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TITLE VII: RELATIONSHIP AND EFFECT ON STATE ACTION

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I. CONCURRENT STATE REGULATION

The most important substantive provisions of the Civil Rights Act of 1964 are Title II, dealing with public accommodations, and Title VII, concerning discrimination in employment affecting interstate commerce. And perhaps the most significant aspect of Title VII is the recognition, in section 708, of the states' basic authority to continue regulating discrimination in employment affecting interstate commerce. Section 708 provides:

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

It is doubtful that this provision was necessary to preserve the application of state laws to interstate commerce. For instance, a recent Supreme Court decision,[1] involving the applicability of the Colorado Fair Employment Practices Law[2] to employment practices of an interstate air carrier, indicates that such laws would be applicable to interstate commerce unless they were in direct conflict with federal law, denied rights secured by federal law, or imposed an obstacle to the effectiveness of federal law. The Court stated that "to hold that a state statute identical in purpose with a federal statute is invalid under the Supremacy Clause, we must be able to conclude that the purpose of the federal statute would to some extent be frustrated by the state statute."[3]

The Court also indicated that, in the absence of an express or implied congressional intent to exclude state legislation, the application of a state law barring discrimination employment in interstate commerce would be constitutional. However, section 708 is valuable, if not necessary, because it contains Congress' clear declaration of

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1 Colorado Anti-Discrimination Comm'n v. Continental Airlines, Inc., 372 U.S. 714 (1963).

2 Colo. Rev. Stat. Ann. § 80-24-6 (Supp. 1960).

3 Colorado Anti-Discrimination Comm'n v. Continental Airlines, Inc., supra note 1, at 722.

intent not to pre-empt the field of antidiscrimination legislation applying to employment affecting interstate commerce.[4] One important aspect of this clause will be seen in our later discussion of bona fide occupational qualifications.[5]

It should be noted that section 708 does not prevent a more stringent ban on discrimination under state law regulating interstate commerce than is provided by federal law. Thus, state laws proscribing discrimination based on age or ancestry, not made unlawful by section 708, may be applied to industries in interstate commerce.

Other provisions of Title VII also manifest the requirement that an individual first resort to state and local laws. Section 706(b) requires that a person in a state or locality having a fair employment practice law prohibiting the act or practice alleged to violate the federal law must first file a complaint under the state or local law. Section 706(c) imposes a similar obligation with respect to a charge filed by a member of the Federal Commission.

Of course the first prerequisite to the requirement of prior resort to state or local law is the existence of such a law proscribing a practice also prohibited by federal law. The table below[6] shows the significant provisions of the various state fair employment practice laws. The three principal unlawful practices which both the federal act and state laws proscribe are discriminatory practices by employers, employment agencies and labor organizations.[7] Other similarities between the federal act and the state laws also become apparent from an inspection of the table.[8]

The federal act provides that a bona fide occupational qualification based upon religion, sex or national origin shall not be an unlawful practice.[9] Some of the states provide such an exception under their acts, and others do not specify religion, sex or national origin as the sole exceptions, although it is possible that the courts or commissions in these states would not accept as bona fide any occupational qualification based upon race. In such an event, the result would be the

[4] See 110 Cong. Rec. 16003 (1964) (comparative analysis of the Civil Rights Bill).

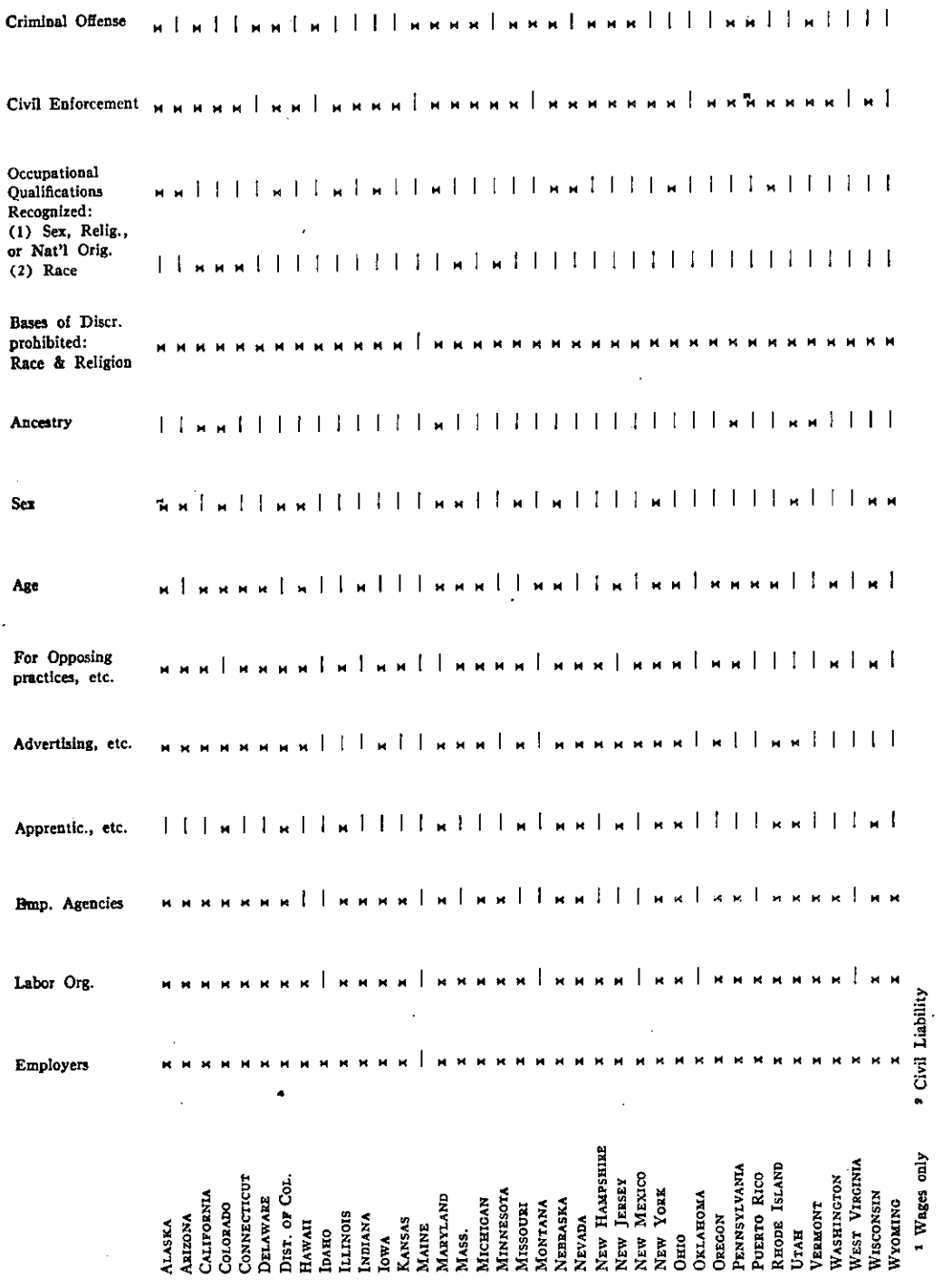
[5] See p. 526 infra.

[6] See Table on p. 527.

[7] Civil Rights Act of 1964, §§ 703(a)-(c), 78 Stat. 241 (1964), 42 U.S.C. § 2000e-2 (1964) [hereinafter cited by section only].

[8] E.g., the federal act and many state laws prohibit discrimination with respect to apprenticeship and training programs. § 703(d). Similarly, many state acts have provisions which make it unlawful for employers, labor unions and employment agencies to discriminate against any person because he has opposed any practice made unlawful by the law of the jurisdiction involved, or has participated in the prosecution of a charge under that law. § 704(a). Finally, both the federal and many state laws proscribe the practice of printing or publishing any advertisement or notice relating to employment or referral or classification for employment indicating a discriminatory preference. § 704(b).

[9] § 703(e).


Criminal Offense
Civil Enforcement
Occupational Qualifications Recognized: (1) Sex, Relig., or Nat'l Orig. (2) Race
Bases of Discr. prohibited: Race & Religion
Ancestry
Sex
Age
For Opposing practices, etc.
Advertising, etc.
Apprentic., etc.
Emp. Agencies
Labor Org.
Employers
Alaska
Arizona
California
Colorado
Connecticut
Delaware
Dist. of Col.
Hawaii
Idaho
Illinois
Indiana
Iowa
Kansas
Maine
Maryland
Mass.
Michigan
Minnesota
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Nevada
New Hampshire
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New Mexico
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Ohio
Oklahoma
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Rhode Island
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same as under the federal law. At any rate, section 708 precludes the application to interstate commerce of a state law permitting discrimination based on an alleged bona fide occupational qualification of race or color.

In a state which recognizes race or color as a "bona fide occupational qualification," the victim of discrimination on that ground should not be required to resort to state proceedings prior to filing a charge with the Federal Commission. But, the question has not been tested, and it is possible that a prior litigation under the state act would remain mandatory.

There are, however, different ways in which a "bona fide occupational qualification" may constitute an excuse for discrimination under various state acts. For example, this is a common exception to the unlawful practice of printing, publishing or circulating a statement, advertisement or publication expressing a preference, limitation, specification or discrimination on the enumerated unlawful grounds. In some states a "bona fide occupational qualification" is an exception to the practices made unlawful for employers, labor organizations and employment agencies. However, at least one state, Michigan, provides in its act such an exception only with respect to employers' practices, and not those of labor organizations and employment agencies.[10]

II. Delay in Federal Proceedings

Section 706(b) provides that no complaint may be filed under the Civil Rights Act "before the expiration of sixty days after proceedings have been commenced under the state or local law, unless such proceedings have been earlier terminated." A period of 120 days is provided for the first year after the effective date of the state or local law. Section 706(b) also provides that if the state or local law requires more for the commencement of proceedings than the filing of a written and signed statement of the facts supporting the complaint, the requirement of commencing state proceedings for the purpose of beginning the sixty or 120 day period shall be met by the filing of such a signed statement of facts by registered mail.

This latter provision is an anomaly for which no satisfactory explanation has been found. Its effect seems to be to require a complainant in jurisdictions having more onerous complaint procedures to file a statement which may be insufficient to initiate the state or local proceedings. The complainant would then be required to wait sixty meaningless days before filing with the Federal Commission under Title VII. Furthermore, his complaint would probably be insufficient to toll the running of the state or local statute of limitations against his

[10] Mich. Comp. Laws § 423.307 (Mason's 1961 Supp.).

remedy for the unlawful practice involved. However, few of the existing state fair employment practice laws require complaint procedures significantly more demanding than that set forth in section 706(b), and the problem thus appears to be more academic than real.[11]

It seems questionable that the Federal Commission should accept as commencement of the state proceedings a signed statement of facts which was not verified as required by the state's law, as a literal interpretation of section 706(b) would require. This is especially true in cases where a state criminal statute is violated, in which a literal interpretation of section 706(b) would produce the ludicrous situation of satisfaction of the requirement of prior resort by the meaningless registered mailing of a signed statement of facts which would not be effective to initiate the misdemeanor charges, followed by an unproductive delay of sixty days. Here again, it would be more practical for the federal statute to simply omit the requirement of resort to state proceedings where the burden of initiating them is more onerous than the filing of the equivalent of a signed statement of facts.

The purpose of the provision under consideration was made clear in the then Senator Humphrey's remarks on the floor of the Senate:

> Section 706(b) provides that in a State with a nondiscrimination law the individual must first follow State procedures for 60 days (or in some cases, 120 days). However, to avoid the possible imposition of onerous state requirements for initiating a proceeding, subsection (b) provides that to comply with the requirement of prior resort to the State agency, an individual need merely send a written statement of the facts to the State agency by registered mail.[12]

While the congressional purpose is thus made clear, it is submitted that an extraordinary method was chosen to accomplish it. It would have been more reasonable to provide that, in the presence of requirements more stringent than the standard set, no prior resort to state procedures need be had. Secondly, the standard of a signed statement fails to agree with the existing reasonable requirements of verification and form in most of the state fair employment practice laws. However, it is recognized that, except for the somewhat ludicrous situation suggested by the above discussion, section 706(b) may be expected to encourage states and cities to adopt less stringent filing

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[11] Probably the most onerous state requirement is contained in § 7 of the Utah Anti-discrimination Act of 1965, which requires the complainant to show his qualifications for employment or the lack of cause for dismissal. The federal law seems to justify disregard of this requirement for the purposes of prior resort to state proceedings to commence the running of the sixty or 120 day waiting period.

[12] 110 Cong. Rec. 12297 (1964).

requirements and to speed the processing of complaints with the objective of completion within sixty days.

In any event, complainants would be well advised to initiate state or local civil proceedings by complaints which meet the requirements of the fair employment practice law involved in order to avoid possibly sacrificing state or local remedies merely to gain the benefit of federal law.

III. Practice of Federal Commission

In practice, the requirement of prior resort to state proceedings has not been followed literally by the Federal Commission. The Commission will accept a complaint alleging a discriminatory practice occurring in a state having a fair employment practice law without requiring the complainant to go through the state proceedings as a literal interpretation of section 706(b) would require. The Commission then sends the state agency, by registered mail, a copy of the federal complaint. This is regarded by the Commission as starting the running of the sixty or 120 day waiting period and, thus far, no state has rejected the copy of the federal charge as insufficient to initiate state proceedings.

Officials at the Commission advised this author that in the event a state agency rejects the copy of the federal charge as insufficient to start state proceedings, the Federal Commission will simply regard the state proceedings as having been terminated and will proceed to process the charge. In this manner, a complainant will receive more speedy attention by the Federal Commission than he could have expected under a literal application of section 706(b).

The Federal Commission, in attempting to develop an understanding with states having working fair employment practice laws, has sent a questionnaire in which the state agencies involved are asked to furnish appropriate information as to the manner in which these laws are interpreted and applied in practice. On this basis, the Commission has been able to determine the state to which it will defer charges filed with the Commission under the practice discussed above. Future questionnaires should include reference to the question of recognition of bona fide occupational qualifications based on race with respect to states where this is possible under a literal interpretation of that state's fair employment practice act.

It is appropriate to note here that section 709(b) authorizes the Commission to agree with states that it will refrain from processing charges in certain classes of cases. No such agreements have yet been made by the Commission and it is suggested that none should be made, even though section 709(b) permits the termination of an agreement in the Commission's discretion when it no longer promotes the

enforcement of Title VII. There is already sufficient deference to state enforcement in the practice outlined above, and formal agreements could impose further delays in securing remedies for specific practices in addition to those which are inherent in the system. The Federal Commission should continue to follow liberal practices to encourage state processing of complaints without burdening this system with formal deference to state procedures under such agreements.

In criminal matters, the Commission may disregard the requirement of prior resort to criminal sanctions and refuse to defer to state or local enforcement of criminal sanctions in instances where the agency involved in such action is a prosecuting attorney, rather than a conventional fair employment practice commission or a similar agency.[18] Adoption of this practice would seem contrary to the literal directive contained in section 706(b) that "no charge may be filed by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the state or local law." However, the staff of the Commission is said to interpret section 706(b) in the light of sections 709 and 716, with the result that "state or local authority" means only those authorities charged with the administration of fair employment practice laws or engaged in furthering equal employment opportunity.

IV. Opportunities for Defense

One possible result of adopting a policy of disregarding those literal requirements of Title VII demanding prior resort to state or local proceedings could be to make available to a person accused of an unlawful practice under the federal law a defense on the ground that the federal proceedings were not properly instituted. The accused might thus assert that, when criminal proceedings had not been sought at the local level, the federal complaint was premature. Furthermore, an accused might properly argue that the Commission is given no discretion to decide which state or local fair employment practice programs meet the "prior resort" requirements of section 706(b). If the state or local law literally prohibits the unlawful practice alleged in a federal complaint and provides for civil or criminal proceedings, then section 706(b) requires prior resort to those proceedings. If the Commission rejects these contentions and follows the practices and interpretations already discussed, an accused should have a valid defense to assert in any enforcement proceedings brought in a federal court under section 706(e).

Similarly, in states accepting the signed statement of facts author-

[18] 6 BNA Lab. Policy & Prac. 451:9, :10 (March 3, 1966).

ized by section 706(b) as sufficient to institute state proceedings, an accused may have a legitimate response that the state or local proceedings were not properly instituted, since the law of that jurisdiction requires a "more onerous" form of complaint. Acceptance of such defenses would lead to the loss by complainants of state or local remedies because the signed statement fails to stop the running of statutes of limitations. The assertion of such procedural defenses to federal, state or local proceedings may cause even further delays in the enforcement of rights secured by the federal act.

V. Civil Suits

The provision for court enforcement in the event that the Commission is unable to obtain voluntary compliance represents a further delay in enforcement of the federal law. After a charge is filed by the aggrieved person, or after the expiration of the period when a case is referred to a state on the basis of a charge filed by a member of the Commission, the Commission is allowed thirty days (which it may extend to sixty days) to obtain voluntary compliance. A civil action may be filed by an aggrieved person within thirty days after being notified by the Commission of its failure to obtain voluntary compliance. The court in which such a civil action is filed may, upon request and in its discretion, stay further proceedings for an additional period of not more than sixty days pending the termination of state or local proceedings or further efforts by the Federal Commission to obtain compliance.

VI. Conclusion

Because Congress intended to encourage state enforcement of rights against discrimination, delay of at least six months from the time a complaint is first filed with the Federal Commission is made possible in obtaining remedies for unlawful practices. Sixty days will almost automatically be involved in the cases arising in states to which the Commission defers. Sixty days will be exhausted in attempts by the Federal Commission to obtain "voluntary" compliance. Sixty additional days will be set aside by the federal court, which possesses the only authority to enforce federal rights created under the Civil Rights Act.

These six months are computed without allowance for time between the unlawful practice and filing the charge with the Commission, and without allowance for up to thirty days permissible time between the termination of one sixty-day period and the legal act required to start the next one. Thus, the normal six month delay can easily be extended to nine months from the date of the unlawful act or practice to

the date upon which a federal district court would docket the matter for enforcement of the federal rights.

With an effective trial de novo in the district court, even with expeditious service, the enforcement of the federal rights can easily run well over a year, without allowance for appeals. It would not be surprising to find that most complainants are satisfactorily employed and have lost interest in their complaint by the time their rights are enforced under the new federal law. One might easily conclude that the rights secured by Title VII will be better served in a state without a fair employment practice law.

Thus, while the concept of encouraging states and political subdivisions of states to police discrimination in employment is valid and praiseworthy, it seems doubtful that the means chosen in Title VII will achieve the desired end. It is submitted that it would have been simpler, more practical and more promising to have afforded a choice of forums and remedies, rather than requiring prior resort to state laws. The Federal Commission may be able to overcome some of the problems discussed in this article, but the cause of equal opportunity would be better served by a federal act more concerned with exercising federal power than with deference to state and local action.