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Sex Discrimination in Help Wanted Advertising

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INTRODUCTION

ACCOUNTANT — CPA or CPA candidate for small S.F. finan. dist. CPA firm perm. Resume to this paper AD No. 54081.1

This want ad discriminates against women.2 Its placement under the column heading "Help Wanted, Men" indicates to the reader that only a man is sought for the position.3 A woman reading such an advertisement might be discouraged from applying for the job, even though she might be fully qualified to hold it.4

Although a newspaper classifies want ads as a service to its readers,5 the system of listing job openings by sex provides no service at all to a society striving to insure equal employment opportunity for both men and women. This comment will explore the role of the newspaper as publisher of classified, help wanted advertising that discriminates on the basis of sex. Special attention will be given to the litigation that has been brought to control the incidence of this type of discrimination.

Psychological Effects of Discriminatory Ads

The psychological effects on women of help wanted advertisements listed under sexually designated columns has been ex-

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5. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 393 (1973) (Burger, C.J. dissenting). See also note 126 infra, which reproduces a typical notice included by most newspapers in their sex-based help wanted columns.
explored in an often cited study conducted by Drs. Sandra and Daryl Bem at Carnegie-Mellon University. Female test participants were asked to indicate their willingness to apply for work listed in both sexually segregated columns and neutral ones. The examples were actually taken from the *Pittsburgh Press*, Pittsburgh's major daily newspaper. The results of the experiment indicated that women, indeed, were disinclined to apply for employment advertised in "Male" columns. The courts have also relied on intangible evidence to support their findings of Fair Employment Practice (FEP) violations in want ad formats. In *Passaic Daily News v. Blair*, Judge Conford spoke of the "justifiable lay inference" that job advertisements placed in "Male" columns discourage many women from applying for the positions offered. And Justice Powell, writing for the majority in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, spoke of the Pittsburgh Commission's "commonsense recognition" that sex-designated column headings fostered sex discrimination in employment.

Laws Against Discriminatory Employment Advertising

Because help wanted advertising plays such an important role in connecting employers with employees, it has received considerable legislative attention. Federal law prohibits advertisers from disseminating employment advertising that discriminates against women. In many jurisdictions such advertising is also proscribed by state and local statutes. All of these enactments,
however, address themselves to the advertising activities of employers, labor unions, or employment agencies; none of them specifically mentions newspapers or their role in the publication of sexually preferential advertisements. Moreover, no Fair Employment Practice (FEP) Act states that the placement of employment advertisements in columns classified by sex indicates an illegal preference for the gender named in the caption. However, the courts and the administrative agencies that enforce FEP laws\textsuperscript{15} have generally determined that the advertisement and the sex-based column in which it appears comprise "an integrated commercial statement"\textsuperscript{16} which expresses preference for the sex named in the caption. Relying on this determination, some courts\textsuperscript{17} and FEP agencies\textsuperscript{18} have held newspapers liable as accessories to the placement of such advertisements. Since it may be illegal for the advertiser to direct an employment opportunity to be placed under a sex-specific column, the newspaper which actually prints the discriminatory advertisement can be deemed to have aided and abetted a discriminatory act.

\textit{The Newspaper as Target of Litigation}

Although Title VII and the related state statutes clearly subject the sponsors of preferential advertising to liability for causing their messages to be printed, the publisher has been the chief target in advertising litigation brought by advocates for working women. To file complaints against each offending advertiser would entail an unmanageable multiplicity of suits. If a newspaper could

\begin{itemize}
  \item \textsuperscript{14} See, e.g., Pittsburgh, Pa., Ordinance 395, July 7, 1969, amending Ordinance 75, § 8(e), Feb. 28, 1967 (amended Ordinance 75 hereinafter cited as Ordinance); New York, N.Y., Administrative Code § B1-7.0(d) (1971).
  \item \textsuperscript{16} Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388 (1973).
\end{itemize}
be persuaded to be responsive to the female sector of the labor market, however, the incidence of discriminatory advertising could be greatly reduced. The discontinuation of a newspaper's classification of employment opportunities by sex would alone eliminate scores of FEP violations of the type exemplified above. Sexual want ad discrimination would vanish if the press merely refused to publish any sexual preferences in its job advertising.

THE EARNING POWER OF WOMEN IN THE WORKFORCE

The plight of the working woman in America has been well documented. According to the United States Department of Labor statistics for the year 1969, women with full-time, permanent jobs earned only 60.5% as much as men with full-time permanent work. One out of seven of these women earned less than $3,000 per year, compared to a figure of one in seventeen and one half for men. While 23% of working males grossed between $10,000 and $15,000 per year, only 4.2% of working females earned as much. This last statistic cannot be explained entirely by major differences in the skill levels between the male and the female working population, because a woman with five years of college can expect to earn only two-thirds as much as her male counterpart.

The discrepancy between the earning power of men and women with similar training can be explained partly by Professor Murphy's observation that:

19. See text accompanying note 1 supra. On the question of advertisers' compliance with the EEOC Guidelines forbidding placement by employers of job orders under sex-titled columns (29 C.F.P.R. § 1604.5 (1974)), one employer has stated:

It would be more effective to have compliance by the publishers, than to complain to the contractor. We must compete with firms that do not comply and we cannot do it successfully by placing ads in a neuter classification.


20. Cf. Notice to Advertisers of the Canadian magazine, OILWEEK, reported in NEW YORKER, Dec. 10, 1973, at 112:

Notice to Advertisers

The Human Rights Code prohibits discrimination because of age, sex, marital status, race, creed, colour, nationality, ancestry, or place of origin.

In compliance with this Code, Oilweek reserves the right to make the necessary changes in advertising copy.


23. Id. at 3.

24. Id.

25. Id.
There is also considerable evidence to show that the gravitation of women towards certain jobs is the result of subtle mechanisms of social control, such as marriage and tradition. These social controls tend to channel women into roles which society finds necessary for continuity and maintenance.28

A help wanted classification scheme that classifies employment opportunities into male jobs and female jobs is one of these controls. It is a significant weapon in the psychological arsenal which society utilizes to keep women in an inferior economic position.

**TITLE VII OF THE CIVIL RIGHTS ACT**

Title VII of the Civil Rights Act of 1964,27 as amended by the Equal Employment Opportunity Act of 1972,28 proscribes discrimination based on race, religion, color, national origin, or sex in many phases of private and public employment. The hiring, upgrading, dismissal, terms of employment, referral for employment, union membership, apprenticeship, and training of protected classes are regulated.29 The activities of labor unions, joint labor-management committees controlling apprenticeship, employment agencies, and employers with fifteen or more employees are covered.30

**The BFOQ and Title VII**

Title VII allows sexual preferences in employment when sex is a bona fide occupational qualification (hereinafter BFOQ) for the work involved;31 the Act does not, however, define a BFOQ. The Equal Employment Opportunity Commission32 (hereinafter Commission), exercising its power to issue interpretative guidelines on sex discrimination,33 has set forth its interpretation of a BFOQ.34 In accordance with state and federal court decisions,35 the EEOC has interpreted the exception very narrowly. Thus, a BFOQ may not be based on stereotyped characterizations of the abilities of the sexes.36 Moreover, the mere preferences of the

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26. Murphy, supra note 21, at 440-41.
30. Id.
32. The EEOC is the administrative agency in charge of enforcing Title VII. See text accompanying notes 41-48 infra.
35. See, e.g., Rosenfeld v. So. Pacific Co., 444 F.2d 1219 (9th Cir. 1971); Weeks v. So. Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).
employer, customer, or co-workers for a particular sex does not justify granting a BFOQ for the position.\textsuperscript{37}

Many states have protective laws and regulations which limit the length of time women can work and the physical exertions that may be required of them.\textsuperscript{38} This protective legislation would seem to justify BFOQs for jobs demanding long or arduous working conditions. Nevertheless, the Commission has found that such legislation does not take into account the individual capacities of different women and, accordingly, has ruled in its guidelines that such laws are superseded by Title VII.\textsuperscript{39} Only in the situation where an occupation requires a particular sex for purposes of genuineness or authenticity, such as the position of actor, actress, or fashion model, do the EEOC Guidelines permit a BFOQ.\textsuperscript{40}

\textit{Enforcement of Title VII}

Title VII is enforced by an administrative body, the Equal Employment Opportunity Commission.\textsuperscript{41} Complaints under the statute must first be filed with the Commission.\textsuperscript{42} If any state or local agency has concurrent jurisdiction over the activity complained of, the Commission must defer to that agency for sixty days.\textsuperscript{43} Should the state or local proceedings fail to satisfy the complainant, he can return to the Commission. The Commission then will investigate the allegations in the complaint to determine whether there is reasonable cause to believe a violation of Title VII has occurred.\textsuperscript{44} Upon a finding of reasonable cause, the Commission then will attempt to correct the unfair practice through "informal methods of conference, conciliation, and persuasion."\textsuperscript{45} If this endeavor fails, the Commission generally will issue the aggrieved party a "right-to-sue letter,"\textsuperscript{46} which authorizes the party to litigate in federal court. In the alternative, the Commission may bring suit itself if the respondent is not a governmental body.\textsuperscript{47} While the Commission has no enforcement power, such as the authority to issue cease and desist orders, a federal court, upon an independent finding of a violation of Title VII, may

\begin{itemize}
\item \textsuperscript{37} \textit{Id.} at § 1604.2(a)(1)(iii).
\item \textsuperscript{38} \textit{See Chart on Female Protective Laws by State, 3 CCH Empl. Prac. Guide §§ 20,095.}
\item \textsuperscript{39} 29 C.F.R. § 1604.2(b)(1) (1974).
\item \textsuperscript{40} \textit{Id.} § 1604.2(a)(2).
\item \textsuperscript{41} 42 U.S.C.A. § 2000e-4(a) (1974).
\item \textsuperscript{42} \textit{Id.} § 2000e-5(b).
\item \textsuperscript{43} \textit{Id.} § 2000e-5(c).
\item \textsuperscript{44} \textit{Id.} § 2000e-5(b).
\item \textsuperscript{45} \textit{Id.}
\item \textsuperscript{46} \textit{Id.} § 2000e-5(f)(1).
\item \textsuperscript{47} \textit{Id.} The United States Attorney General is to bring Title VII suits against a government, governmental agency, or political subdivision. \textit{Id.}
issue injunctions against unlawful practices and order affirmative relief.  

**EEOC Guidelines**

Title VII authorizes the Commission periodically to issue, amend or rescind guidelines to insure that the provisions of the Act are carried out. These guidelines are important in unfair employment practice cases because it is a complete defense to a complaint that a challenged act or omission was committed in good faith reliance on a Commission guideline or opinion. In addition, the guidelines are extremely useful because they serve to educate courts on the nuances of sex discrimination. Finally, the guidelines are important in the process of conciliation between the Commission and a respondent employer. The final conciliation agreement may incorporate the guidelines and require that the employer henceforth comply with the standards the guidelines have established.

The original provision of the Commission Guidelines on Discrimination Based on Sex (hereinafter EEOC Guidelines) relating to employment advertising, allowed the advertiser to place advertisements under sexually designated columns if (1) the advertisement itself stated that both men and women would be considered for the job, and (2) the newspaper printed a notice explaining that its sexual column captions were for the convenience of readers and that most listings were open to both sexes. This guideline was modified in 1966, pursuant to section 713(a) of Title VII, to read in relevant part:

(b) Advertisers covered by the Civil Rights Act of 1964 may place advertisements for jobs open to both sexes in columns classified by publishers under “Male” or “Female” headings to indicate that some occupations are considered more attractive to persons of one sex than the other. In such cases, the Commission will consider only the advertising of the covered employer and not headings used by publishers.

Thereafter, the National Organization for Women (NOW) peti-
tioned for an amendment\textsuperscript{56} to this guideline and, in 1968, section 1604.5 was adopted in its present form:

It is a violation of Title VII for a help-wanted advertisement to indicate a preference, limitation, specification, or discrimination based on sex unless sex is a bona fide occupational qualification for the particular job involved. The placement of an advertisement in columns classified by publishers on the basis of sex, such as columns headed “Male” or “Female,” will be considered an expression of a preference, limitation, specification, or discrimination based on sex.\textsuperscript{57}

\section*{Litigation Pursuant to EEOC Guidelines}

Section 1604.5 presented a threat to the press and, as a result, the American Newspaper Publishing Association (hereinafter ANPA) initiated a suit in federal district court to challenge the validity of this guideline. In \textit{American Newspaper Publishing Association v. Alexander},\textsuperscript{58} ANPA alleged that the Commission lacked the authority to issue the guideline and sought an injunction against the enforcement of section 1604.5. The district court held that no injunction would issue because the guidelines were not regulations having the force of law, and the Commission lacked any enforcement powers.\textsuperscript{59} The court also found that the guidelines were not binding on the judiciary and noted that courts were free to differ on their interpretation.\textsuperscript{60} Finally, the court concluded that since voluntary compliance was necessary for Title VII to be effective, guidelines were important to inform the public of the Commission's interpretation of the Act.\textsuperscript{61}

It is unclear which side gained (or lost) the most from the decision in \textit{Alexander}. Federal court decisions prior to \textit{Alexander} had indicated a greater respect for the guidelines. In \textit{Udall v. Tallman}, the United States Supreme Court held that “great deference” would be accorded the interpretation of statutes by the agency charged with their administration.\textsuperscript{62} These interpretations are the contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in mo-

\begin{itemize}
\item \textsuperscript{56} 29 C.F.R. § 1601.32 (1974) allows any interested persons to petition the EEOC for the issuance, amendment, or repeal of guidelines.
\item \textsuperscript{57} 33 Fed. Reg. 11539 (1968).
\item \textsuperscript{58} 294 F. Supp. 1100 (D.D.C. 1968).
\item \textsuperscript{59} \textit{Id.} at 1103.
\item \textsuperscript{60} \textit{Id.} The United States Code, however, requires courts to take judicial notice of the guidelines. 44 U.S.C. § 1507 (1970).
\item \textsuperscript{61} 294 F. Supp. at 1103.
\item \textsuperscript{62} 380 U.S. 1, 16 (1965).
\end{itemize}
tion, of making the parts work efficiently and smoothly while they are yet untried and new.\textsuperscript{63}

In addition, the Fifth Circuit Court of Appeals, in \textit{Weeks v. Southern Bell Telephone and Telegraph Co.}, concluded that the EEOC Guidelines were entitled to "considerable weight."\textsuperscript{64} Thus it appears that although a court can rule contrary to a Commission position, as was suggested in \textit{Alexander}, the courts normally will accord due consideration to the Commission's interpretation of Title VII.

\textbf{Classified Advertising Cases}

The reported cases dealing with sex discrimination in the want ad pages have considered most of the legal issues suggested by this form of discrimination. The adverse psychological effect on job seekers confronted by want ads indicating sexual preferences is well demonstrated in the case of \textit{Hailes v. United Air Lines}.\textsuperscript{65} The problem of abridging a newspaper's free speech by enjoining publication of discriminatory advertisements is thoroughly explored in \textit{Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations}.\textsuperscript{66} The federal case of \textit{Brush v. San Francisco Publishing Co.}\textsuperscript{67} exemplifies an unfavorable court response to an attempt to classify a newspaper as an employment agency for purposes of regulation under Title VII of the Civil Rights Act. Want ad discrimination suits brought in state courts have focused primarily on the newspaper's role as a participant in the dissemination of discriminatory advertising. As of this writing, the only reported state cases have emanated from Pennsylvania\textsuperscript{68} and New York,\textsuperscript{69} with somewhat similar results in each jurisdiction. Although no litigation based on a newspaper's participation in discriminatory advertising has been brought in California, the state Attorney General has issued an opinion on the subject that merits discussion.\textsuperscript{70} Finally, sex-biased advertising controversies have arisen because of the action of state FEP commissions.\textsuperscript{71} We turn now to an analysis of the cases and controversies spawned by sex discrimina-

\begin{itemize}
  \item 64. 408 F.2d 228, 235 (5th Cir. 1969).
  \item 65. 464 F.2d 1006 (5th Cir. 1972).
  \item 67. 315 F. Supp. 577 (N.D. Cal. 1970).
  \item 68. See, e.g., \textit{Appeal of the Pittsburgh Press}, 3 BNA FEP CAS. 409 (Pa. C.P. 1971).
\end{itemize}
tion in employment advertising, and to an examination of the relevant legal considerations raised.

Psychological Factors in Classified Advertising Cases

The case of *Hailes v. United Air Lines*\(^{72}\) illustrates how psychological factors can control the outcome in a sex discrimination advertising suit. *Hailes* was a Title VII action brought under section 704(b),\(^{73}\) charging the employer, rather than the newspaper, with illegal preferential advertising. Mr. Clarence Hailes filed a complaint against United Air Lines for its causing to be published an advertisement seeking “Stewardesses” in the “Help Wanted-Female” section of the classified ads.\(^{74}\) The complainant had responded to similar advertisements of other airline companies and had consistently been refused employment. Hailes believed sex to be the reason for his inability to obtain a job as a steward with an airline. It was settled law in the Fifth Circuit that the occupation of flight cabin attendant did not require a BFOQ for women.\(^{75}\) Hailes therefore claimed that he had been discriminated against by United’s advertisement because its obvious reference to female cabin attendants deterred him from applying for the job.

The United States District Court for the Eastern District of Louisiana dismissed the suit for failure to state a claim upon which relief could be granted.\(^{76}\) The court reasoned that since Hailes had never applied for the job, he could not have suffered discrimination and thus lacked standing to sue.

On appeal, the Fifth Circuit Court of Appeals held that Hailes did have standing as an aggrieved person under Title VII.\(^{77}\) The court noted that Hailes could not have applied for the stewardess job because, the very appearance at an employer’s offices of one who had read the discriminatory ad but nevertheless continued to seek the job, would demonstrate that the reader was not deterred by this unlawful practice and therefore not aggrieved.\(^{78}\)

Thus, the gravamen of the complaint was that United had wrongfully interfered with Hailes’ application for employment. To show actual deterrence, a complainant needed only to have a “real present interest in the type of employment advertised.”\(^{79}\) In ad-

\(72\) 464 F.2d 1006 (5th Cir. 1972).
\(74\) Hailes v. United Airlines, 464 F.2d 1006, 1007 (5th Cir. 1972).
\(75\) See Diaz v. Pan American World Airways, 442 F.2d 385 (5th Cir. 1971).
\(76\) Unreported decision. See Note, 52 B.U.L. Rev. 896, 897 (1972).
\(77\) 42 U.S.C.A. § 2000e-5(b) (1974) requires charges to be filed “by or on behalf of a person claiming to be aggrieved.”
\(78\) 464 F.2d at 1008.
\(79\) Id.
dition, the court noted that it was not necessary for Hailes to prove that he had been turned down by other airlines solely because of his sex; it sufficed to present,

sufficient evidence of sex discrimination by the other airlines to inculcate a reasonable belief on his part that applying to United was a futile gesture.80

In contrast to the Hailes case is a Commission decision81 in which a woman filed a complaint against an advertiser who utilized the "Help Wanted-Male" column for a job properly open to both sexes. Since the complainant had no intention of applying for the opening, she was found to have no real or present interest in the matter.82 Title VII suits thus require a showing of actual interference with a person's employment opportunities. The Hailes case demonstrates that such interference need not be physical; it may operate in subtle, psychological ways to deter job seekers.83

The Newspaper as an Employment Agency

The crucial provision of Title VII for sexual want ad suits is section 704(b), dealing with "Other Unlawful Employment Practices,"84 which reads in relevant part:

(b) It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship . . . to print or publish or cause to be printed or published any notice or advertisement relating to employment . . . indicating any preference, limitation, specification, or discrimination based on . . . sex . . . except . . . when . . . sex . . . is a bona fide occupational qualification for employment.85

80. Id. at 1000.
82. Id. ¶ 6421 at 4124. However, an organization representing a class protected by legislation will generally be afforded standing. See, e.g., NOW v. State Div. of Human Rts., 34 N.Y.2d 416, 419-20, 314 N.E.2d 867, 869-70 (1974).
83. Cf. United States v. Hunter, 459 F.2d 205 (4th Cir. 1972), where the court held that a newspaper's publication of classified ads offering lodging in a "white" home could properly be enjoined, even though the advertiser could legally refuse to rent to non-white tenants because he lived on the premises. See 42 U.S.C. § 3603(b)(2) (1974). The court noted:

Widespread appearance of discriminatory advertisements in public or private media may reasonably be thought to have a harmful effect on the general aim of the Act [Federal Fair Housing Act, 42 U.S.C. § 3601 et seq. (1970)]: seeing large numbers of "white only" ads in one part of a city may deter non-whites from venturing to seek homes there, even if other dwellings in the same area must be sold or rented on a nondiscriminatory basis.

459 F.2d at 214.
85. Id. § 2000e-3(b) [emphasis added].
Suits brought under Title VII against newspapers have been based on the following rationale: the employment advertisements appearing in sex-based columns do indicate the preference outlawed by section 704(b), and the newspapers who publish these advertisements do so as employment agencies, since, in conformance with the statutory definition of an employment agency, they regularly undertake to procure employees for an employer. \(^{86}\)

*Brush v. San Francisco Publishing Co.* The first major challenge under Title VII against the press' role in discriminatory advertising was *Brush v. San Francisco Printing Co.* \(^{87}\) In 1969, Brenda Brush filed a Title VII complaint against the publisher of the *San Francisco Chronicle* and the *San Francisco Examiner*. She alleged that the publisher violated section 704(b), \(^{88}\) prohibiting employment agencies from printing sexually preferential advertising by listing job opportunities under columns designated by sex, when sex was not a BFOQ for the positions. The plaintiff's crucial contention was that the defendant was an employment agency since it engaged in disseminating job offerings through its classified ad sections.

The court for the Northern District of California relied heavily on the legislative history of section 704(b) to reject Brush's theory and to determine that a newspaper was excluded from the statute's coverage. \(^{89}\) The House Judiciary Committee report on Title VII had noted that newspapers were not required under the Act to control, supervise or screen advertisements that were submitted to them. \(^{90}\) In addition, an interpretative memorandum by Senators Clark and Case had made it clear that the prohibition against employment agencies, employers, and labor unions in section 704(b) "does not extend to the newspaper or other publication printing the ad." \(^{91}\) Furthermore, the court found that the words "employment agency" do not, in common parlance, encompass a newspaper. \(^{92}\)

Also discussed in the opinion was the problem newspapers would encounter were they to be required to screen advertisements to comply with section 704(b). The court noted that such

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86. 42 U.S.C.A. § 2000e(c) (1974) defines employment agency as "any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer."
89. 315 F. Supp. at 581-82.
90. Id. at 582.
91. Id., quoting 110 CONG. REC. 7213 (1964) (Interpretative Memorandum of Senators Clark & Case).
92. 315 F. Supp. at 580.
an obligation would force the classified editor to research every advertisement requested to be placed under a male heading.\textsuperscript{93} He also would have to determine whether a BFOQ exemption applied. The court found that such a determination was uniquely within the purview of a true employment agency, which has the professional expertise and the opportunity to interview employers.\textsuperscript{94} In addition, EEOC Guideline section 1604.6\textsuperscript{95} requires employment agencies to keep records of every BFOQ asserted by employers and to "keep informed of opinions and decisions of the EEOC on sex discrimination."\textsuperscript{96} The court concluded that to place a similar responsibility on the press would be to saddle it with an unnecessary burden.\textsuperscript{97}

While the San Francisco Printing Company could be responsible, under California law, for false or misleading advertising, liability of a publisher for false advertising generally is predicated on a showing of bad faith.\textsuperscript{98} On the other hand, it could be argued that a newspaper does not know and cannot reasonably be expected to ascertain which employment offerings specifying a sexual preference will violate the law. The \textit{Brush} court felt that liability for illegal advertisements properly rested with the sponsor.\textsuperscript{99} Thus, persuasive policy considerations operated in \textit{Brush} to shield the press from responsibility for advertising which discriminated against women.

\textbf{The Progeny of Brush.} Suits similar to \textit{Brush} have been brought in federal courts against newspapers which print job advertisements under sexual classifications. The plaintiffs in \textit{Greenfield v. Field Enterprises, Inc.}\textsuperscript{100} and \textit{Morrow v. Mississippi Publishers Corp.},\textsuperscript{101} like the plaintiff in \textit{Brush}, contended that because newspapers came within Title VII's definition of employment agencies, section 704(b) had been violated. These contentions were rejected in both cases. The determination in \textit{Brush} that a newspaper does not constitute an employment agency for purposes of Title VII was deemed controlling.\textsuperscript{102} It is noteworthy,

\textsuperscript{93} \textit{Id.} at 581. \\
\textsuperscript{94} \textit{Id.} \\
\textsuperscript{95} 29 C.F.R. § 1604.6 (1974). \\
\textsuperscript{96} \textit{Id.} \\
\textsuperscript{97} 315 F. Supp. at 583. \\
\textsuperscript{98} See, e.g., \textit{CAL. BUS. \& PROF. CODE} § 17500 (West 1974) (false advertising in general); \textit{Id.} § 11022 (false real estate advertising); \textit{CAL. LABOR CODE} § 976 (West 1971) (misleading advertisements on commission salesmen). \\
\textsuperscript{99} 315 F. Supp. at 583. \\
\textsuperscript{100} 4 BNA FEP CAS. 548 (N.D. Ill. 1972). \\
\textsuperscript{101} 5 CCH Empl. Prac. Decs. ¶ 8415 (S.D. Miss. 1972). \\
\textsuperscript{102} \textit{Morrow}, however, was remanded on a technicality. The court felt that the respondent newspaper might be an employment agency for the purpose of Title VII because the editor determined how advertisements were to be placed. \textit{Id.} at 7048.
however, that the courts in both Greenfield and Morrow were moved to add that the position taken by the plaintiffs in each case was "an idea whose time has come." Although dictum, this statement is significant in that it reflects the judiciary's (and presumably society's) progress toward embracing the cause of equality between the sexes.

The newspaper-as-employment-agency theory also has been urged in two New York cases. The relevant New York statute restricts the dissemination of discriminatory employment advertising, but it covers only employers and employment agencies. The courts in National Organization for Women v. Buffalo Courier-Express, Inc. and National Organization for Women v. Gannett Co., Inc. held that the absence of any mention of newspapers in the FEP law indicated that newspapers were to be excluded from its coverage; neither court found a newspaper to be an employment agency.

**Cases Based on State FEP Laws**

State FEP laws parallel many of the provisions of Title VII, with one important exception: many of them grant the agency in charge of implementing the law the power to issue cease and desist orders. While all FEP commissions stress conciliation rather than compulsion to combat sex discrimination in employment, conciliatory efforts by agencies holding cease and desist powers in reserve are more successful than efforts by agencies lacking these powers. The New Jersey Division on Civil Rights is authorized to make legally binding rules, and can control the incidence of employment discrimination by issuing what amounts to compulsory guidelines.


104. N.Y. EXECUTIVE LAW § 296(1)(d) (McKinney 1974).


107. Id. at 115, 338 N.Y.S.2d at 577; NOW v. Buffalo Courier-Express, Inc., 71 Misc. 2d at 918, 337 N.Y.S.2d at 610.


109. See J. WITHERSPOON, ADMINISTRATIVE IMPLEMENTATION OF CIVIL RIGHTS 113 (1968). See also 1962-63 LOUISVILLE HUMAN REL. COMM'N ANN. REP. 20-21, 25, 28-29; and BALTIMORE EQUAL EMPLOYMENT OPPORTUNITY COMM'N 3RD ANN. REP. ii, 1, 4, 12 (1959) for the experience of two FEP commissions before and after they gained enforcement powers. In both cases, compliance with the FEP law rose markedly upon acquisition of the new powers.

110. Law Against Discrimination § 8(d), (g), N.J.S.A. § 10:5-8(d), (g) (1974).

111. See text accompanying notes 173-74 infra.
Most state FEP laws have advertising provisions similar to section 704(b) of Title VII. In addition, the state statutes usually contain an "aiding and abetting" provision. California's "aiding and abetting" clause is typical:

> It shall be an unlawful employment practice . . .

> (f) For any person to aid, abet, incite, compel or coerce the doing of the acts forbidden under this part, or to attempt to do so.

As a result of such clauses, state FEP acts have spawned cases charging newspapers with aiding and abetting advertisers in the dissemination of preferential work advertisements. According to the theory behind these cases, the advertisers violate the provision of the FEP statute controlling the advertising policy of employers, unions, and employment agencies by causing discriminatory advertising to be published; then by actually publishing the advertisements the newspapers violate the section proscribing the aiding of any unlawful employment practice enumerated in the act. This theory has been tested in the courts of Pennsylvania and New York, and has been the subject of an Attorney General's opinion in California.

**Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations**

In 1969, the National Organization for Women filed a complaint against Pittsburgh's major newspaper, the *Pittsburgh Press*, with the Pittsburgh Commission on Human Relations (hereinafter Pittsburgh Commission). The complaint alleged that the Pittsburgh Press Company's policy of allowing advertisers to place employment notices in "Male" or "Female" columns, when the jobs so advertised did not have BFOQs, as unlawful under Pittsburgh Ordinance No. 75. The ordinance was a municipal FEP law, under which the Commission had the power to issue cease and desist orders. The Pittsburgh Press classified all employment advertisements under columns headed "Jobs-Male Interest," "Jobs-Female Interest," and "Male-Female Help." The advertiser was allowed

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112. See, e.g., N.Y. EXECUTIVE LAW § 296(6) (McKinney 1972); PA. STAT. ANN., tit. 43 § 955(c) (1964).
113. CAL. LABOR CODE § 1420(f) (West 1971).
114. See text accompanying notes 117-34 infra.
115. See text accompanying notes 147-57, 196 infra.
116. See text accompanying notes 159-69 infra.
118. Ordinance, supra note 14.
119. Id. § 13(i).
to select the desired category. The Pittsburgh Commission found that the advertiser's placement of job announcements under sex-based columns violated the advertising provision of the ordinance.

The Pittsburgh Commission decided that the Pittsburgh Press violated the "aiding" clause of the ordinance by printing the illegal advertisements. The Press was ordered to discontinue its unlawful practices and to "utilize a classification system of employment advertisements with no reference to sex." Thus the Pittsburgh Commission found that the mere maintenance of the dual classification scheme by the Pittsburgh Press constituted a violation of the ordinance.

The Pittsburgh Press appealed the order to the Pennsylvania Court of Common Pleas. The Press urged various issues of standing, breadth of the order, and freedom of the press. The court held that the Pittsburgh Commission could reasonably have determined that the newspaper had participated in the commission of an unfair employment practice and rejected all of the defendant's other contentions.

The court also addressed itself to various aspects of the sexually segregated want ad question. Although the Pittsburgh Press had printed a disclaimer, stating that no discriminatory intent was to be inferred from advertising placed under sex-based titles, the disclaimer was found to be ineffective. In addition, the court observed that the more attractive jobs appeared in the "Male" column. Finally, the court found that the Press' classification

120. Section 8(e) is a typical discriminatory advertising ban directed against employers, unions, and employment agencies.
121. Section 8(j) makes it unlawful to "aid, incite, compel, coerce or participate in the doing of any [unlawful] act . . . ."
123. For a discussion of the first amendment issue see text accompanying notes 135-46 infra.
125. Underneath the initial appearance of its sex-based column captions the Pittsburgh Press printed the following:

Notice to Job Seekers

Jobs are arranged under Male and Female classifications for the convenience of our readers. This is done because most jobs generally appeal more to persons of one sex than the other. Various laws and ordinances—local, state and federal, prohibit discrimination in employment because of sex unless sex is a bona fide occupational requirement. Unless the advertisement itself specifies one sex or the other, job seekers should assume that the advertiser will consider applicants of either sex in compliance with the laws against discrimination.

126. 3 BNA FEP Cas. at 414.
127. Id.
scheme allowed employers to evade the law against discrimination by using the newspaper's "Male" column to indicate illegal sex preferences.\textsuperscript{128}

The \textit{Pittsburgh Press} appealed this decision to the Pennsylvania Commonwealth Court.\textsuperscript{129} Its main contentions on appeal were (1) that it had been denied due process of law, since no specific offense of illegal participation had been proved; (2) that the use of the column captions was not discriminatory; and (3) that the \textit{Press}' first amendment rights had been violated.\textsuperscript{130}

In affirming\textsuperscript{131} the lower court, the appellate court compared sex discrimination to race discrimination. The court reasoned that since specific, injured parties were not necessary for suits alleging discriminatory acts against a racial class, the same standard should apply to sex discrimination cases.\textsuperscript{132} The court based this conclusion on the premise that sex was, like race, a suspect classification. Continuing in this egalitarian vein, the court declared asexual help wanted titles to be a symbol of social commitment to equality between the sexes.\textsuperscript{133}

While the words "aid," "abet," and "participate" were used interchangeably by the courts reviewing the Pittsburgh Commission's order, the rationale of the Pennsylvania rule on sex-based columns appears to depend on the newspaper's participation in an unfair employment practice. Considering the depressed status of working women, caused in part by widespread sex discrimination, and a want ad system that tended to perpetuate that status, the Pennsylvania courts were willing to confront the \textit{Pittsburgh Press} case pragmatically. Thus the deliberate aiding and abetting of the advertisers' discriminatory purposes were not necessary for a newspaper to violate the ordinance. Since the \textit{Pittsburgh Press}

\textsuperscript{128} \textit{Id.} at 415.
\textsuperscript{129} \textit{Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 4 Pa. Commw. 448, 287 A.2d 161 (1972).}
\textsuperscript{130} For a discussion of the first amendment issue see text accompanying notes 135-46 infra.
\textsuperscript{131} 4 Pa. Commw. at 469, 287 A.2d at 172. The scope of the Pittsburgh Commission's order, however, was modified to allow advertisers beyond the coverage of the ordinance or offering employment requiring a BFOQ to use the sex-specific columns.
was inextricably involved in an advertising scheme held to be illegal, it followed that the publisher did “aid, incite, compel, coerce or participate in” the unlawful practice.\textsuperscript{134}

\textit{Freedom of the Press}

In practically every case challenging the help wanted format of the press, a first amendment defense has been raised.\textsuperscript{135} Newspapers have claimed that restrictions on their want ad policies interfere with their editorial judgment, in violation of the right of freedom of the press.\textsuperscript{136} Additionally, injunctions forbidding the future publication of certain help wanted advertisements have been challenged as prior restraints on publication, contrary to the guarantees of the first amendment.\textsuperscript{137}

Alleging infringement of their editorial policy and prior restraint, the \textit{Pittsburgh Press} appealed the decision of the commonwealth court to the United States Supreme Court. By a 5-4 margin, the Supreme Court affirmed the state court decision.\textsuperscript{138} Justice Powell, writing for the majority, found no editorial judgment involved on the part of the newspaper, because it was the advertiser who determined where his advertisement would appear.\textsuperscript{139} Consequently, the publication enjoined by the Pittsburgh Commission could be categorized as commercial speech, which traditionally has been afforded less protection by the Supreme Court.\textsuperscript{140}

\begin{thebibliography}{99}
\bibitem{134} Ordinance § 8(j), \textit{supra} note 14.
\bibitem{137} See, \textit{e.g.}, United States v. Hunter, 459 F.2d 205 (4th Cir. 1972).
\bibitem{139} 413 U.S. at 386.
\bibitem{140} The commercial speech doctrine has been applied periodically in the case law. In \textit{Breard v. Alexandria}, 341 U.S. 622 (1951), a “green river” ordinance limiting the door-to-door solicitation of salesmen of magazine subscriptions was upheld. \textit{But see} \textit{Martin} v. City of Struther, 319 U.S. 141 (1943), where an ordinance prohibiting the ringing of door bells to distribute advertisements for religious meetings was held violative of the first amendment. Although the free speech issue was not specifically argued in \textit{Head v. New Mexico Board}, 374 U.S. 424 (1963), the media was prohibited from carrying illegal optometrist advertisements. The ban on cigarette advertising on the electronic media was upheld in \textit{CBS v. Acting Att'y Gen.}, 405 U.S. 1000 (1972). In another broadcasting case, \textit{New York State Broadcasters Ass'n v. United States}, 414 F.2d 990 (2d Cir. 1969), \textit{cert. denied}, 396 U.S. 1061 (1970), the court refused to strike down a ban on broadcasts promoting a lottery.

The Court reaffirmed the principle that commercial speech containing significant elements of protected speech could not be censored.\textsuperscript{141} But the \textit{Pittsburgh Press} situation presented a stronger case for permitting the suppression of commercial speech, because:

\begin{quote}
[a]ny first amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.\textsuperscript{142}
\end{quote}

The Court also rejected the \textit{Pittsburgh Press'} contention that the Pittsburgh Commission's order amounted to prior restraint.\textsuperscript{143} Prior restraint tends to have a chilling effect on the publication of matter not meant to be restrained, because a publisher may hesitate to print some "borderline" material for fear that he later may be judged to have violated the law.\textsuperscript{144} In the instant case, however, the \textit{Pittsburgh Press} knew precisely what category of copy would violate the ordinance, namely, advertisements the advertiser was not free to place under sexually captioned want ad headings. Moreover, the \textit{Press} would not be liable for printing such advertisements until the Supreme Court had ruled on the constitutionality of the Commission's restraint on their publication.\textsuperscript{145}

Even after the Supreme Court's decision, the \textit{Pittsburgh Press} is still left in the predicament of having to determine whether an advertisement requested for a sexually exclusive column is exempt from the ordinance. However, a newspaper generally can ascertain whether such an advertisement is legal. Whether the employer possesses a certified BFOQ and whether he is beyond the jurisdiction of the Pittsburgh Ordinance are the determinative factors in deciding on the propriety of a sex-based advertisement. The Court in \textit{Pittsburgh Press} suggested that the publisher could inquire whether a BFOQ existed, and would be protected if he relied in good faith on an advertiser's affirmative answer.\textsuperscript{146} Hence, the \textit{Press} could also determine whether a sponsor of a job order resided in Pittsburgh or was covered by the ordinance.

\textsuperscript{141} 413 U.S. at 384.
\textsuperscript{142} Id. at 389.
\textsuperscript{143} Id. at 390.
\textsuperscript{145} 413 U.S. at 390.
\textsuperscript{146} Id. at 390-91 n.14.
The New York Experience

The aiding and abetting provision of the New York FEP law\textsuperscript{147} received substantially different treatment in the New York courts. In \textit{National Organization for Women v. Buffalo Courier-Express, Inc.},\textsuperscript{148} the newspaper's policy of classifying help wanted advertising under "male" and "female" columns was attacked on several grounds, including the "aiding" ground urged in the \textit{Pittsburgh Press} case.\textsuperscript{149} In contrast to the Pennsylvania decisions, the Supreme Court of Erie County dismissed the complaint for failure to state a cause of action. The court emphasized that "the judicial principles governing criminal liability through accessorial conduct"\textsuperscript{150} would apply to the \textit{Courier-Express}' alleged aiding. An accessory to a crime must share the subjective intent of the principal.\textsuperscript{151} The court reasoned that since the \textit{Courier-Express} was ignorant of the details of employment offered in advertisements, it lacked the necessary intent or "community of purpose" with the employer placing the advertisement.\textsuperscript{152} The court apparently felt that the duty of determining whether a job properly could appear under a sexual caption, because of a BFOQ exemption, rested with the person placing the advertisement.

The aiding theory again was urged in \textit{National Organization for Women v. Gannett Co., Inc.}\textsuperscript{153} The appellate division of the New York Supreme Court basically followed the \textit{Courier-Express} court's construction of the New York aiding provision. Without specifically mentioning the criminal accessory analogy employed in \textit{Courier-Express}, the court held that to violate the aiding section there must be a "knowledgeable and intentional participation on [the defendant's] part in the unlawful conduct charged."\textsuperscript{154}

The \textit{Gannett} court considered its case distinguishable from the \textit{Pittsburgh Press} decision. In the city of Pittsburgh, the Commission had the duty to certify BFOQ jobs upon request.\textsuperscript{155} Thus, reasoned the \textit{Gannett} court, the \textit{Pittsburgh Press} had only to ask an advertiser whether he possessed a BFOQ certification to determine the legality of a proposed advertisement.\textsuperscript{156} In New York,
however, there was no legislative provision whereby the publisher could determine whether there visted a valid basis for a BFOQ ex-
emption.\textsuperscript{157}

\textit{The California Position}

The question of a newspaper's participation in an advertiser's violation of the California FEP law\textsuperscript{158} recently was considered in an opinion by the California Attorney General on the "printing by newspapers of help wanted advertisements in columns segre-
gated by sex."\textsuperscript{159} The Attorney General concluded that in order to aid and abet\textsuperscript{160} a violation of the state FEP act,\textsuperscript{161} a newspaper must act with knowledge of the unlawfulness of the discrimination expressed.\textsuperscript{162} Thus he agreed with the pre-1974 New York view that a criminal law definition of aiding should govern the question of liability.

The opinion also stated that the question of a newspaper's actual knowledge would be a question of fact, provable by circum-
stantial evidence.\textsuperscript{163} The Attorney General also pointed out that a newspaper's suggesting or insisting upon the improper placement of employment advertising under sex-based columns might well amount to an "incitement or coercion"\textsuperscript{164} to violate the law. Unlike the court in \textit{Gannett},\textsuperscript{165} the California Attorney General stated that the EEOC Guidelines would be controlling in Califor-
nia, and he reiterated the Guideline's narrow interpretation of the BFOQ exemption.\textsuperscript{166} Consequently, the Attorney General con-
cluded, nearly every advertisement published in a sexually seg-
regated column would violate California's preferential advertising regulation.\textsuperscript{167}

The crime of abetting requires criminal intent on the part of the abettor.\textsuperscript{168} One who innocently aids the commission of a

\textsuperscript{157} It should be noted that the recent New York Court of Appeals case, \textit{NOW v. State Div. of Human Rts.}, 34 N.Y.2d 416, 314 N.E.2d 867 (1974), overruled \textit{Courier-Express} and \textit{Gannett} on their conclusions that the newspapers did not aid and abet FEP violations.

\textsuperscript{158} \textit{CAL. LABOR CODE} § 1410 et seq. (West 1971).

\textsuperscript{159} \textit{55 Ops. CAL. ATT'Y GEN.} 53 (1972).

\textsuperscript{160} \textit{CAL. LABOR CODE} § 1420(f) (West 1971), \textit{quoted in text accompanying note 113 supra}.

\textsuperscript{161} \textit{CAL. LABOR CODE} § 1420(d) (West 1971) contains the usual proscrip-
tions against employers' and employment agencies' advertising in a discriminatory fashion.

\textsuperscript{162} \textit{55 Ops. CAL. ATT'Y GEN.} 53, 54 (1972).

\textsuperscript{163} \textit{Id.}

\textsuperscript{164} \textit{Id.}


\textsuperscript{166} \textit{55 Ops. CAL. ATT'Y GEN.} 53, 55-56 (1972).

\textsuperscript{167} \textit{Id. at 56}.

\textsuperscript{168} \textit{1 W. BURDICK, THE LAW OF CRIME} § 221, at 297 (1946).
crime is thus protected from criminal prosecution. It could be argued that one who aids the commission of an unfair employment practice does not need the protection which the necessity of intent affords the innocent participant in a crime. Since FEP acts are remedial rather than punitive, they give both aider and principal the opportunity voluntarily to comply with commission orders before any judicial action may be taken.\textsuperscript{169} Once a person is alerted to his unknowing commission of an unlawful employment practice, he ordinarily can comply thereafter with the requirements of the statute.

When a person does not know that he is violating a FEP provision, however, then it seems manifestly unfair to subject him continually to FEP supervision through orders. Newspaper publishers claim to be in such a position when they print classified help wanted advertising under sexual columns. Unversed in the nuances of the BFOQ, the press might be subject to endless legal proceedings for having made an unlucky legal guess on the propriety of placing certain job orders. Newspapers, of course, could voluntarily discontinue the hazardous practice of classifying employment advertisements by sex, especially in light of the fact that most notices printed under such captions will be illegal because of the scarcity of BFOQ occupations. In fact, as a result of the United States Supreme Court's affirmation\textsuperscript{170} of the Pittsburgh Press case, virtually every major newspaper in California has discontinued its twin job opportunity listings.\textsuperscript{171} The single title "employment opportunities" now generally heads all jobs.

\textit{State FEP Commissions}

State FEP commissions, the counterparts of the federal EE OC, are responsible for enforcing state anti-discrimination laws. California's FEP Commission has been criticized for its allegedly lax stance on sex discrimination in employment.\textsuperscript{172} In contrast, the New Jersey Division of Civil Rights (hereinafter New Jersey Division) has used its power to issue rules having the force of law to curtail objectionable advertising practices before they become the subject of litigation. For example, the New Jersey Division has outlawed sexually segregated help wanted columns.\textsuperscript{173} In ad-

\begin{footnotesize}
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\item \textsuperscript{169} See, e.g., \textit{Cal. Labor Code} § 1421 (West 1971).
\item \textsuperscript{170} Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 367 (1973) (freedom of the press not abridged by statutory restriction on the publication of sexually discriminatory advertising).
\item \textsuperscript{171} Interview with B.J. Miller, California FEP Commission Conciliator, in Santa Clara, Jan. 24, 1974.
\item \textsuperscript{172} Comment, \textit{California's FEPA Remedies for Sex Discrimination—Are They Working?}, 5 U.C.D.L. Rev. 483 (1972).
\item \textsuperscript{173} See New Jersey Employment Advertising Rules, NJ.A.C. § 13:11-1.3 (1972).
\end{itemize}
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dition, the New Jersey Employment Advertising Rules, promul-
gated by the Division, hold the newspaper responsible for publish-
ing any advertising that specifies a particular sex within the adver-
tisement, unless a BFOQ applies. The press responded to the
Division's strong stand against newspaper participation in sex dis-
Mr.ine in Passaic Daily News v. Blair. The press responded to the
Division's strong stand against newspaper participation in sex dis-

Passaic Daily News v. Blair

The Passaic Daily News challenged the promulgation of the
New Jersey Rules, claiming that they constituted an incorrect in-
terpretation of the state anti-discrimination law. The Daily
News sought a declaratory judgment in the New Jersey Supreme
Court that its sex-based help wanted format was legal under exist-
ing law. It contended that New Jersey Statute section 10:5-12
(c), which prohibits the expression of discriminatory intent in
job advertising, was limited in its coverage to employers, unions,
and employment agencies. Furthermore, the Daily News argued
that because of the unpredictability of the BFOQ factor, the Rules
placed an unreasonable burden on newspapers to determine when
an advertisement could legally indicate sexual preference. The
issue to be decided was whether the New Jersey Division had ex-
ceeded the scope of its authority in promulgating such far-reaching
rules.

The New Jersey Supreme Court unanimously approved the
adoption of the Advertising Rules. The court ruled that the
remedial powers of the New Jersey Division were to be liberally
construed in view of the preeminent social significance of its pur-
poses. Furthermore, explained the court, an agency in charge
of administering a law is entitled to considerable deference.
In discussing the harmful effect of separate newspaper classifica-
tions for male and female jobs, the court noted that the mere exis-
tence of sex-based columns for BFOQ jobs actually encourages the
discrimination which the Division was attempting to prevent: the
availability of sex-specifying headings enables the advertiser to
circulate his discriminatory intent at little risk to himself. The
columns thus served both to “encourage” and to “facilitate” dis-

177. Id. § 10:5-12(c).
178. 63 N.J. at 479, 308 A.2d at 651.
179. Id. at 493, 308 A.2d at 659.
180. Id. at 484, 308 A.2d at 654.
181. Id.
182. Id. at 487, 308 A.2d at 656.
The court also found little merit in the Daily News' contention that it was too burdensome to screen individual advertisements for illegal expressions. The Division's rules clearly spelled out what sexual preferences were permissible. The court noted that genuine BFOQs were rare; thus, the screening of individual advertisements would result in minimal inconvenience to the Daily News and, in any case, such inconvenience should be borne by the newspaper in the interest of public policy. Since the rules also required a newspaper to ask for the identification number given by the Division to any BFOQ claimed by an advertiser, a publisher relying in good faith on such a number would not be in violation of the Rules. Finally, the court observed that, with a little experience, the Daily News' advertising editor would have no trouble screening submissions. The New Jersey Supreme Court thus approved of the strong position taken by the state FEP commission.

Connecticut and New York Commission Decisions

State FEP commissions can also advance the cause of equal employment opportunity for women in their enforcement proceedings. The case of Connecticut Commission on Human Rights v. The Evening Sentinel provides an example of a forceful stand against sex bias taken by the Connecticut Commission, which is authorized to issue cease and desist orders to enforce the state FEP act. The Evening Sentinel, a Connecticut newspaper, had a policy under which the advertiser was permitted to place employment advertisements in either "Male" or "Female" columns. When a complaint regarding this practice was filed with the Commission, the Sentinel asked the agency for guidelines on the proper placement of advertisements in sex-based columns. The Commission declined this request, however, declaring only that the practice of using segregated columns must cease.

The conservative influence a FEP agency can have on sex discrimination, as manifested by newspaper help wanted formats, can be observed in the operation of the New York Division of

183. Id. at 488, 308 A.2d at 656.
184. Id. at 492-93, 308 A.2d at 658.
185. Id. at 493, 308 A.2d at 659.
186. Id.
187. Id.
188. 2 CCH EML. PRAC. GUIDE ¶ 5073 (1972).
190. 2 CCH EML. PRAC. GUIDE ¶ 5073 at 3151 (1972).
Human Rights prior to 1973. In 1971, the National Organization for Women filed a complaint with the Division charging the Gannett Company, operator of two New York newspapers, with maintaining separate classifications for male and female employment openings. The Division ruled that the mere maintenance of the dual classification scheme did not establish Gannett's participation in illegal discrimination, since there was no proof that Gannett knew the jobs did not require BFOQs. The Division's guidelines on sex discrimination specifically allowed the use of the dual column format for employment advertising if a disclaimer, similar to the one used by The Pittsburgh Press, appeared in the classified section. Since Gannett's newspapers printed such a disclaimer, the Division dismissed the action. The administrative remedy having been exhausted, the action thereafter was pursued in state court, where the Division was upheld.

CONCLUSION

It is probable that no FEP statute has been enacted with the intention of controlling the publication of sexist advertisements by newspapers. However, a substantial body of law has arisen from the FEP laws with respect to the role of the press in sex-biased advertising. While the courts are the final arbiters of what employment advertising practices are unlawful, the administrative agencies in charge of enforcing FEP laws have the greatest influence on the incidence and scope of occupational discrimination in the want ad pages. Through guidelines, rules, and opinion letters, FEP commissions define the parameters of permissible sexual specification appearing in the printed media.

The New York Court of Appeals recently addressed itself to the issue of sexually designated want ad columns. Without mentioning the Courier-Express and Gannett cases or their rationales, the court held, in National Organization for Women v. State Division on Human Rights, that the publication of sex-based columns aided and abetted sex discrimination. No authority was cited for this conclusion and no supportive reasoning was

193. 1972 CCH EMPL. PRAC. GUIDE ¶ 26,053.
194. See note 125 supra.
offered. It was as if the court found the resolution of the matter before it so obvious as to require no discussion.

In California, although employment columns designated by sex have virtually disappeared since Pittsburgh Press, unlawful specifications of sex still regularly occur in the body of help wanted advertisements. According to the California Attorney General's opinion, a newspaper is not responsible for sexual preferences appearing in individual advertisements unless it knows that such preferences are improper. The California FEP Commission, on the other hand, has informed state newspapers that it considers the publisher to be in possible violation of the FEP Act for publishing individual employment advertisements specifying sex.

The issue in discriminatory want ad litigation has thus moved from column titles to the content of single advertisements. Probably the strongest position a state FEP commission can now take against single advertisement sex discrimination is to issue a guideline holding a newspaper responsible for such notices and to litigate violations. Counsel for the press can no doubt present technical legal arguments why the additional burden of screening individual advertisements should not be imposed on newspapers. Hopefully, though the recent New York Court of Appeals decision in NOW v. State Division presages a general willingness of courts to cut the Gordian knot of nice legal questions and hold outright that practices which further sex discrimination in employment must be eliminated. Indeed, the New Jersey Supreme Court, in Passaic Daily News v. Blair, has already shown the way.

Few newspapers would print in their classified pages job notices that indicated racial preferences. Nevertheless, most newspapers are willing to print FEP advertising violations when sex discrimination is involved. The unlikelihood of enforcement of these violations is insured by the difficulty in ascertaining which advertisements specifying sex are illegal. Yet the press is aware by now that many of its job notices will be discriminatory. Clearly, an additional problem facing advocates for working women is the apparent lack of commitment the press has shown towards insuring equal employment opportunity for women.

Of course, combatting sex discrimination in employment ad-

vertising is only the first step for the female worker. Discrimination in hiring and advancement still occurs in spite of advertising notices proclaiming that the employer is an equal opportunity employer. Nevertheless, the struggle to rid the want ad pages of their blatantly sexist character has helped to remove the preliminary obstacle female job seekers have faced. Inevitably, as more women apply for positions formerly considered “male only,” more will be accepted. And, to be sure, more women will respond to job advertisements which place no limitations, express or implied, on female applicants.

Peter W. Kerman