitution and the various civil rights statutes have had a significant impact on the employment opportunities for women. This study involved a historical-legal search of literature bearing upon the rights of women in secondary and higher educational professions. The procedure associated with the collection of related materials involved the location, examination, and analysis of published materials located in libraries and various governmental agencies. The first source of reference was the United States Constitution, as any reference to the laws of the United States are bound together by this document. The original case materials, legal periodicals, and state and Federal statutes were analyzed for content and importance. Relative questions were asked of each case studied. Only a cross section of court cases dealing with women in secondary and higher education involving job discrimination were included.

CHAPTER II

REVIEW OF RELATED LITERATURE

An explanation of selected cases which set the stage for court cases analyzed was necessary at this point. Landmark cases not dealing with educational matters are often used to emphasize a point or arrive at a verdict in educationally-related cases. Though history of women in litigation was not extensive, it is essential to the understanding of problems faced by women. The following material will expound on earlier cases emphasizing litigation dealing with women.

Historical Cases

One of the earliest Supreme Court decisions upholding sex discrimination by state action was Bradwell v. Illinois, 16 Wall. 130 (U.S. 1872). The Illinois Supreme Court had denied a woman's application for a license to practice law solely because she was a female. The petitioner appealed this ruling to the Supreme Court on constitutional grounds. There was no opposing counsel, but none was needed since only Chief Justice Chase dissented from the decision affirming the denial of the application. Plaintiff's claim, based upon the privileges and immunities

clause, was rejected by the Supreme Court which held that the practice of law was not one of the privileges or immunities guaranteed by the Constitution.

Justice Bradley's often quoted concurring opinion reflected 19th-century thinking concerning the woman's role in society:

> Man is, or should be, women's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womenhood. The harmony. . . of interests and views which belong to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . . It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases (Miller, 1974, p. 67).

Essentially, the equal rights movement began with Bradwell v. Illinois (Miller, 1974). Twenty-one years after Bradwell v. Illinois the United States Supreme Court affirmed another state's denial of a woman's application for admission to law school in Ex Parte Lockwood, 154 U.S. 166 (1893). This case reaffirmed the fundamental issue of the Bradwell case which was the right to practice law in the state courts and whether a woman was entitled to be admitted to practice law in that state (Kanowitz, 1968).

In Minor v. Happersett, 88 U.S. (21 Wall.) 22 L. Ed. 627 (1875), an action was brought in the Circuit Court of St. Louis County, Missouri by the plaintiffs in error against the defendant, a registering officer, for refusing to register Virginia L. Minor as a lawful voter. The Court held that the Fourteenth Amendment did not confer on women citizens the right to vote, a position which stood until ratification of the suffrage amendment in 1920. In Muller v. Oregon, 208 U.S. 412 (1908), women's rights were again denied. The case concerned the validity of Oregon's law limiting the hours of work for female factory employees to ten a day. That law was challenged, by an employer who had been convicted of violating it, as contravening the due process and equal protection guarantee of the Fourteenth Amendment. The Court was responding to the demonstrated need for legislative protection of working conditions. Yet the assumptions about women on which the Court based its decision in Muller v. Oregon had become firmly

entrenched in judicial doctrine. Again the findings were that the apparent difference in physical endurance and strength between men and women justified the state's restriction on the right of women to work.

The Court sustained other labor laws for women in subsequent years as reasonable under the Fourteenth Amendment. In West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), a minimum wage law for women was upheld as a reasonable exercise of the state's police power. In Radice v. New York, 264 U.S. 292 (1924), a law prohibiting nighttime employment of women in restaurants was held as not unreasonably discriminatory. More recently, in Hoyt v. Florida, 368 U.S.57, 60 (1961), the Court upheld a Florida statute providing that no female would be called for jury list. The Court found that such discrimination was permissible under the Fourteenth Amendment since it was reasonable.

Prior to November 22, 1971, the United States Supreme Court had never invalidated any law or regulation discriminating between people solely on account of their sex. In a number of earlier decisions spanning almost a century from Bradwell v. Illinois in 1873 through Hoyt v. Florida in 1961, the Court had uniformly rejected the argument that various sex-based state laws contravened certain guarantees of the Fourteenth Amendment. By 1961, the constitutionality of sex discriminatory laws appeared to be well settled.

On November 22, 1971, the United States Supreme Court, in a unanimous opinion delivered by Chief Justice Burger, held that a statutory classification based upon sex was in violation

of equal protection. Reed v. Reed, 404 U.S.71, 92 S. Ct. 251, 30 L. Ed. 225 (1971), the first decision of the United States Supreme Court to hold that such a distinction based upon sex violates the equal protection clause, was a step forward in the struggle to achieve equal status between the sexes (Miller, 1974). At issue was an Idaho statute setting priorities for appointment of individuals to administer estates. The dispute in Reed v. Reed was between the defendant's adoptive parents. The mother had challenged the order of the probate court which granted letters of administration to the father in obedience to the contested statute. The Supreme Court of Idaho rejected her argument that the statute violated the equal protection clause. The United States Supreme Court unanimously reversed the decision with a short opinion by Chief Justice Burger.

The year 1972 featured Frontiero v. Richardson, 411 U.S. 677 (1972), the pinnacle of the Court's conscious raising. In Frontiero v. Richardson an Air Force officer attempted to claim her husband as a dependent in order to obtain housing and medical benefits. Her claim was denied by the majority of a three-judge district court.

Although no other sex discrimination decisions were handed down during the United States Supreme Court's 1972 term, the next term provided two major cases. The first was LaFleur v. Cleveland Board of Education, 414 U.S. 632, (1974), in which the Court considered the validity of mandatory pregnancy leave regulations imposed by two public school boards upon their

female teachers. The purpose of the regulation in dealing with pregnancy was to protect the teachers from ridicule, violence, and medical complications while also assuring the continuity of classroom instruction. It then concluded that the regulation was entirely reasonable.

The second major decision was Cohen v. Chesterfield County School Board, 474 F.2d 395 (4th Cir. 1973). In this Virginia case the mandatory termination provision of the teacher's employment contract was declared unconstitutional. The plaintiff's baby was due April 28, 1971. She had requested maternity leave effective April 1, 1971. Instead, the School Board had placed her on leave effective December 18, 1970. The court granted relief necessary to put her in the same position as if she had been allowed to teach until April 1, 1971, with salary, seniority, and any and all other rights and benefits she would have received had she been teaching during that period.

In both the LaFleur v. Cleveland Board of Education and Cohen v. Chesterfield County School Board cases, the Equal Employment Opportunity Commission (EEOC) filed an amicus brief in the court supporting the teachers' position. Certainly their involvement helped in obtaining the favorable decisions made by the United States Supreme Court.

LaFleur v. Cleveland Board of Education and Cohen v. Chesterfield County School Board are two landmark cases involving women in education. Other landmark cases not pertaining to educational matters, and the two cases previously mentioned,

were cited numerous times in later cases. They laid the foundations for decisions made in litigation to follow.

State and Federal Legislation

In recent years, no doubt partly due to a general rekindling of interest in the status of women in society and the emergence of positive corrective legislation in the field, constitutional challenges of laws that discriminated on grounds of sex have increased. Progress has been made, particularly in the area of equality in salary, so that faculty, administrators, and non-professional staff receive millions of dollars in increases and accumulate back pay after institutions re-examine salary scales for compliance with the Equal Pay Act, 29 U.S.C. section 206 (d), and Executive Order 11246, 3C.F.R. 339, in 1965.

First, an act used by the schools was the Fair Labor Standards Act (FLSA). As amended, this law, known as the Federal minimum wage and hour law, covered the great majority of workers. It applied generally to employers whose gross volume of sales exceeded $250,000 a year. However, employees engaged in laundering, drycleaning, and repair of clothes or textiles, and workers in hospitals (except Federal), nursing homes, and schools (public and private) were covered, irrespective of the dollar volume the establishment grossed.

The 1974 amendments to the act extended coverage to 6.7 million additional workers. Among the newly covered were most private household workers (except casual babysitters and companions for the aged and infirm) and additional retail and

service employees. The law was enforced by the Wage and Hour Division of the United States Department of Labor. All complaints received were treated in strict confidence. Provisions of the act provided that unpaid wages could be restored under the supervision of the Secretary or employees and that employers could not, by law, fire or otherwise discriminate against a worker on the basis of a complaint.

The Equal Pay Act of 1963 amended the FLSA to prohibit discrimination based on sex in earnings, including overtime pay and most fringe benefits. The Federal Equal Pay Act was enacted in 1963, one year before passage of the 1964 Civil Rights Act. In contrast to Title VII's prohibition against sex discrimination in employment opportunities, the Equal Pay Act was supported by an extensive legislative history, including elaborate committee hearings demonstrating widespread wage discrimination against women (Kanowitz, 1973).

The heart of the Equal Pay Act was found in Section 3, adding a new subsection (d) to Section 6 of the Fair Labor Standards Act, 29 U.S.C. section 201, of 1938, which provided in part that:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance

> of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex;. . . .

The Education Amendments of 1972 included an amendment to the Equal Pay Act of 1963. This act now covers teachers and other professional pe[illegible]cational institutions at all levels, and prohi[illegible] the basis of sex. Generally, the [illegible]o performed the same work, or substa[illegible]uiring equal skills, effort, respons[illegible]cational backgrounds as their male c[illegible]ve comparable pay.

Mere differe[illegible]es will not be considered a sufficient reason to [illegible] pay. Women who have experience and degrees equal to their male counterparts, but who do not receive the same teaching load, can challenge the failure of an institution to pay them the same salary. Victims of discrimination in pay may be awarded back pay for up to two years for nonwillful and three years for willful violations of the act.

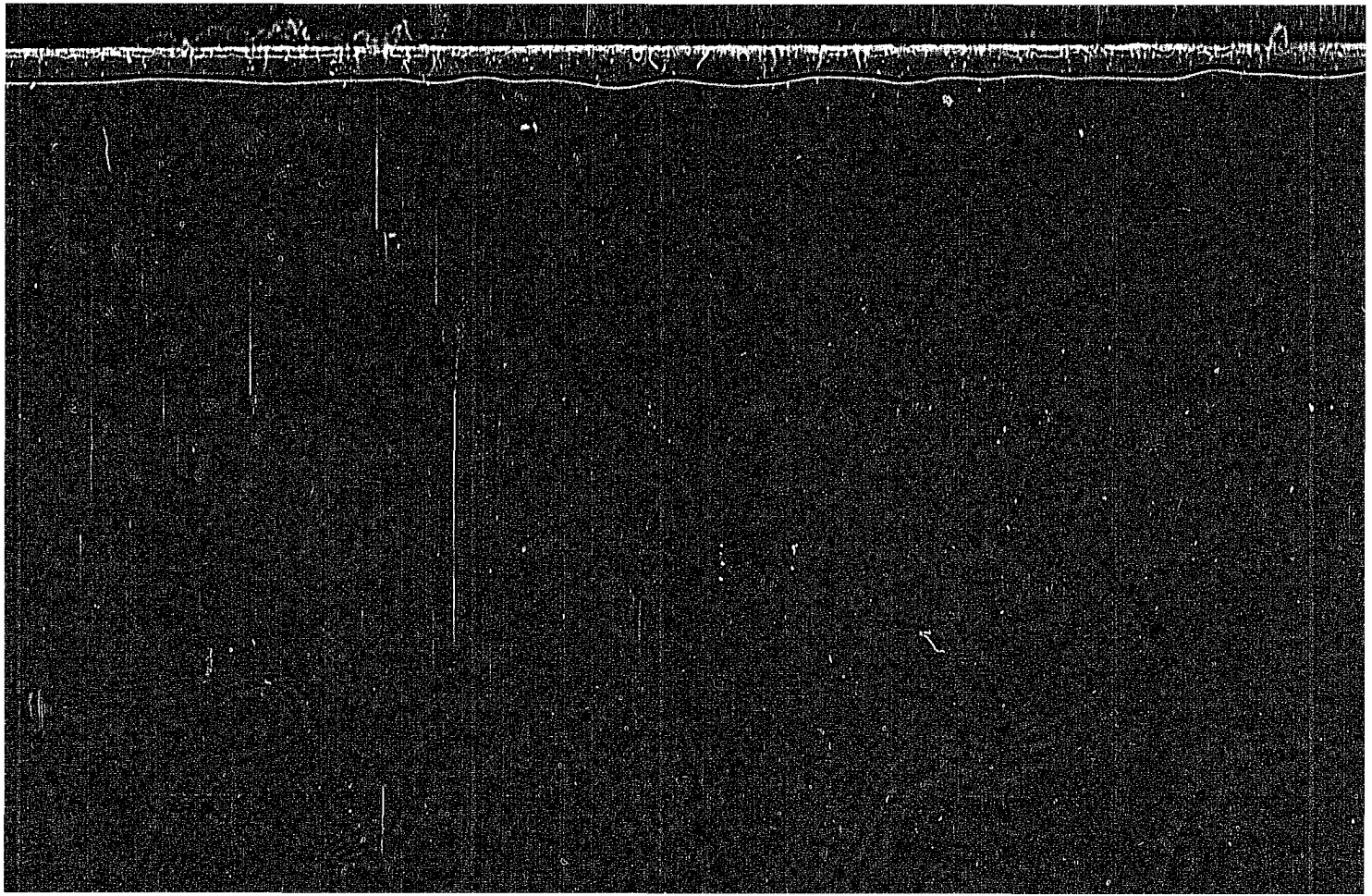
This act is enforced by the Wage and Hour Division of the Employment Standards Administration of the Department of Labor. Individuals or organizations may file complaints on their own behalf or on the behalf of others. Every effort is made to

keep the identity of complainants confidential unless court action is required to enforce the act. Prior to court enforcement, voluntary compliance is requested (Hallam, 1973).

Discriminatory employment practices in both public and private educational institutions which have five or more employees were prohibited by Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. (See Appendix A). Title VII of the Civil Rights Act of 1964, which became effective on July 2, 1965, prohibited discrimination based on race, color, religion, sex or national origin in all aspects of employment. It covered discrimination in hiring, firing, layoff, recall, recruitment wages, conditions of employment, promotional opportunities, assignment, sick leave, vacations, overtime, insurance benefits retirement programs, and employment advertising.

To handle complaints of employment discrimination, the Equal Employment Opportunities Commission (EEOC), a bipartisan agency, was created under this title. The role of the commission was defined primarily in terms of investigation and conciliation; its enforcement authority was limited. The EEOC consists of five commissioners who serve five-year terms on a staggered basis. Commissioners are appointed by the President subject to the Senate's consent, with one member designated as a chairman who is responsible for the commission's administrative operations.

Complaints may be filed with the EEOC by individuals, groups of individuals, or by organizations on behalf of others. Within ten days after a charge is filed, the EEOC must notify



> of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex;. . . .

The Education Amendments of 1972 included an amendment to the Equal Pay Act of 1963. This act now covers teachers and other professional personnel in educational institutions at all levels, and prohibits discrimination on the basis of sex. Generally, the act provided that women who performed the same work, or substantially the same work, requiring equal skills, effort, responsibilities, and similar educational backgrounds as their male counterparts, should receive comparable pay.

Mere differences in position titles will not be considered a sufficient reason to deny equal pay. Women who have experience and degrees equal to their male counterparts, but who do not receive the same teaching load, can challenge the failure of an institution to pay them the same salary. Victims of discrimination in pay may be awarded back pay for up to two years for nonwillful and three years for willful violations of the act.

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Complaints may be filed with the EEOC by individuals, groups of individuals, or by organizations on behalf of others. Within ten days after a charge is filed, the EEOC must notify

the employer of the charge. Generally, the names of individuals involved are kept as confidential as possible. If the complaint is filed in a state or locality which has a law covering discrimination of the charged and the enforcing agency of the state or locality includes enforcement powers similar to EEOC, the complaint will be referred to that agency for a period of 60 days. The EEOC investigates complaints and seeks voluntary compliance by the employer. When discrimination is found, the commission attempts to eliminate it and seeks compensation for those affected.

If conciliation fails, the EEOC may bring suit against a private employer, employment agency, or labor union. In the case of state or local government employers, the charge is referred to the United States Attorney General, who, within 180 days, will decide whether or not to bring suit. If the Attorney General does not bring suit, the complaining party may do so.

Equal Employment Opportunity Commission's guidelines on the meaning of sex discrimination cover discrimination in employment policies relating to pregnancy and childbirth as well as discrimination on the basis of marital status. According to the guidelines, written or unwritten employment policies which exclude applicants from employment or require forced leave because of pregnancy are in prima facie violation of Title VII. The guidelines also require that disabilities related to pregnancy be treated as temporary disabilities under health, temporary disability, and sick leave plans. In addition, restrictions on

the employment of married women which are not applicable to married men are prohibited. Complaints must be filed within 180 days after the discrimination has occurred, although continuing forms of discrimination are subject to complaint as long as such discrimination continues. Back pay may be awarded for up to two years prior to the time the complaint was filed.

One of the major advantages of litigation to complainants under Title VII relates to the manner in which a presumption of discrimination is raised. Once an employment practice is shown to have a differential impact on persons of one sex, the practice is regarded as suspect, and an employer must then demonstrate that its effect is related to some factor which is not discriminatory. Such practices include the use of tests which eliminate a disproportionate number of female applicants and job qualifications not reasonably related to job performance which have a disparate effect on women.

The part in Title VII of greatest concern to women reads:

> (1) to fail or refuse to hire or to discharge an individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's. . . sex. . . 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 . . . sex . . . (Oehmke, 1974).

Since the Equal Employment Opportunity Act of 1972 amended Title VII of the 1964 Civil Rights Act to cover previously exempt employers of educational institutions and state and local government employees, all institutions of higher education, whether public or private, became subject to the prescriptions placed by Title VII against discrimination on the basis of sex in all matters relating to employment.

In addition to Title VII compliance responsibilities, the Department of Health, Education, and Welfare (HEW) has responsibilities under Executive Order 11,246,which require substantially all government contractors to include in the contract provisions an assurance on nondiscrimination on the basis of race, color, religion, sex, or national origin in the terms and conditions of employment. The Executive Order also requires the contractor to develop and implement an affirmative action program. Although the Executive Order is administered by the Office of Contract Compliance (OFCC) of the Department of Labor, each contracting agency has primary initial responsibility to effect compliance with the Order's provision.

The list of Federal legal weapons against employment discrimination always includes Executive Order 11, 246, which prohibits discrimination by employers who hold contracts with the Federal government. The order originally included race, color, religion, and national origin, but not sex, which was added to the order in October, 1967, by Executive Order 11,

375, 3C.F.R. 684. While the Executive Order appears on paper to provide substantial leverage against companies which discriminate, it has been largely ineffective (Babcock et al., 1975). Health, Education and Welfare's recent history of using enforcement procedures has been characterized by inordinate delays in achieving results. This is due to a reluctance to utilize enforcement sanctions.

Under Executive Orders 11,246, 11,375, and Revised Order No. 4, employment discrimination by Federal contractors on the basis of sex is prohibited. These orders cover contracts for $10,000 or more. Private contractors whose contracts are for $50,000 or more and who have 50 or more employees are required to file an affirmative action plan with the Federal government. Public institutions have not been required to have a written plan until after discrimination charges have been made.

The Department of Labor has primary enforcement responsibility, which delegates the enforcement of its terms to the Office of Federal Contract Compliance of the United States Department of Labor (OFCC). The OFCC has delegated its power to HEW which supervises the compliance of educational institutions.

Institutions may be required to summarize the distribution of faculty personnel by rank, pay, title, longevity of service, sex, race, job qualifications, and other employment factors which relate to equality of employment opportunity. Affirmative action plans which establish goals and timetables for correcting the effects of past discrimination in promotion, hiring, and pay may be required.

Back pay may be awarded to individuals who have not been covered by other laws concerning back pay. Complaints must be filed within 180 days of the discrimination, but, as in Title VII, continuing discrimination was subject to complaint as long as it endures. Failure to implement an acceptable affirmative action plan may result in cancellation of contracts. The institution will be asked to comply voluntarily; if this fails, a hearing must be held prior to the withdrawal of Federal funds.

To ensure nondiscrimination in employment, contractors must take affirmative action in such areas as recruitment and advertising; hiring, upgrading, demotion, and transfer; layoff or termination; rates pay or other compensation; and selection for training, including apprenticeship.

The Labor Department's Office of Federal Contract Compliance (OFCC) which enforces the order, has issued "Sex Discrimination Guidelines." The guidelines state, among other things, that contractors may not advertise under male and female classifications, seniority lists on sex, deny a person a job because of state "protective" labor laws, make distinctions between married and unmarried persons of one sex only, or penalize women in their terms and conditions of employment because they require leave for childbearing. The guidelines also specifically required the granting of a leave of absence to an employee for childbearing and reinstatement to her original job or to a position of like status and pay without loss of service credits. A proposed revision of these guidelines appeared in the Federal Register of December 27, 1973.

As a step toward arresting and reversing sex discrimination in education, women's rights advocates sought a Federal legislative remedy. Title IX of the 1972 Education Amendments (see Appendix B), enacted by the 92nd Congress, represents the culmination of that search. Title IX, signed on June 28, 1972, is a broad-scale bill covering a range of Federal assistance programs. Proposed regulations were issued on June 20, 1974, and became effective on July 2, 1975.

The key provisions were a broad prohibition against discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, including school districts, their professional and non-professional employees,and students as well as employees. Congress consciously modeled Title IX after Title VI of the 1964 Civil Rights Act, which prohibits discrimination on the basis of race, color, or national origin in any federally assisted program. Early versions of Title IX would have added the word "sex" to Title VI, but the final product chose instead to place the prohibition in a separate law dealing particularly with education. Nevertheless, Title VI precedent provides important guidelines for the application of Title IX, although the analogy is not perfect, since Title IX contains three important exceptions absent in the Civil Rights Act. These were exemptions for military schools, traditionally one-sex schools, and undergraduate admissions. Because the laws diverge at this point, the policies behind Title VI precedents must be weighted carefully so that only those principles that were truly analogous will be carried over

from one area to the other (Todd, 1974). Title IX provides that with limited exceptions:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federally financial assistance (20 U.S.C.S. section 1681).

As an agency which extends Federal financial assistance for education programs and activities, the HEW was empowered under Title IX to issue rules, regulations, and order to effectuate the purposes of the act. Therefore, Title IX was enforced by compliance actions initiated by Federal funding agencies. If compliance was not obtained through persuasion and conciliation, an investigation by the funding agency was made. The institution was entitled to a hearing to determine whether or not discriminatory practices had occurred. Judicial review was available following the hearing. During the review by the agency, the names of the complaining parties were kept confidential, if possible.

Title IX has rules that fall into six subparts. Subpart A defines terms and includes general matters such as the "assurances" that schools must give HEW, remedial action for past discrimination, and dissemination of information. Coverage of institutions and programs were the topic of subpart B. Subpart C outlined the prohibitions with regard to admissions and recruiting. Subpart E concerned employment in the education field. Finally, subpart F set forth the administrative enforcement procedures. These regulations were reasonably comprehensive, but

they included some disappointing omissions, such as a refusal to cover sex discrimination in texts and materials, that Title IX plaintiffs will be forced to confront.

This law covers pre-schools, elementary and secondary schools, institutions of vocational education, professional education, and undergraduate and graduate higher education. Any program receiving Federal financial assistance by way of grant, loan, or contract, other than contracts of insurance or guaranty was covered.

One of the more well-publicized approaches for combatting sex discrimination has been the proposed Equal Rights Amendment. The proposed amendment reads as follows:

> Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.
>
> Section 2. The Congress shall have the power to enforce by appropriate legislation, the provisions of this Article.
>
> Section 3. This amendment shall take effect two years after the date of ratification.

Certainly the amendment is a step forward, but there is no guarantee that it would assure equal rights between the sexes any more than ratification of the Fourteenth Amendment in 1868 guaranteed equal rights between the races. In fact, one commentator, Professor Freund, had suggested that Congress' power under the commerce clause would be more successful in combatting sex discrimination than ratification of the Equal Rights

Amendment. He argues that if the amendment were passed, statutes would have to be enacted to carry out its purpose (Miller, 1974). Moreover, Professor Kanowitz points out that ratification of the amendment would not render all discriminatory legislation invalid. This statement is especially true when one remembers that the United States Supreme Court has never interpreted any constitutional amendment as an absolute prohibition against regulation, whether the subject is speech, press, religion, association, or assembly (Miller, 1974).

There are various forces for and against the Equal Rights Amendment. On the subject of the Equal Rights Amendment, James Buckley stated:

> I find myself in full agreement with the finding that there still exists in our country a discrimination against women which cannot be justified and which ought not to be tolerated. . . Yet the proposed Equal Rights Amendment would have the inevitable effect of obliterating all of these differentiations. . . (Buckley, 1972, pp. 494-495).

As a proponent, Martha W. Griffiths in her remarks to the House of Representatives June 10, 1970 said that the "Equal Rights Amendment would establish a clear and unambiguous constitutional yardstick for measuring laws which discriminate against half of the citizens (Griffiths, 1970, p. 1)."

The American Bar Association Journal summarized the two sides of the argument over whether a constitutional amendment banning sex discrimination was needed:

> The legal debate on the Equal Rights Amendment has revolved around the question of whether the amendment is necessary. Opponents have insisted that there is ample constitutional authority without the amendment to secure equal rights of women...But proponents of the amendment have pointed out that judicially condoned classifications based on sex still stand in many fields (Bayh, 1972, p. 82).

It was primarily, though not entirely, the failure of the courts to apply the Fourteenth Amendment to sex discrimination with the same vigor they had applied it to racial discrimination that, in turn, prompted Congress to approve the Equal Rights Amendment (Sex Discrimination and Equal Protection, 1971). After 1923, when the original version (the language of the original amendment, changed in 1943, was: "Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction.") was offered to the House Judiciary Committee, the Equal Rights Amendment was introduced in Congress every year. However, except in the years 1946, 1950, and 1953, little attention was paid to the proposal until the 1970's.

In the 1920's and 1930's, the Equal Rights Amendment was urged as a corollary to the Nineteenth Amendment. In the early 1940's the Senate Committee on the Judiciary began to report the amendment for favorable action on the floor (Brown, 1971).

America's experience in World War II provided strong evidence in the case for the amendment. That war had taken women out of the home in far greater numbers than ever before, and

women had shown they could perform many jobs successfully. Still, the amendment was debated and defeated on three occassions between 1946 and 1953 (Babcock, 1975). Beginning in 1970, heightened effort brought about passage by the Senate on March 22, 1972, ending a half-century campaign for congressional enactment of a constitutional guarantee of equal rights for men and women (Ross, 1973, p. 24).

Between 1953 and the amendment's next serious consideration in 1970, the women's movement, which had subsided after passage of the Nineteenth Amendment, again became a serious force in American politics. Simone de Beauvoir had published The Second Sex in 1949 (Babcock, 1975); it first appeared in the United States in 1953; ten years later, Betty Friedan's book, The Feminine Mystique, appeared (Astin, 1975). "President Kennedy appointed the first Commission on the Status of Women in 1961, and in 1966 the National Organization for Women (NOW) was founded"(Kanowitz, 1972, p. 203).

Decrow states, "Women have [fared] miserably under the law, not only in the decisions which are against us, but even in the cases that went 'for' us, and we are deluding ourselves if we think that women can get justice in the courts" (1974, p. 1). Fortunately, progress has been made in the area of fair employment practices. Equity, as well as Federal legislation, demands that a policy of nondiscrimination be maintained in employment practices (Steinback & Reback, 1974). Although courts seem very reluctant in making decisions regarding sex discrimination, it can be said that there are no hard and fast answers in this area of the law.

Sex discrimination can and does limit employment opportunities for women. Institutions of learning are overlooking an invaluable asset to their programs. Talented and qualified women are being detoured to lesser positions which discourages advancement. Therefore, it is necessary to know where and how these practices exist so that change can occur.

CHAPTER III

FINDINGS

Doris L. Sassower (1972) stated:

> Time was when women, like children, were seen and not heard. But the times are indeed "a changing" for women and children! Women have become vocal, and not only aware of their rights, but ready to assert them, and what's more, they are demanding that rights be created where the law failed to recognize them. Whether the thought of women poised as litigants ready to do combat against an academic institutional adversary is frightening to educators or not, such confrontations have been increasing with dramatic frequency in the past few years. The pressure of organized women has brought forth new remedies and, thus, New Rights to deal with old grievances now irrefutably come to light (p. 29).

Recent court decisions, together with new and amended legislation, have created new methods to eradicate sex discrimination in education. The impact of the new and changed legislation has hardly begun to be felt in education. It will bring about significant changes from kindergarten through the graduate school. Discrimination in education on the basis of sex begins

with the denial of equal educational opportunities and extends to denial of equal employment opportunities and related benefits (Hallam, 1973).

As stated numerous times, employment discrimination based on sex is unlawful, but it still occurs. "The EEOC received 33,948 complaints during fiscal 1973 alone. Of these, 15,719 were from women, but not necessarily because of sex discrimination" (Blackey, 1974, p. 13). Many victims of discrimination are unaware of what they can do. Some accept discrimination for fear of reprisal or because relief is expensive and time consuming. Employment discrimination is perhaps the clearest example of the adverse effects of sex discrimination. The various phases of employment discussed within this paper include promotion and tenure, appointment, dismissal and pregnancy, all of which are subject to some form of discrimination.

Promotion and Tenure

Tenure was expressed by Arthur P. Manare in the Journal of College and University Law:

> The purpose of tenure is principally to preserve academic freedom. This is to say, tenure is designed to safeguard the teacher from dismissal for arbitrary or invidious reasons, and so protects and preserves the freedom of inquiry and freedom of expression which are desirable to an academic community. To most people, tenure probably connotes job security. What it actually confers is the right to a specified grievance procedure. The "right" to continued employment embodied in tenure is of little

> worth without these procedural protections; and what distinguishes the status of a tenured from that of a non-tenured professor is primarily this right to procedural safeguards in case of termination (1975, p.256).

In regard to legislation, it is a violation of both Title VII, 42 U.S.C. section 2000 of the Civil Rights Act of 1964, administered by the EEOC, and Executive Order, administered by the OFCC, for Federal contractors to deny equal opportunity for promotion. Under both, employers must recruit, train, and promote persons in all job classifications without regard to sex, race, color, religion, or national origin. They must insure that promotion decisions are in accord with principles of equal employment opportunity by imposing only valid requirements for promotion opportunities. Under the affirmative action plan outlined in Revised Order No. 4, employers are required to set goals and time-tables for promoting women (Terlin, 1975).

An assistant professor brought action, on her own behalf and on behalf of other women employed by the University in professional positions, against the University and its chancellor, alleging discrimination against women. Dr. Ina Braden was employed by the corporate defendant, University of Pittsburgh, as an assistant professor in the Learning Resources Division of the University's Dental School.

Braden v. University of Pittsburgh, No. 72-1220, 477 F.2d 1 (3rd Cir. 1972), alleged that the defendants had enacted and effected policies and practices of unlawful and systematic exclusion of and discrimination against women by hiring them at

lower rank and lesser pay than similarly trained and qualified men, failing to promote women as they promoted men, and failing to grant tenure as was granted to men.

The United States District Court for the Western District of Pennsylvania, Herbert P. Sorg, J., dismissed the complaint. The Court of Appeals held that judgment dismissing action could not be sustained in light of deficiencies in the record as to number of trustees selected by the state and sums of money contributed by the state to the University. The complaint was dismissed.

A case involving promotion of women in educational institutions was Green v. Board of Regents of Texas Tech University, No. 72-1542, 474 F.2d 594 (5th Cir. 1973). The case was a civil rights action by Lola Beth Green, associate professor, seeking redress for grievance allegedly resulting from sex discrimination by University officials.

Ms. Green was an associate professor of English at Texas Tech University and had been teaching in the English Department of that University for almost 25 years. She began at the rank of instructor in 1946, received her doctorate in 1955, was promoted to assistant professor in that same year, and was promoted to the rank of associate professor in 1959. Beginning in 1962, she had applied periodically for promotion to full professor and had been denied each time. She alleged that these denials were based solely on the fact that she was female and that such action on the part of Texas Tech University exemplified the long-standing pattern and policy of the

University of discrimination against women. The suit resulted from the denial of her 1969 application for promotion.

Lola Beth Green introduced evidence of her professional competence and achievements, as well as those of her male colleagues in the English Department who had been granted the rank of full professor. She also produced statistical evidence to support the allegations of a pattern of discrimination against women in the hiring, salary, and promotion practices of the English Department.

The overwhelming evidence, decided by the Court, was that the decision not to promote Ms. Green was based entirely on considerations other than that of her sex and was completely uninfluenced by the fact that she was a woman. Texas Tech University had established definite criteria for evaluating a person's eligibility for promotion in teaching rank. The Court found that these criteria were reasonable, they bore a rational relationship to the duties of a full professor, and they were reasonably applied in this case.

Each of the defendants' witnesses testified that the decision not to promote was based solely on the facts of Ms. Green's record, with no thought given to her sex. Therefore, the Court found no evidence that the denial of her promotion was based on sex discrimination or on any other constitutionally prohibited grounds, but was, in fact, based solely on the evidence considered by the proper authorities as to her qualifications under the established criteria for such a promotion. A judgment was entered by the Court denying plaintiff all relief and taxing costs against plaintiff.

Women who believe they have met discrimination in employment are increasingly turning to state anti-discrimination agencies, as well as federal agencies, for relief. In EEOC v. Tufts Institution of Learning, 10 EPD 6365 (1973), there were indications that two females were denied promotion and tenure because of their sex. They both seemed to be qualified for promotion and tenure, and further evidence indicated that the chairman of the subcommittee selected to rule on their tenure had demonstrated a sex-biased attitude.

This action was handled by the EEOC for relief from alleged discriminatory employment practices based upon sex, which were in violation of Title VII of the Civil Rights Act of 1964, as amended. The EEOC sought relief against Tufts to redress alleged discriminatory acts involving the discharges of Christiane L. Joost-Gaugier and Barbara E. White, former employment practices and policies.

Joost resided in Newton, Massachusetts. She was first employed by Tufts as a part-time lecturer in 1967 in the Fine Arts Department and served in that position for two years. During that period she was also part-time lecturer at Newton College. In 1969, she was employed full time by Tufts in the department with the rank of assistant professor. Tufts notified her on August 21, 1972, that her contract of employment would not be renewed at the expiration of the 1972-73 academic year.

White resided in Lexington, Massachusetts. She was first employed by Tufts in 1965 with the rank of lecturer-teacher in

art history and employed as assistant professor in the department during the academic years beginning September, 1966 to August, 1973. In January, 1972, White was informed that the tenure committee had decided not to recommend her for promotion to the rank of associate professor and for tenure. She was notified by Tufts on May 4, 1972, that her contract of employment would not be renewed at the expiration of the 1972-73 academic year.

The Court concluded that there was no showing of sex discrimination that would warrant preliminary relief to a female faculty member in being denied reappointment when both plaintiffs were evaluated on the basis of quality of mind, intellectual force, scholarship, teaching effectiveness, and contributions to University objectives.

Most cases dealing with promotion involve the question of tenure. An example of this was Johnson v. University of Pittsburgh, No. 73-120, 359 F.Supp. 1002 (W.D.Pa. 1973). Sharon L. Johnson was denied tenure and a promotion, allegedly for deficiencies in her teaching. Dr. Johnson filed an EEOC complaint, received a right to sue letter from EEOC, and, subsequently, filed her Title VII suit. This action by an untenured assistant professor against the University and officials of the University was on the grounds that she was to be discharged because of her sex.

Ms. Johnson had been employed in 1967 for three years as assistant professor without tenure in the Department of Biochemistry of the School Medicine at the University of Pittsburgh

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Ms. Johnson had been employed in 1967 for three years as assistant professor without tenure in the Department of Biochemistry of the School Medicine at the University of Pittsburgh

at a salary of $13,000 per year. At the time of her employment, she was advised by the Chairman of the Biochemistry Department that the requirements for securing tenure within six years were research and membership in the American Society of Biological Chemists. During her employment at the University of Pittsburgh, Dr. Johnson did attain membership in the American Society of Biological Chemists; attained professional stature; published independent research of high quality; was active in other contributions; and fulfilled her teaching requirements in a fashion that was not criticized prior to 1971.

On October 27, 1971, it was decided not to grant Dr. Johnson tenure. This decision was based primarily on the committee's finding that her teaching was inadequate. She was first notified that her employment would be terminated on January 6, 1972, in a conversation with the chairman of the department.

In issuing the injunction, the judge noted that "evidence established a reasonable probability of plaintiff's success on the merits":

> The Title VII suit makes a prima facie case for intentional discrimination, using such evidence as statistical proof of discrimination (in the School of Medicine, despite the fact that over a six-year-period many women were eligible for tenure, 70 men were given that status as compared to three women), the differential treatment of a male professor who was granted tenure, although he had much the same evaluations that she had as lecturer;

> the raises given men regardless of their tenure in the Biochemistry Department for the years 1967-1972 that were higher than those given Johnson; the failure of the Medical School to take substantial steps to increase the number of faculty women, despite its affirmative action program (Sinowit, 1974, p. 62).

The court granted a preliminary injunction restraining the University from discharging Sharon Johnson or denying her tenure.

The use of Title VII dealing with promotions can also be found in Rackin v. University of Pennsylvania, No. 73-1007, 386 F. Supp. 992 (E.D. Pa. 1974). Dr. Phyllis Rackin, professor at the University of Pennsylvania, brought an action against the University, its various officers, and certain tenured members of the University's English department, for redress of alleged discrimination against her in the terms and conditions of her employment solely on the basis of her sex.

Essentially the complaint alleged that in 1962 Dr. Rackin, who had earned a Ph.D. in English, was appointed as fully affiliated instructor in the English Department of the University. She was promoted in June, 1964, to a fully-affiliated assistant professor of English for a three-year term. Subsequently, Dr. Rackin, believing her credentials sufficient, applied for promotion and tenure within the department. Under circumstances which deviated from normal procedure within the University, her application was denied despite two votes of approval by the tenured members of the English Department. Dr. Rackin alleged that the defendants had violated her rights

under Title VII of the Civil Rights Act of 1964, amended on March 24, 1972.

The case was dismissed. However, in 1974, the University of Pennsylvania offered Dr. Phyllis Rackin the sum of $70,000 in partial settlement of the suit she had brought against the University in 1973. Dr. Rackin charged that she had been denied tenure because of her sex, and that she had been receiving $7,000 less in annual pay than her male colleagues doing the same work. The University claimed that the $70,000 was solely for application to Dr. Rackin's legal expenses, and that it did not constitute an admission of guilt. The University also denied a report that it had spent $400,000 fighting the suit (Sandler, 1975, p. 2).

Still another case which based its defense on Title VII was Calage v. The University of Tennessee in 1975. Cleo Calage brought an action under Title VII of the Civil Rights Act of 1964 alleging that the plaintiff was unlawfully discriminated against because of her sex while employed by the University of Tennessee Food Service Department. She claimed that her treatment by the University was discriminatory in the following respects:

1. The University failed to grant her promotion during her employment because of her sex.
2. The University failed to pay her the same wages for the same work performed by males.
3. The University unlawfully maintained sex-based job classifications.

4. The University unlawfully discriminated against her in regard to certain fringe benefits.

Plaintiff filed a complaint with the EEOC on February 27, 1973, and received a right to sue letter on October 4, 1974.

In the fall of 1966, a male manager of catering was hired and in 1968,transferred, creating a vacancy in the catering position, which Cleo Calage assumed. She contended that in 1968, she, in fact, if not in title, assumed the former position of manager of catering, for which she should have been paid an equal salary of $8,200 instead of the $5,800 that she received.

The Court held that any wage difference between Calage and males and her lack of promotion was founded entirely on factors other than her sex. The Court was also of the opinion that she was not the object of unlawful discrimination under Title VII of the Civil Rights Act (Calage v. The University of Tennessee, No. 3-75-1, 400 F. Supp. 32, (D.Tenn. 1975).

Another case, Cohen v. Illinois Institute of Technology, No. 74-1930, 524 F.2d 818, (7th Cir. 1975), which dealt with promotion and tenure, brought a Civil Rights Act suit against the University and others to recover for alleged sex-based discrimination against female faculty. For five years, commencing in the fall of 1966, Dr. Cohen served as an assistant professor in the Department of Psychology and Education of the Illinois Institute of Technology. In March of 1969, and in 1970 and 1971 as well, the head of her department recommended that she be promoted to associate professor, a tenured position, but in each of these years the recommendation was denied for

no stated reason. She alleged that each denial was in fact based solely on Dr. Cohen's being a woman. In March of 1971, the President advised Dr. Cohen that she would not be offered a tenured appointment, and therefore the ensuing year would be her last.

Unwilling to continue in an untenured status, Cohen resigned and requested a statement of reasons for refusing to grant her tenure. The chairman of her department responded that he "frankly did not know."

In August of 1971, Cohen filed a complaint with the Department of Health, Education and Welfare. After an investigation, the Regional Civil Rights Director reported that there was reasonable cause to conclude that Dr. Cohen was discriminated against because of her sex by the Institute when she was paid less than the average salary of similarly situated males, and that she was terminated in part because of her sex.

The United States District Court for the Northern District of Illinois dismissed the complaint, and the plaintiff appealed. The Court of Appeals affirmed.

The next case to be discussed in this section was Byron v. University of Florida, No. 75-15, 403, F.Supp. 49 (D. Fla. 1975). Billie H. Byron brought an action against the University and various individuals as its agents, claiming that they had been guilty of sex discrimination against her in connection with her employment.

The complaint alleged that Bryon was denied promotion from a position of Staff Assistant II to that of Staff Assistant

I and that she was finally demoted to a position of Secretary III. Byron also charged that she was given unsatisfactory job ratings for disloyalty, denied access to her personnel file, and was reassigned to another department where her prospects for advancement were curtailed. The complaint alleged that she filed charges with the EEOC and subsequently received a notice of right to sue. Billie Byron was seeking reinstatement as a Staff Assistant I, other injunctive relief, and back pay. The District Court held that the suit against the University for back pay was barred by the Eleventh Amendment. The action was dismissed as to the University; in other respects, the motion to dismiss was denied.

The most recent case involving tenure was Dillion v. Board of Education of Pearl River School District, 51, A.D.2d 967 (App. Div. N.Y. 1976). Alicia Dillion, a tenured teacher, was formally placed on suspension on September 4, 1973, pending a determination of charges preferred against her by the Board to the effect that she had been excessively absent and that her physical condition, including one instance of intoxication, had interfered with the performance of her duties. Statutory hearing on the charges was held by the commissioner's hearing panel. It was determined that Dillion would remain on suspension until the completion of medical and psychological examinations to determine whether she was physically and psychologically capable of resuming her teaching responsibilities, and whether she had solved her problem relating to alcoholism. If she was found to be fit for duty after these examinations, she would

be returned to teaching duty at the beginning of the 1974 spring semester. She passed the required medical and psychological examinations and sought back pay for the suspension period, September 4, 1973 to February 4, 1974. Although petitioner, as a tenured teacher, was entitled to back pay until the time of the determination of the charges preferred against her, the court ruled that she could not recover any back pay for the period of her suspension following the determination of her unfitness for duty.

In conclusion, these cases related to the implementation of tenure and promotion involving women in higher education. The only exception was in the case of Dillion v. Board of Education which dealt with the administrative process of the public schools. Tenure and promotion seemed easier to attain in the public schools than in colleges and universities.

Discrimination, a term with numerous connotations, has a stigma of being an unwanted or unwarranted act. The courts have a reluctance to interfere with educational matters, especially steering away from a question of discrimination when it lies between a value judgment and the act itself. Since it was hard to define the term, even when presented in charges as in promotion and tenure, the courts tried to avoid the topic altogether.

In dealing with promotion and tenure, women were usually not told with any clarity that they would not be approved. Women in several cases were not given reasons as to why they would not be accepted (Johnson v. University of Pittsburgh and

Calage v. The University of Tennessee). Women did not give up the pursuit of receiving tenure but tried countless times for tenure even with forces working against them (Green v. Board of Regents and Cohen v. Illinois Institute of Technology).

Within these cases, courts were unable to provide a solution to many discriminatory problems because of their inability to change the traditional attitudes of employers regarding women. Recent research revealed that women were pursuing advanced educational training with a desire to apply and seek higher-level positions (Schmuch, 1975). Since the qualifications of women are increasing, promoting women will become an easier task. Nevertheless, the perplexities experienced by women desiring and deserving tenure and promotion were growing ones.

Appointment

Discrimination in education on the basis of sex began with the denial of equal educational opportunities and extended to the denial of equal employment opportunities and related benefits (Hallam, 1973). Equal opportunity has become front-page news in recent years, as many women question their roles in public and private activities. Nowhere do the far-ranging aspects of this equality have more impact than in the labor force and especially in the education job market (Hall, 1973). The elevation of the role of women in the labor market drew more attention when the Civil Rights Act of 1964 was passed. Title VII of this act prohibited discrimination in employment on the basis of sex. Over the years since the Civil Rights Act was passed,

numerous suits have been brought by women, or civil rights agencies on their behalf, charging employers and institutions with discrimination. Some decisions stated that, though discrimination was not intended, the employment practice in an institution resulted in an unequal pay or promotion treatment for women employees.

A flood of new administrative memos and guidelines has changed the ground rules. But new laws and efforts by employers will not make equal opportunity a fact if society's views about women's potential remain. The following cases dealt with discrimination in regards to the appointment of women.

The first case in this area was Pace College v. Commission on Human Rights of the City of New York and Valentine R. Winsey, No. 17011, 5 FEP 77, (Sup. Ct. N.Y.1972). The petitioner (Pace) was an institution of higher education incorporated by charters granted by the Board of Regents of the State of New York.

Winsey had been an associate professor at Pace. In February, 1970, instead of being promoted to full professor, she was given a contract for the next academic year, 1970-1971, with a notice that it was a terminal one. She refused to accept the contract and resigned. Later, she attempted to rescind her resignation, but Pace refused, apparently because other teachers had been hired to handle her courses. At this time, she made a complaint to the Commission that she had been discriminated against because of her sex.

Four hearings were held before two Commissioners in December, 1971 to April, 1972. On July 3, 1972, the Commission made its decision and gave its order, which was served July 6, 1972. The Commission found that members of the faculty at Pace had hostile attitudes toward women, that Winsey was terminated because of her sex, that petitioner discriminated against women in hiring, promotion, and termination, and that Winsey's employment was terminated by an act of the petitioner. The Commission went on to direct Pace to reinstate petitioner and order an affirmative action program with respect to women and Pace College. The Court reviewed the minutes of the hearings held before the Commission and found that the conclusions arrived at by the Commission and its subsequent directions were arbitrary, and not supported by the evidence.

The Commission admitted that Winsey was initially hired at a position higher than that for which she was qualified and was insisting upon promotion to a position to which she admittedly was not qualified. Also, she was paid more than most of the men in her department holding the same title.

In the Court's summary, it was stated that the Court was mindful of the fact that respondents had shown sufficient evidence to indicate that women were definitely in a minority at Pace and that some members of the faculty might be hesitant to hire women. But there was insufficient evidence to show that Pace practiced any kind of intentional discrimination against women in its personnel practices or that Winsey was terminated

solely because of sex. The Court also stated to Ms. Winsey personally that she had received far better treatment than most men.

The Court also stated that they were mindful of, and appreciated the effects of, the Commission in trying to right the wrongs of centuries, but the record did not support the conclusions arrived by the Commission and the harsh directions that the petitioner received as a result. The Court granted petitioner's application and denied the cross-applications of the respondents.

Another action dealing with the appointment of women was League of Academic Women v. Regents of the University of California, No. C-72-265, 343 F. Supp. 636 (D.Ct.,Cali.1972). This case pursued declaratory and injunctive relief against regents of the University of California to prevent them from continuing to discriminate in hiring and employment on the basis of sex.

The plaintiffs in this action were the League of Academic Women, twelve individual plaintiffs, and the class of women which they sought to represent. The League of Academic Women was a common-law association of women employees and women students at the Berkeley complex. Of the twelve individual plaintiffs, three were members of the academic staff at the Berkeley complex, one was a former academic employee, five were currently employed on the nonacademic staff, and three were presently enrolled as graduate students and were potential employees of the University. The class which these plaintiffs

were seeking to represent was composed of all women presently employed, or employed at some time during the past five years, at the Berkeley complex, and all women qualified for such employment. Named as defendants in this action were the Regents of the University of California.

Plaintiffs attempted to invoke the jurisdiction of the Court, to secure the protection, and redress the deprivation of rights secured by the Fourteenth Amendment to the United States Constitution and section eighteen of the California Constitution. The first cause of action alleged was that the policies and practices of defendants denied to women an equal right to make and enforce employment contracts as was enjoyed by white male citizens. The question in mind dealt with the interpretation of the Fourteenth Amendment. The challenge, brought against the rights of these individuals, was whether the Amendment implied white citizens or white males. Some cases applied the amendment solely to cases of racial discrimination.

The second complaint was that defendants had denied women an equal protection of the laws and equal access to public employment. The third complaint was that the University had denied them equal protection of the law of the California Constitution.

In judgment given defendants' motion to dismiss, the District Court held that the civil rights statute provides that all persons within jurisdiction of the United States shall have the same right in every state to make and enforce contracts as was enjoyed by white citizens. Therefore, it does not apply to sex discrimination claims.

In 1974, Janet Jackson Keller brought action for alleged sex discrimination charges against a University in regard to compensation, terms, conditions, and opportunities for employment in Keller v. University of Michigan, No. 74-72182, 411 F. Supp. 1055 (E.D. Mich. 1974). There was a question by the District Court whether the University was a "person" within the civil rights statute or an agency of state so as to be immune from suit under the Eleventh Amendment.

By neglect, Janet Jackson Keller failed to file all of the charges against defendants with the EEOC. Those that were not filed were dismissed, but the motion which was seeking to dismiss plaintiff's claim for punitive damages was denied without prejudice.

A female teacher, whose husband was employed by the same College in which she sought employment, was denied term appointment on the basis of sexually discriminatory application of a nepotism rule in Sanbonmatsu v. Boyer, 45 A.D. 2d (App.N.Y. 1974). Dr. Joan Sanbonmatsu and her husband Dr. Akira Sanbonmatsu were speech professors. They found that teaching at the same institution was desirable and convenient. The so-called nepotism rule of the University prohibited the appointment of parent, child, brother, sister, husband or wife to be a member of the academic or nonacademic staff. Appellant's husband had been a member of the staff since 1964. Because of that fact, she had been denied a "term" appointment to the staff since her marriage, although she had been employed regularly on a "temporary" appointment. Appellant contended that the nepotism

rule was discriminatory and that the decision of Brown, President of the College, denying her a term appointment for the year 1969-1970 was arbitrary and illegal.

After administrative hearings and appeals, Joan Sanbonmatsu submitted the issue to the Courts. Dr. Sanbonmatsu had become associated with the University as an assistant professor when she was given a "term" appointment in 1963. She resigned that appointment when she planned to marry Dr. Akira Sanbonmatsu. The College had hired her by "temporary" appointments for a period of five and one-half years. She requested a term appointment and was refused by Brown. Instead, she was given a temporary appointment which denied her of fringe benefits and tenure rights. February, 1970, she applied for maternity leave of absence for the fall semester of 1970, which was a benefit accorded to term appointees. She was immediately terminated from her position.

The decision to deny appellant a term appointment for the year 1969-1970 was arbitrary because it was based upon the application of an unlawful discriminatory rule. Judgment entered reinstatement of Dr. Joan Sanbonmatsu as a member of the staff of State University College with a term appointment.

When an individual does not file a charge with the EEOC, a suit usually cannot be made against an employer under Title VII. An example of this type of case was Johnson v. Board of Education of the City of Fargo, No. A3-74-20, 12FEP 997 (D.N.D. 1975). Ms. Johnson stated two claims. Her first claim was that the Board discriminated against her on the basis of sex by

failing to hire her either as a full-time teacher during the academic year 1971-1972, or as a full-time teacher during the year 1972-1973. Her second claim was that the Board failed to give her notice of contemplation of nonrenewal of her contract and of her right to a meeting which deprived her of substantive and procedural due process of law.

Susan Johnson had been hired as a social studies teacher at South High School on a part-time contract designated as a part-time position. She was advised by letter that she would not at that time be offered employment for the 1971-1972 school year, but if she wished to be considered for either a part-time or full-time contract for 1971-1972, she should notify the personnel office. She was offered a part-time position for the 1971-1972 school year.

On April 14, 1972, she was advised by letter that she would not be offered employment for the 1972-1973 school year, but that if she wished to be considered for a part-time or full-time position, she should submit a written notice to the office. She was not informed that she could appear before the School Board to discuss the reasons for not being rehired and she did not request an appearance with the School Board. At both times that she was in question for a position, men were hired for full-time appointments.

The question of this case was whether the School Board was required by law to give her a preliminary notice of contemplated nonrenewal with a notice of right to appear before the School Board prior to the "final decision" for discussion

of the reasons for the contemplated nonrenewal. Since she had sent a letter requesting full-time employment, she abandoned any possible right to be rehired as a part-time teacher under the same terms and conditions as the contract for the current year. The judgment was for a dismissal of action.

A case involving one former female University instructor, and one female whose application for teaching position had been denied was Weise and Mortenson v. Syracuse University, Nos. 372, 383, 522 F.2d 897 (2nd Cir. 1975). Two women, Selene Weise and Jo Davis Mortenson, brought separate actions against a private University and some of its officials.

In 1969, Ms. Weise applied for a position as lecturer in the Department of Public Address at Syracuse University. She was denied the position in favor of an allegedly less qualified male. In January of 1970, she requested consideration for a teaching assistantship for the academic year 1970-1971. Although Weise was hired for this position in March, 1970, she filed charges in reference to the Human Rights Law of New York alleging sex discrimination in the denial of her application for the lecturer's position. On December 14, 1970, seven days after the hearing of the charges, she was notified that her appointment as teaching assistant would be terminated at the end of the academic year. Sensing that this was no mere coincidence, Weise filed an additional charge, this time alleging retaliation. These complaints were dismissed by the State Division of Human Rights on April 21, 1972, and Weise's appeals were dismissed by the Division's Appeal Board on June 1, 1973.

She also filed charges with the EEOC on May 8, 1972. On June 28, 1973, the EEOC issued a notice of right to sue.

Mortenson, who had a Ph.D. in English, was employed as an assistant professor in Syracuse's Department of English from 1966-1968, during which time she taught lower and upper level undergraduate courses. According to the complaint, when defendant Bryant became chairman of the department in 1968, he gave her less desirable assignments in terms of courses and scheduling while assigning less well qualified males to teach more desirable classes. In the fall of 1969, the tenured staff of the English Department met to consider the prospects for tenure of Ms. Mortenson and three male faculty members, which included Peter Mortenson, who was soon to become the plaintiff's husband. Peter Mortenson and Donald Morton were advised that they would be recommended to tenure; Mortenson and Joseph Roesch were told that they would be terminated in June, 1971. In the fall of 1970, Roesch's position was extended until June, 1972, and Ms. Mortenson was told by a tenured professor that Roesch's extension was granted because he was married and at that time he was unable to find desirable employment. Ms. Mortenson's appointment was terminated as scheduled.

After filing several local complaints, Ms. Mortenson on September 24, 1973, filed a complaint with the EEOC in Buffalo, alleging that her termination of employment was in violation of Title VII. The complaint was dismissed because it was untimely filed. On December 7, Mortenson filed her complaint in the district court.

The District Court for the Northern District of New York, James T. Foley, Chief Judge, dismissed both complaints and the women appealed and the appeals were consolidated. The Court of Appeals, J. Joseph Smith, Circuit Judge, held that evidence was insufficient to permit determination of existence of state action.

In Stevens v. Junior College District of St. Louis, St. Louis County Missouri, No. 75-151C(4), 410 F.Supp. 309 (D.Mo. 1976), a black female employee of a Junior College district brought civil rights suit alleging discrimination on the basis of race and retaliatory conduct on the part of defendant for plaintiff's filing of complaints of discrimination.

Agnes E. Stevens brought this action under Title VII of the Civil Rights Act of 1964. The case was tried before the Court without a jury. The Court considered the pleadings, the testimony of the witnesses, and documents in evidence, and the stipulations of the parties, made the following statement:

> The Court found that plaintiff was transferred solely because of her poor performance, use of profane language, and offensive personal habits. The Court has further found that these same considerations were the sole reasons for her discharge. Ms. Stevens was not discriminated against on account of her race, not in retaliation for filing charges with the EEOC. Therefore, Title VII had not been violated.

The second category dealt with appointments. In the realm of equal opportunities for women in employment, Miller stated:

> The role the courts can play in achieving equal status between the sexes must be kept in perspective, for the judiciary can only achieve legal equality. The greater task which lies beyond the achievement of legal equality involves a socialization process for both men and women which consists of rethinking the roles and stature of men and women in modern society as well as educating people in the wisdom and benefit of basic human equality. The legal struggle is crucial for it is the first step ... (1974, pp. 82-83).

One of the more interesting cases was Sanonmatsu v. Boyer. In this case, the courts found the nepotism rule to be discriminatory. An interesting note was that the administrators were willing to bypass the ruling and allow Dr. Joan Sanbonmatsu to work, but others were reluctant to change the system.

Women were not given reasons why they were not appointed, as in tenure and promotion discrimination (Johnson v. Board of Education of the City of Fargo and Weise and Mortenson v. Syracuse University). Within these same cases, women were needlessly turned down for positions because their competitors were male applicants. Since men are looked upon as the breadwinners of the family, they were sometimes hired over more qualified women.

This paper did not deal exclusively with sex discrimination but with the problem of job discrimination. Therefore, discrimination on the basis of race was an acceptable topic. Women who have been denied appointment due to race and sex

discrimination have tested the courts to decide if discrimination existed within an institution (Stevens v. Junior College District of St. Louis). Courts have difficulty in deliberating a decision when both sex and race discrimination were involved. The sex of an individual has a greater effect than race on one's appointment according to this particular ruling.

Dismissal

An individual's sex is or should be irrelevant to his or her potential to contribute to a position (Buek and Orleans, 1973). This idea was in Weber v. Aetna Casualty and Surety Co., 406 U.S. 164, 175 (1972):

> Since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seen to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility..."

Frequently, women felt that the termination of positions occurred because of their sex. Many have gone to court for relief and many have not. Most of the litigation researched involved the question of dismissal. The following court cases dealt with the topic of dismissal in relation to women in educational institutions.

In Jones v. School District of Borough of Kulpmont, 3 A.2d (Sup. Ct., 1939), Ms. Jones, after nine years as teacher in the Kulpmont first grade, was elected to be the sole "permanent supply teacher" in the district, commencing September, 1936.

Her duty was to act as full-time substitute in all elementary grades and kindergarten. In May, 1938, she was notified of a resolution of the Board discontinuing the permanent supply position and suspending Ms. Jones until its reestablishment. Upon appeal, the Court found that her contract was within the Tenure Act, that the elimination of the position was for the purpose of dismissing Margaret R. Jones as a nonresident, and that no grounds appeared for discontinuing her employment. From the order of reinstatement, the school district appealed. The School Board stated that Ms. Jones was not a "professional supply teacher" and that she clearly does not fall within the clause of any regular full-time employee certified as a teacher.

In the absence of a specific constitutional or statutory provision, or a valid regulation on the part of the employing body, there were no general requirements in the law that public employees reside within the territory of the governmental body employing them, although the School Board may adopt such rules in order to manage its affairs. But since there was nothing in the record to show that the School Board made any such regulation as a matter of general school policy, the mere fact of non-residence would not warrant the Board's action. The order was affirmed at the school's cost.

Even in the past, society's concept of educators was one of idealistic morality as in the case of Horosko v. School District of Mount Pleasant Township, 6 A.2d 866 (Sup. Ct., 1939). The case was an appeal from an order of the Superior

Court reversing an order of the Common Pleas which had affirmed the action of a School Board in discharging a teacher. On her appeal to the Common Pleas the teacher requested and obtained a hearing. The difference of view between the two courts which had considered the case arises from a different interpretation of the following which can terminate the teacher because of immorality, incompetency, intemperance, cruelty, willful and persistent negligence, mental derangement, persistent and willful violation of the school laws of this Commonwealth.

The members of the court agreed that the Superior Court was much narrower than was apparently intended by the legislature. The Superior Court had stated:

> It has always been the recognized duty of the teacher to conduct himself in such way as to command the respect and good will of the community, though one result of the choice of a teacher's vocation may be to deprive him of the same freedom of action enjoyed by persons in other vocations (Horosko v. School District).

Difficulties between this teacher and the Board had existed for some time because of her conduct with respect to a restaurant maintained by a man whom she married in August, 1936. In this restaurant, beer was sold, a pin-ball and a slot machine were maintained, and dice were played. The restaurant was across the road and about 125 feet from the school.

Evelyn Horosko acted as waitress and, on occasion, as bartender, with such services being performed after school hours and during the summer vacation. She was accused of taking an

occasional drink of beer, serving beer to customers, shaking dice with customers for drinks and playing a pin-ball machine on the premises. Some of this occurred in front of some students she was tutoring. Furthermore, she was rated by A.H. Howell, County Superintendent of Schools, as 43% competent, in which 50% was passing or average rating.

There was in the case of Horosko v. School District a difference of opinion in the definition of "incompetency." The opinion of the Superior Court based its definition on a narrower construction of "competency." The Supreme Court questioned whether competency was merely the ability to teach the "Three R's." The Court decided that the provisions of the clause which included the words "incompetency" and "immorality" are therefore to be construed according to their common and approved usage.

Definitions of "immorality" include conduct inconsistent with moral rectitude. A large body of public opinion regarded gambling as immoral. Furthermore, gambling with a pin-ball or a slot machine, or with dice was prohibited by law.

The Superior Court concluded that the order made in the Common Pleas was "just," and that each party was to bear its own costs. Therefore, the action of the School Board in discharging Evelyn Horosko was agreed upon by the higher court.

A problem of dismissing faculty members in schools occurs when the population of pupils decreased. This particular problem of decreasing faculty occurred in Walker v. School District of City of Scranton, 12 A.2d 46 (Sup. Ct. 1940). The plaintiffs

not only included Gertrude Walker but other faculty members. Plaintiffs were appointed as professional employees of the School District under what may be referred to as the "Scranton plan of appointment." This plan was devised by the Board of Directors in an effort to select those best qualified to teach. After the applicants for appointment presented their certificates from the Department of Public Instruction licensing them to teach, they were examined by the School Board to determine their qualifications to teach those courses. They were rated on this examination and their names placed on a list as eligible for appointment to that teaching assignment for which they were examined. All plaintiffs qualified under the "Scranton plan of appointment" to teach in the intermediate grades of the School District and taught in that teaching assignment. None of them qualified under the plan to teach in any other assignment, either in the elementary schools or in the high schools of the District. School directors suspended the necessary number of professional employees where a decrease in pupil population occurred. Suspensions occurred in the inverse order of their appointment, without regard to the suspended employees' seniority to employees in other assignments, even though the suspended senior employees were licensed to teach in other subjects.

Plaintiffs were working under their original appointments when suspended. If any one of them had been transferred to another teaching assignment subsequent to her appointment a further problem would have been created. The Court ruled that each plaintiff's case be disposed of on its own particular

facts. The Court favored the school district and stated: "each School Board is empowered to administer the public school system within its school district. To enable it to do so efficiently and in the best interest of the children, it may adopt and enforce reasonable rules and regulation" (Walker v. School District).

Another case with a decrease in student population was Wall v. Stanly County Board of Education, No. 11019, 378 F.2d 275 (4th Cir. 1967). This case was an action by a Negro school teacher seeking reemployment by the County Board of Education. The United States District Court for the Middle District of North Carolina denied relief, and an appeal was taken.

Audrey Gillis Wall, who had 13 years of experience, was recommended for reemployment in county school system, but, after shift in pupil enrollment resulting from freedom of choice desegregation plan, was not reemployed due to decrease in allocation of teacher spaces to Negro schools. Therefore, she was not allowed by the School Board to compete for another teaching position. On the basis of merit and qualifications, Ms. Wall felt that she was entitled to damages for such discrimination, including salary difference between former position and new position subsequently obtained by the teacher, as well as moving expenses to her new residence. The School Board was charged with violation of the Fourteenth Amendment.

Previous court cases had established:

(1) that the Fourteenth Amendment forbids the selection, retention, and assignment of public school teachers on the basis of race;

(2) that reduction in the number of students and faculty in a previously all-Negro school will not alone justify the discharge or failure to reemploy Negro teachers in a school system;

(3) that teachers displaced from formerly homogeneous schools must be judged by definite objective standards with all other teachers in the system for continued employment.

With these principles, the district court denied relief to the Negro school teacher, Ms. Audrey Wall. Since Ms. Wall was recommended for reemployment by her principal and his recommendation approved by the School Board, the Court of Appeals said that the unfair rejection of her application for reemployment entitles her to recover damages.

Ms. Wall managed to secure employment elsewhere for the school year 1965-1966. Proper damage elements included salary differences, if any, and moving expenses to her new residence.

A case cited many times regarding dismissals was Morey v. Independent School District, No. 1-69 Civ. 74, 312 F. Supp. 1257 (D.Minn. 1969). In February of 1962, the defendant school district, acting through the School Board, attempted to terminate Edith Morey's teaching contract. A hearing was held before the school board which resulted in her discharge. Thereafter, Ms. Morey brought an action for back pay in the Mower County District Court for the State of Minnesota. The case was tried before a state district court judge, without a jury. Ms. Morey was awarded damages of $26,888.19 for back salary, interest, and

various medical and hospital insurance benefits. In March of 1967, Morey resumed her teaching job for defendant school district. Earlier the state district court judge determined that plaintiff was not entitled to be reimbursed for any increments in her salary during the period.

Later the plaintiff made a complaint that the School Board had failed to reimburse her for usual and customary scheduled salary increases afforded other teachers of like education and experience within the School District for the period 1962 to the present date. That such failure to reimburse her said increases were in violation of her due process and equal protection right secured by the Fifth and Fourteenth Amendments to the Constitution of the United States. The complaint demanded judgment for $14,301 for lost earnings, $50,000 for damages to her reputation, and $50,000 for damages.

The action was under the Civil Rights Act against the School Board and individual members by school teacher for lost earnings, for damages to her reputation and for injunctive relief. On motion to dismiss for lack of jurisdiction and for failure to state a claim, the District Court, Miles W. Lord, J., dismissed the case for lack of jurisdiction and stated that the school district was not subject to suit under the Civil Rights Act and that failure of individual members to grant periodic salary increases during the period from improper discharge to reinstatement did not constitute deprivation of any right, privilege or immunity secured by the Constitution and laws.

Many educators were dismissed for other reasons than a decrease in pupil population. Gouge and Klein v. Joint School District No. 1, Nos. 69-C-166, 165, 310 F. Supp. 984 (D.Wis. 1970), was an action by teachers whose contracts were not renewed against the school district and the Board of Education for compensatory damages, punitive damages, and an order compelling reinstatement. The defendants moved for summary judgment dismissing the actions. Gouge v. Joint School District involved two plaintiffs who were Ms. Saxon Gouge and Ms. Viola G. Klein. These were civil actions to challenge the defendants' decisions not to retain plaintiffs as teachers in Joint School District No. 1. Each plaintiff sought compensatory damages, and an order compelling reinstatement in her teaching position.

Mrs. Gouge was retained as a teacher by the Board of Education for the school years 1963-1964 through 1968-1969 on a series of one-year contracts. At a meeting of the Board held on February 25, 1969, Johnson, Administrator of Joint School District, recommended nonrenewal of Gouge's contract for the 1969-1970 school year. Johnson informed the Board that Gouge was and had been for some time in a relatively poor state of physical health. In his opinion, she had shown an inability to plan and conduct the elementary school vocal music program, and, repeatedly left the class for short periods without explanation. By unanimous vote, the Board decided to consider the nonrenewal of Gouge's contract. On February 26, 1969, Johnson gave such written notice to Gouge. She requested a private conference with the Board and a written letter of reasons for her dismissal.

The meeting was held and the Board voted unanimously, again not to renew Gouge's contract.

The other defendant Klein had been employed as teacher by the school district for 18 years, on a series of one-year contracts. At the February 25, 1969, meeting of the School Board defendant Johnson recommended the nonrenewal of Klein's teaching contract for the 1969-1970 school year be considered for the following reasons:

> Klein had been "unable to adapt to departmentalized team teaching"; Klein did not have the knowledge or training to efficiently or effectively teach as a member of the teaching team handling the program; Klein had persisted in a self-contained program; and Klein had caused disharmony among the middle school staff.

After presentation and discussion of these reasons the Board voted unanimously to consider nonrenewal of Klein's contract. The Board directed Johnson to advise Klein of their decision. Klein received the letter and requested a private conference with the Board.

Defendants contended that plaintiffs had no right to renewal of their teaching contracts under the substantive law of Wisconsin. Wisconsin case law permitted the defendants to refuse to renew a teacher's contract for any cause or no cause at all except that the decision of nonrenewal cannot be based upon constitutionally impermissible grounds. The courts expressed no opinion as to what the requirements of Wisconsin were, but the issue presented was whether the defendants met

the minimal requirements of substantive and procedural due process required by the Fourteenth Amendment of the United States Constitution in coming to the decision not to renew the plaintiffs' contracts.

The Court ruled that summary judgment of dismissal was inappropriate because there was a genuine issue of material. The Courts concluded that in the Gouge and Klein case, both letters from Johnson had reasons stated that were limited and softly expressed. Also, the Board gave each plaintiff cause to believe that only a single reason was actually under consideration.

The District Court, James E. Doyle, J., held that a teacher in a public elementary or secondary school is entitled to a statement of reasons for considering nonrenewal and a notice of a hearing at which the teacher can respond to the stated reasons. The Court order was that the school district's motions in both of the above actions for summary judgments of dismissal are granted with respect to the claims for damages against them. But in all other respects, the school district's motions in both of the above entitled actions for summary judgment of dismissal were denied.

In Harkless v. Sweeny Independent School District, No. 28188, 427 F.2d 319 (5th Cir. 1970), another dismissal case appeared by Ms. Harkless and other Negro school teachers against school district and against trustees and superintendent of the district in their official capacities for violation of teacher's civil rights in failure of school to renew teaching contracts

when school system was desegregated. This appeal involved an action brought by ten Negro teachers who alleged that the failure of the school district to renew their teaching contracts denied them rights secured by the Fourteenth Amendment. They were seeking reinstatement and back pay.

The United States District Court for the Southern District of Texas, James L. Noel, J., ordered back pay and all other factual issues and dismissed the claims. An appeal was taken. The Court of Appeals held that the school district, as well as trustees and superintendent in their official capacities, was within meaning of person as used in Civil Rights Act, for purposes of being subject to suit, but the seeking of equitable relief, reinstatement, and back pay was subject to jury trial.

Women are dismissed for a variety of reasons. Elizabeth Anna Duke was dismissed in 1972 for making speeches using profane language and criticizing the university administration and policies. In Duke v. North Texas State University, No. 71-3198, 469 F2d 829 (5th Cir. 1972), she was seeking an injunction reinstating her. The United States District Court for the Eastern District of Texas, William Wayne Justice, J., entered judgment in favor of plaintiff, and an appeal was taken.

Ms. Elizabeth Anna Duke filed a complaint on May 13, 1971 against North Texas State University alleging that the University violated her First, Fifth, and Fourteenth Amendment rights pertaining to freedom of speech and due process of law when it withdrew an offer to employ her as a teaching assistant. On two evenings, Ms. Duke appeared before and made an address to

an unauthorized and unsponsored group. During the course of her address she was accused of using profane and obscene language and discredited the University administration and the governing board of the University. In early August, 1970, Mr. John Carter, Acting President of North Texas State University learned of Ms. Duke's actions and directed an investigation. He reported the results of the investigation to a meeting of the Board of Regents on August 19, and the Regents instructed him to conduct an additional investigation and if the charges were true to dismiss her. President Carter investigated and wrote Ms. Duke of her dismissal and optional hearing.

Since Ms. Duke was without tenure, and her appointment for the preceding term had expired, the University proceeded on the basis that the procedure prescribed by the "Statement on Academic Freedom" did not govern her case. One of the most disturbing aspects of this case is that Ms. Duke was notified that the appeal before the Regents would consist of a review of the transcript and that there would be no witnesses.

The Court of Appeals held that the University did not produce any persuasive evidence concerning the scope of interests in which they had been infringed. Since the University was trying to maintain a competent faculty and a public confidence in the University the case was reversed in favor of the University.

Another case involving dismissal was Schreiber v. Joint School District No.1, Gibraltar, Wisconsin, No. 70-C-270, 335 F. Supp. 745 (D.Wis. 1972). This was a case in which a teacher

brought civil rights action challenging her dismissal. The civil action was in request of a summary judgment requesting $100,000 damages and reinstatement. Ms. Schreiber had become engaged to Robert Schreiber but the wedding was postponed because Mr. Schreiber had to obtain permission of the court to remarry. Ms. Schreiber had been living with a family during the summer of 1969 which was to terminate September 1. She had difficulty in finding a room and moved into Mr. Schreiber's home. A rumor suggested that a petition was being circulated in an attempt to have her fired because of this act. But by the end of the month she had found an apartment in which to live until the wedding.

On October 24, 1969, plaintiff received a letter dated October 22, 1969. The Board of Education accused her of "unprofessional conduct." Finally, the Board of Education, in executive session, voted to request Ms. Schreiber to tender her resignation effective December 1, 1969. She refused to resign, and on November 11, 1969, again in executive session, the Board of Education decided to terminate her employment.

The District Court held that where teacher under one-year contract was dismissed during the course of the year, due process entitled her to a statement of the reasons for dismissal and notice of hearing at which to respond to such reasons; and that money judgment for back pay would be equitable rather than legel in nature. The defendant's motion was denied and the plaintiff's motion was granted.

A state Federal Employment Practice agency had jurisdiction to decide whether an employee of the state University had been discharged due to sex bias in Regents of University of Colorado v. Colorado Civil Rights Commission, No. 72-1810-1, 7 EPD 6445 (D.Colo. 1973). Betty Nesheim was employed by the University of Colorado Medical Center from 1962 until 1970, when she was terminated from her position. After termination Nesheim filed a grievance with the University of Colorado Medical Center alleging that her discharge was based upon sex discrimination.

The Commission ordered that Nesheim be offered reinstatement in a similar job from which she was discharged. The Commission further ordered that the University pay Ms. Nesheim back pay from the date of her discharge to the day she was offered re-employment, provided, however, that the respondents may withhold federal and state income tax. The order of the Commission further provided that in the event of a dispute as to the offer of reinstatement or the amount of back pay due, the Commission would hold further hearings to determine it.

O'Dessa J. Shipley was employed by Fisk University as Dean of Women from September 5, 1969 to June 9, 1971. Her employment was on a one-year basis. By letter defendants advised Ms. Shipley that her contract of employment would not be renewed due to reorganization of the Office of Student Personnel at the University. Her contract of employment was for the job of Dean of Women. She was moved to the faculty housing complex and failed to pay the $130 monthly rental to the defendant. The

University began to withhold from her monthly paychecks the unpaid rent.

On May 19, 1971, plaintiff filed a complaint against defendants with the Office of Civil Rights, United States Department of Health, Education and Welfare, alleging sex and race discrimination. The complaint was that the Dean of Men received free rent while plaintiff did not. Furthermore, she was not rehired.

The court found that the University did not discriminate against O'Dessa J. Shipley on the basis of sex with regard to compensation, terms, conditions, and privileges of her employment. Therefore, it was the opinion of the court that judgment be entered against the plaintiff and in favor of the defendants, with costs to be assessed to Ms. Shipley (Shipley v. Fisk University, No. 6975, 7 FEP 244 (M.D.Tenn. 1973).

In Soucy v. Board of Education of North Colonie Central School District No. 5, 41 A.D.2d 984 (U.S. 1973), the petitioner was a teacher with 23 years of experience and for the last 21 years has been employed by the district as an elementary teacher. She had been tenured on three occasions by the board. After a new principal was hired, Alton Downer, Ms. Soucy was dismissed.

The charges were incompetency as evidenced by:

1. time wasted on class plans
2. lack of planning for definite readiness sequence
3. lack of units in art, music and science.

Also charged was conduct unbecoming a teacher, as evidenced by:

1. alleged falsification of the Metropolitan reading test
2. missing library materials found in petitioner's locker
3. certain list belonging to another teacher which petitioner returned to the library as her own.

Ms. Soucy was served with charges and demanded a hearing. A panel recommended that she be dismissed and the Board of Education on August 16, 1971 followed the recommendation and voted to dismiss her. In summary, the petitioner was dismissed for acts of incompetence; she was denied notice with appropriate detail of the charges, and prejudicial and irrelevant testimony was admitted at the hearing. The case went through several courts of appeals in New York. Finally, the Supreme Court, Appellate Division held that the petitioner be reinstated together with appropriate back salary.

Women have and are asking for equal rights for themselves and others in employment. With such unsatisfactory laws possibly new ones need to be enacted or the older ones need to be revised. Judge Jackson stated, "But I know of no way that we can have equal justice under the law except we have some law" (Brown v. Allen, 344 U.S. 443, 546, 97 Led 469, 73 S.Ct. 397). An example of a case requesting civil or equal rights was Andrews and Rogers v. Drew Municipal Separate School District, No. GC 73-20-K, 371 F. Supp 27 (D.Miss. 1973). This civil rights action was brought against a school district, its trustees

and superintendent. The case sought declaratory and injunctive relief to redress alleged deprivation of rights and privileges guaranteed by the Fourteenth Amendment.

The complaint alleged that plaintiffs, Katie Mae Andrews and Lestine Rogers, both of whom were black females, qualified to be employed as teachers' aides in the Drew Public Schools. They were wrongfully denied employment because of a local policy which forbade employment of school personnel who are unwed parents. Plaintiffs contended that this policy was violative of equal protection because it created an unconstitutional classification to both race and sex.

The District Court held that the policy of barring an otherwise qualified person from being employed in public schools merely because of the person's previously having had an illegitimate child had no rational relation to objectives by school officials. The case was dismissed.

Action for monetary damages as well as injuncitve relief was brought against a state University and one of its employees for alleged violation of a teacher's civil rights on the grounds that she was not retained for employment because of her sex in Van De Vate v. Boling, No. 8463, 379 F. Supp. 925 (D.Tenn. 1974). Defendants denied that they discriminated against the plaintiff on account of her sex or on any other unlawful basis in her efforts to gain employment in the Department of Music.

In the light of the testimony, the Court concluded that the action taken by the individual defendant and the University

of Tennessee was a result of a personality clash between the individuals involved, and nothing more. There was no evidence in this record to indicate that Nancy H. Van De Vate had anything to do with the decision not to employ her. The Court's prerogative was not to interject itself into the educational institution and to not require an institution to either hire or not hire a professor.

Van De Vate argued, however, that a careful reading of Executive Order 11,246, as amended by Executive Orders 11,375 and 11,478 compelled a different conclusion. Since she had not established a prima facie case of discrimination on the basis of sex, she cannot rely upon the Executive Orders and the regulations cited to establish her case. The action was dismissed.

After her prior action involving the same factual situation had been dismissed, a former associate professor of anthropology at a private college filed a so-called "amended complaint" alleging that her constitutional rights had been violated when her contract of employment with the College was not renewed in Pendrell v. Chatham College, No. 74-621, 386 F.Supp. 341 (D Pa. 1974). On December 10, 1971, the plaintiff in these actions alleged that her Constitutional rights under the First, Fifth, and Fourteenth Amendments had been violated when her contract of employment was not renewed. On January 23, 1974, the Court entered an opinion on the College's motion to dismiss because Chatham College was a private institution, and Nan Pendrell was unable to state a claim for relief under a certain section.

June 24, 1974, Nan Pendrell filed, under a new civil action number, what is called an "Amended Complaint." An important note is that the plaintiff had moved to another state, Pennsylvania.

The Court found that the defendant's motion to dismiss was granted as to those portions of plaintiff's amended complaint which attempted to state a claim under Pennsylvania State Law. Ms. Pendrell was ordered to amend her pleadings so as to conform with the order of the Court. Motion was granted in part and denied in part regarding dismissal of case.

Another case brought under the Civil Rights Act was Presseisen v. Swarthmore College, No. 74-1313, 386 F. Supp. 1337 (D.Pa. 1974). A former assistant professor brought action against College and College officials charging that nonrenewal of her employment was based on sex discrimination. On February 29, 1972, the plaintiff received notification from the college that she would not be reappointed as an assistant professor for the 1972-1973 academic year because they were going to absorb her position into a new post in which she did not quality. Barbara Z. Presseisen filed a charge of sex discrimination with the EEOC. Her complaint against the College was dismissed by the EEOC on the grounds that Title VII of the Civil Rights Act did not apply to educational institutions with respect to the employment of individuals to perform work connected with the educational activities. The Civil Rights Act does not apply to the claim filed prior to effective date of amendment striking exemption for educational institution. Although,

with the help of the Pennsylvania Human Relations Commission, a sex discrimination charge was filed against Swarthmore College.

On Swarthmore College's motion to dismiss, the District Court held that the College enjoyed national reputation and attracted students and faculty from all over the country. Motion was denied.

Former teachers at Virginia institutions of higher education brought sex discrimination action against state council of higher education and certain named defendants. The defendants moved for dismissal. The case was Taliaferro v. State Council of Higher Education, No. 73-584-R, 372 F.Supp. (E.D.Va.1974).

Ruth Taliaferro and other female teachers at Virginia institutions of higher education were seeking monetary and injunctive relief on behalf of themselves and others similarly situated from alleged deprivations of constitutional rights arising during the course of their employment, including their dismissal. Taliaferro was allegedly forced into retirement by the discriminatory action of the defendants, effective September 1973. Plaintiff Dyson was allegedly dismissed by the actions of the defendants, effective at the end of the 1972-1973 year and denied reinstatement at the Virginia Polytechnic Institute and State University.

The District Court held that state council of higher education and named defendants, in their official capacities, were not "persons" for purposes of either monetary or injunctive relief under the Civil Rights Act. The case was dismissed.

The State Human Rights Appeal Board vacated an order of the State Division of Human Rights dismissing a discrimination complaint in Queensborough Community College of the City University of New York v. State Human Rights Appeal Board, State Division of Human Rights, 49 A.D.2d 765 (Sup.N.Y. 1975). The Supreme Court, Appellate Division, held that Ethne Elsie K. Marenco's cause of action for discriminatory notice of nonreappointment occurred when Marenco received notice of nonreappointment, and the limitation period that began to run. The action was barred. Ms. Marenco's discrimination complaint, filed with the State Division of Human Rights some 20 months after she was given notice that she would not be reappointed as an assistant professor at Queensborough Community College was time-barred. The case was dismissed because the complaint of Ethne Elsie K. Marenco was not filed within the prescribed period. The case was remanded to the Divison of Human Rights for further proceedings.

In a Statute of Westminster it was stated, "That no man of what estate or condition, shall be put out of land of tenement, nor taken nor imprisoned, nor disinherited, nor put to death, with being brought in answer by due process of law" (28 Edw. III (1354). Due process was a popular issue in regards to teacher rights. A discharged black teacher brought civil rights action and alleged that discharge was a result of desegregation and that she was denied procedural due process. The case was Blunt v. Marion County School Board, No. 74-1279, 515 F.2d 951 (5th Cir. 1975).

In May, 1969, on grounds of incompetency the School Board of Marion County, Florida, terminated the employment contract of Ms. Hattie M. Blunt, a black school teacher of some 25 years experience. Unsuccessful in the administrative appeal from the School Board decision, Ms. Blunt initiated this civil rights suit which challenged the constitutionality of her dismissal. She alleged that in the course of proceedings before the Marion County School Board and the Florida State Board of Education certain of her constitutional rights had been violated. The relief sought was reinstatement of Ms. Blunt's teaching contract, along with back pay and retirement benefits.

The Court stated that Ms. Blunt was denied substantive due process. For sound policy reasons, courts are reluctant to intrude upon the internal affairs of local school authorities in such matters as a teacher's competency (Ferguson v. Thomas, 5 Cir. 1970, 430 F.2d 852, 858).

The United States District Court entered judgment in favor of defendants, and plaintiff appealed. The Court of Appeals held that School Board's finding of incompetency was supported by substantial evidence so that teacher was not denied substantive due process and that there were no terminations made in the total professional staff of the school system in order to accommodate desegregation effort so it was not necessary to compare plaintiff's qualifications with those of all other teachers. Ms. Blunt was not dismissed on account of race and that she was not denied procedural due process. The Appeals Court affirmed.

As stated by Flygare, "The Supreme Court has noted on numerous occasions that due process is a flexible concept. It must be tailored to balance the interests of the government with the rights of the individuals involved in the dispute" (1976, p. 206).

Another case involving due process was Gray v. Union County Intermediate Education District, No. 73-3072, 520 F.2d 803 (9th Cir. 1975). A special education teacher brought a suit against the county intermediate education district, its acting superintendent and members of its board of directors. Ms. Gray alleged that the district violated her due process and First Amendment rights in connection with nonrenewal of her teaching contract. Ms. Gray was employed on a year-to-year contract basis.

During the spring of 1970, Mary C. Gray became involved in an effort to assist a student who had become pregnant. Ms. Gray advised the girl that she had a right to a therapeutic abortion. The girl was made a ward of the State Welfare Department and the Department decided an abortion was not advisable. Ms. Gray insisted that the girl be dealt with in a manner other than as the Welfare Department had determined was best, thereby creating a problem in the relationship of Union County Intermediate Education District (I.E.D.) and the Welfare Department. I.E.D. is a separate entity with its own budget, staff and Board of Directors, but it does not operate any school. In March of 1971, the I.E.D. Board voted not to renew the appellant's contract for 1971-1972 and a hearing on the

matter was held at Ms. Gray's request on April 14, 1971.

The Board voted to sustain their original decision not to hire Ms. Gray for the upcoming year, and this suit followed. Although the District Court found that the incident involving the pregnant student formed part of the basis for the Board's decision, the Court also found that Ms. Gray's activities with regard to this matter exceeded the scope of free speech, and, thus, the appellant's first amendment rights were not violated. In addition, the District Court held that the nonrenewal of Ms. Gray's contract did not result in either a loss of liberty or property to her, and, therefore, she was not denied due process.

The Court of Appeals, William D. Murray, District Judge, held that nonrenewal of teacher's contract did not constitute a denial of her First Amendment or due process rights. The decision was affirmed.

An action under Title VII of the Civil Rights of 1964 was brought by Dr. Peters against Middlebury College, Peters v. Middlebury College, No. 73-153, 12 FEP 296 (D.Vt. 1976). The suit was in reference to the dismissal of Peters after a two year teaching position.

The Court decided that the College did not violate Title VII when it did not grant a third-year teaching contract to Dr. Peters who taught Reniassance literature. The decision was based upon professional judgment that the instructor's qualifications to teach advanced courses in English department

were in substantial accord that the weakest point in the department was Renaissance literature, and the instructor was unable to lecture adequately on John Donne and Ben Johnson. Therefore, the decision not to reappoint her was made according to prescribed procedures, and at each step she was given the same consideration as any instructor under consideration for reappointment and review. The case was dismissed.

The majority of the litigation occurred in the area of dismissal, the third category. Doris Sassower explained, "Legal action by women is a powerful wedge in opening doors long closed and that they must be unhesitating in asserting their rights and demanding remedies to secure relief against deeply-felt complaints" (1972, p. 29).

Within this section, female teachers were dismissed for reasons of incompetency. This term has many connotations and becomes difficult for the courts to rule upon. Therefore, educational institutions found that dismissing women on the grounds of incompetency was easier than using other rationale (Horosko v. School District of Mount Pleasant Township, Soucy v. Board of Education, and Blunt v. Marion County School Board).

Women were discriminated against in regard to appointments due to the decrease of student population (Walker v. School District of City of Scranton, Wall v. Stanly County Board of Education, Gouge & Klein v. Joint School District). Women were dismissed when the student population declined in compliance with desegregation.

Many reasons for dismissal were justifiable, but others were inadequate. Discrimination charges were filed when women were dismissed because positions were to be absorbed into new posts (Presseisen v. Swarthmore College and Shipley v. Fisk University). Discrimination charges also occurred when a woman was forced into early retirement (Taliaferro v. State Council of Higher Education). Yet these forms of discrimination were hard to prove in the courts.

Value judgments sometimes entered into the dismissal charge (Jones and Schreiber v. Joint School District No. 1). Women in comparison to their fellow male workers were judged on a double standard. Andrews and Rogers v. Drew Municipal Separate School District illustrated an example of this point. This double standard constitutes unneeded discrimination toward women.

Many times women were dismissed without being given a justification which constitutes, in many cases, lack of due process. At times administrators took grievances to the school board without the employee's knowledge (Gouge and Klein v. Joint School District No. 1). This act of neglecting proper due process also entered into job discrimination relating to dismissals (Duke v. North Texas State University and Gray v. Union County Intermediate Education District.)

Pregnancy

As discussed Katherine T. Barlett in the California Law Review, "Pregnancy is unique. Only women may experience pregnancy; most women can, and in the United States approximately

84% of the married women do at least once"(1974, p. 1532). That women may and do become pregnant was the most significant single factor used to justify the countless laws and practices that have disadvantaged women for centuries. Woman's role as childbearer has given rise to many of the most common Western sterotypes about women. These sterotypes have often been characterized as part of the divine order:

> The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood...The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator (Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873).

In 1961, the United States Supreme Court renewed legal support of these sterotypes. In upholding a statute which permitted females in effect to exempt themselves from jury duty, it wrote:

> Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life (Hoyt v. Florida, 368 U.S. 57, 61-62 (1961).

Laws and practices that single out pregnancy for special treatment are not limited in their effect to pregnant women.

A woman who might become pregnant is also affected (Bartlett, 1974).

The primary thrust of EEOC's policies relative to maternity and childbirth is that the employer should treat these conditions, for the purposes of applying personnel practices and policies, just as he would treat all other temporary disabilities (Oehmke, 1974).

> Under guidelines issued by EEOC, an applicant or employee may not be discriminated against because of pregnancy. Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery should be considered temporary disabilities and should be treated as such under any health or disability insurance or sick leave plan (Terlin, 1975, p. 15).

One of the earliest cases dealing with pregnancy was Appeal of School District of [redacted], 32 A.2d 565 (Pa. Sup. Ct. 1943), which occurred in 1942. Incompetency was the justification of the school district for the pregnant teacher to leave. "Incompetency" as used in the Teachers' Tenure Act, was a valid cause for termination of contract with professional employees of school district and embraced lack of physical ability to perform duties incident to the employment.

As was stated, "*incompetency*" was a relative term which may be employed as meaning disqualification, inability, incapability, lack of ability, legal qualification, or fitness to discharge the required duty. Furthermore, it means general

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lack of capacity or fitness, or lack of the special qualities required for a particular purpose.

Mrs. Brown in Appeal of School District of City of Bethlehem was employed originally by the appellant as a dental hygienist in 1932 and continued to perform her duties in that capacity until September 3, 1941. She was married during the school year of 1937-1938 and executed a contract in a statutory form prescribed by Section 2 of the Teachers' Tenure Act. The Tenure Act permitted certain restrictions for termination which were immorality, incompetency, intemperance, cruelty, persistent negligence, mental derangement, persistent and willful violation of the school laws.

On July 13, 1941, Mrs. Brown advised the Board by letter that because of her physical condition a leave was necessary. Her physician enclosed one also. Not until August 12 did she forward a letter of her condition, which was pregnancy. Mrs. Brown was informed that sick leave was denied. The Board, after giving her an opportunity to resign, which she refused to do, passed a resolution with formal charges for her dismissal. Within this resolution, incompetency was mentioned.

The Court stated that Mrs. Brown was not being discriminated against because of her marriage, which occurred prior to the events which have recited. Her dismissal was due neither to that fact nor to her legitimate pregnancy, but because she became incompetent due to her physical incapacity to discharge her duties. The Court favored the School Board because they were unable to discover any indication of an abuse.

In La Fleur v. Cleveland Board of Education, Nos. C 71-292, C 71-333 326 F.Supp. 1208 (D.Ohio 1971), the employment contract of the Virginia School Board provided that all pregnant teachers would be "terminated" at least four months prior to the expected birth of the child; they could be eligible for reemployment only after a physician certified their physical firmness and the School Board found an opening. The Cleveland, Ohio regulations provided for a mandatory leave of absence without pay, beginning not less than five months before the expected birth of the child and extending for a maximum of two years. After the child reached three months of age, the teacher would be eligible to return to work, provided application accompanied by a physician's certificate of fitness was made six weeks before the beginning of the semester and there existed a vacancy for which she was qualified.

At first, the purpose the effect of these regulations seemed obvious in order to protect the teacher's health and to assure the continuity of the instructional program in the classroom. A mandatory suspension of duties was justified only to the extent that pregnancy and the after effects of childbirth actually impaired a teacher's ability to function. The degree to which pregnancy affects women's health and vitality varies enormously with widely differing effects on their ability to work. Thus, some women might be so seriously impaired from the time of conception that they could no longer perform their normal employment functions; others might be quite capable of working until the onset of labor. The majority would be found

somewhere between these extremes. The point at which the performance of normal employment functions will actually be impaired was a highly variable matter; it depends upon a medical evaluation of each woman's health in relation to the stresses imposed upon her by her employment (Johnston, 1974).

In LaFleur v. Cleveland, the School Board presented extensive evidence concerning the medical problems and educational complications associated with teaching problems and educational complications associated with teaching during the latter months of pregnancy, and the Court concluded that the Board's leave policy was, therefore, reasonable. In 1972, this decision was reversed by an appellate Court.

In Cerra v. East Stroudsburg Area School District, No. 445, 4 EPD 5587 (App. Pa. 1971), the Court upheld the discharge of a teacher who had failed to resign at the end of her fifth month of pregnancy as required by a regulation of the Board of Education which employed her. Cheryl Cerra argued that pregnancy was an illness like any other illness and therefore it would be unlawfully discriminatory to classify it otherwise. As the Court pointed out, the plaintiff's own medical expert testified that current thinking regarded pregnancy as a physiological condition, not an illness. The Board of Education based its termination policy on its previous unsuccessful experience with maternity leaves because several teachers had opted not to return to work following such leaves. The Court found the regulation of the school district as invalid and unconstitutional.

In Cohn v. Chesterfield, No. 678-70-R, 326 F.Supp. 1159 (D.Va. 1972), Susan Cohen, a Virginia high school teacher, knew that her School Board required that she take a leave at the end of her fifth month of pregnancy. But she felt that the rule was unreasonable, unfair, and unnecessary, and soon after becoming pregnant she requested maternity leave which would begin at the end of her eighth month. Pursuant to established policy, the Board denied her request and granted her leave beginning four months before she expected her child. Cohen believed that the Board's decision violated her constitutional rights, and she appealed the decision to the local federal court.

The Court found neither medical nor psychological reasons for a pregnant teacher to be required to take a leave of absence at the end of the fifth month of pregnancy. The Court also found that constitutional protection extends to all teachers "whose exclusion pursuant to a regulation is arbitrary of discriminatory". In the words of the Court:

> The maternity policy of the School Board denies pregnant women such as Mrs. Cohen equal protection of the laws because it treats pregnancy differently than other medical disabilities. Because pregnancy, though unique to women, is like other medical conditions, failure to treat it as such amounts to discrimination which is without rational basis, and therefore is violative of the equal protection clause of the Fourteenth Amendment" (Cohen v. Chesterfield).

William A. Carey who at one time was General Counsel of the Equal Employment Opportunity Commission remarked that the hottest issue in sex discrimination was that of pregnancy, which brings to the courts questions of maternity leave and medical benefits. Two cases, LaFleur v. Board of Education and Cohen v. Chesterfield County School Board, brought pursuance to Section 1983 of the Civil Rights Act of 1871. (Title VII coverage did not extend at this time to state and local units of government). The plaintiffs claimed in each case that the equal protection clause of the Fourteenth Amendment had been violated as to them by the enforcement of the maternity leave policies, which they claimed were an unconstitutional discrimination on grounds of sex (Carey, 1974).

The facts in the Cohen case were virtually identical to those before the case of Williams v. San Francisco Unified School District, No. 72-2092, 522 F. 2d (D.1972). This case was an action attacking school district's mandatory maternity leave policy. Plaintiff moved for preliminary injunction. The District Court held that the policy violated the equal protection clause by singling out pregnant certificated employees for classification without any relation to any legitimate objective of district. The motion was granted.

Amelia Williams was employed by San Francisco Unified School District as a social worker in its special program for pregnant students at the San Francisco General Hospital. Her work consisted of advising students in various aspects of

their pregnancies, helping them find alternatives available upon the birth of their children.

Mrs. Williams had been advised by her doctor that delivery was in late April 1972. The District's maternity leave stated that the employee should be absent from duty for a period of at least two months before the anticipated birth of her child and have the option to return after one month. The District Court decided in Amelia Williams' favor.

Pregnancy is a unique condition, but it is one which defines the female sex. Its uniqueness explains why sex discrimination is in many respects different from other forms of discrimination, but it does settle the question of whether pregnancy classifications discriminate on the basis of sex (Bartlett, 1974).

Susan A. Bravo sued on behalf of herself individually and all others similarly situated. The case was Bravo v. Board of Education of City of Chicago, No. 72 C 970, 345 F. Supp. 155 (N.D.Ill. 1972). Civil rights action by pregnant teacher was brought against School Board.

The complaint charged the Board of Education of the City of Chicago and other named defendants with discrimination against pregnant school teachers in violation of the Civil Rights Act of 1871, 42 U.S.C. section 1983, the Equal Protection clause of the Fourteenth Amendment to the United States Constitution, and various Illinois statutes.

Mrs. Bravo had been a certified teacher for the Board since 1964. She was expected to deliver on or about June 22,

1972. She decided to apply for maternity leave from her position beginning April 12. The Board stated that her last working day would be March 30, and she could not return to teaching until September 20, 1972. The Board also asserted that the leave period was reasonably related to its objective of protecting pregnant teachers and their unborn babies against the assaults, accidents, diseases, and physical demands which teachers must normally face.

The District Court held that pregnant school teacher sufficiently sustained burden of showing reasonable likelihood of success in attacking school board's maternity leave policies on equal protection grounds. He granted a preliminary injunction.

A mandatory maternity leave was in question in Green v. Waterford Board of Education, No. 213, Docket 72-1676, 473 F.2d 629 (2nd Cir. 1972). Priscilla B. Green, a teacher, was required to take a leave of absence from her job when she reached six months of her pregnancy. The rule by the School Board required a maternity leave without pay to begin not less than four months. The United States District Court for the District of Connecticut, M. Joseph Blumenfeld, Chief Judge, 349 F. Supp. 687, dismissed complaint on the merits, and plaintiff appealed.

Green argued that the Board's inflexible maternity leave provision denied her the equal protection of the law. In early September 1971, Green was a nontenured teacher of English at Waterford High School under a one-year employment contract.

She informed the principal that she was pregnant, that her date was about mid-February, 1972, and that she wanted to continue teaching until January 31, 1972. The Superintendent of Schools told plaintiff that her leave would start as soon as a suitable replacement could be found.

The Court decided that Mrs. Green's complaint stated a denial of equal protection of the laws and that summary judgment for defendants be granted. The amount of damages, if any, to which Green was entitled remains to be determined. The Court remanded and reversed the decision.

Another pregnancy case to be discussed was Guelich v. Mounds View Independent Public School District, No. 621, 334 F. Supp 1276 (D.Minn. 1972). An action was brought under the Civil Rights Act with respect to maternity leave policy of school district. The maternity leave policy in which Janet Guelich complained provided:

> The employee shall apply for a leave of absence no later than four months previous to the expected date of normal birth of the child...The employee must begin her leave no later than three months prior to the expected date of normal birth of the child.

On motion to dismiss, the District Court held that since the policy had been replaced by a new policy eliminating the provisions complained of, and there was no reasonable expectation that the wrong would be repeated, claims for declaratory and injunctive relief were mooted. Furthermore, the School Board was of a "person" against whom damages could be recovered,

and that action solely for damages could not be maintained against individual members of the Board. The summary judgment for defendants granted.

A case litigated under the Fourteenth Amendment was Danielson v. Board of Higher Education, 4 FEP 885 (S.D.N.Y. 1972). A man and his wife, who were on the staff of a university as lecturers, maintained an action against the University claiming a denial of equal protection of the laws by the operation of a leave policy which did not provide pay for families during maternity leave and did not allow males leave time for time spent caring for a newborn infant. The allegations of sex discrimination against both the man and wife presented a claim on which relief could be granted upon a proper showing (42 U.S.C. Sec. 1983).

Ross Danielson, a lecturer in sociology at City College, challenged the constitutionality of defendants' maternity leave provision. He claimed that women faculty members are permitted to take a leave of absence in connection with pregnancy, up to three semester and the same child care leave privilege was denied to men. Mr. Danielson's wife, Susan, who was a lecturer in English at Lehman College, another branch of the City University of New York, challenged the constitutionality of defendants' refusal to treat her 12 day leave, during which she gave birth to a child, as sick leave.

The Court stated that summary judgment cannot be granted for either part. The case was dismissed.

Reinhardt v. Board of Education, 6 FEP 235 (3rd. Cir. 1973), was a case involving sex discrimination, discharge, and pregnancy. Elizabeth Ann Reinhardt filed her complaint under the Administrative Review Act. The School Board filed an answer. But on April 26, 1972 the School Board voted to discharge Reinhardt, because the teacher had taken a leave of absence from her teaching position due to her pregnancy, and that she had anticipated resuming her teaching on March 1, 1972. The School Board dismissed the teacher on the grounds of immorality.

The teacher requested a hearing by the School Board, and the School Board requested that said hearing be made public. The hearing lasted for two days. The teacher had been employed for 12 years and was on tenure. She became married on December 4, 1971 and gave birth to a child on January 15, 1972. The school district caused her to be subjected to public scorn and ridicule and parents stated that they would not permit her to teach their children.

The Court declared that:

> The board of education that unlawfully discharged pregnant unmarried teacher is ordered (1) to reinstate teacher to her former tenured position, (2) to pay teacher all money, including summer salaries, that she would have earned during period of discharge, minus her earnings from other employment during this period, and (3) to remove from its personnel and employment that records all mention of any disciplinary action or wrongful conduct on part of teacher.

Another case involving a man and his wife in regards to maternity and child care leave was Ackerman v. Board of Education of the City of New York, No. 71 Civ. 5106, 372 F.Supp. 274 (S.D. N.Y., 1974).

A man former teacher and his wife brought action challenging constitutionality of Board of Education regulation which provided for maternity and child care leave for female teachers but under which plaintiff teacher had been denied leave when his wife had a baby. On motion of Ackerman's for class action determination and partial summary judgment and of the Board of Education for summary judgment dismissing the complaint, the District Ct. Bonsal, J., held that class action was not appropriate, where only one other male teacher had applied for child care leave prior to amendment to the regulation which relieved it of the legal infirmity. The motions were denied.

Francine E. Black and Kathleen M. Lane, both tenured teachers whose employment had been terminated, brought declaratory suits against school committee and Superintendent of Schools in which questions were raised with regard to committee's rule pertaining to maternity leave. Teachers sought reinstatement with back pay in Black v. School Committee of Malden, 310 N.E. 2d 330 (Sup.Ct.Mass.1974).

The ladies were engaged as teachers by the Malden school department in September, 1964, and after September, 1967, they qualified for tenure. It should be noted that their pregnancies occurred in late June or early July, 1968. Early in November, 1968, they informed the Superintendent of Schools

that they were pregnant and requested leaves of absence on that account to commence on January 2, 1969. In response to these requests the school committee voted at its meeting on November 12, 1968 to accept the resignations of both, December, 1968.

The rules of the school district provided that a married teacher must resign her position at the end of the fourth month of pregnancy and was not eligible for reinstatement until six months after the birth of her child. Both women worked until January 31, 1969, since neither turned in the requested resignation. Both took sick leave pay for 13 days after the last day of work. The teachers did not press the issue of pregnancy but noted that they were being dismissed and both were tenured teachers.

The Superior Court found that dismissals to be illegal, ordered reinstatement and awarded teachers back pay, and defendants appealed. The Superior Judicial Court held that the rules of the school district were unconstitutional.

Betty J. Buckley brought a civil rights suit in regards to her dismissal due to pregnancy. There were also allegations that Mrs. Buckley's race was a factor in the application of dismissal since white teachers were not subjected to dismissal in every instance. Regulations required dismissal of teachers at end of sixth month of pregnancy. The suit was brought under the Civil Rights Act of 1866 and of 1871, and of 1964, Title VII.

The specific conclusions and reasons of the trial court are as follows:

> The Court is of the opinion that there was no discrimination against Plaintiff either because of race or sex; that the rule regarding pregnancy is reasonable and applies to all women; that the Civil Rights Act applied only to persons of a class who were helpless to prevent becoming a member of that class. Women are such a class; they are not responsible for their sex; they did not choose it. Pregnant women do not constitute such a class; they are only a segment of a class (Buckley v. Coyle Public School System, No. 72-1520, 476 F.2d 92 (10th Cir.1973).

The United States District Court for the Western District of Oklahoma rendered summary judgment for defendants, and plaintiff appealed. The Court of Appeals held that claim as to validity of school system policy terminating teacher's employment at the end of the sixth month of pregnancy presented constitutional issues of sufficient substance to justify hearing on merits, and it was error to grant summary judgment for defendants. The judgment was reversed.

In Freeport Area School District v. Commonwealth of Pennsylvania, Pennsylvania Human Relations Commission, No. 152 C.D. 335 A.2d 873 (Commw. Ct.Pa. 1974), the Human Relations Commission held that the policy violated the Human Relations Act, and the school district appealed. The Act declared that it was unlawful for an employer to discriminate by reasons of sex with respect to compensation, hire, tenure, terms, conditions or privileges of employment.

Linda Szul, a teacher in the district since 1969, applied for maternity leave giving April 7, 1973, as the likely date of birth. The district notifed Mrs. Szul that her leave was to commence December 23, 1973 which was three and one half months before the predicted date of birth. Szul informed the Board that she desired to remain on the job through February 9, 1973. Mrs. Szul filed a complaint with the Human Relations Commission alleging discrimination on the basis of sex.

After this complaint was served to the School Board the Commission heard the testimony of Karen Harrison, Mary Ippolito, and Darlaine Thompson. These were other district teachers who had taken maternity leaves, although these people did not file complaints. The Commission concluded as a matter of law that the district's maternity leave policy was discriminatory in requiring termination of employment 3½ months before predicted birth, and in not making full time reemployment available when affected employees are physically able to resume their duties. The Commission directed payment of lost pay not only to Mrs. Szul, who filed a complaint, but also to Mrs. Harrison, Mrs. Ippolito and Mrs. Thompson who had not.

The Court decided that since the time period when teachers should leave was a part of collective bargaining agreement between the school district and the teachers' representative, these provisions are reasonable and permissible.

In Sale v. Waverly-Shell Rock Board of Education, No. C 74-2029, 390 F. Supp. 784 (N.D.Iowa. 1975), Charlene Sale instituted an action under Title VII of the Civil Rights Act

of 1964, as amended by the Equal Employment Opportunity Act of 1972. Sale claimed that she was discriminated against in the "compensation, terms, conditions, or privileges of employment" on the basis of sex. The central issue raised by the Board of Education was whether a cause of action lay under the statute for failure to pay sick leave benefits to women employees whose absence from work was solely caused by normal pregnancy. On Board of Education's motion to dismiss, the District Court held that denial of such leave pay solely for pregnancy constituted the establishment of differentials in compensation or terms of employment prohibited by Title VII of the Civil Rights Act of 1964 since only females are biologically capable of becoming pregnant. The denial of motion to dismiss involved a controlling question of law as to which there was substantial ground for differences of opinion thereby justifying immediate certification of appeal from order.

An action was brought by a female school teacher for declaratory judgment for damages for failure of the School Board to grant sick leave benefits for normal pregnancy in Hutchison v. Lake Oswego School District, No. 7, Nos. 74-3181, 74-3182, 519 F.2d 961 (9th Cir. 1975). The case involved a sick leave policy which excludes from coverage absences related to pregnancy or childbirth.

Barbara Hutchison was employed for two school years by the school district as a part-time junior high school teacher. On January 27, 1973, she gave birth to a child, necessitating her absence from work for 15 working days. She suffered no

complications as a result of either her pregnancy or childbirth. Upon her return to work, she requested that she be allowed sick leave benefits for her absence. She had accrued 15 days sick leave at this time. The School Board refused her request. They stated that pregnancy was not deemed to be an "illness or injury" but rather a temporary disability permitting leave without pay. This interpretation was rendered by the Superintendent of the Lake Oswego Schools and concurred in by the Director of Legal and Executive Services. The sum of $339.59 was deducted from Hutchison's wages because of her absence from her job and the necessity of hiring a replacement during her absence.

After exhausting all possible administrative remedies, she brought the present suit seeking a declaration that the school district's maternity leave policy constituted sex discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964. The District Court dismissed the school district on the basis of sovereign immunity, but found that the School Board and its individual members had engaged in unlawful sex discrimination in violation of both the Equal Protection Clause and Title VII. The Court of Appeals held that school district policy denying sick leave benefits for normal pregnancy did not violate equal protection but was violative of Civil Rights Act, that the Eleventh Amendment did not bar suit against the Oregon school district whose financing largely came from local sources and that the school board members were entitled to qualified good-faith immunity from liability for damages. The case was affirmed in part and reversed in part.

The last case regarding pregnancy was Berg v. Richmond Unified School District, No. 74-1457, 11 FEP 1285 (9th Cir. 1975). When Mrs. Berg, a school teacher employed by Richmond Unified School District, became pregnant the School District and its officers threatened to:

(1) require her to cease working on a date earlier than she and her physician believed necessary

(2) deny her the benefit of accumulated sick leave pay while she was not working.

Therefore, in the fifth month of her pregnancy, Mrs. Berg filed with the EEOC a charge of discrimination based on sex. About two months later, plaintiff requested the EEOC to issue a right to sue letter. She waited in vain for about a month and then commenced a class action in the district court under the purported authority of the Civil Rights Act of 1964, and the Fourteenth Amendment to the Federal constitution. She continued to teach until the day before her child was born. Meantime, the EEOC did issue its letter, and plaintiff supplemented her complaint. The Court held that the school district's exclusion of pregnancy- or childbirth-related disabilities from sick leave coverage was a Title VII violation.

Incompetency was used in the past to identify the school district's disapproval of pregnancy. The proper procedure was for ladies who were pregnant to leave the school setting early in the stages of pregnancy (Appeal of School District of City of Bethlehem).

School districts forced pregnant women to take leave due to their belief that it was best for the women involved. The woman was also not allowed employment until a specific time after the baby's birth (La Fleur v. Cleveland Board of Education and Freeport Area School District v. Commonwealth Pennsylvania). The school district wanted to protect the teacher's health and assure that the instructional program in the classroom was continued.

In the early 1970's, the courts upheld the school's position that pregnant women should be relieved after the fifth or sixth month of pregnancy (LaFleur v. Cleveland Board of Education and Cerra v. East Stroudsburg Area School District). With the same circumstances but with different cases, the court went through an era of deciding in favor of mandatory maternity leaves (Cohen v. Chesterfield, Williams v. San Francisco Unified School District, and Green v. Waterford Board of Education).

Two interesting cases involving married couples who requested that the man take maternity leave to take care of the new born baby were Danielson v. Board of Higher Education and Ackerman v. Board of Education of the City of New York. Although both cases were dismissed, discrimination not only applies to women, but to men as well. The sterotype definition of discrimination covers only the female sex.

Pregnancy poised a very big issue. The problem of whether to consider pregnancy as an illness for sick leave reasons was not decided in the court cases. Discrimination exists when women who are qualified and competent individuals were forced

to leave positions with no guarantee of reinstatement after the birth of their child (Black v. School Committee of Malden, Buckley v. Coyle Public School System, and Sale v. Waverly-Shell Rock Board of Education). The analysis of judicial responses to laws and practices that single out pregnant women for discriminatory treatment focuses on an incomplete understanding of one form of sex discrimination affecting all women (Bartlett, 1973).

The preceding were four major categories of cases. These four included the recurrent subjects involved in the court cases researched affecting women in educational positions. Often cases overlapped into other categories. With each case a particular point emphasized a specific category in the study. The following will be answers to questions posed earlier in this study.

Influence of Courts on Hiring Practices

In a recent study entitled Wanted: More Women; Sex Differentiation in Public School Administration, Patricia Ann Schmuck explained, "The most often cited reasons against the hiring of women in any position in education has been concern that a woman will become pregnant and leave the job"(1975, p. 26). East Stroudsburg Area School District made this point when they based their termination policy on its previous unsuccessful experience with maternity leaves because several teachers had decided not to return to work following such leaves (Cerra v. East Stroudsburg Area School District).

Traditional hiring practices have consistently favored men for positions in secondary and higher education. This traditional hiring practice is a sex-typing of occupations as presented by Suzanne Howard (1975). Some are known "male," and others are known as "female." Only 10% of American occupations are held by both men and women, the remainder are filled predominantly by either men or women (Dreeban, 1970, p.24). Cynthia Epstein in Women's Place stated that "Men rank first in the ranking of the sexes and they get the first-ranking jobs. Women rank second and lowest and get the second and lowest-ranking jobs (1971, p.162)." As an example, the plaintiffs in League of Academic Women v. Regents of the University of California pursued action seeking declaratory and injunctive relief against regents of the University of California to prevent them from continuing to discriminate in hiring and employment on the basis of sex.

Some acts of discrimination ceased when Title VII, 42 U.S.C. section 2000e-2 (a) of the Civil Rights Act was amended. The important section outlawing sex discrimination in employment states, in part:

> (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 adverely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Selene Weise and Jo Davis Mortenson attempted to use provisions of Title VII in charges of sex discrimination against the University. Title VII's amendment regarding sex went into effect after the plaintiff's charges of discrimination. Therefore, this discrimination was not covered by the Act (Weise & Mortenson v. Syracuse University).

Recent court decisions have made employers more aware of discriminatory practices. "The issue is not whether the practices will be eliminated, but whether long and antagonistic battles will be required to enforce the law" (Hallam, 1973, p. 131).

Categories Prompting Litigation

The question of discrimination has affected many female employees within the educational institutions. Areas that are most likely to be discriminating, based on past court decisions, include practices and policies of recruitment, selection, hiring, placement, promotion, testing, benefits, wages, terms and conditions of employment, advertising, discharge, seniority, and many other basic terms and conditions of employment.

Other situations which the courts might declare discriminatory will never appear, women who experience discriminatory practices at their positions hesitate to pursue litigation because of their fear of reprisal. As it was stated in Administrative Positions in Public Education by Niedermayer and Kramer:

> Not only is the legal route often a long one, it is a frightening one for many individuals. Not everyone will be willing to take it. However, it does provide a way for both individuals and professional groups to seek remedies.

Decisions Antagonistic to Women's Rights

The majority of cases in this study dealing with discrimination were dismissed by the courts. Several factors prompted this action including the fact that the amended Title VII did not come into effect until 1972. Prior to this date acts of discrimination in public employment were judged under the equal protection clause of the Fourteenth Amendment (Braden v. University of Pittsburgh, Pace College v. Commission on Human Rights of the City of New York, and Morey v. Independent School District).

Discrimination, even when it did exist, was very difficult to prove through litigation. The court system has demonstrated a reluctancy to interfere with areas of the educational system (Nordin, 1975). As the United States Supreme Court noted in Epperson v. Arkansas, 393 U.S. 97, 89 S.Ct.266, 21 L.Ed. 2d 228 (1968):

> Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint...Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.

Another antagonistic Court practice is the lack of a universal meaning of the word discrimination. Niedermayer and Kramer explained:

> The term "discrimination" tends to arouse anger and defensiveness in those who consider themselves men of good will. Many women also deny or fail to recognize it..." (1974, p.13).

Discrimination against female professionals occurs according to Theordore in The Professional Woman, "when females of equivalent qualifications, experience, and performance as males do not share equality in the decision-making process nor receive equal rewards" (1971, p. 27).

One of the few cases won by plaintiffs in the litigation discussed was Johnson v. University of Pittsburgh. The case involved a question of whether tenure was denied to Dr. Sharon Johnson because of sex discrimination. The court restrained the University from discharging her, stating, "The discharge and refusal of tenure on June 30, 1973, will, under the circumstances of this case, amount to such discrimination" (Johnson v. University Pittsburgh). The difficulty in labeling discrimination was stated within the same case:

> It is obvious that in a case of sex discrimination, as in a case of race discrimination, we very seldom find a resolution of a board of directors or a faculty committee agreeing to engage in sex discrimination any more than we would expect to find the same in a conspiracy to violate the antitrust laws. The existence of such discrimination must therefore be found from circumstantial evidence and inferences from the circumstances (Johnson v. University of Pittsburgh).

Another example was Stevens v. Junior College District of St. Louis, in which Agnes E. Stevens lost her case because she could not prove her claim of employment discrimination.

Judgment was to the defendant at plaintiff's cost. This particular court case included race and sex discrimination.

Still other rulings by courts which were antagonistic to women dealt with pregnancy. There is a difference of opinion as to whether maternity leave should be comparable to other leaves of medical illnesses. Teachers on illness leave are allowed to draw pay for their sick leave days while pregnant teachers are not. Pregnant teachers get no seniority for the period of their leave; however, those on leave for illness do. Gains in the area are being made, and some decisions ruled in favor of pregnancy such as in the following example:

> ...the basis of plaintiff's action was that a mandatory maternity leave provision for teachers which fails to consider the physical ability of the individual and treats pregnancy differently from any other form of disability

> deprives a pregnant teacher of rights guaranteed under the Fourteenth Amendment" (Green v. Waterford Board of Education).

In 1970, the Presidentially appointed Citizens' Advisory Council on the Status of Women adopted the following statement of principles:

> Childbearing and complications of pregnancy are, for all job-related purposes, temporary disabilities and should be treated as such under any health insurance, temporary disability insurance, or sick leave plan or an employer (or) union. Any policies or practices of an employer or union, written or unwritten, applied to instances of temporary disability other than pregnancy should be applied to incapacity due to pregnancy or childbirth, including policies or practices relating to leave of absence, restoration or recall or duty, and seniority. No additional or different benefits or restrictions should be applied to disability because of pregnancy or childbirth, and no pregnant woman employee should be in a better position in relation to job-related practices or benefits than an employee similarly situated suffering from other disability (Women and the Law, 1976, p. 20).

In Buckley v. Coyle Public School System the court stated that regulations of School Boards regarding pregnancy penalizes the female school teacher for being a woman, and the regulations should be condemned. "Since only females are biologically capable of becoming pregnant, denying sick leave pay solely for

pregnancy seems clearly to be setting up differentials in the compensation or terms of employment prohibited Title VII of the Civil Rights Act" (Sale v. Waverly-Shell Rock Board of Education).

Some ruling were antagonstic to women because the women introduced cases in courts without following proper procedure. In Keller v. University, Janet Jackson Keller brought charges against the University of Michigan in an EEOC complaint and accused other defendants not named in charge filed by the EEOC in the District Court. This is an example of why many cases involving women are dismissed. The court system relies heavily on administrative procedure. Even if discrimination existed in the institution, the process involved in filing the case appears to be more significant to the judge than the charge itself. Still another example was Queensborough Community College v. State Human Rights Appeal Board. In this case, Ms. Marenco's discrimination complaint was filed with the State Division of Human Rights 12 months after the deadline period. The complaint dealt with her notice that she would not be reappointed as an assistant professor at Queensborough Community College. Both of these cases were dismissed.

The last issue to be discussed in the decisions that were antagonistic to women's rights is "incompetency." Hattie M. Blunt was dismissed by the School Board on incompetency even though she had received satisfactory evaluations for 25 years (Blunt v. Marion County School Board).

"Incompetency" is a relative term without technical meaning which may be employed as meaning disqualification, inability, incapacity, lack of ability, legal qualification, or fitness to discharge the required duty. Within Appeal of School District of City of Bethlehem the court found the plaintiff, Mrs. Brown, incompetent as stated below:

> We must bear in mind that Mrs. Brown was not being discriminated against because of her marriage, which occurred long prior to the events we have recited. Her dismissal was due neither to that fact nor to her legitmate pregnancy, but because she became incompetent due to her physical incapacity to discharge her duties.

Another teacher, Elizabeth Soucy, was dismissed by her new principal because of "incompetency." She had been employed in the school for 21 years. The courts ordered reinstatement (Soucy v. Board of Education of North Colonie Central School District).

Fundamental Issues Presented in Litigation

Each case cited in this study was unique in that it presented issues that were unparalled by another case. For instance, the concept of due process was challenged in several cases (Regents, University of Colorado v. Civil Rights Commission and Gray v. Union Co. Intermediate Ed. Districts). Justice Frankfurter commented on the elusiveness of due process in Gifis' Law Dictionary:

> ...Due process is not a mechanical instrument. It is not a yardstick. It is a delicate process of adjustment

> inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process (U.S. 123, 162-163 (1975, p. 66).

Lola Beth Green in Gray v. Union County maintained that the School Board's failure to provide her with a fair and meaningful hearing before deciding to terminate her employment deprived her of "liberty" without due process of law. In Board of Regents v. Roth, 408 U.S.564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), the Supreme Court made it clear that the requirements of procedural due process apply when a teacher is being deprived of his job, if such action would result in a loss of "liberty" or "property."

Filling a position with a man when a qualified woman is available for a position is another area precipitating litigation. Cleo Calage was denied appropriate payment and promotion in Calage v. University of Tennessee. Cleo Calage in a Title VII suit claimed that she and other females were denied promotions because of sex. Calage was denied equal payment and recognition when she was given the responsibilities of two positions when her immediate superior transferred to another university. Judgment was for the defendant. In another case Selene Weise was turned down for employment at Syracuse University in favor of an allegedly less-qualified male (Weise v. Syracuse University).

Equal Employment Opportunity Commission v. Tufts also involved the appointment of tenure to a less qualified male without a doctorate over two qualified women, one of whom had a

Ph.D. degree. Joost, one of the plaintiffs felt that she was discriminated against because "larger salaries were paid men in the Department. . ." (EEOC v. Tufts Institution of Learning.)

The efforts to change employment patterns for women are part of a larger social concern. Yet, the socialization process will take longer primarily because traditional male and female roles are so firmly entrenched in the attitudes of American society. Still, the legal and social movements have begun and both have gained sufficient momentum at this point that some resemblance of equality between men and women may be expected (Miller, 1974). Few observers of the educational system will deny that it needs all the talent and commitment available. Women educators constitute a source of vastly underutilized talent (Niedermayer and Kramer, 1974).

Moreover, another fundamental issue challenged by the educator is the term nepotism. In 1974, New York State Supreme Court ordered the State University of New York to reinstate speech professor Joan Sanbonmatsu as a member of the staff of State University College at Brockport. Dr. Sanbonmatsu, whose husband was a tenured faculty member, had been given a "temporary" appointment, rather than a more desirable "term" appointment because of the University's antinepotism rule which prohibited husband and wife and other closely related persons from being regular members of the college staff at the same time. In a unanimous decision in the case, the court found that the "anti-nepotism rule had been applied unevenly and had resulted in discrimination against women" and that the "nepotism

rule was discriminatory, unnecessary, and served no job-related purpose" (Sanbonmatsu v. Boyer).

Litigation: An Avenue for Change

In recent years, possibly because of a general rekindling of interest in the status of women in society and the emergence of positive corrective legislation in the field, constitutional challenges of laws that discriminate on grounds of sex have increased. In other words, more women are identifying discriminatory practices in their positions and are pursuing litigation so that change will occur in their personal situations. This could be due to the more recent litigation that has won judgment for females.

The most recent decision handed down by the United States Supreme Court was in regards to pregnancy. Although it does not speak of education directly, it should have an indirect influence on future decisions involving educators. In December, 1976, the United States Supreme Court stated that a company's disability and sick leave programs did not have to include coverage for pregnancy (General Elec. Co. v. Gilbert, Nos. 74-1589 and 74-1590, 97 S. Ct. 201 (Sup. Ct. 1976). The case stated:

> ...the rule at issue places the risk of absence caused by pregnancy in a class by itself. By definition, such a rule discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male. The analysis is the same whether the rule relates to hiring, promotion, the

acceptability of an excuse for absence, or an exclusion from a disability insurance plan.

The avenue for change in this area is that as the number of constitutional challenges to the sex-based discrimination multiply, the likelihood that the United States Supreme Court, the final arbitrator of Federal Constitutional disputes, will agree to review lower state or Federal court decisions (Kanowitz, 1968). This would definitely be an advantage for women because lower courts would have to investigate thoroughly the activities of educational institutions.

Women's legal and social emanicipation is far from complete as noted by more cases entering the courts dealing with employment discrimination and the present problems and popularity of the subject of equal rights.

> If the partial emancipation of women to date has had an unsettling effect upon the psychological stability of both men and women, a certain amount of this may be inevitable; change and instability are in many respects synonymous. On the other hand, the psychological problems presumably resulting from such changes may merely reflect the very incompleteness of women's legal emancipation and the fact that it is still an ongoing process...both men and women will be able to recognize themselves for what they have always been--people. The psychological well-being of our total population may therefore be the most important single reason for getting on with the job of erasing all remaining

pockets of legal and social inequality between the sexes (Kanowitz, 1968, pp. 202-203).

In the past it has appeared that women were unconcerned with the problem of sex-based legal discrimination. But there are many indications that the situation is changing rapidly, especially with the increasing frequency with which sex-discriminatory legal rules are being challenged on the basis of constitutional doctrine.

Rule of State and Federal Legislation

During the last few years, sexual imbalance in many areas of employment has been recognized. Major steps have been taken which seek to remedy this condition through Federal and state laws, executive orders, city ordinances, and resulting litigation, settlements, and affirmative action. One major step was when the Department of Health, Education and Welfare first blocked new government contracts to four major universities in 1970 because of their inequitable treatment of women. After 7.5 million dollars in Federal contracts were stalled by HEW at a major university in the early 1970s, the nation's first affirmative action program was written. Superficially, at least, it was one of the first model plans for achieving job equality for women (Sassower, 1972).

Discrimination, whether social, legal or both, not only stunts the personal development of the individuals but nurtures the development of traits and characteristics that would be deemed undesirable and unworthy (Kanowitz, 1968). Such

differences in treatment have often been challenged in the courts as alleged violations of state or Federal constitutional provisions. But these constitutional attacks have met with failure, leading to, among other things, persistent pressure for a Federal constitutional amendment that would specifically prohibit legal discrimination based on sex.

However, the widespread reluctance of individuals to admit that discrimination has occurred is likely to prevent equal employment opportunity. In any event, women in education now have the tools to eradicate discriminatory practices. They and their organizational representatives should use these tools whenever necessary.

Summary of Findings

Questions posed in this study with accompanying answers are as follows:

1. What influence have court decisions had on traditional hiring practices?

The court decisions analyzed had no significant influence on educational institutions' attitudes toward their hiring practices.

2. What were the general categories or areas of concern that have prompted litigation?

The four main categories of the study included promotion and tenure, appointment, dismissal, and pregnancy.

3. What court rulings were antagonistic to women's rights?

The fact that most court cases were dismissed was antagonistic to women's rights. Court decisions regarding pregnancy issues were also antagonistic because women were singled out and were required to leave their positions because of mandatory maternity leave policies.

4. What fundamental issues were presented in litigation regarding rights for women?

Throughout the litigation studied, women felt that they were not given equal employment opportunities. Women challenged in court cases equal pay, equal privileges, equal conditions, and equal opportunities.

5. What relationships existed between positions in secondary and higher education for women and litigation as an avenue for change?

A relationship was not found between women in secondary and higher educational positions in regard to litigation. Excluding pregnancy cases, more women in higher educational positions pursued litigation; women in the secondary schools need to be less fearful of the court systems as an avenue for change.

6. What role did state and Federal legislation play in the litigation procedure?

In reference to legislation, Title VII was used most frequently by women with job discrimination problems. The Fourteenth Amendment was also referred to in court cases dealing with discriminatory charges.

CHAPTER IV

SUMMARY, CONCLUSIONS, DISCUSSION, AND IMPLICATIONS

Summary

The problem for this investigation was to analyze litigation and to examine its implications for the employment of women in secondary and higher educational professions. Questions posed in this study with accompanying answers are as follows:

1. What influence have recent court decisions had on traditional hiring practices?

The court decisions analyzed had no significant influence on educational institutions; attitudes toward their hiring practices.

2. What were the general categories or areas of concern that have prompted litigation?

The four main categories of the study included promotion and tenure, appointment, dismissal, and pregnancy.

3. What court rulings were antagonistic to women's rights?

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5. What relationships existed between positions in secondary and higher education for women and litigation as an avenue for change?

A relationship was not found between women in secondary and higher educational positions in regard to litigation. Excluding pregnancy cases, more women in higher educational positions pursued litigation; women in the secondary schools need to be less fearful of the court systems as an avenue for change.

6. What role did state and Federal legislation play in the litigation procedure?

In reference to legislation, Title VII was used most frequently by women with job discrimination problems. The Fourteenth Amendment was also referred to in court cases dealing with discriminatory charges.

Certain limitations were placed upon the available literature and litigation concerning women. The first limitation was that the research and literature studied related only to historical-legal matters dealing with women in or seeking positions in education. The second limitation was that judicial decisions analyzed were those in the United States District Courts and state and Federal Appellate Courts, including the

United States Supreme Court as reported in the National Reporter System.

The study involved a historical-legal search of literature bearing upon the rights of women in secondary and higher educational professions. The procedure associated with the collection of related materials involved the location, examination, and analysis of published materials in libraries and various governmental agencies. The source of reference was the United States Constitution, as any reference to the laws of the United States are bound together by this document. The original case materials, legal periodicals, and state and Federal statutes were analyzed for content and importance. Relative questions were asked of each case studied. Only a cross section of court cases dealing with women in secondary and higher education involving job discrimination were included.

The compilation of cases involving litigation of women employed in secondary and higher educational institutions evidenced the fact that job discrimination practices do exist. Whether the reasons for such litigation rest with problems within the educational system itself, ambiguity in the courts, or a need for change in attitudes toward women in professional situations, was not under scrutiny. However, an awareness of job discrimination practices is vital to the successful future of women educators in all areas of endeavor.

Conclusion

The term discrimination has ambigious connotations in United States Courts. Discrimination, even when it does exist,

was very difficult to prove. Discrimination in one court could be construed as nondiscrimination in another court. The word caused anger in some individuals, but more frequently made educators very defensive. Men, as well as women, deny or fail to recognize its existence.

Women have not had the appropriate legislation on which to rely. The role of state and Federal legislation in the litigation procedure was presented earlier in the study. The legislative process has become very lengthy, expensive, and time consuming with no guarantee of success. Title VII seems to be the most appropriate piece of legislation with which to fight job discrimination in the courts. The First, Eleventh, and Fourteenth Amendments were used frequently, but the courts were not consistent with their interpretation of these Amendments. Title IX will soon change this pattern. Title IX identifies discrimination explicitly in Federally supported programs and will help bear some of the load carried by Title VII.

More women in higher education pursued court action than did women in the public schools (excluding pregnancy cases). This could be because of the job security that lies in the public schools or because women were accepted as equals in the public school more often than in higher education. However, one can readily see that more may be at stake in the higher institutions than in public school positions. Higher salaries, advanced degrees, and the time necessary to attain them have made the pursuit of litigation worth the effort.

The question of how many cases did not reach litigation through the courts should be answered. The assumption was that administrators recognized valid points brought to them by women and dealt with them through administrative process rather than in the courts. Those that did go to court were cases administrators and women were unable to resolve out of court. One could conclude from some of the recent cases that the failure of arbitrations sent complaints to the courts. An honest assumption would be that women did not have valid complaints. This point can be substantiated by the fact that most rulings were against the women and their grievances.

The primary problem facing pregnant women in educational institutions was whether the institution would consider maternity leave within the sick leave policy. An important fact was that the degree to which pregnancy affects women's health and vitality varies enormously with the individual and the work. In all of the cases studied, the most gains were made in the area dealing with pregnancy. Many institutions had the approval of the courts for their mandatory maternity leave policies, and in the same time period other courts ridiculed mandatory maternity leave for women.

Discussion

Discrimination having been a term difficult to define by the courts was proven in very few instances (Johnson v. University of Pittsburgh and Cohen v. Chesterfield). In most circumstances evidence was insufficient to substantiate

discrimination (Stevens v. Junior College District of St. Louis, Queensborough Community College v. State Human Rights Appeal Board, and Byron v. University of Florida). Niedermayer and Kramer (1974) agree that individuals in educational institutions become defensive when approached by the accusation of discriminating acts and attitudes (Weise v. Syracuse University, Cohen v. Chesterfield County School Board, Shipley v. Fisk University, Calage v. University of Florida, and Regents of University of Colorado v. Colorado Civil Rights Commission). As Kanowitz (1968) was quoted earlier in the paper, discrimination, whether social, legal, or both, not only stunts the personal development of the individuals, but nurtures the development of traits and characteristics that would be deemed undesirable and unworthy. The widespread reluctance of individuals to admit that discrimination has occurred is likely to prevent equal employment opportunities for women.

Most cases in the study which dealt with discrimination were dismissed by the courts. Several factors prompted this action, including the fact that the amended Title VII did not come into effect until 1972. Prior to this date, several amendments were used as a defense for the complaint. One of these was the Fourteenth Amendment (Braden v. University of Pittsburgh, Pace College v. Commission on Human Rights of the City of New York, Danielson v. Board of Higher Education, and Morey v. Independent School District). Other amendments were presented, including the Eleventh Amendment (Byron v. University of Florida and Keller v. University of Michigan). Still another amendment used was the Fifth Amendment (Morey v. Independent

School District, Pendrell v. Chatham College, and Duke v. North Texas State University). However, most of the cases studied used Title VII as their major legislation (Stevens v. Junior College District of St. Louis, Presseisen v. Swarthmore College, Peters v. Middlebury College, Weise and Mortenson v. Syracuse University, Sale v. Waverly-Shell Rock Board of Education, and Hutchison v. Lake Oswego School District). In the past the Courts and legislation have not had much of an influence on the hiring practices of educational institutions in regard to women. Presently, with new legislation such as Title IX and Executive Orders, educational institutions need to change certain attitudes of employers and present routine procedures in hiring practices in order to receive Federal funds. This new legislation has not been tested in the courts, but identifies the problem of discrimination more than in the past legislation.

The question of whether mandatory maternity leaves are to be accepted or not in educational institutions may still be undecided. Some courts justified sick leave being used for pregnancy as in Hutchison v. Lake Oswego School District. The Equal Employment Opportunity Commission's policies relative to maternity and childbirth were that the employee may not be discriminated against because of pregnancy. One can assume that pregnancy issues have made greater gains because more cases were decided in favor of women (Cohen v. Chesterfield, Williams v. San Francisco Unified School District, Reinhartd v. Board of Education and Hutchison v. Lake Oswego School District). However, some courts did rule in favor of mandatory maternity

leave policies (La Fleur v. Cleveland Board of Education and Cerra v. East Stroudsburg Area School District).

The most obvious conclusion was that women in the public schools did not seek court action as much as women in higher education in the areas of promotion and tenure, appointment, and dismissal (Soucy v. Board of Education, Harkless v. Sweeny Independent School District, Blunt v. Marion County School Board, and Dillion v. Board of Education of Pearl River School District). Women with educational positions in the public schools did pursue court action more than women in higher educational professions (Jones v. School District of Borough of Kulpmont, 1939, Walker v. School District City of Scranton, 1940, and Appeal of School District of City of Bethlehem, 1943).

Implications

Since court decisions are constantly being handed down, future research should include the current status of the litigation regarding women in educational employment. More discrimination occurs than is reported by the courts or shown by complaints made to various agencies.

Furthermore, since Title IX is one of the newest legal tools, it would be important to know its contribution to the rights of women. At present, educational institutions are in the process of establishing affirmative action approaches for their particular situations. A study evaluating its effective uses would be of value.

Since this study included only a selection of cases involving women in education, a collection of all court cases would be helpful for further reference. A historical collection of all cases dealing with matters of education that women have tried in the courts would be an aid to college professors, educational administrators, and other educators in evaluating their current situation as to compliance and administration.

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APPENDIX A

GUIDELINES OF TITLE VII

PART 1604 -- GUIDELINES ON DISCRIMINATION BECAUSE OF SEX

By virtue of the authority vested in it by section 713(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C., section 2000e-12, 78 Stat. 265, the Equal Employment Opportunity Commission hereby revises Title 29, Chapter XIV, § 1604 of the Code of Federal Regulations.

These Guidelines on Discrimination Because of Sex supersede and enlarge upon the Guidelines on Discrimination Because of Sex, issued by the Equal Employment Opportunity Commission on December 2, 1965, and all amendments thereto. Because the material herein is interpretive in nature, the provisions of the Administrative Procedure Act (5 U.S.C 553) requiring notice of proposed rule making, opportunity for public participation, and delay in effective date are inapplicable. The Guidelines shall be applicable to charges and cases presently pending or hereafter filed with the Commission.

Section 1604.1 General Principles.

(a) References to "employer" or "employers" in 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.

Section 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 non-discrimination 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 subparagraph (2) of this paragraph.

(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.

Section 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 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.

Section 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.

Section 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.

Section 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 occupations 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.

Section 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 non-discriminatory purpose. Any pre-employment inquiry 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.

Section 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.

Section 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 violation 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.

Section 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 is in prima facie violation of Title VII.

(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencment and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

(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.

APPENDIX B

TITLE IX

Public Law 92-318
92nd Congress, S. 659
June 23, 1972

An Act

TITLE IX—PROHIBITION OF SEX DISCRIMINATION

SEX DISCRIMINATION PROHIBITED

SEC. 901. (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

Exceptions.

(1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) in regard to admissions to educational institutions, this section shall not apply (A) for one year from the date of enactment of this Act, nor for six years after such date in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is the later;

(3) this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine; and

(5) in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex.

(b) Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this title of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) For purposes of this title an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

Definition.

FEDERAL ADMINISTRATIVE ENFORCEMENT

SEC. 902. Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 901 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Report to congressional committees.

JUDICIAL REVIEW

SEC. 903. Any department or agency action taken pursuant to section 1002 shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 902, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of title 5, United States Code, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that title.

86 STAT. 375

80 Stat. 392.
5 USC 701.

PROHIBITION AGAINST DISCRIMINATION AGAINST THE BLIND

SEC. 904. No person in the United States shall, on the ground of blindness or severely impaired vision, be denied admission in any course of study by a recipient of Federal financial assistance for any education program or activity, but nothing herein shall be construed to require any such institution to provide any special services to such person because of his blindness or visual impairment.

EFFECT ON OTHER LAWS

SEC. 905. Nothing in this title shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.

AMENDMENTS TO OTHER LAWS

SEC. 906. (a) Sections 401(b), 407(a)(2), 410, and 902 of the Civil Rights Act of 1964 (42 U.S.C. 2000c(b), 2000c-6(a)(2), 2000c-9, and 2000h-2) are each amended by inserting the word "sex" after the word "religion".

78 Stat. 246, 266.

(b)(1) Section 13(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)) is amended by inserting after the words "the provisions of section 6" the following: "(except section 6(d) in the case of paragraph (1) of this subsection)".

75 Stat. 71. 77 Stat. 56. 29 USC 206.

(2) Paragraph (1) of subsection 3(r) of such Act (29 U.S.C. 203(r)(1)) is amended by deleting "an elementary or secondary school" and inserting in lieu thereof "a preschool, elementary or secondary school".

80 Stat. 831.

(3) Section 3(s)(4) of such Act (29 U.S.C. 203(s)(4)) is amended by deleting "an elementary or secondary school" and inserting in lieu thereof "a preschool, elementary or secondary school".

INTERPRETATION WITH RESPECT TO LIVING FACILITIES

SEC. 907. Notwithstanding anything to the contrary contained in this title, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.