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Elimintation of Sexually Segregated Employment Ads: A Step Toward Equal Employment Opportunity

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ELIMINATION OF SEXUALLY SEGREGATED EMPLOYMENT ADS: A STEP TOWARD EQUAL EMPLOYMENT OPPORTUNITY

[A]sexual employment advertising column headings will aid in guaranteeing women their fundamental right to be hired and judged on the basis of individual characteristics and capabilities.[1]

The number of women in the labor force has grown substantially each decade since the turn of the century.[2] For example, the 1970 census showed 32 million women among the working force, an increase of almost forty per cent over the 1960 poll of 23 million.[3] Yet statistics from the same ten-year period indicated a noticeable gap between salaries of men and women,[4] even among the college educated.[5] Such data illustrates the correlation between the caliber of the job, analyzed in terms of economic rewards and upward mobility, and the sex of the individual who will most likely fill that position.[6]

To discourage hiring practices that led to this type of class discrimination, legislation such as the Civil Rights Act of 1964[7] was enacted, indicating a congressional desire to make employment dependent upon bona fide qualifications for the job rather than considerations of race, religion, or sex. Provisions particularly applicable to employers and employment agencies have been effective in reducing discrimination when there are equally qualified applicants for available jobs.[8] Yet the circulation of employment advertisements, possibly directed to an unduly selective audience, does not seem to be as carefully supervised by the Civil Rights Act.[9]

Notice to the public, commonly accomplished through the newspaper classified section, certainly performs the initial task of alerting potential employees to those jobs available to persons with particular qualifications. But a format that divides jobs into those appropriate for women and those appropriate for men assures that discrimination will be built into the employment system.[10] For example, placing a particular job under a heading "Help

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1. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 4 Pa. Commw. 448, 463, 287 A.2d 161, 169 (Commw. Ct. 1972).

2. 28 CONGRESSIONAL Q. ALMANAC 203 (1972).

3. *Id.*

4. *Id.* The 1970 census showed 75% of the women working full time were earning less than $6,000 per year, an income bracket claiming fewer than one-third of the men in the full-time labor force.

5. *Id.* In 1969 there was a $5,500 gap between the median income of college-educated men and women.

6. *Hearings,* 91st Cong., 2d Sess., pt. 2, at 974 (1970) (paper submitted by Hawkins, *The Odds Against Women*); *id.* at 1049 (paper submitted by Stafford, *Women on the March Again—Are They Being Discriminated Against in White-Collar Federal Jobs?*).

7. 42 U.S.C. §§2000a *et seq.* (Supp. II, 1972), *amending* 42 U.S.C. §§2000a *et seq.* (1970).

8. 42 U.S.C. §§2000e-2, -3 (Supp. II, 1972), *amending* 42 U.S.C. §§2000e-2, -3 (1970).

9. 42 U.S.C. §2000e-3(b) (Supp. II, 1972), *amending* 42 U.S.C. §2000e-3(b) (1970).

10. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, CCH EMP. PRAC. DEC. ¶8154, at 6492 (Allegheny County, Pa. C.P. 1971); *Hearings,* 91st Cong., 2d Sess., pt. 2,

Wanted – Male" can effectively discourage women from applying due to a fear their time will be wasted by an uninterested employer.[11] The result is that sexually segregated help wanted ads not based on a bona fide occupational qualification further the sexual discrimination prohibited by the Civil Rights Act.

PERTINENT TITLE VII PROVISIONS

The basic design of title VII of the Civil Rights Act[12] was to prohibit job discrimination in those industries engaged in commerce and employing fifteen or more persons,[13] while also supplementing similar state legislation. As a result, state laws have remained effective measures of enforcing an employer's responsibility not to discriminate, since such laws are operative unless in conflict with title VII.[14]

In actions requesting the court to enjoin the segregation of help wanted ads according to sex, a few provisions of title VII have been of major importance. Section 2000e-3(b) specified it would be an unlawful employment practice for an employer or employment agency (or an agent thereof) to print or cause to be published any employment advertisement indicating a preference due to sex where sex was not a bona fide occupation qualification (bfoq)[15] for employment. The definitional section of title VII[16] provided further guidance by defining an employment agency as a person[17] engaging regularly in procuring employees for an employer or locating opportunities for employees to work. The question focused upon by ensuing litigation was whether a newspaper could appropriately be considered an employment agency (or its agent) subject to the aforementioned prohibitions.

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at 891 (1970) (paper submitted by Bem & Bem, *Sex Segregated Want Ads: Do They Discourage Female Job Applicants?*); 228 BNA FAIR EMPL. PRAC. SUMMARY OF LATEST DEVELOPMENTS (Nov. 15, 1973); Boyer, *Help-Wanted Advertising – Everywoman's Barrier*, 23 HASTINGS L.J. 221, 223 (1971).

11. Brush v. San Francisco Newspaper Printing Co., 315 F. Supp. 577, 579 (N.D. Cal. 1970); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, CCH EMPL. PRAC. DEC. ¶8154, at 6492 (Allegheny County, Pa. C.P. 1971).

12. 42 U.S.C. §§2000e to -17 (Supp. II, 1972), *amending* 42 U.S.C. §§2000e to -17 (1970).

13. 42 U.S.C. §2000e(b) (Supp. II, 1972), *amending* 42 U.S.C. §2000e(b) (1970).

14. 42 U.S.C. §2000e-7 (1970), *as amended*, 42 U.S.C. §2000e-7 (Supp. II, 1972).

15. A bona fide occupational qualification (bfoq) is an exception to the provisions of title VII, which prohibit discrimination on the basis of sex. For example, if an employer correctly classifies a job as one requiring a male rather than a female, and on that basis fills the job with a male applicant, title VII will not interfere with the employer's actions. However, the bfoq must first be shown as *reasonably necessary* to the normal operation of the particular business. Similarly, sex will be considered a bfoq for the purpose of authenticity or genuineness where an actress or a restroom attendant is required. The burden of proof in establishing the existence of a bfoq is on the employer, often in defense to actions charging discrimination. In addition, the Equal Employment Opportunity Commission (EEOC) has indicated that the bfoq exception based on sex needs to be interpreted narrowly so as to avoid denying employment opportunities to one sex. 1 CCH EMPL. PRAC. GUIDE ¶¶1262, 1264 (1973), 29 C.F.R. §1604.2 (1973).

16. 42 U.S.C. §2000e (Supp. II, 1972), *amending* 42 U.S.C. §2000e (1970).

17. 42 U.S.C. §2000e(a) (Supp. II, 1972), *amending* 42 U.S.C. §2000e(a) (1970).

To maintain compliance with the provisions of title VII, an Equal Employment Opportunity Commission (EEOC)[18] was established to serve as a regulatory agency.[19] Initially, the enforcement role of the EEOC was confined to that of amicus curiae,[20] but its power has recently been expanded to include civil actions against parties unresponsive to attempted conciliation.[21] As an administrative agency the EEOC was empowered to promulgate interpretive rules pursuant to title VII,[22] one of which was particularly applicable to sexually segregated help wanted advertising. The force and effect to be given this regulation, which stated explicitly that advertising in columns classified on the basis of sex would be considered an expression of discrimination prohibited by the Act,[23] became the subject of subsequent litigation.[24]

TITLE VII AND "HELP WANTED — FEMALE"

The practice of placing employment ads in the newspaper's classified section under columns headed "Help Wanted — Female" or "Help Wanted — Male" was challenged in 1970 in the case of *Brush v. San Francisco Newspaper Printing Co.*[25] Even though the female plaintiff's occupation did not require a particular sex as a bfoq for employment, while unemployed, she found jobs of interest resembling her previous employment were listed under "Help Wanted — Male." The plaintiff failed to apply for those jobs but alleged that she would have, had their categorization in the classifieds not indicated a preference for males. Consequently, she sought a declaratory judgment and injunction against the newspaper's further use of sexually segregated ads where no bfoq was appropriate.

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18. 42 U.S.C. §2000e-4 (Supp. II, 1972), *amending* 42 U.S.C. §2000e-4 (1970).
19. 42 U.S.C. §2000e-5 (Supp. II, 1972), *amending* 42 U.S.C. §2000e-5 (1970).
20. 42 U.S.C. §2000e-5 (1970), *as amended,* 42 U.S.C. §2000e-5 (Supp. II, 1972).
21. 42 U.S.C. §2000e-5(f)(1) (Supp. II, 1972), *amending* 42 U.S.C. §2000e-5(f)(1) (1970).
22. 42 U.S.C. §2000e-12 (1970), *as amended,* 42 U.S.C. §2000e-12 (Supp. II, 1972).
23. The text of the job opportunities advertising guideline is: "It is a violation of title VII for a help-wanted advertisement to indicate a preference, limitation, specification, or discrimination based on sex unless sex is a bona fide occupational qualification for the particular job involved. The placement of an advertisement in columns classified by publishers on the basis of sex, such as columns 'Male' or 'Female,' will be considered an expression of a preference, limitation, specification, or discrimination based on sex." 29 C.F.R. §1604.5 (1973). There is within the guideline no clear indication that its terms should be applicable merely to employers and employment agencies or that newspapers are to be excluded from its coverage. For the court's interpretation of this guideline, see text accompanying note 36 *infra.*
24. American Newspaper Ass'n v. Alexander, 294 F. Supp. 1100 (D.D.C. 1968), where the court found that the job opportunities advertising guideline, although reasonable and within the authority of the EEOC to promulgate, did not have the force and effect of law; Greenfield v. Field Enterprises, Inc., 4 CCH EMPL. PRAC. DEC. ¶7763, at 5933 (N.D. Ill. 1972), held the job opportunities advertising guideline applicable to those persons covered by title VII and thus not newspapers.
25. 315 F. Supp. 577 (N.D. Cal. 1970), *aff'd,* 469 F.2d 89 (9th Cir. 1972), *cert. denied,* 410 U.S. 943 (1973).

The district court in *Brush* focused on the title VII definition of an employment agency[26] as well as the statutory provision prohibiting an employment agency from printing or publishing any employment advertisement indicating a preference for a certain sex where no bfoq existed.[27] Strictly construing the term "employment agency"[28] the court ruled that an employment agency "regularly" undertaking personnel placement activity included "only those engaged to a significant degree in that kind of activity *as their profession or business,*"[29] and not newspapers.[30] Aware that this was a case of first impression the court stated that its decision was mandated by the statutory language, suggesting in conclusion: "[I]f . . . the legislation would be improved by inclusion of newspapers, such inclusion must be accomplished by the Congress – not by the courts."[31]

Approximately a month prior to the 1972 amendments to title VII, sexually segregated help wanted ads were again challenged,[32] this time by six female plaintiffs who similarly sought an injunction against the defendant newspaper publisher, prohibiting the listing of help wanted ads under male and female headings. The *Brush* decision in 1970 had determined that a newspaper was not to be considered an employment agency within the scope of title VII. Nevertheless, the plaintiffs in *Greenfield v. Field Enterprises, Inc.*[33] asserted that even if a newspaper were not an employment agency within title VII it acted as an agent for an employment agency and therefore was covered under the statutory definition.[34] Deciding to the contrary, the court found that an

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26. 42 U.S.C. §2000e(c) (1970), *as amended,* 42 U.S.C. §2000e(c) (Supp. II, 1972).

27. 42 U.S.C. §2000c-3(b) (1970), *as amended,* 42 U.S.C. §2000e-3(b) (Supp. II, 1972).

28. The plaintiff had asserted that the statutory language defining an employment agency in §2000e(c) as "regularly undertaking . . . to procure employees for an employer or to procure for employees opportunities to work for an employer" was applicable to newspapers in their role of dispensing employment information through the classified ads. Once categorized as an employment agency the newspaper would be in violation of title VII if the segregated help wanted format continued.

29. 315 F. Supp. at 580.

30. The sparse legislative history on this point did support the court's finding that a newspaper was not meant to be categorized as an employment agency under title VII. The House Judiciary Committee commented that the prohibitions in §2000e-3(b) did not require newspapers to exercise any control or supervision over the advertisements or notices published by them. This indicated that Congress did not intend to impose upon a newspaper the obligations of an employer or an employment agency to ascertain an unlawful sex specification. 2 U.S. CODE CONG. & AD. NEWS 2403 (1964). By exacting a less stringent standard for newspapers, Congress manifested an intent that newspapers were to be distinguished from employment agencies and thus not subject to provisions regulating the conduct of such agencies. Also, an interpretive memorandum prepared by the Senate floor managers of the Civil Rights Act of 1964 stated that the §2000e-3(b) prohibition against discriminatory advertising by employers, employment agencies, and labor organizations did not extend to the newspapers but rather to the organization sponsoring the ad. 110 CONG. REC. 7213 (1964).

31. 315 F. Supp. at 583.

32. Greenfield v. Field Enterprises, Inc., 4 CCH EMPL. PRAC. DEC. ¶7765 (N.D. Ill 1972).

33. *Id.*

34. 42 U.S.C. §2000e(c) (Supp. II, 1972), *amending* 42 U.S.C. §2000e(c) (1970).

agent of an employment agency must be engaged in the same activity as that agency. By publishing classifieds the newspaper provided a vital link between employers and potential employees, thus furthering the business of employment agencies, but such conduct did not of itself establish a newspaper as an agency.[35] Thus, efforts to bring a newspaper within those groups covered by section 2000e-3(b) were uniformly defeated.

The court also considered the EEOC's job opportunity advertising guideline,[36] which prohibited the use of sexually segregated ads but failed to clearly indicate the scope of its coverage. Noting that the promulgated guideline was an interpretation of the Act, especially section 2000e-3(b), the court held it was applicable only to persons covered by the statutory restrictions: employers, employment agencies, and labor organizations. Since the newspaper did not fit into any of the aforementioned categories, compliance with the guideline was not deemed necessary.

Both the *Brush* and *Greenfield* courts, in recognizing the general intent of title VII to eliminate employment discrimination, expressed the need for newspapers to be included among those explicitly prohibited from publishing discriminatory employment advertisements. For example, the *Greenfield* court suggested that the position of the plaintiff reflected the prevailing trend toward equality of employment opportunities and that serious consideration be given to revising the structure of classified ads to alleviate unwarranted sex designations.[37] Nevertheless, the 1972 amendments to title VII failed to make the needed addition. Perhaps Congress believed state activity in this area was more appropriate or that voluntary compliance by newspapers would be forthcoming.[38] In addition, there may have been a reluctance to thrust upon the newspaper the responsibility for determining whether employers were justified in claiming a bfoq and requesting sexually segregated advertising.[39] In all likelihood, however, Congress probably preferred to avoid the then undecided constitutional issue of whether the press, clothed with first amendment protection, could be prohibited from using a specific format for help wanted advertisements. If the latter is the case, the recent United States Supreme Court decision of *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,[40] which found that the format of classified ads could constitutionally be regulated so as to eliminate discriminatory effects, might influence Congress to amend title VII including newspapers within the provisions of section 2000e-3(b).[41]

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35. 4 CCH EMPL. PRAC. DEC. ¶7763, at 5933 (N.D. Ill. 1972).

36. 29 C.F.R. §1604.5 (1973); see note 23 *supra*.

37. 4 CCH EMPL. PRAC. DEC. ¶7763, at 5934 (N.D. Ill. 1972).

38. Passaic Daily News v. Blair, 63 N.J. 474, 486, 308 A.2d 649, 654 (1973); *see* Boyer, *supra* note 10, at 224, 226.

39. Passaic Daily News v. Blair, 63 N.J. 474, 490, 308 A.2d 649, 657 (1973); National Organization for Women v. Gannett Co., Inc., 40 App. Div. 2d 107, 116, 338 N.Y.S.2d 570, 579 (4th Dep't 1972).

40. 413 U.S. 376 (1973).

41. The Pittsburgh Press argued that the restraints imposed upon its classified ad structure by §8 of the Pittsburgh Ordinance interfered with its editorial judgment and was in

STATE VIEWS OF SEXUALLY SEGREGATED EMPLOYMENT ADS

Although under title VII the challenges to sexually segregated help wanted ads have been ineffective, a similar effort has resulted in greater success on a state-by-state basis. The landmark case initiated by the National Organization for Women (NOW) against the Pittsburgh Press[42] asserted violation of the Pittsburgh Human Relations Ordinance.[43] In particular, section 8(j)[44] of the ordinance designated as unlawful the participation of any person in the publication by an employer or employment agency of a job advertisement that discriminated sexually where no bfoq existed.[45] Evidence showing that males were given preference in one segregated column of job listings while females were preferred in the complementary set of listings convinced the trial court that with the aid of the Pittsburgh Press, employers and employment agencies were able to defeat the policy of the Human Relations Ordinance[46] to prevent job discrimination.[47]

In an appeal to the Pennsylvania Commonwealth Court[48] the Pittsburgh Press defended its method of arranging help wanted ads as convenient for the reader. It also asserted that a disclaimer preceding the ads indicated that employers were not to discriminate on the basis of sex due to the placement of ads under either the male or female heading and that this relieved the Pittsburgh Press of any responsibility for resultant discrimination because of those listings. The court found, however, that the disclaimer operated merely as a screen for discrimination and was not an acceptable device to avoid compliance with the spirit of the legislation.[49] Affirming the decision below, the Common-

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violation of its first amendment right to publish the ads in the manner it saw fit. However, the United States Supreme Court ruled to the contrary by finding that job advertisements were classic examples of commercial speech beyond first amendment protection and thus subject to state regulation.

42. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 3 CCH EMPL. PRAC. DEC. ¶8154 (Allegheny County, Pa. C.P. 1971), *aff'd*, 4 Pa. Commw. 448, 287 A.2d 161 (1972), *aff'd*, 413 U.S. 376 (1973).

43. PITTSBURGH, PA., HUMAN RELATIONS ORDINANCE §8 (1969).

44. Section 8(j) provides that it will be an unlawful employment practice, except where based upon a bona fide occupational exemption certified by the Commission, "for any person, whether or not an employer, employment agency or labor organization, to aid . . . in the doing of any act declared to be . . . unlawful . . . by this ordinance."

45. *See* PITTSBURGH, PA., HUMAN RELATIONS ORDINANCE §8(a) (1969).

46. The Pittsburgh Human Relations Ordinance was based on sections of the Pennsylvania Human Relations Act. 43 PA. STAT. ANN. §§951 *et seq.* (Cum. Supp. 1973-1974). As a result of the similarity, the Pennsylvania attorney general issued an order, following the Supreme Court decision in the *Pittsburgh Press* case, that the entire state of Pennsylvania would henceforth refrain from the use of sexually segregated employment ads. 2 CCH EMPL. PRAC. GUIDE ¶5167 (1973).

47. CCH EMPL. PRAC. DEC. ¶8154, at 6492 (Allegheny County, Pa. Ct. C.P. 1971).

48. 4 Pa. Commw. 448, 287 A.2d 161 (Commw. Ct. 1972).

49. Press allegations that the segregated columns were for reader convenience were not supported by the evidence that in fact showed they were primarily geared to the interest and desires of employer. 4 Pa. Commw. 448, 461, 287 A.2d 161, 168 (Commw. Ct. 1972). *See also* Bem & Bem, *supra* note 10.

wealth Court ruled that through the use of sexually segregated column headings the Pittsburgh Press had effectively aided the employer in his discriminatory practice[50] in violation of section 8(j), and for that reason had been correctly ordered to cease and desist from segregating help wanted ads where no bfoq existed.[51]

The statutory language of section 8(j), providing that *any person* who participated in an unlawful employment practice would be subject to the sanctions of this ordinance, spelled the difference between the Pittsburgh outcome prohibiting sexually segregated help wanted ads and the federal decisions to the contrary. Lacking such comprehensive coverage, the restricted title VII provisions[52] effectively force any federal challenge to employment advertising practices to be directed at the individual employer and his ad content or placement[53] rather than at the newspapers that arranged the ads in columns according to sex.

In a New Jersey Supreme Court case[54] the Passaic Daily News sought a declaratory judgment that its practice of sexually segregating job advertisements was in compliance with a New Jersey law against discrimination.[55] In particular, it challenged interpretive rules[56] that prohibited newspaper publication of employment advertisements under sexually segregated column headings[57] and that required the newspaper to prevent publication of ads with a sexual preference if no bfoq existed.[58] To make the determination whether such a qualification was valid the rules also required the Division on Civil Rights to respond to inquiries as to the bfoq for a particular job.[59]

The Daily News contended that the applicable New Jersey statute[60] mentioned only employers and employment agencies and thus was ineffective in regulating newspaper activity.[61] But a statutory provision very similar to that

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50. 4 Pa. Commw. 448, 463, 287 A.2d 161, 169 (Commw. Ct. 1972).

51. This case was subsequently heard by the United States Supreme Court, 413 U.S. 376 (1973), which affirmed the decision of the Pennsylvania Commonwealth Court. The Supreme Court approach was somewhat different from that of the Pennsylvania courts as it was primarily concerned with the effects of the Pittsburgh Ordinance on the first amendment freedom of the press, while the Pittsburgh courts had focused on whether the ordinance coverage was applicable to newspapers. See note 41 *supra.*

52. 42 U.S.C. §§2000e(c), 2000e-3(b) (Supp. II, 1972), *amending* 42 U.S.C. §§2000e(c), 2000e-3(b) (1970).

53. *See* Comment, *Discrimination — Banishing Sex Preferences in Job Advertising Through Title VII,* 52 B.U.L. REV. 896 (1972). Interestingly enough, this comment focuses on Hailes v. United Air Lines, 464 F.2d 1006 (5th Cir. 1972), a case involving employer sexual discrimination against a man applying for a job as an airline cabin attendant.

54. Passaic Daily News v. Blair, 63 N.J. 474, 308 A.2d 649 (1973).

55. N.J. STAT. ANN. §§10:5-1 *et seq.* (1972).

56. 3 CCH EMPL. PRAC. GUIDE ¶25,690 (1973).

57. *Id.* ¶25,690.03 (1973).

58. *Id.* ¶¶25,690.01, .04 (1973).

59. *Id.* ¶25,690.06 (1973).

60. N.J. STAT. ANN. §10:5-12c (1972).

61. The News was essentially defending in a manner that had proved successful in title VII litigation. See text accompanying notes 26-30 *supra.*

involved in the *Pittsburgh Press* case[62] stipulated that any person who aided or abetted an unlawful practice under the Act would be in violation of the Act.[63] Backed by this statutory language, the court found the Daily News employment ad format inappropriate, citing as unrealistic the contention that a newspaper, which persisted in publishing sexually segregated classified ads, was not aiding in discrimination within the statutory context.[64]

An employment practices provision similar to those of New Jersey and Pittsburgh came into question in two New York cases.[65] Initiated by NOW, these suits were brought on behalf of female members of the employment market against newspapers that were publishing sexually segregated help wanted ads. In each case the ads were preceded by a disclaimer indicating that the segregated format was for reader convenience and was not intended as an unlawful limitation based on sex.[66] Both cases pivoted on whether a newspaper could be considered an entity that aided or abetted an unlawful employment practice by an employer or employment agency. Although New York had a statute prohibiting aiding and abetting,[67] which was essentially the same as those of New Jersey and Pittsburgh, the court in the case involving the Buffalo-Courier Express chose to interpret it in a fashion consistent with the principles of criminal law, requiring the accused party to have the intent of the principal actor. Since this "community of purpose" was not evident between the newspaper and employer-advertisers, the Express could not have aided in unfair employment practices.[68]

The reason for this divergent interpretation of the aiding and abetting statute was not readily apparent until the New York court partially clarified its position in *National Organization for Women v. Gannett Co.*[69] As noted previously, the Pittsburgh ordinance (as well as that of New Jersey) provided a convenient service that quickly informed the employer and newspaper whether a bfoq could legitimately be asserted. Without such a service in New York, the courts were unable to impute knowledge of unlawful job classifica-

62. PITTSBURGH, PA., HUMAN RELATIONS ORDINANCE §8(j) (1969).

63. N.J. STAT. ANN. §10:5-12e (1972).

64. 63 N.J. 474, 308 A.2d 649, 656 (1973).

65. National Organization for Women v. Gannett Co., Inc., 40 App. Div. 2d 107, 338 N.Y.S.2d 570 (4th Dep't 1972); National Organization for Women v. Buffalo Courier-Express, Inc., 71 Misc. 2d 917, 337 N.Y.S.2d 608 (Sup. Ct. 1972).

66. The following disclaimer was formulated by the New York Division of Human Rights to precede employment advertisements: "Important Notice: The New York State Law on Human Rights and the Federal Civil Rights Act of 1964 prohibit discrimination in employment because of age and sex unless based on a bona fide occupational qualification. Help Wanted and Situations Wanted advertisements are arranged in columns captioned 'Male' and 'Female' for the convenience of readers and are not intended as an unlawful limitation or discrimination based on sex." 40 App. Div. 2d 107, 109, 338 N.Y.S.2d 570, 574 (4th Dep't 1972).

67. N.Y. EXEC. LAW §296(6) (McKinney 1972).

68. National Organization for Women v. Buffalo Courier-Express, Inc., 71 Misc. 2d 917, 919, 337 N.Y.S.2d 608, 611 (Sup. Ct. 1972), *quoting* 1 W. BURDICK, LAW OF CRIME §221, at 297 (1946).

69. 40 App. Div. 2d 107, 338 N.Y.S.2d 570 (4th Dep't 1972).

tion to the newspaper, resulting in a frustration of the very intent behind the statutory provisions.

TYPES OF STATE LEGISLATION

State cases illustrate some of the plans existing to prohibit job discrimination based on sex when there is no bfoq. A few states, such as Georgia and Alabama, do not have any statutory provisions of general application concerning equal employment opportunities. Others merely parrot the title VII provisions[70] prohibiting employment agencies from printing or causing to be printed advertisements listing a preference as to sex where no bfoq exists.[71] And some have in addition adopted the job opportunity advertising guideline[72] of the EEOC.[73] These provisions in all likelihood will yield the same result as the title VII cases, where the statute applicable to employment agencies was not applied to the newspaper publishing help wanted ads.

A comprehensive method of covering help wanted designations in newspapers is found in both the Iowa and New Jersey guidelines, which provide a complete plan to eliminate sexually segregated columns.[74] Other states have simply stated that newspapers will be prohibited from using sexually segregated columns, as column headings for males or females effectively aid employers in violating the state job discrimination legislation.[75] This language leaves no doubt but that newspapers must cease this practice and use neutral terms in classifying job advertisements.

The middle ground between model title VII legislation and the complete help wanted regulation encompasses the majority of states.[76] In predicting the impact of such legislation it may be stated that the more closely a statutory provision resembles that of Pittsburgh or New Jersey, the more likely a newspaper will fall under state regulation. But as the attributes of the legislation tend toward those of title VII, newspaper regulation will be doubtful. Nevertheless, the existence of successful state plans, combined with the recent decision of the constitutionality of such newspaper format regulations,[77] should serve as inspiration and guidance to those states that as yet have rather general employment practices legislation.

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70. 42 U.S.C. §2000e-3(b) (Supp. II, 1972), *amending* 42 U.S.C. §2000e-3(b) (1970).
71. *See, e.g.*, MD. ANN. CODE art. 49B, §19e (1973).
72. 29 C.F.R. §1604.5 (1973).
73. *See* legislation for Colorado and Michigan, 3 CCH EMPL. PRAC. GUIDE ¶¶21,065.10, 24,235.6 (1973).
74. 3 CCH EMPL. PRAC. GUIDE ¶22,875 (1973); *id.* ¶25,690 (1973).
75. *See* legislation for Massachusetts and Minnesota, 3 CCH EMPL. PRAC. GUIDE ¶24,051.11 (1973); *id.* ¶24,490.06 (1971).
76. *See, e.g.*, KAN. STAT. ANN. §§44-1001 to -1013 (1973); KY. REV. STAT. ANN. §§344.080, 344.280 (1972).
77. 413 U.S. 376 (1973).

CONCLUSION

The Civil Rights Act, considered responsive to the needs of women seeking job opportunities, has proved inadequate in dealing with an important aspect of the job hiring process. The obvious solution is to seek responsive legislation that corresponds to that of New Jersey or Pittsburgh. But the rather laborious process of implementing legislation, especially in those states that have no statutory plan for equal employment opportunity, leaves much to be desired in the interim.

One solution would be to bring a direct action against the employer who requested the placement of his ad under a heading designated "Female Wanted" or "Male Wanted." He clearly is in violation of title VII and the job opportunity advertising guideline, yet he will probably escape prosecution due to the cost involved and the rather disappointing return. Realistically, prohibiting one employer from using those column designations is but a hollow victory when a myriad of others are left free to continue the practice until prosecuted.

An alternative would be to invoke the provisions of section 2000e-6(a) of title VII in bringing a pattern or practice suit alleging that a particular newspaper is engaged in a pattern of resistance to the full enjoyment of equal employment opportunity for women. This could be supported by at least one sociological study presented before the Special Subcommittee on Education of the House Committee on Education and Labor, which indicated that the segregation of help wanted ads does have an effect on women's selections for interviewing purposes.[78] To alleviate this discriminatory effect, newspapers could easily maximize exposure for the employer and adequately inform the public by alphabetically categorizing jobs under headings such as "Mechanic" or "Computer Programmer."

The courts have expressed their opinion that neutralizing job opportunity advertising is an idea whose time has arrived, that newspapers should voluntarily cease present discriminatory practice, and that the legislature should respond to the inadequacy of statutory provisions. It can be asked how much longer the federal courts, which essentially act as courts of equity in these matters, will continue to defer to the inadequate statutory provisions rather than to implement the general intent of such legislation.

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78. *Hearings*, 91st Cong., 2d Sess., pt. 2, at 891 (1970) (paper submitted by Bem & Bem, *Sex Segregated Want Ads: Do They Discourage Female Job Applicants?*).