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Elizabeth Boyer

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By ELIZABETH BOYER*

IF all jobs were open to all persons, women could compete freely for them and would have no just cause for complaint. But all jobs are not open to all persons; those available to women are significantly limited, creating a sort of reverse monopoly. Women, whatever their individual qualifications, are forced to compete among themselves for the small pool of jobs available to them *as women*, fostering harsh and unrealistic competition from oversupply and overqualification.

"Overqualification" means simply that no jobs are open which are commensurate with an individual's training and ability. If the only women affected by this situation were the elite few—those women who would be this country's leadership had they been born men—the situation would be wasteful and iniquitous enough. But the situation applies to all women. If we consider "women's jobs" as a ladder, where overqualified women compete for the few top rungs, obviously other well-qualified women are forced farther down the ladder. This overcrowding persists to the very bottom, the entry level, where inexperienced or otherwise handicapped women have to compete with those better qualified for a variety of marginal and undesirable jobs.[1]

Thus, the limitation of jobs available to women has its harshest effects on the marginally employable women—for example, the woman on welfare seeking an entry level job, or the unwed mother who did not finish school. She is forced to compete, at a great disadvantage, with her younger, or better trained, or better groomed sister, for the jobs into which all are forced by the downgrading effect of an artificially

* B.S., 1937, Bowling Green State University; J.D., 1947, Cleveland-Marshall Law School of Cleveland State University; LL.M., 1956, Western Reserve University; Member, Ohio Bar.

1. "The median earnings of year-round full-time women workers 14 years of age and over in 1968 were $4,457 . . . [t]wenty percent of the women but only eight percent of the men earned less than $3,000." WOMEN'S BUREAU, U.S. DEP'T OF LABOR, FACTS OF WOMEN WORKERS 4 (table 1) (1970).

induced supply-and-demand situation.[2] This is the context in which the artificial limitation of jobs available to women, and the efforts which have been made to remedy the situation, must be considered. This article will be restricted to a discussion of an effort to eliminate one such artificial limitation—sex discriminatory help-wanted advertising. Proscriptions are available yet they are only now beginning to be applied. The success of enforcement will be a small but important factor in women's fight for equal rights.

The Importance of Help-Wanted Advertising

While the injury to individual job-seekers from hiring discrimination is often grievous, the injury to the whole class of women job-seekers is a serious matter to the entire economy.[3] Jobs ordinarily advertised in help-wanted sections of newspapers are those for which women are accustomed to apply. A study by Dr. Sandra Bem and Dr. Daryl Bem shows that 78 percent of all working women are *currently* employed in jobs which would be advertised in female help-wanted columns, and that less than 1 percent of the rest are in positions such as physician, judge, college president or professor, which would not be advertised in the newspaper.[4] Therefore, most of the "better" jobs for which women could qualify are reached by help-wanted columns, *including* the lower level jobs forced on most women.[5] The sex classification of

2. In terms of family income, one in ten families was headed by a woman, and 42.3% of these had an annual income of less than $3,000—below poverty level by current standards. Statement by Elton Brombacher, Commissioner of California Fair Employment Practice Commission before the Richmond City Council, Sept. 26, 1966, regarding California's employed women in poverty. "In 1968 the unemployment rate for women was much greater than for men, 4.8 compared to 2.9 percent." WOMEN'S BUREAU, U.S. DEP'T OF LABOR, FACTS ON WOMEN WORKERS 18 (table 14) (1970). "1,021,000 white women and 734,000 black women and others are the sole support of families in poverty." *Id.* at 10 (table 6).

3. The economic plight of America's working women is both well known and documented. *See, e.g.*, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, ECONOMIC FACTS ABOUT DISCRIMINATION, SER. P-60 (1967); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, FAMILY INCOME ADVANCES, POVERTY REDUCED IN 1967, SER. P-60 (1967); BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT AND EARNINGS (1968); WOMEN'S BUREAU, U.S. DEP'T OF LABOR, WHO ARE THE WORKING MOTHERS? (leaflet 37) (1968).

4. Bem & Bem, *Sex-Segregated Want Ads: Do They Discourage Female Job Applicants?*, in *Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Educ. of the Comm. on Educ. and Labor*, 91st Cong., 2d Sess., pt. 2, at 891 (1970).

5. See note 26 *infra*. The deterrent nature of male/female headings has also been demonstrated in another study by the Bems. PENNSYLVANIA DEP'T OF PUBLIC INSTRUCTION, TRAINING THE WOMAN TO KNOW HER PLACE: THE SOCIAL ANTECEDENTS OF WOMEN IN THE WORLD OF WORK (1971).

jobs in newspapers has a direct effect on the number of jobs available to the vast majority of working women.

The effects are not restricted to quantitative limitations on employment opportunities, however. There is also a direct effect on the quality of the jobs available to women. At least one study has been made to document the disparity between the quality of jobs offered under the "male" and "female" headings,[6] but even a cursory reading of the jobs offered in any newspaper's male headed columns, as compared with those offered in the female headed columns, will disclose this wide disparity, day by day and week by week. The higher paid jobs, the "career" jobs, appear in the male columns, and the lower paid, non-career jobs in the female columns. Even the number of jobs advertised is ordinarily far less in the female section. Thus, the talents of well-qualified women are wasted, and their value depressed in the job market, resulting in a loss to the economy,[7] as well as to the individual worker.

Enforcement Efforts

Section 704(b) of Title VII of the Civil Rights Act of 1964[8] prohibits employers and employment agencies from placing job listings under male and female headings unless there is a bona fide occupational qualification by sex for the job.[9] One would expect that employers and

6. Testimony of Dr. Gerald H. F. Gardner, before the Office of Federal Contract Compliance, Aug. 6, 1969.

7. The amounts of money at stake are vast. Considering only the *earnings* of newspapers from help-wanted advertising, we arrive at some very large figures. Published lineage figures for the first eleven months of 1970, for example, were $16,673,673 for the morning Los Angeles Times and $10,973,049 for its Sunday paper. A rule of thumb sets help-wanted advertising at approximately one-third of a newspaper's total commercial lineage, and a fair average figure of cost per line would be about 70 cents. It is thus apparent that enormous amounts are being derived by newspapers countrywide from advertisements which are clearly illegal on the part of the employers and employment agencies placing them. However, it must again be noted that the amounts at stake in the under-utilization of women workers would transcend even these sizeable amounts many times. *Classified Advertising of the First Fifty Sunday and Morning Newspapers*, MEDIA RECORDS 16, 18 (1970).

8. 42 U.S.C. § 2000e (1964).

9. Title VII, § 704(b), 42 U.S.C. § 2000e-3(b) (1964), provides: "It shall be an unlawful employment practice for an employer, labor organization, or employment agency to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex or national origin, except that such a notice or advertisement may indicate a preference,

employment agencies would simply comply with this section but that has not been the case. With relatively few exceptions,[10] newspapers throughout the country still are heading their help-wanted columns with male and female designations, and these columns are filled with advertising which is clearly unlawful.[11]

Ignoring for the time being, the powers granted to the attorney general to enforce section 704(b),[12] a reading of Title VII indicates that Congress did not give the Equal Employment Opportunity Commission (EEOC) effective enforcement authority,[13] and time has proved the EEOC's powers are inadequate for its tasks.[14] Its only powers are essentially persuasive, and the commission has found difficulty in using them to enforce section 704(b).

To improve on its weak position, the EEOC issued on August 14, 1968, "Guidelines on Discrimination Because of Sex," reading as follows:

> 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 advertisements in columns . . . headed "Male" or "Female" will be considered an expression of preference, limitation, specification, or discrimination based on sex.[15]

While this guideline is based very closely on section 704(b) and spells out what would seem to be rather obvious, it was challenged by the American Publishers' Association and the Washington Evening Star

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limitation, specification, or discrimination based on religion, sex or national origin is a bona fide occupational qualification for employment." *See* Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 716 (7th Cir. 1969), *rev'g in part* 272 F. Supp. 332 (S.D. Ind. 1967); Cheatwood v. South Central Bell Tel. & Tel. Co., 303 F. Supp. 754 (M.D. Ala. 1969). The bona fide occupational qualification exception has been limited by court interpretation to situations "where the employer proved that all or substantially all women were unable to perform" the job involved. Oldham, *Questions of Exclusion and Exception Under Title VII,* 23 HASTINGS L.J. (1971).

10. Newspapers in Atlanta, Baton Rouge, Des Moines, Grand Rapids, Houston, Kansas City, Minneapolis, New York, Oakland, Washington, D.C. and a number of smaller municipalities have begun listing jobs in their classified pages by job category rather than by male/female designations.

11. 42 U.S.C. § 2000e-3(b) (1964), *quoted in full* note 9 *supra.*

12. See text accompanying notes 33-35 *infra.*

13. 42 U.S.C. § 2000e-4 (1964); *see* America Newspaper Publishing Ass'n v. Alexander, 294 F. Supp. 1100, 1103 (D.D.C. 1968).

14. A bill has been introduced which would grant such powers to the commission, including cease and desist powers. H.R. 1746, 92d Cong., 1st Sess. (1971).

15. 29 C.F.R. § 1604.4 (1971).

in an action against the EEOC.[16] The association sought injunctive and declaratory relief with regard to the guideline, asking the court to find that the guideline did not have the force and effect of law, that it was unauthorized and invalid, and that the defendant commission should be enjoined from making the guideline effective. The district court found the guideline permissive and interpretive of the law, without the force and effect of law, and thus within the commission's power to promulgate. After appeal, the sole remaining point to be decided was whether the mere existence of the guideline injured the plaintiffs.

At this point, the Women's Equity Action League (WEAL) filed a motion to intervene[17] on behalf of working women, as a class, alleging that working women, the intended beneficiaries of the provisions of this section of Title VII, were, in fact, the parties injured by the help-wanted advertisements. WEAL attempted to have the court examine the equity position of the plaintiffs. The district court denied the motion, as did the appellate court,[18] apparently because such intervention would result in an enlargement of the issues involved. Thus, the substantive issues of compliance with the guideline and with the section of Title VII on which the guideline is based were not brought before the court.

On October 22, 1970, at the request of the American Newspaper Publishers' Association and the Washington Evening Star, the case was dismissed without prejudice. Thus, injury from the guideline was never established and the guideline has remained in effect. This whole exercise never determined the position of newspapers in the help-wanted matter and had no utility insofar as enforcement of section 704(b) was concerned. It must be noted that great public confusion still exists with regard to the scope and significance of this litigation.

Another enforcement effort is now before the Ninth Circuit Court of Appeals in *Brush v. San Francisco Newspaper Printing Co.*[19] The issue presented is whether the defendant newspaper publishers are employment agencies within the definition of the above cited sections of Title VII insofar as their function of help-wanted advertising is con-

16. American Newspaper Publishers Ass'n v. Alexander, 294 F. Supp. 1100 (D.D.C. 1968).

17. Motion to Intervene filed March 27, 1969.

18. Appeal denied, No. 22,519, D.C. Cir., June 29, 1970.

19. 315 F. Supp. 577 (N.D. Cal. 1970), *appeal docketed,* No. 26,666, 9th Cir., Jan. 8, 1971. Amicus curiae briefs in support of the appellant, Brenda Brush, have been filed by WEAL, the Equal Employment Opportunity Commission, and the National Association for the Advancement of Colored People.

cerned. Since the case and this writer, as amicus curiae, are before the court, further discussion is not appropriate at this time.

Other efforts to obtain compliance in the help-wanted matter have been made by human relations commissions and civil rights commissions. While it seems improbable that Congress intended enforcement of a federal statute to depend on state and municipal human relations and civil rights commissions, these groups at the present time seem to be accomplishing more, as a practical matter, than are the more traditional forms of adversary proceedings under the federal statute. It is notable that the New York newspapers abandoned the male/female classified headings early in the controversy, in conformity with New York's Human Relations Ordinance,[20] and that the District of Columbia newspapers, one of which was co-complainant with the American Newspaper Publishers' Association against the Equal Employment Opportunity Commission's guideline,[21] have very recently dropped the male/female column headings, reportedly at the instance of the District of Columbia Human Relations Commission.[22]

In one case, however, a newspaper has challenged the help-wanted regulations of a human relations commission. On July 24, 1970, the Pittsburgh Human Relations Commission ordered the Pittsburgh Press

20. NEW YORK CITY LAW ON HUMAN RIGHTS § B 1-7.0 (1965).

21. *See* American Newspaper Publishers' Ass'n v. Alexander, 294 F. Supp. 1100 (D.D.C. 1968).

22. Washington Post, Jan. 9, 1971 at B5, col. 1: "Sex Labels in Job Ads to be Ended." "The city's [Washington's] three daily newspapers, The Washington Post, The Evening Star and The Daily News, will stop using sex designations in help wanted advertisements Monday.

"Sources said the decision followed three meetings between representatives of the newspaper and officials of the D.C. human relations commission over a period of several months.

"The meetings were initiated by the human relations commission in an effort to improve its enforcement of laws prohibiting job discrimination on the basis of sex, sources indicated." *See also* the regulation recently adopted by the Iowa Civil Rights Commission: "1.1(1) All newspapers within the state of Iowa shall cease to use sex-segregated want ads—*e.g.* 'Male Help Wanted,' 'Female Help Wanted' and 'Male and Female Help Wanted' *or* 'Men-Jobs of Interest,' 'Women-Jobs of Interest' and 'Men and Women.'

"1.1 (2) Any newspapers failing to comply with subrule 1.1 (1) shall be deemed in violation of the Iowa Civil Rights Act . . . and legal proceedings shall henceforth be initiated against such newspaper." IOWA CIVIL RIGHTS COMM'N, Ch. 1, Sex-Segregated Want Ads, 1.1 (105-A) *Cease Use*, Date Adopted Nov. 5, 1970, *quoted in* LAB. REL. REP., FAIR EMP. PRAC. MANUAL 451:406-407. No court test of this regulation has been initiated and compliance seems to have resulted in Iowa. Letter from Roxanne Barton Conlin, Iowa Assistant Attorney General, to Dr. Boyer, June 25, 1971, "We have had virtually no difficulty in securing the cooperation of newspapers . . . ."

to remove all reference to sex from its help-wanted advertisements. The order was based on a series of hearings held in January and February of 1970, based on a complaint filed by the National Organization for Women (NOW).[23] The newspaper appealed to the Court of Common Pleas of Allegheny County, basing the appeal on local agency law,[24] denial of due process, breadth of complaint, evidentiary and First Amendment questions. The court upheld the commission's determination that:

> [T]he Press is guilty of aiding employers, labor organizations, and employment agencies *who are* engaged in unlawful employment practices. The unlawful practice of which the Press is guilty is the publication of sex designation in job classifications.[25]

These relatively few cases have been essentially class actions to obtain compliance in the help-wanted matter. Ordinarily, individual litigants injured by noncompliance—in this case, working women who seek jobs through the help-wanted columns—could also enforce the statute. It is apparent that women who are qualified to perform jobs listed under male help-wanted headings are effectively barred and discouraged from applying for such jobs.[26] The use of these headings, which still predominates in the nation's newspapers, is clearly unlawful as to employers and employment agencies,[27] and it would seem that test cases would have been filed by individuals entitled to legal relief.

One difficulty preventing a spontaneous flow of such litigation may very well be the conjectural nature of the damage to a given *individual* who might or might not have been hired had she been permitted to apply for a given job; the measure of her individual damages might well be extremely difficult to prove. Another practical barrier to such actions may be that suing one's prospective employer to obtain a job is an unattractive method to most job applicants. These very real deterrents are probable causes for the dearth of individual actions on this matter.

One such case, however, has been filed in the District Court for the Northern District of Ohio.[28] The grounds of the action are that an employment agency refused to consider the plaintiff, Adrienne Lieb, for an

23. Appeal of the Pittsburgh Press, 3 FAIR EMP. PRAC. CAS. 409, 410 (C.P., Allegheny County, Pa. Mar. 24, 1971).

24. *Id.* at 409.

25. *Id.* at 411-12.

26. "The inevitable consequence of putting the ad in the 'male' or 'female' column is to cut off at the outset any further reading . . . by persons of the other sex." 112 CONG. REC. 13691 (1966) (remarks of Congresswoman Griffiths). See note 5 *supra*.

27. 42 U.S.C. § 2000e-3 (1964).

28. Lieb v. Drambarean, No. C-69-347 (N.D. Ohio filed May 10, 1969).

accounting position, under rather interesting circumstances. The employment agency advertised in a Cleveland newspaper under the "Help Wanted, Female" section, offering an accounting position at $700 a month. When Miss Lieb applied for this position, she allegedly was told that there had been a mistake, and that the advertisement should have been in the "Help Wanted—Male" section. Miss Lieb now contends that she has been deprived of her civil rights solely on account of her sex, and that the agency refused even to evaluate her qualifications. In addition to a claim for lost earnings and legal fees, the action seeks to force the employment agency to desist from placing similar advertisements under the proscribed headings. The case has not as yet been heard.

Eventually, enforcement of section 704(b) may have to be brought about by a multiplicity of such actions, on a test case basis, wherein complainants with strong fact situations bring cases on an individual basis. However, this could result in a vast number of cases. Most jobs do not qualify under the bona fide occupational qualification exemption, even though sex discrimination with regard to them is prevalent; this would mean that each job, and each offender, could require separate litigation. Some method of enforcement on a class basis, avoiding such a multiplicity of actions, would certainly seem desirable.

Alternative Enforcement Approaches

Legally, there are many other approaches possible to challenge the unlawful advertising practice. The question of the agential role of the newspapers who publish advertisements which are unlawful on the part of their principals, *i.e.* the advertisers, is worthy of scrutiny[29] as is the newspapers' position in aiding and abetting[30] what probably constitute torts against the injured individuals—the women job-seekers entitled to

29. "The person who actually does the act is liable although he was acting for another person, as . . . agent. In general, anyone who aids or cooperates with another in the commission of a trespass is liable for it." 87 C.J.S. *Trespass* § 31, at 987 (1954). Also, violation of a statute by doing a prohibited act or by failing to do a required act makes a person liable for an invasion of an interest of another if the intent of the statute is exclusively or in part to protect the interest of another person and the interest invaded is one which the statute is intended to protect. Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946).

30. "One who . . . advises, encourages, procures . . . aids, or abets a wrongful act by another has been regarded as being responsible as the one who commits the act, so as to impose liability upon the former to the extent as if he had performed the act himself. The liability in such case is joint and several." 52 AM. JUR. *Torts* § 114 (1944). *See also* Appeal of the Pittsburg Press, 3 FAIR EMP. PRAC. CAS. 409, 411-12 (C.P., Allegheny County, Pa. Mar. 24, 1971).

the protection of section 704(b). Also, the position of the newspapers in publishing box advertisements which conceal the identity of the employers who are placing the unlawfully categorized advertisements, is particularly subject to question, as being of a participatory, rather than a neutral, nature. Since these matters have been mentioned, in passing, in a brief now before a court[31] they will not be further documented herein.

As an ancillary matter it must be noted that holders of federal contracts, who place help-wanted advertisements under male/female headings, risk the loss of their contracts. A guideline recently issued by the Office of Federal Contract Compliance provides as follows:

> Advertisement in newspapers and other media for employment must not express a sex preference unless sex is a bona fide occupational qualification for the job. The placement of an advertisement in columns headed "Male" or "Female" will be considered an expression of a preference, limitation, specification or discrimination based on sex.[32]

Since an enormous number of employers hold federal contracts, or hope to receive them, it may be possible to achieve a sort of "back-door" enforcement of section 704(b) by filing complaints against federal contract holders who place advertisements under male/female headings in violation of the guideline.

It is notable that the words "We are an Equal Opportunity Employer" appear in many newspapers, within advertisements appearing under the proscribed male/female headings. The statement ordinarily denotes that the advertiser holds a federal contract. Such contract holders are subject to compliance review and to contract revocation for noncompliance with the guideline. Persons who desire to see the help-wanted provisions enforced may request compliance reviews merely by writing a letter of complaint based on the guideline. This procedure obviates individual court action and eliminates the need for court enforcement against federal contract holders.

Considering the diverse nature of the foregoing enforcement options, and their indifferent success to date, it is difficult to understand why the most obvious procedure has not long since been adopted in the help-wanted matter. The attorney general has authority to bring pattern and practice actions where sweeping violations of Title VII exist.[33]

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31. See text accompanying note 19 *supra.*

32. 29 C.F.R. § 1604.4 (1971).

33. Title VII § 707(a), 42 U.S.C. § 2000-6(a) (1964) provides: "Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the

The help-wanted matter certainly qualifies as a widespread and long continuing violation "of general public importance." As has been stressed, it is without question a clearly defined violation insofar as employers and employment agencies are concerned. The language of the applicable subsections seems to express an urgency on the part of the Congress, which has not been reflected in the administration of the Office of the Attorney General.

Title VII further provides that:

> In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending, immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.
>
> It shall be the duty of the judge designated pursuant to this section to assign the case for hearing *at the earliest practicable date and to cause the case to be in every way expedited.*[34]

The foregoing has been quoted in its entirety to make clear the detailed provisions for court handling which Congress incorporated in Title VII. The language would seem to be clear, and even imperative, but it has for some reason never been taken at face value in the help-wanted matter. A pattern and practice of section 704(b) violations certainly exists, and has existed since Title VII was enacted.

The failure of the attorney general to enforce this section of Title VII is disappointing and difficult to understand. More direct, expeditious enforcement would exist if the attorney general fulfilled his indicated function, rather than having enforcement proceed on a piecemeal basis. After seven years of continued violations, the matter should have attained some priority among the duties of the attorney general. As District Judge George Templar recently remarked in another Title VII matter:

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rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described."

34. *Id.* § 2000e-6(b) (emphasis added).

> The Court is aware that this is not to be classified as private litigation but is a proceeding in which the public has a substantial interest, bearing in mind the policy established by Congress that *unlawful employment practices so threaten the fabric of our society that their effects are inherently irreversible.* . . . [W]here an "employee is discriminatorily denied a chance to fill a position for which he is qualified . . . he suffers irreparable injury as does the labor force of the country as a whole."[35]

Conclusion

The legislative, judicial, and executive branches of government have not functioned in a particularly effective way in enforcing proscriptions against sex discriminatory help-wanted advertising. For the many years since its enactment, the applicable federal statute has been openly violated by the great majority of employers and employment agencies, with the assistance of the nation's newspapers. Certainly, respect for the established means of obtaining justice is not enhanced by our record on this matter. If sex discrimination is to be eliminated, government must shed its reluctance to become an active advocate of women's rights. Policy and statutes must be enforced, and a good place to begin may be against sex discriminatory help-wanted advertising.

35. Edmonds v. E. I. duPont de Nemours & Co., 315 F. Supp. 523, 525 (D. Kan. 1970).