

4-1-1966

Title VII: Coverage and Comments

Charles T. Schmidt Jr

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/bclr>

 Part of the [Civil Rights and Discrimination Commons](#), and the [Labor and Employment Law Commons](#)

Recommended Citation

Charles T. Schmidt Jr, *Title VII: Coverage and Comments*, 7 B.C.L. Rev. 459 (1966), <http://lawdigitalcommons.bc.edu/bclr/vol7/iss3/4>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

TITLE VII: COVERAGE AND COMMENTS

CHARLES T. SCHMIDT, JR.*

INTRODUCTION

As a direct result of extreme pressures from leaders of the civil rights groups and with additional support from interested third parties, the Congress, in its wisdom, and through its procedural labyrinth, drafted a piece of legislation entitled the Civil Rights Act of 1964.¹ Title VII thereof offers something to everyone and very little to anyone. The broadness of its scope and the fabrication of its administrative machinery reveal the stark inadequacy of the democratic law-making process, with its necessity of compromise, to legislate effectively in areas where the flames of discontent threaten the very existence of the process itself.

Title VII has been declared to "broaden the *possible* area of government intervention in the personnel policies of American employers to an extent unmatched by any Federal statute since the Wagner Act" and said to go "beyond any prior Federal law or order."² This title "constitutes a regulatory device over employment practices of immense proportions."³

The authors quoted may very well be correct. Title VII in some ways does perhaps go further than previous legislation, and there possibly *could be* an impact upon some employment practices and procedures. Simply going beyond what may previously have been inadequate, however, does not make a piece of legislation appropriate to meet the need, nor does inconvenience in fulfilling its requirements say anything for either the legitimacy of the requirements or the relevance of their inclusion.

In my eyes, this title is wholly inadequate to meet even the minimum demands of the Negro, being ill-conceived in scope, coverage, administration, and enforcement. The problem in civil rights is the

* B.S., University of Massachusetts, 1958; M.B.A., Northeastern University, 1962; Master of Industrial and Labor Relations, Cornell University, 1964; Assistant Professor and Lecturer of Labor and Industrial Relations, School of Labor and Industrial Relations, Michigan State University; Member, Industrial Relations Research Association, the American Academy of Political and Social Science, the American Economic Association, the Michigan Academy of Arts, Letters and Science, the Industrial Relations Association of Detroit, Michigan Mediation Board, Panel of Arbitrators and the National Labor Panel of the American Arbitration Association.

¹ 78 Stat. 241, 42 U.S.C. 2000e (1964).

² Kheel, *The Impact of Title VII of the Civil Rights Act of 1964*, BNA Daily Labor Report No. 16, Jan. 26, 1965, p. E-1.

³ Civil Rights Act of 1964, National Association of Manufacturers Law Department Review 9 (1964).

Negro—the problem in job discrimination is the *Negro*—the problem in unemployment is the *Negro*—the problem in skilled craft unions is the *Negro*—the problem in apprenticeship and training is the *Negro*—the problem in job referrals and promotions is the *Negro*—the one internal national force that threatens to extinguish this nation is the *Negro*, and *extinguish he will* unless his demands for jobs, employment and training are fulfilled immediately—without question, without debate, and without qualification.

However, Title VII does not exclusively focus upon the Negro. In fact, some have even expressed this lack of focus as being one of the outstanding virtues of the title. They argue that by requiring merit employment and non-restrictive membership provisions along very broad lines—*i.e.*, national origin, sex, and religion, as well as race and color—that we may “package” the American ideal of equal opportunity into one convenient container. To me, this is equivalent to treating a cancer with aspirin because you also happen to have a headache, a sore toe, and a hangnail!

This legislation has little chance of securing even the Negro's minimum required demands, for there simply is not time to change the attitudes of an entire nation through mediation, conciliation and admonishments, and without a change in attitudes by the vast majority of our population, this title simply will not meet the job and employment requirements of the Negro.

There is not time to change these attitudes. For the Negro of Watts, Harlem, Rochester, Birmingham or Dallas is not the same Negro serving on presidential commissions and state, county and city boards of review or similar FEP commissions. In order that conciliation and mediation and similar “sophisticated” processes of this nature may work, there has to be a level of comprehension on the part of both parties and a high level of communication between them. The establishment of this communication with the people directly affected is the basis for the hope of resolution in Title VII. I maintain that this communication does not exist either between employers, unions, employment agencies, the majority of Negro spokesmen and the unemployed, underemployed or untrained Negro. Further, the Negro in America has been mediating and conciliating for over 150 years. He has little faith in the process, nor should he!

Unlike the relationship between labor and management, the word “volunteerism” is neither included nor understood in the Negro vocabulary. Volunteerism is a white man's word; a word which, when combined with economic and political power, allows discrimination on any basis which is chosen—and more often than not, the Negro finds that this discrimination is based upon the color of one's skin.

TITLE VII: COVERAGE AND COMMENTS

I. THE EFFECTS OF TITLE VII

A. *Management and Organized Labor*

Together with some management spokesmen, the voices of organized labor lightly applauded the enactment of Title VII—both groups obviously wishing to be counted on the “side of the angels.” However, some members of each group appeared rather annoyed that Congress had not recognized that they had made “significant” efforts—“voluntarily”—toward merit employment practices and non-prejudicial discriminatory membership and apprenticeship selection processes. Admittedly, they argued, there were still some problems in these areas, but “voluntary” progress was being made and “obviously these things take time!” However, despite the unquestioned sincerity of some of the leadership of both management and labor—*e.g.*, Walter Reuther of the UAW and Charles Kothe of the NAM—there is neither an indication of widespread support for the provisions of Title VII nor is there any reason to expect any more than compliance with the “black letter” of the law—regardless of the admonitions of some labor and management leaders to look beyond, to the “intent” of the law.

In fact, Eugene Adams Keeney, Manager and Labor Counsel for the Chamber of Commerce of the United States, is highly critical of those who advocate adherence to the “spirit” rather than the “letter” of the law. Speaking at the Twenty-Seventh Annual Personnel and Management Conference in Austin, Texas, on October 21, 1965, Mr. Keeney suggested that:

At a recent White House Conference some rather *startling views* were expressed. It was suggested that the “spirit of the law” is somehow more important than the letter of the law. With the philosophy in mind, the letter of the law can easily be modified to suit the whim of the person enforcing the law.⁴ (Emphasis added.)

With such narrowly constricted views of Title VII and the law in general, it is difficult to see how voluntary solutions to social problems can ever be seriously considered when advanced by those who assume such a stance.

It is encouraging to note, however, that this Chamber of Commerce spokesman's view is not necessarily shared by many of the chief executives of forty companies interviewed by the National Industrial Conference Board (NICB). In a May 1965 report, the NICB reports that “there is one theme developed time and time again by

⁴ Address by Eugene A. Keeney, University of Texas 27th Annual Personnel and Management Conference, Austin, Tex. Oct. 21, 1965, p. 11, BNA Daily Labor Report No. 204, Oct. 21, 1965, pp. D-1 to D-4.

the presidents: The law can go only so far; the best and final way to progress is the way of voluntary, affirmative action by companies in all areas of the nation."⁵ However, less encouraging in the same report, these executives also stated that they "do not feel that the problem is a major one in their companies,"⁶ and although the majority approved of the act in general, most indicated that local customs affecting racial relations would be considered to "some extent," and that only gradual changes can be made since "the facts of life must be faced in the practical world in which we live."⁷

In another somewhat similar survey conducted by the Bureau of National Affairs in July 1965 through the personnel and industrial relations executives who form BNA's *Personnel Policies Forum*, it was found that "the percentage of Negroes in the work force is less than many would expect. When asked what percentage of their companies' total work force is Negro, a sizable majority (58 percent) reported that it was 3.9 percent or less . . ."⁸ and that "according to over three in five executives" queried, there "hasn't been any increase in the number of Negroes in *Forum* companies since the passage of the Civil Rights Act."⁹ Further, these executives emphasized what I consider the "fairy tale" of the business community previously alluded to—*i.e.*, that "many of the respondents . . . did say that they have in the past, and will continue, to hire without regard to a person's race, creed, color or national origin, *thus implying* that the Civil Rights Act and the Executive Orders concerning the employment of Negroes weren't necessary in the first place."¹⁰ (Emphasis added.) This view is emphasized by at least one executive who, in spite of contradictory sociological evidence, emphasizes the Horatio Alger solution to the problem when he states that "the answer lies with the Negroes themselves to pull themselves up by their bootstraps, without reliance on special government pressures."¹¹

Notwithstanding the unquestioned sincerity of a portion of the business community, it appears that very little can be expected by way of their voluntarily going beyond the letter of the law. And compliance with the letter—both in terms of coverage and substance—may very well impose inconveniences and require more imagination to enable the continuation of practices which exclude Negroes from employment, but the legislation, as presently conceived, can do little

⁵ National Indus. Conference Bd., *Chief Executives View Negro Employment*, The Conference Board Record 33 (1965).

⁶ *Id.* at 30.

⁷ *Id.* at 33.

⁸ BNA, *Personnel Policies Forum* 1 (1965).

⁹ *Ibid.*

¹⁰ *Id.* at 2.

¹¹ *Id.* at 6.

TITLE VII: COVERAGE AND COMMENTS

to effectively prohibit these practices. This is not to say that all or most businessmen consciously wish to continue these practices of exclusion. (Some obviously do; one executive in the NICB study was convinced of Negro racial inferiority.¹²) Rather, under the ethos of productivity, efficiency and hiring standards, which too often are unrealistic, the untrained and uneducated Negro is automatically excluded.

There is no question that much of the business community is concerned with the Negro discrimination problem. Unfortunately, however, it is too often viewed as a social problem, distinctly separate from the operational concerns of running the enterprise. It is argued that the lack of Negroes in any significant number in other than menial jobs in private industry is to be regretted and perhaps constitutes one of the major factors contributing to second class citizenship and poverty. But, they continue, even if prejudice is eliminated, private industry must offer employment opportunities only to those in the available labor market who are most qualified, and, at present, this does not include very many Negroes. To do otherwise would be a most irresponsible "business practice," a breach of faith with the stockholders and an invitation for competition to gain the advantage. They further argue that when the social problems (education, training, delinquency, family patterns, job consciousness, motivation, etc.) of the Negro are resolved by the rest of society (including businessmen—acting, however, as individuals and not as representatives of their companies), they will then consent to consider the Negro for employment.

Likewise, the labor unions, especially the crafts but not exclusively so, are concerned with the Negro membership problem. They are concerned, perhaps, to a higher degree than the businessman, for the leadership is presently in a dilemma that has made even the most hard-boiled trade unionist "squirm." On one hand is the ideology of the union leader—not so openly voiced today as formerly, and at times embarrassing to the business unionist—but none the less, an ideological commitment to the social and economic betterment of the poor, the oppressed, the unrepresented and the exploited. Certainly in all respects an accurate profile of the Negro mass. On the other hand, however, labor, not unlike the businessman, is acutely conscious of the attitudes of the membership and local customs. And well they have learned to be, for a labor organization, especially at the local level, is first and foremost a political organization with all the good and bad, strategies and tactics, deals and compromises associated with the vernacular use of the word. Moreover, it is a political organi-

¹² National Indus. Conference Bd., *supra* note 4, at 31.

zation with constituents at least as apathetic as other political organizations, and perhaps much more apathetic than some. Labor leaders, however, have learned to respect this apathy as having a capability of destroying them should any of the members' basic attitudes be challenged. And these attitudes need not reflect any of the ideological consideration previously alluded to, nor is there convincing evidence that they do. They are more often found to rest upon "here and now" economic gains for themselves or for those with whom they are closely associated. In fact, this is a membership suggesting a similar "don't rock the boat" middle class Americanism with its local "customs" of which the businessman is desperately fearful and to which he wishes to defer. For the labor leadership (and again I refer especially to those at the local levels) to attach their personal fortunes to the "Negro Crusade" in many cases is tantamount to political defeat and political defeat at the best means a return to the "bench." In spite of Title VII, I suggest that this requires a good deal more ideological attachment than has been evidenced among labor leadership in recent years.

This is not to suggest that the national union is completely helpless. Although the debate on local union autonomy is far from conclusive, it does suggest that a substantial degree of authority over the locals is retained by the national organization. I suspect, though, that while the national's power over the local may be considerable in such areas as bargaining patterns, strike authority and even political action, authoritarian directives regarding membership qualifications, minority groups representation and the like will not be persuasive. This is particularly true of the craft unions, where even the national hierarchy has given little evidence of a willingness to promote a relaxation of membership and apprenticeship color bars.

I am not questioning the sincerity and integrity of those nationally prominent labor officials who, as in the case of some management spokesmen, have exerted both the power of their own positions and the machinery of their organizations in support of both the "letter" and "spirit" of Title VII. In fact, without the support of some key elements of organized labor, it is doubtful that Title VII would have been enacted at all. Certainly the Civil Rights Department of the AFL-CIO can, and undoubtedly will, exert considerable influence upon the international unions for the implementation of corrective measures and programs. At best, however, this will be given in the form of advice and counsel, with the international union obviously free to accept the pronouncements and recommendations only when the political climate and its relations with the locals is favorable. Commenting on this very situation, Donald Slaiman, Director of the AFL-CIO's Department of Civil Rights recently remarked that "one of the problems . . . is

TITLE VII: COVERAGE AND COMMENTS

that [if] you have a local union in a tough community, or a local union officer with no knowledge of the FEP problems involved in the case, it's hard for the international union to really help."¹³

Title VII obviously will directly alter some of the union's more flagrant discriminatory practices, and the letter of the law certainly will be eventually obeyed. For example, the requirement to merge Negro and white locals will be severely pursued as will the merger of seniority lists, and there is some prospect that limited gains will be achieved here. Addressing himself to the former issue in answer to the possibility that merged Negro and white locals could result in the Negro local losing its ability to represent the Negro, Slaiman commented:

Now, of course, there can be something lost if, in the merged local, the Negroes don't get any representation. But the answer to this isn't maintaining segregation. Now, if you are talking about representation in member's rights—not in its officers and delegates—then you have to ask how much influence does the Negro local have when it is representing its members separately in negotiations, since the contracts that are arrived at are jointly negotiated, at best, and sometimes negotiated principally by the white local.

So, the real answer to representation is integrated locals, in which the Negroes have equal rights and participation. There may be, I repeat, situations where temporarily something is lost. We hope not. But, the fact is, we have to get merger, because segregation in unions is no better than segregation in schools. And there, too, in individual cases, there may be a temporary loss by somebody, but the answer isn't continuation of segregation.

In the "long run," . . . and we hope almost always in the short run—that the merger of locals will be attended by improved opportunities for Negro workers.¹⁴

Is it enough, however, for the unions to merge their locals and to integrate their seniority lists? Given the prerogative of employers to establish their hiring and promotional standards at any level which they choose (as long as these are consistently applied), is it not probable that Negro jobs will remain Negro jobs and white jobs remain white jobs—regardless if the names are separated or not? The question is, will the local unions, in the administration of their grievance procedures, support and reinforce unrealistic hiring and promotion stan-

¹³ Slaiman, *AFL-CIO Expects Equality Commission's Guide for Unions Will Help Compliance*, BNA Daily Labor Report No. 206, Nov. 25, 1965, p. A-8.

¹⁴ *Ibid.*

dards in order to maintain white jobs? Or, will they utilize their power at the collective bargaining table to challenge these standards? Will they present as a bargaining demand a program of broad-based occupational and skill training designed for the unskilled and undereducated Negro? Will they support the Negro in his demands against discrimination to the same degree, with the same enthusiasms and with the same financial commitment as they might a white worker filing an ordinary grievance? Or, what is unfortunately more likely, might it be easier (even if less effective) to defer to the EEOC as a more "appropriate" tribunal for adjudication? These are the types of questions the unions must answer in the affirmative if the effects of their coverage under Title VII is to have any meaning and effect.

B. Effect on Apprenticeship and other Training Programs

Almost without exception, my previous criticisms and pessimism regarding Title VII's ability to significantly reduce prejudicial discrimination are compounded when consideration is given to the coverage of labor-management training committees and apprenticeship programs. Suffice it to say that standards for selection and testing programs can still be legally applied in a manner which will deny admission into these programs of all but the most highly qualified Negro, *i.e.*, those who have somehow managed to get and keep their jobs even under the pre-1964 conditions. Outright discrimination because of one of the five factors outlawed will certainly be challenged in litigation, and we can expect "showcase" minority group trainees to appear frequently in most of the programs. However, as with other "equal" selection procedures, the impact upon a majority of Negroes will be inconsequential.

Within this group, too, is the most severe outright prejudicial discriminatory factor in the labor movement, the skilled trades. My earlier comments regarding the inability of the international unions to control membership selection techniques of the locals, assuming they wanted to, apply here for two reasons. First, because of the much more autonomous nature of the skilled trade and building trade locals and their history of relative freedom to run both their own internal political affairs and to handle their own collective bargaining. And second, the political pressures on the local business agents and local officers tend to be substantially more severe than those evidenced within the industrial type unions. Only when strenuous efforts have been made has the Negro been able to "crack" the craft union apprenticeship bars,¹⁵ and I see nothing in Title VII that will create any more than an inconvenience in continuing this trend.

¹⁵ See, e.g., 60 Lab. Rel. Rep. 205-06 (1965):

The campaign to enroll Negroes and Puerto Ricans in New York City con-

TITLE VII: COVERAGE AND COMMENTS

This view is well supported by my own research in Detroit, where I was told by a building trade representative that "although there may be discrimination in apprenticeship programs in other communities, this is not true in Detroit, for we have a lot of colored and . . . there is no problem."¹⁶ This statement was made in the face of facts that in 1963, 0.9 per cent, or twelve of the 1,311 apprentices in the construction trades' program were nonwhite and fifty-one or 2.7 per cent of the 1,902 trainees were nonwhite in 1964, while over twenty-five per cent of Detroit's labor force is nonwhite.¹⁷

The realities of Title VII's inability, as presently written, to cope effectively with the apprenticeship and training problem is made evident in *Workshop Report—Panel #5* of the White House Conference on Equal Employment Opportunity. The workshop participants agreed on the following relevant points:

2. It is a fact that the number and percentage of Negroes and certain other minority groups in apprenticeship programs is small in manufacturing and other sectors of the economy as well as in the construction industry.

3. In recent years some progress toward greater equality of opportunity has been made in reducing the preferences for relatives of members, in securing adoption of objective standards for selection on the basis of qualifications and in establishing centers for disseminating information about apprenticeship openings—but to date the number of minority groups apprentices has not increased significantly.

struction crafts took a leap forward in the results of the most recent apprenticeship test given by Local 28 of the Sheet Metal Workers. Of the 65 applicants who passed the test, 14 were Negroes or Puerto Ricans.

The 14 were part of a group of 25 that underwent four weeks of tutoring by the Workers Defense League in preparation for the test. This was the second test given by the union since a state court ordered it to stop giving preference in its apprenticeship program to relatives of members. No Negro candidate scored in the top 65 on the first test, though one subsequently was admitted when three whites withdrew their applications.

Passing the written test doesn't automatically mean admission to the apprenticeship program for all 14, however. Applicants also are required to undergo physical exams and personal interviews. Moreover, the union wants to limit the number of new apprentices to 30, at least until an appeals court decides whether to uphold the original order that 65 be taken. . . . Eleven of the candidates supplied by the Workers Defense League scored in the top 30 on the written test.

A spokesman for the League hailed the results of the test as a tremendous breakthrough, predicting that it would lead the way for other unions and would provide encouragement to other members of minority groups. The League indicated that the Plumbers would be the next union to which it would seek admissions.

¹⁶ Blum & Schmidt, "Job Training Through Adult Education: The Negro and the Community's Second Chance," *Employment, Race and Poverty* 33 (Ross ed. 1966).

¹⁷ *Ibid.*

While there was agreement on the need for affirmative action and on the Commission's role in stimulating such action by private parties and government agencies, there was disagreement as to whether the Commission could or should insist on more than fair and non-discriminatory selection procedures in enforcing Title VII.¹⁸

C. Prohibition of Discrimination on Account of Sex

This prohibition, with all the puns and "bunny stories" circulating the country since its inclusion, is far from funny in its original intent and final incorporation into Title VII.

Allegedly added to Title VII to promote debate within Congress in the apparent hope of defeating the entire title, the sex prohibition became law without even token consideration of its implications, not only as to its own intended meaning and ramifications, but more importantly, of its effects upon the intent and administration of the remainder of the title.

If this title is a direct outgrowth of the political pressures finally brought to bear upon a "RATHER NOT BE INVOLVED" Congress by civil rights groups and others similarly interested, and if the title is law today as an attempt to improve the employment opportunities of America's Negroes, and if the problem of job and training discrimination is considered a substantial contributing factor to Negro unemployment and underemployment, there then appears no legitimate reason for sex discrimination to be even remotely connected with this title. This is not to say that the "gals" (especially the "gals") don't have serious problems in this regard. But, unlike the Negro, other weapons and tactics are available by which redress of wrongs may be secured. Further extension of unionism into the white collar sector immediately comes to mind. Even with the history of male-female job restrictions that presently exist, I cannot imagine either an employer or union representative successfully standing up to the onslaught of even one aroused female—much less a whole factory, or office or union hall. Perhaps I am being too cavalier here, but I remain to be convinced of either the necessity or desirability of the sex discrimination inclusion if for no other reason than I believe there are better and more effective alternatives.

There are at least five major problem areas that have been pointed out as causing concern to both the Commission and those affected. The Commission has issued broad interpretative guidelines regarding these problems which should be consulted in detail. Briefly, these include: (1) The meaning and application of a bona fide occupational quali-

¹⁸ White House Conference on Equal Employment Opportunity, Workshop Report—Panel #5, Aug. 18-19, 1965.

TITLE VII: COVERAGE AND COMMENTS

fication including the relationship of Title VII to state and local laws regulating the employment of women and expenses related to separate facilities; (2) separate-merged promotion and seniority systems; (3) help wanted advertising; (4) discrimination against married women; and (5) the relationship to the Equal Pay Act.

The Commission has chosen to narrowly interpret the bona fide occupational exception as to sex and has found many arguments to be unpersuasive.¹⁹ So too, with respect to separate seniority and pro-

¹⁹ Guidelines on Sex Discrimination Provisions of Title VII of Civil Rights Act of 1964, BNA Daily Labor Report No. 225, Nov. 22, 1965, p. E-1.

(a) 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 men.

(b) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes included, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship, etc. The principal of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

(c) The refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers except as covered specifically in paragraph (2) below.

(d) The fact that the employer may have to provide separate facilities for a person of the opposite sex will not justify a bona fide occupational qualification except where the expense would clearly be unreasonable.

(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.

(3)(a) Most states have laws or administrative regulations with respect to the employment of women. These laws fall into two general categories:

Laws that require that certain benefits be provided for female employees, such as minimum wages, premium pay for overtime, rest periods or physical facilities.

Laws that prohibit the employment of women in certain hazardous occupations: in jobs requiring the lifting of heavy weights, during certain hours of the night or for more than a specified number of hours per day or week.

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

(b) The Commission does not believe that Congress intended to disturb such laws and regulations which are intended to, and have the effect of, protecting women against exploitation and hazard. Accordingly, the Commission will consider qualifications set by such state laws or regulations to be bona fide occupational qualifications and thus not to conflict with Title VII. However, in cases where the clear effects of a law in current circumstances is not to protect women but to subject them to discrimination the law will not be considered a justification for discrimination. So, for example, restrictions on lifting weights will be honored except where the limit is set at an unreasonably low level which could not endanger women.

(c) An employer, accordingly, will not be considered to be engaged in an unlawful employment practice when he refuses to employ a woman in a job in

motional systems, the Commission maintains that "unless sex is a bona fide occupational qualification for that job" it shall be "an unlawful employment practice to classify a job as 'male' or 'female' or to maintain separate seniority lists based on sex where this would adversely affect any employee."²⁰

The Commission has stated, in answer to an employer inquiry, "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,"²¹ except that, "it may be that under certain circumstances, such a Rule could be justified as based on a bona fide occupational qualification," but the Commission does not "express [an] opinion on this question at this time."²² In September of 1965, the EEOC released its

which women are legally prohibited from being employed or which involves duties which women may not legally be permitted to perform because of hazards reasonably to be apprehended from such employment.

(d) On the other hand, an employer will be deemed to engage in an unlawful employment practice if he refuses to employ or promote a woman in order to avoid providing a benefit for her required by law—such as minimum wage or premium overtime pay.

(e) Where state laws or regulations provide for administrative exceptions, the Commission will except an employer asserting a bona fide occupational qualification pursuant to this paragraph to have attempted, in good faith, to obtain an exception from the agency administering the state law or regulation.

Ibid.

²⁰ Id. at E-2.

²¹ EEOC Releases Reply to Inquiry on Termination of Employee After Marriage, BNA Daily Labor Report No. 215, Nov. 5, 1965, p. A-9.

²² BNA Daily Labor Report, supra note 18, at E-2.

Help Wanted Advertising may not indicate a preference based on sex unless a bona fide occupational qualification makes it lawful to specify male or female.

When a newspaper or other publication classifies such advertising in separate "Male," "Female" and "Male and Female" columns, advertisers will most clearly avoid an indication of preferences by using the "Male and Female" column. However, for the convenience of the readers, advertisers covered by the Civil Rights Act of 1964 may place advertisements for jobs open to both sexes in columns classified "Jobs of Interest—Male" or "Jobs of Interest—Female" provided (1) the advertisement specifically states that the job is open to males and females and (2) substantially the following notice appears in a prominent place on each page on which the classified advertising appears:

NOTICE: Many listings in the "male" or "female" columns are not intended to exclude or discourage applications from persons of the other sex. Such listings are for the convenience of readers because some occupations are considered more attractive to persons of one sex than the other. Discrimination in employment because of sex is prohibited by 1964 Federal Civil Rights Act with certain exceptions [and by the law of _____ State]. Employment agencies and employers covered by the Act must indicate in their advertisement whether or not the listed positions are available to both sexes.

Abbreviations, such as M & F, may be used to indicate that males and females may apply, if such abbreviations are readily comprehensible or are explained in the notice.

In the absence of such a statement in the advertisement, readers may assume

TITLE VII: COVERAGE AND COMMENTS

guidelines on help wanted advertising which are covered under Title VII.²³ And finally, in partial answer to the problem of the Bennett provision, which has left the interrelationship between the Equal Pay Act and the prohibition of sex discrimination in Title VII very much in doubt, the Commission has also released its interpretation of section 703(h).²⁴

Although Chairman Roosevelt of the Equal Employment Opportunity Commission has indicated that complaints under the sex provisions of Title VII only comprise about fifteen per cent of the total complaints received by the Commission, and that the Commission will concentrate the majority of its attention upon employment related racial discrimination,²⁵ it remains a serious waste to have the time and effort of the Commission, its investigators and legal staff used for purposes other than the central theme of the law. Further, the emphasis which industry, labor and the employment agencies have placed upon the sex provisions and their application have tended to focus a disproportionate amount of concern on these provisions at the expense of the racial requirements.

II. CONCLUSIONS AND RECOMMENDATIONS

Although I am pessimistic about the overall effects of Title VII and obviously am unhappy with its coverage of sex discrimination, this in no way suggests that I view racial discrimination in the world

that the advertiser prefers applicants of a particular sex, and the Commission will regard the advertisement as an expression of a preference within the meaning of Section 704(b) of the 1964 Civil Rights Act.

The Commission intends to review the operation of this guideline in the light of experience to ensure that male and female classifications in help wanted advertising do not operate to limit employment opportunity.

Ibid.

²³ Equal Employment Opportunity Commission Issues Guidelines for Help Wanted Advertising, BNA Daily Labor Report No. 183, Oct. 22, 1965, pp. A-6 to A-7:

[T]he standards of "equal pay for equal work" set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII. However, it is the judgment of the Commission that the employee coverage of the prohibition against discrimination in compensation because of sex is coextensive with that of the other prohibitions in Section 703, and is not limited by Section 703(h) to those employees covered by the Fair Labor Standard Act.

Accordingly, the Commission will make applicable to equal pay complaints filed under Title VII the relevant interpretations of the Administrator, Wage and Hour Division, Department of Labor. These interpretations are found in 29 Code of Federal Regulations, Part 800.119-800.163. Relevant opinions of the Administrator interpreting "the equal pay for equal work standard" will also be adopted by the Commission.

The Commission will consult with the Administrator before issuing an opinion on any matter covered by both Title VII and the Equal Pay Act.

Ibid.

²⁴ BNA Daily Labor Report, supra note 18, at E-3.

²⁵ The Wall Street Journal, Nov. 23, 1965, p. 3, col. 2.

of work as not being subject to effective legislation, nor am I reluctant to suggest additional legislation.

Although I support in principal the primary intent of H.R. 11065,²⁶ I cannot agree that the continued coverage of other than race or color is appropriate. Notwithstanding this major exception, the Equal Employment Opportunity Commission obviously must have authority beyond that of mediation and persuasion, so that the inclusion in this bill of authority for the Equal Employment Opportunity Commission to issue cease and desist orders is certainly an appropriate step.

However, in my judgment, even this is not enough to provide the necessary job opportunities to the majority of American Negroes. To obtain this end, there appear two, and only two, alternatives—short of further social insurrection.

First, the federal government could simply require private industry and labor unions to accept substantial *quotas* of Negroes—trained or untrained—into the working force and training programs as a necessary step to preserve the national welfare. I am well aware of the constitutional limitations to such a proposal, but am convinced that such legislation, properly framed, would stand a reasonable chance of success, given the present civil rights disposition of the Supreme Court.

Or, certainly more acceptable, the Government can attempt to convince industry and the unions that it is absolutely necessary for them to assume the employment training responsibility of the Negro. The Government could offer some type of tax or other incentive to industry to accomplish this. The Human Investment Act²⁷ is one such suggestion, as is the British Industrial Training Act of 1964.²⁸ Negative incentives could be imposed upon the unions. For instance, withdrawal of protection under the National Labor Relations Act is one possibility. Legislation framed and publicized with these objectives, when combined with an amended Title VII, could, hopefully, make a substantial contribution within the required short run to allow our educational endeavors at the grade and high school levels to "bear fruit." Without *immediate* consideration of such alternatives there is little reason to be optimistic, for I am convinced that Title VII in no substantial way alters our present "collision course" with social disaster.

²⁶ H.R. 11065, 89th Cong., 1st Sess. (1965).

²⁷ S. 2509, H.R. 10934, 89th Cong., 1st Sess. (1965).

²⁸ Eliz. 2, c. 16.