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The Elimination of Sex Discrimination in Employment: Alternatives to a Constitutional Amendment

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THE ELIMINATION OF SEX DISCRIMINATION IN EMPLOYMENT: ALTERNATIVES TO A CONSTITUTIONAL AMENDMENT

The 1970's will be a decade of reform in the area of labor law for women. Fifty years after being given the right to vote,[1] women have renewed demands for their rights in other areas of the law. Perhaps the greatest and most appealing of these demands is the abolishment of sex discrimination in employment practices. Statistics show that more and more women are entering the labor force every year,[2] yet the laws with regard to labor have not kept pace with this change in the social and economic development of the country. Since 1923, amendments to the Constitution have been proposed which would give women equal rights under the law.[3] In 1950[4] and in 1953,[5] the Senate approved such an amendment, but limited its effect by attaching a clause which virtually nullified any beneficial aspects of the amendment.[6] The Second Session of the Ninety-first Congress saw renewed efforts[7] to pass an amendment[8] on the wave of a Women's Rights Movement which has gained wide support throughout the country and in Congress. The proponents of a Women's Rights Amendment seek this change because of a failure of the Supreme Court to interpret the Fifth and Fourteenth Amendments as applying to sex discrimination.[9] However, it is conceded that by the time the Amendment could be enacted, its effect on employment discrimination would be insignificant due to recent court decisions, agency rulings, and changes in state legislation.[10] Furthermore, outside the area of labor relations an Amendment would result in consequences adverse

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[1] U.S. Const. amend. XIX.

[2] In 1947, 20% of the married women were in the labor force. In 1967, this figure rose to 33%. See Monthly Labor Review, Feb. 1968 at 1.

[3] President's Commission on the Status of Women, Report of the Committee on Civil and Political Rights 32 (1963).

[4] 96 Cong. Rec. 872-73 (1950).

[5] 99 Cong. Rec. 8954-955 (1953).

[6] The "Hayden Rider" designated that the amendment "shall not be construed to impair any rights, benefits, or exemptions now or hereafter conferred by law, upon persons of the female sex." 99 Cong. Rec. 8955 (1953) (statement of Amendment by Legislative Clerk).

[7] See Hearings on S.J. Res. 61 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. (1970).

[8] The amendment read in part:

> 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. Congress and the several States shall have power, within their respective jurisdictions, to enforce this article by appropriate legislation . . . .

Hearings on S.J. Res. 61, supra note 7, at 3.

[9] See Murray and Eastwood, Jane Crow and the Law: Sex Discrimination and Title VII, 34 Geo. Wash. L. Rev. 232, 237 (1965).

[10] Report by Citizens Advisory Council on the Status of Women 2 (Aug. 25, 1970).

to women in areas such as military service, life insurance premium rates, criminal penalties, state support laws and alimony.[11]

This comment will demonstrate that the goal of equality in employment can be advanced through statutory modifications and through more responsive judicial utilization of presently available federal statutory prohibitions against discrimination based on sex. No attempt will be made to discuss the entire range of remedies for unlawful discrimination. Rather, this comment will focus upon two areas of statutory coverage of discrimination in employment as being workable alternatives to a Women's Rights Amendment. The two Acts which will be discussed are Title VII of the Civil Rights Act of 1964[12] and the Labor Management Relations Act.[13]

I. Title VII of the Civil Rights Act of 1964

Congress's first efforts[14] to eliminate sex discriminatory employment practices culminated in Title VII of the Civil Rights Act of 1964. The bill before Congress proposing Title VII initially covered only the areas of race, color, religion and national origin. "Sex" was added in an effort to defeat the bill.[15] The effort failed and the bill passed with "sex" included in it. However, despite this attitude of the drafters toward the inclusion of sex discrimination within the coverage of Title VII, Title VII has in fact become the primary statutory weapon against discrimination on the basis of sex. This comment will suggest several methods by which the effectiveness of Title VII may be significantly increased.

A. *Judicial Recognition of Discrimination Based on Sex*

The basic anti-discrimination provisions of Title VII are found in Section 703(a) which provides that 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 in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his

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11 See Hearings on S.J. Res. 61 and S.J. Res. 231 Before the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. at 72-86 (testimony of Prof. Freund).

12 42 U.S.C. § 2000e et seq. (1964).

13 29 U.S.C. § 141 et seq. (1964).

14 In 1963, Congress passed the Equal Pay Act (29 U.S.C. § 206(d) (1964)). This Act merely provides equal pay for equal work. The fact that this Act did not guarantee women the right to acquire a better job had some influence on Congress in passing Title VII. See L. Kanowitz, Women and the Law 132 n.1 (1969).

15 See Vaas, Title VII: Legislative History, 7 B.C. Ind. & Com. L. Rev. 431, 441 (1966).

> status as an employee, because of such individual's race, color, religion, sex, or national origin.[16]

The application of these provisions requires an initial determination by the courts that there has been discrimination based on sex. However, due to the lack of congressional history on what constitutes sex discrimination,[17] the courts have had to "wrestle with the problems as best they can."[18] This lack of legislative guidance has led to judicial confusion in the recognition of certain employment practices as acts of sex discrimination. Such confusion is evidenced by the court's opinion in *Phillips v. Martin-Marietta*.[19] In *Phillips*, female applicants with pre-school age children were refused employment for the position of Assembly Trainee, while men with pre-school age children were hired for the job. In an action brought by the female applicants under Title VII, the employer claimed that this practice was not discriminatory since *all* women were not excluded from the position. It was contended that since exclusion was based upon the additional factor of having pre-school age children, there was no discrimination on the basis of sex within the meaning of Title VII.

The *Phillips* court strictly construed Title VII as applying only where there is "discrimination based solely on one of the categories, i.e., in the case of sex, women vis-a-vis men."[20] The court held that whenever discrimination is based upon another factor in addition to one of those prohibited categories, the practice is not unlawful under Title VII. Therefore, the court concluded that this two-pronged qualification of "sex plus" the additional factor of having pre-school age children rendered Title VII inapplicable.[21] However, the adoption of this "sex plus" standard would allow employers to circumvent Title VII by the addition of arbitrary qualifications to the basic distinguishing factor of sex. This reasoning in *Phillips*, therefore, must be viewed as "a palpably wrong"[22] interpretation of the extent to which sex must be the sole criterion in determining whether there has been a violation of Title VII.

Earlier cases applying Title VII indicate a more reasonable and

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[16] 42 U.S.C. § 2000e-2(a) (1964). Since the vast majority of cases brought under Title VII are within the employer section rather than the employment agency or labor organization sections, and since many of the principles are applicable to all three, this section will deal exclusively with employer practices.

[17] See Note, Sex Discrimination in Employment Under Title VII of the Civil Rights Act of 1964, 21 Vand. L. Rev. 484, 492 n.56 (1968).

[18] Berg, Equal Employment Opportunity Under the Civil Rights Act of 1964, 31 Brooklyn L. Rev. 62, 79 (1964).

[19] 411 F.2d 1 (5th Cir. 1969), petition for rehearing denied, 416 F.2d 1257 (1969), cert. granted, 397 U.S. 960 (1970).

[20] 411 F.2d at 3.

[21] Id. at 4. The court indicated by way of dicta that there were sociological considerations involved in allowing fathers with pre-school age children to work, but not allowing mothers with pre-school age children to work.

[22] 416 F.2d at 1259.

effective interpretation than that expressed in *Phillips*. In *Cooper v. Delta Air Lines*,[23] the plaintiff stewardesses asserted a violation of Title VII because of their being discharged when they married. Their discharge was pursuant to the contract their employer had all stewardesses sign as a condition of employment. The court held that there was no discrimination based on sex because the employer hired no stewards, and hence the only discrimination lay in the females' marital status.[24] The provisions of Title VII, however, were found to be applicable in *Sprogis v. United Airlines*.[25] There, former stewardesses charged the defendant airline with a violation of section 703(a) in maintaining a policy of discharging stewardesses who married, but not stewards who married. In reinstating the women to their former employment, the court found that a comparison of all the qualifications for the job indicated the plaintiffs were fired solely on account of their sex.[26]

The *Cooper* and *Sprogis* cases are indicative of the proper interpretation of "sex discrimination" under Title VII. Should the courts follow the "sex plus" approach adopted in *Phillips*, the employer would be free to continue his discriminatory practices by arbitrarily modifying the qualifications for a job and thereby render Title VII impotent to eliminate these practices. To enable the provisions of Title VII to be effective against discriminatory employment practices, the courts must determine whether in each particular case sex is, in fact, the distinguishing factor. When reviewing all of the qualifications for a job, if the court finds that the male and female applicant meet such qualifications except for the factor of sex, then it must classify this as discrimination based on sex.[27]

B. *The Administration of Title VII*

The correct recognition of sex discriminatory practices is, of course, only a preliminary step in the application of Title VII. In addition, the elimination of discriminatory employment practices requires an effective enforcement procedure through which an aggrieved party may seek relief, and the establishment of uniform standards for the application of Title VII. The Equal Employment Opportunity Commission (EEOC) provides the means for realizing both of these requirements. In an attempt to develop uniform standards under which Title VII could be more effectively applied, the Commission was given the authority to evaluate individual complaints and to issue interpretative guidelines concerning the provisions of Title VII.[28]

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[23] 274 F. Supp. 781 (E.D. La. 1967).

[24] Id. at 783.

[25] 2 ___ F. Supp. ___, F.E.P. Cases 385 (N.D. Ill. 1970).

[26] Id. at 386.

[27] Of course, a final finding of unlawful discrimination based on sex depends upon full consideration of all the provisions of Title VII, such as the possibility of an exemption under § 703(e).

[28] 42 U.S.C. § 2000e-12(a) (1964).

The need for uniformity is especially important in applying those sections of Title VII that are not clarified by legislative history. One such provision is section 703(e) which allows an employer to discriminate on the basis of religion, sex, or national origin if the employer can prove that such discrimination is a "bona fide occupational qualification necessary to the normal operation of that particular business or enterprise . . . ."[29] The legislative history of this section provides no basis for an authoritative interpretation of the bona fide occupational qualification exception.[30] It was suggested in Congress that this exception be construed narrowly—but this suggestion was made before "sex" was added to Title VII.[31] Because of this paucity of legislative history it seems appropriate that the interpretations given by the EEOC should be consulted to supplement those areas of Title VII about which Congress was silent. However, despite the numerous rulings on this section by the EEOC,[32] the courts have too often ignored these administrative guidelines.

An example of the courts failure to follow the EEOC in this area is *Diaz v. Pan American World Airways*.[33] In *Diaz*, the male plaintiff's application for a position as a flight cabin attendant was rejected pursuant to the defendant airline's policy of hiring only females for that position. The airline claimed that its discriminatory hiring policies were within the protection of section 703(e) since psychological evidence and passenger preference surveys indicated that females, as a class, are more qualified than males to act as cabin attendants. The court accepted the airline's argument, and held that discrimination on the basis of sex in this case was within the exemption provided by Section 703(e) and, therefore, was not unlawful under Title VII.[34] This result directly contradicted a ruling by the EEOC which held that the position of flight cabin attendant could not qualify for exemption under section 703(e) since the "basic duties" of this position could be satisfactorily performed by members of both sexes.[35] The court in *Diaz* expressly rejected this EEOC guideline, noting that EEOC rulings are "entitled to deference" but are not binding upon the courts.[36]

EEOC guidelines have also been rejected in the interpretation of section 703(h) which provides in part:

. . . it shall not be an unlawful employment practice for an

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29 42 U.S.C. § 2000e-2(e) (1964).

30 See Berg, supra note 18.

31 H.R. Rep No. 914, 88th Cong., 1st Sess. 27 (1963).

32 The Equal Employment Opportunity Commission has ruled that this exception should be interpreted narrowly (29 C.F.R. § 1604.1(a) (1970)); that it would not apply where refusal to hire an individual was based on assumptions of the comparative employment characteristics of women in general (29 C.F.R. § 1604.1(a)(1)(i) (1970)); or based on stereotyped characterizations of the sexes (29 C.F.R. § 1604.1 (a)(1)(ii) (1970)).

33 311 F. Supp. 559 (S.D. Fla. 1970).

34 Id. at 569.

35 33 Fed. Reg. 3361 (1968).

36 311 F. Supp. at 568.

> employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.[37]

Section 703(h), like section 703(e), lacks sufficient legislative history to clarify the intended purposes and scope of this section.[38] However, despite the absence of clear congressional language to aid in the interpretation of section 703(h), the courts have not uniformly followed the guidelines of the EEOC clarifying this section.

In *Griggs v. Duke Power Co.*,[39] the plaintiff employee contended that the defendant employer's use of generalized employment tests was a racially discriminatory practice in violation of Title VII. The plaintiff contended that these testing requirements were not protected by section 703(h) since the tests were not related to any specific job skills but measured only general intelligence. The court rejected this contention and held that section 703(h) applied to any bona fide employment test created by a qualified expert regardless of whether or not the test measured a particular employment skill.[40] In reaching this conclusion, the *Griggs* court disregarded an EEOC guideline limiting the application of section 703(h) to tests which fairly measure the knowledge or skills required by a particular job or class of jobs.[41]

As exemplified by the decisions in *Diaz* and *Griggs*, courts have not followed EEOC guidelines in interpreting sections of Title VII that are not clarified by accompanying legislative history. This judicial disregard of EEOC guidelines overlooks the expertise of the EEOC in the area of discriminatory employment practices which could act as a comprehensive substitute for the insufficient legislative history of certain sections of Title VII. These guidelines should be followed especially since rulings by the EEOC involve "a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."[42] The effectiveness of EEOC rulings in clarifying the interpretation of Title VII depends largely upon uniform judicial acceptance of these guidelines. As long as individual courts disregard the current standards set forth by the EEOC, a more effective and uniform application of Title VII will not be realized.

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[37] 42 U.S.C. § 2000e-2(h) (1964).

[38] See Comment, Employment Testing Under Title VII of the Civil Rights Act of 1964, 12 B.C. Ind. & Com. L. Rev. 268, 276 (1970).

[39] 420 F.2d 1225 (4th Cir. 1970).

[40] Id. at 1235.

[41] EEOC Guideline, CCH Empl. Prac. Guide ¶ 16,094, at 7319, cited in 420 F.2d at 1240.

[42] Power Reactor Dev. Co. v. Electricians, 367 U.S. 396, 408 (1961), cited in 420 F.2d at 1241 (dissenting opinion).

In addition to a lack of uniformity, Title VII has been ineffective because present enforcement procedures place the burden of enforcement on the individual.[43] The aggrieved party presently must wait up to eighteen months before the EEOC can handle her complaint. Once the Commission does handle her complaint, there is no assurance that her grievance will be remedied. The Commission's conciliatory efforts have been unsuccessful in more than half of the cases in which discrimination occurred.[44] In those cases which are not settled through conciliation, the aggrieved party must bear the burden of bringing a private suit.[45] This civil action encompasses expensive legal fees and a long delay in the over-crowded federal district courts. This demanding procedure is discouraging not only to the aggrieved party, but also to those individuals who look to Title VII as a possible remedy to existing discriminatory employment practices. The ineffectiveness of the EEOC in administering Title VII is due principally to the limited powers granted the Commission under Section 706(a) which provides:

> If the Commission shall determine, after . . . investigation, that there is reasonable cause to believe that the charge of unlawful discrimination is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practices by informal methods of conference, conciliation and persuasion.[46]

Although the Commission's powers are thus presently limited to conference and conciliation,[47] there have been considerable congressional efforts to extend these powers. The bill creating Title VII originally vested in the EEOC powers similar to those held by the National Labor Relations Board.[48] Since then, other bills before Congress have proposed the extension of the Commission's powers. In 1967, a bill was introduced which would have empowered the Commission to issue cease and desist orders, and would have had the Attorney General litigate any case where the employer disregarded the order.[49] Current congressional proposals would confer upon the Com-

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[43] The Report of the President's Task Force on Women's Rights and Responsibilities, A Matter of Simple Justice 6 (April 1970).

[44] Id.

[45] 42 U.S.C. § 2000e-5(e) (1964).

[46] 42 U.S.C. § 2000e-5(a) (1964).

[47] Though Congress in setting up this procedure specifically preferred voluntary compliance on the employer's part to judicial action, see, e.g., Dent v. St. Louis-San Francisco Ry. Co., 406 F.2d 399, 402 (5th Cir. 1969), recent decisions have recognized that the fact that the Commission did not engage in conciliation would not preclude an individual from bringing a civil action under Title VII. This current judicial approach clearly indicates a shift away from attempts at solving employment problems through conciliation. See *Dent*, supra; Johnson v. Seaboard Coast Line R.R. Co., 405 F.2d 645 (4th Cir. 1968).

[48] 109 Cong. Rec. 13009 (1963).

[49] S.1308, 90th Cong., 1st Sess. (1967).

mission the authority to institute enforcement actions in the federal district courts.[50]

The EEOC should be given the power to institute civil actions against the employer on behalf of the aggrieved party when it has reasonable cause to believe a violation exists. The individual complainant possesses neither the broad investigatory powers nor the expertise in discriminatory employment practices that the EEOC possesses, nor can the individual bear the expense of litigation as well as the EEOC could. The transfer of the power to institute a civil action to the Commission would still enable a cooperative employer to reach an agreement before actual court action, but would serve as a deterrent to those uncooperative employers who previously relied on the lengthy procedure to delay or discourage potential court actions. Without this transfer of power, the effectiveness of Title VII's substantive protection against discrimination based on sex will continue to be seriously hindered.

C. *The Enforcement of Title VII By The Attorney General*

Since over half of the complaints received by the EEOC are not settled through conciliation,[51] consideration must be given to alternative means of enforcement provided in Title VII. One such method was established in section 707(a), which provides:

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order . . . as he deems necessary to insure the full enjoyment of the rights herein described.[52]

The legislative history of the passage of Section 707(a) indicates that this section was meant to be an important factor in the enforcement of Title VII. Since the powers of the EEOC were limited to conciliation and advice,[53] section 705(g)(6)[54] was enacted to enable the EEOC to refer matters to the Attorney General for the institution of a civil action under section 707(a). The enactment of 705(g)(6) was intended to assure proponents of a strong EEOC that an effective enforcement procedure would be available under section 707(a) in

50 Berg, supra note 18, at 64-65.

51 See note 43 supra.

52 42 U.S.C. § 2000e-6(a) (1964).

53 See p. 729 infra.

54 42 U.S.C. § 2000e-4(f)(6)(1964).

addition to an individual's right to maintain a private action.[55] However, despite this legislative intention to create an effective method of enforcement through section 707(a), it was not until July, 1970, that the Attorney General brought a suit under that section against a "pattern or practice" of sex discrimination.[56]

The Attorney General's neglect in using section 707(a) is not the result of the inapplicability of the section itself. Legislative history indicates that "such a pattern or practice would be present only when the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a *generalized nature*." (Emphasis added.)[57] While this interpretation of the scope of section 707(a) excludes acts that are merely isolated incidents, most acts of discrimination on the basis of sex should be recognized as being of a "generalized nature" and therefore constituting a "pattern or practice" within the terms of section 707(a).

The recognition of the generalized nature of acts of sex discrimination has been demonstrated through judicial approval of class actions brought by plaintiffs alleging unlawful discrimination on the basis of sex. The courts have held that individual plaintiffs bringing such suits under Title VII are "vindicating not individual, but public rights."[58] This approach was followed in *Jenkins v. United Gas Corp.*,[59] where a black employee alleged that his employer's promotion system was discriminatory and in violation of Title VII. Subsequent to the institution of the action, the plaintiff employee was promoted and the district court granted summary judgment dismissing the action as moot.[60] The Court of Appeals for the Fifth Circuit[61] reversed dismissal of the suit, and held that the plaintiff's promotion did not render the action moot since the employment practices in question continued to affect the rights of other employees.[62] The decision of the court of appeals demonstrates the general nature of sex discrimination since the extinguishing of an individual's claim was recognized as not invalidating the rights of other employees to have the discriminatory practice eliminated.

The generalized nature of acts of sex discrimination is also evident in judicial awards of damages to employees other than the actual complainants. In *Bowe v. Colgate-Palmolive Co.*,[63] the complainant employees charged that the defendant employer had unlawfully discriminated through a seniority system which permitted men to bid for

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[55] Vaas, supra note 15, at 451-52.

[56] United States v. Libbey Owens-Ford Co., Complaint No. C70-212 filed July 20, 1970 (N.D. Ohio), in Wall Street Journal, July 21, 1970, at 8, col. 3.

[57] 110 Cong. Rec. 14270 (1964) (remarks of Senator Humphrey).

[58] 416 F.2d at 1258 (dissenting opinion).

[59] 400 F.2d 28 (5th Cir. 1968).

[60] 261 F. Supp. 762, 764 (E.D. Tex. 1966).

[61] 400 F.2d at 35.

[62] Id. at 33.

[63] 416 F.2d 711 (7th Cir. 1969).

all jobs, but limited women to jobs not requiring lifting more than thirty-five pounds. The court held that the weight restriction was in violation of Title VII since the limitation was based on an arbitrary sex stereotype, and no provisions were made to allow individual employees to prove their ability to perform more strenuous tasks.[64] Upon this finding, the court held that damages were not limited to the employees who had filed suit, but that any other similarly situated employee could apply to the court for appropriate relief.[65] The extension of relief to these employees was based upon the court's recognition of the generalized nature of suits against sex discrimination since "the evil sought to be ended is discrimination on the basis of a class characteristic."[66]

These cases demonstrate that most permanent employer practices which discriminate on the basis of sex are of a generalized nature and, therefore, fall within the scope of section 707(a). While this section does not apply to temporary employment practices, the intended broad application to permanent practices should be recognized. The application of Section 707(a) by the Attorney General would more effectively implement Title VII, and is a needed departure from the present neglect of Section 707(a).

II. Sex Discrimination and the Union Duty of Fair Representation Under the Labor Management Relations Act

The enactment of Title VII engendered congressional concern as to its effect upon the Labor Management Relations Act[67] (LMRA) and other existing acts which determined union-employment relations. In a letter from the Department of Justice to former Senator Clark, the Department assured the Senator that the National Labor Relations Board would not be deprived of jurisdiction if a case came under both acts, and that the duties of the employers and labor organizations under the LMRA would not be affected.[68] This prediction has been fulfilled by judicial experience demonstrating that Title VII and the LMRA may be accommodated without conflict. Thus, it has been held that an employee is not precluded from bringing a suit for an unfair labor practice under the LMRA by the specific protection given to employees from discrimination under Title VII.[69] The courts have recognized an employee's right to maintain an action under Title VII where an employee proceeds under the grievance procedures within the LMRA, but fails to exhaust these procedures,[70] or the union

[64] Id. at 717-18.
[65] Id. at 719.
[66] Id.
[67] 29 U.S.C. § 141 et seq. (1964).
[68] 110 Cong. Rec. 7207 (1964).
[69] See Local 12 v. NLRB, 368 F.2d 1224 (5th Cir. 1966).
[70] See Evans v. Local 2127 IBEW, 313 F. Supp. 1354, 1358 (N.D. Ga. 1969).

decides to proceed no longer.[71] Moreover, it has been held that an employee may bring an action under Title VII even though the action was within the original jurisdiction of the NLRB since Title VII provides statutory rights exclusive of the rights under the LMRA.[72]

The accommodation of these overlaping acts is due in part to the fact that the LMRA contains no provisions which directly prohibit union discrimination on the basis of sex. However, under the LMRA employees are guaranteed the fundamental right to bargain collectively through representatives of their own choosing.[73] As a correlative of this right, the LMRA grants to the unions selected by the majority of the employees the right to be the exclusive representatives of the employees for the purpose of collective bargaining.[74] Where the union serves such a vital function in determining the conditions under which an employee will work, the union must be held subject to certain restrictions. Courts, cognizant of this important union-employee relationship, have imposed upon the unions a duty of fair representation.

The duty of fair union representation was first enunciated under the Railway Labor Act[75] in 1944 in *Steele v. Louisville & Nashville R.R. Co.*[76] In *Steele*, the petitioner, a black member of a firemans union, alleged that without first notifying the black firemen of their negotiations, the union and the railroad entered into an agreement which reduced the number of carriers employing blacks and which adversely affected their seniority rights. Under this agreement the petitioner was replaced by a white fireman and was subsequently given a less desirable and less remunerative job. When protests of black firemen to the union were ignored, the petitioner sought to enjoin the enforcement of the agreement, to enjoin the union from representing him so long as the union discriminated against him, and to recover damages against the union for its wrongful conduct.[77] The Supreme Court of Alabama held on the merits that the complaint stated no cause of action.[78] In reversing that court's decision, the United States Supreme Court held that the union had breached its statutory duty of representation to the black firemen, and granted the petitioner's request for an injunction and damages.[79]

The Supreme Court in rendering this decision held that the representative union had a duty under the Railway Labor Act to protect the interests of all members of the craft, not just those of the

[71] See Younger v. Glamorgan Pipe and Foundry Co., 310 F. Supp. 195, 198 (W.D. Va. 1969).

[72] See Bremer v. St. Louis Southwestern R.R. Co., 310 F. Supp. 1333, 1337 (E.D. Mo. 1969).

[73] 29 U.S.C. § 157 (1964).

[74] 29 U.S.C. § 159(a) (1964).

[75] 45 U.S.C. § 151 et seq. (1964).

[76] 323 U.S. 192 (1944).

[77] Id. at 197.

[78] 245 Ala. 113, 122, 16 So.2d, 416, 423 (1944).

[79] 323 U.S. at 207.

white majority. In defining this duty, the Court stated that "the statutory power to represent a craft and to make contracts as to wages, hours and working conditions does not include the authority to make, among members of the craft, discriminations not based on such relevant differences."[80] The Court set out as examples differences "relevant to the authorized purposes of the contract . . . such as differences in seniority, the type of work performed, [and] the competence and skill with which it is performed. . . ."[81]

Despite the sweeping import of the *Steele* rationale, the courts moved slowly to enforce this duty of fair representation. The next major case which applied the *Steele* doctrine arose under the LMRA in 1953 in *Ford Motor Co. v. Huffman*.[82] In *Huffman*, an employee asserted that a collective bargaining agreement was invalid since it established a seniority system for veterans which adversely affected him. Under the agreement some employees who commenced work after the plaintiff received seniority rights over the plaintiff. The Court upheld the seniority agreement, noting that the complete satisfaction of all union members was not possible but that "[t]he complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."[83] The Court was attempting to refine the area of legitimate discriminations which a union could make in best serving its members, recognizing the fact that some employees will not fare as well under a collective bargaining agreement as other employees.

Until 1962, the courts alone had developed the duty of fair representation doctrine into a statutory duty which was judicially enforceable. *In Miranda Fuel Co. v. NLRB*,[84] the Board for the first time considered a union's breach of the duty of fair representation as an unfair labor practice in violation of Section 8(b)(1)(A) of the LMRA.[85] In *Miranda Fuel*, an employee claimed that the union had breached its duty of fair representation by compelling the employer to reduce the plaintiff's seniority status for an unauthorized early leave of absence as set out in the collective bargaining agreement. The Board recognized that the *Steele* case established a union duty to represent all of its members equally and without discrimination on the basis of race, color or creed.[86] Based upon the *Steele* rationale, the Board concluded that a union violates section 8(b)(1)(A) whenever the union, acting in its capacity as statutory representative, takes

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80 Id. at 203.

81 Id.

82 345 U.S. 330 (1953).

83 Id. at 338.

84 140 NLRB 181, 51 LRRM 1585 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963).

85 29 U.S.C. § 158(b)(1)(A) (1964).

86 140 NLRB at 185, 51 LRRM at 1587.

action "against any employee upon considerations or classifications which are irrelevant, invidious, or unfair."[87]

Although *Miranda Fuel* was denied enforcement on other grounds,[88] the principles set forth were reaffirmed in *Local 12 v. NLRB*.[89] There, black employees were laid off although they had acquired more seniority than whites. The union refused to take investigatory action since there had been no contract violation. Although the blacks were subsequently reinstated, the union refused to process their grievances concerning back wages or the existing segregated facilities. The Board had found that the union's breach of its duty of fair representation was a section 8(b)(1)(A) violation.[90] The Fifth Circuit granted enforcement of the Board's order and held that the union's failure to process the employee's grievances violated its duty to represent the employee fairly and impartially without discrimination.[91] Hence, it appears that the courts and the NLRB have readily accepted the concept of a duty of fair representation.[92]

While this duty of fair union representation has not been applied specifically to the area of sex, it is reasonable to extend this duty to practices of discrimination based on sex. In the absence of any clear legislative intent to the contrary, it is reasonable to conclude that this statutory duty of fair representation as expressed in *Steele* applies beyond the narrow area of race discrimination[93] to all forms of hostile discrimination by unions.[94] The broad scope of this duty was recognized in *Local 12* where the court compared the duty of fair representation and Title VII and concluded that:

> . . . there continues to exist a broad potential range of arbitrary union conduct not specifically covered by Title VII which may also violate the union's duty of fair representation. The comprehensive right of an employee to be represented fairly and in good faith by his exclusive bargaining agent clearly encompasses more than freedom from union discrimination based solely upon race, religion, and sex.[95]

This assessment of the breadth of a union's duty appears to be

87 Id.

88 NLRB v. Miranda Fuel Co., Inc., 326 F.2d 172, 180 (2d Cir. 1963).

89 368 F.2d 12 (5th Cir. 1966).

90 Id. at 15.

91 Id. at 19.

92 This comment has not discussed the subordinate problem of whether this duty of fair representation is within the exclusive jurisdiction of the courts or of the NLRB. The Supreme Court has rejected the argument that violations of a union's duty of representation are within the exclusive jurisdiction of the NLRB (Vaca v. Sipes, 386 U.S. 171, 183 (1967)). For further discussion of this problem see Cox, the Duty of Fair Representation, 2 Vill. L. Rev. 151, 173 (1957); H. Wellington, Labor and the Legal Process, 172-75 (1968).

93 See Wellington, Union Democracy and Fair Representation: Federal Responsibility in a Federal System, 67 Yale L.J. 1327, 1335 (1958).

94 See Cox, supra note 92, at 159-60.

95 368 F.2d at 24.

correct. Unions must in all cases act with "good faith and honesty of purpose"[96] and avoid practices which are "irrelevant, invidious, or unfair."[97] These requirements of fair representation encompass race, religion, sex, national origin and more. The present recognition by the NLRB and the courts of the applicability of the duty of fair representation in sex discrimination cases is as necessary and plausible as was the Court's recognition in 1944 of the applicability of the doctrine in race discrimination cases. Should the courts and the NLRB so recognize a female's right under this theory, reliance upon the enforcement-deficient Title VII in suits against a union would be avoided, and the possibility of finally eliminating sex discrimination in this area vastly improved.

CONCLUSION

The present concern throughout the nation for equal rights for women is well justified in the area of labor relations. Yet, significant progress toward equality in employment can be made without the enactment of a Women's Right Amendment. The presently available anti-discrimination provisions of Title VII could be made substantially more effective by statutorily enlarging the powers of the EEOC and thus relieving the individual complainant of the burden of bringing a private suit as the primary means of enforcing the right to fair employment. Increased judicial recognition of employment practices which do in fact discriminate on the basis of sex, and a more active utilization by the Attorney General of his powers to enjoin generalized discrimination practices would also contribute to the realization of the promise of equal employment. In addition to the broad anti-discrimination coverage already available in Title VII, the extension of the duty of fair union representation to the area of sex discrimination offers another means of guaranteeing fair employment to the great number of female employees who are union members. These suggested approaches to greater equality in employment for women demonstrate the availability of workable solutions to the problem of sex discrimination that avoid the difficulties inherent in the passage of a Women's Rights Amendment and the possible adverse consequences of its enactment.

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[96] 345 U.S. at 338.
[97] 140 NLRB at 185, 51 LRRM at 1587.