Union Liability for Sex Discrimination

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NOTE

UNION LIABILITY FOR SEX DISCRIMINATION

Women have played an important role in the American labor movement and in the development of unionization. The use of low-paid female labor was one of the original reasons why workers organized. Yet to date, compared with their male counterparts, very few women in the work force are unionized. They comprise about one-fifth of total union membership and a large portion are members of a few unions. Once members, women rarely serve in policy-making positions or on governing bodies; negotiating teams, for both sides, are usually all-male; and, sometimes opportunities for promotions and positions of responsibility are unaccessible. The result is that women's interests are often not considered in the negotiation of collective bargaining agreements. Thus, it is no surprise that while membership figures for women have increased, they have not kept pace with the increasing number of women entering the work force.

Since sex discrimination still pervades the American labor force, it is a premise of this note that unions, in their collective bargaining capacity, are partly responsible for the situation. If unions are to truly represent all of labor, they must be held accountable to their ever-increasing female membership. Recently, the plight of women has been recognized and legislation is now available to protect a woman from sex discrimination by the very unions charged with protecting her employment rights. Specific provisions in the Equal Pay Act of 1963 prohibit unions from causing employers to sexually discriminate; Title VII of the Civil Rights Act of 1964 outlaws many forms of union discrimination and is widely invoked; the National Labor Relations Act provides a duty of fair representation and possibly makes it an unfair labor practice to discriminate on ac-

1. S. COHEN, LABOR IN THE UNITED STATES 76 (1960).
2. Id.
3. Dewey, Women in Labor Unions, MONTHLY LAB. REV., Feb. 1971, at 42. In California, only 18% of the women in the work force are organized as compared to 42% of the men. LOS ANGELES COUNTY FEDERATION OF LABOR, POLICY STATEMENT ON WOMEN IN THE WORK FORCE 5 (1970).
5. POLICY STATEMENT, supra note 3, at 5-6.
7. The Los Angeles County Federation of Labor made such a confession at their delegate meeting of September 21, 1970. See POLICY STATEMENT, supra note 3, at 5-6.
count of sex; and, the California Labor Code also sets forth certain prohibitions against union discrimination. This note shall analyze the strengths and weaknesses of these available remedies.

Federal Legislative Remedies

The Equal Pay Act of 1963

Wage discrimination is one of the major obstacles women must overcome to achieve equality in employment. Statistics indicate that women receive unequal pay for equal work, although the Labor Department has suggested that wage disparities between men and women exist because women are employed in low-skilled, low-paying jobs. For whatever reasons, grossly disparate wage scales have long existed, and Congress has reacted by passing the Equal Pay Act of 1963 as one approach to solving the problem.

The Equal Pay Act adds a new section to the Fair Labor Standards Act (FLSA) of 1938. Basically, it provides that women shall receive equal pay for equal work; and, more specifically, it provides a cause of action against unions which cause or attempt to cause an employer to discriminate against any of its employees on the basis of sex. This is appropriate since wage structures are generally established by collective bargaining agreements and unions can intentionally or unintentionally discriminate against women employees. If an employer is pressured through union picketing or strikes into instituting or maintaining a prohibited wage differential, the union will be held solely liable. If the discriminatory wage rates arise out of a collect-


12. The congressional purpose in passing the Equal Pay Act was to eliminate "those subjective assumptions and traditional stereotyped misconceptions regarding the value of women's work." Shultz v. First Victoria Nat'l Bank, 420 F.2d 648, 656 (5th Cir. 1969).


tively bargained contract, the union must share the responsibility with the employer.15

Violations of the equal pay requirements of the Fair Labor Standards Act may be enforced directly in three ways.16 First, a civil action for damages, primarily lost wages, may be brought by or on behalf of any injured employees.17 Second, the secretary of labor may institute an injunction suit to enforce the act.18 Reinstatement of unlawfully discharged employees and payment of lost wages may both be ordered in such a proceeding.19 Although an injunctive suit is normally brought only against the employer, labor organizations are also subject to the injunctive relief provisions of the FLSA.20 Third, the attorney general of the United States may bring criminal proceedings against violators of the act.21 If a violation has been willful, authorized penalties are imprisonment for up to six months, fines of up to $10,000, or both.22

Employees may desire to complain or file grievances in order to take advantage of these available direct actions, but threats of discharge from employment or of expulsion from a union are viable methods of coercing members to drop charges or pending complaints. To protect employees and union members from such retaliation and to encourage reports of violations, the FLSA forbids “any person”23

15. Id.

16. It appears that, thus far, only one reported action has been brought directly against a union charging a section 6(d)(2) violation. In Shultz v. Kimberly-Clark Corp., 315 F. Supp. 1323 (W.D. Tenn. 1970), the secretary of labor filed an action alleging violation of the equal pay provisions with respect to job classifications. The action was brought directly against both the employer and the union on the basis that the union contract had established arbitrary job classifications which created discriminatory wage rates. The court concluded that all jobs which the secretary chose to compare were not shown to be equal in skill, effort, and responsibility. Therefore, the plaintiff had not proven any violations.

17. FLSA § 16(b),(c), 29 U.S.C. § 216(b),(c) (1964). Section 16(b) authorizes either a suit by one or more employees on their own behalf, or a suit by one or more employees on behalf of themselves and all other employees similarly situated. Section 16(c) authorizes the secretary of labor to bring suit on behalf of one or more employees.


22. Id.

23. The FLSA fails to define what “any person” as used in that act encompasses. Nevertheless, the term “any person” has been judicially interpreted to include a labor union, its officers and members, even though “[t]he framers of the Act wished to preserve the rights of labor unions and not to permit the Act to be used to interfere with the
from discharging or discriminating in any way against an employee who files a complaint, institutes any kind of proceeding, or serves on an industry committee.  

In addition to the three direct methods of enforcing the Equal Pay Act, the possibility exists of indirect enforcement by allowing an employer who has been found guilty of sex discrimination to use the act as a basis for seeking contribution from a union who was in pari delicto. This was tried in one case, but the court held that a complaint which simply alleged the union had actively participated in negotiations was insufficient since it set forth no specific facts tending to prove that the union had "caused" the employer to discriminate within the meaning of the act. A motion for summary judgment in favor of the third party defendants was granted. On the other hand, the court indicated that the act might be available under the proper set of facts and suggested that contribution from a third party defendant might be possible under common law theories of recovery.

The problem most frequently raised in equal pay cases seems to be discrimination in job classifications which serve as the basis for discriminatory wage rates. Women are given different classifications and much lower wages for work that is substantially equal to that of their male counterparts. Murphy v. Miller Brewing Co. raised the...
question of union involvement in such a classification scheme. Women laboratory technicians sought injunctive relief and back pay because of alleged sex discrimination in employment practices. The Miller Co. asserted that the union should be held liable because the discriminatory job classifications had been established in a collective bargaining contract and the union had represented the women in the negotiations.

The court found evidence of sexual discrimination in the different wage rates paid due to job classifications. More importantly, it found no evidence that the unions had proposed the discriminatory provisions of the contract. The fact that the local and international unions would not strike or picket over Miller's refusal to equalize the wages did not support the claim that the unions caused or attempted to cause employer discrimination. 31

Thus, according to the Miller Brewing decision, unions must do something more than merely agree to discriminatory wage contracts before they will be found in violation of the Equal Pay Act. Some affirmative action must be taken before liability will be imposed. The decision infers that if the union, rather than the employer, had proposed the sexually discriminatory provisions, the court could have found union liability. This may raise the question of whether Miller Brewing removes some of the substance of the act's prohibitions against union caused discrimination. Apparently, unions may accept any discriminatory contract terms without incurring Equal Pay Act liability.

While job classifications by union-management collective bargaining agreements are not binding on the courts, they are established by individuals with many years of experience in the field, and some recognition should be given to their judgment. However, courts should be encouraged to look into the union-management motives behind classification systems and, for that matter, behind merit and seniority systems as well. For example, in Schultz v. American Can Co.—Dixie Products 32 the court found that the wage differential between male and female roller machine operators was based in part on sex and was not the product of a bona fide job classification system; 33 it was thus held to be indicative of the employer's discriminatory view of the job. The court looked into the motives behind the wage differential and

31. Id. at 839.
32. 424 F.2d 356 (8th Cir. 1970).
33. The committee report on the final version of the Equal Pay Act commented on job classifications as follows: "This language recognizes that there are many factors which may be used to measure the relationship between jobs and which establish a valid basis for a difference in pay. These factors will be found in a majority of the job classification systems. Thus, it is anticipated that a bona fide job classification program that does not discriminate on the basis of sex will serve as a valid defense to a charge of discrimination." H.R. REP. No. 309, 88th Cong., 1st Sess. 3 (1963).
"pierced" the classification "veil" to find liability for sexual discrimination.

Unfortunately, statutory construction and judicial interpretations have limited the effectiveness of Equal Pay Act sanctions. For example, Bowe v. Judson C. Burns, Inc.\(^3\) held that a district court had no jurisdiction to order a union to reinstate the plaintiffs in an action brought by them to restrain their union from violating provisions of the FLSA. An employee's action can be maintained only to recover back wages and liquidated damages from the employer since employees are not authorized to bring direct actions to restrain either unions or employers.\(^5\) Actions for injunctive relief lie exclusively with the secretary of labor.\(^6\) The only civil remedy available from district courts against unions under the Equal Pay Act is for injunctive relief to restrain unions from causing employers to discriminate in the payment of wages.\(^7\)

Additionally, much of the Equal Pay Act's potential strength is drained by its status as an amendment to the minimum wage sections of the Fair Labor Standards Act. Congress felt that a simple expansion to include an equal pay concept would be the easiest and most efficient course of action due to the "long history and experience of Government and business and workers with the Fair Labor Standards Act."\(^8\) But the FLSA is laden with exceptions and those exceptions are just as applicable to the equal pay provisions as to other portions of the act. Generally, the act does not apply to executive, administrative, and professional employees, retail or service establishment employees, agricultural workers, certain workers of publications or newspapers, motion picture theater employees and switchboard operators.\(^9\) As a result, the Equal Pay Act covers only one-half of the female employees in the United States.\(^0\)

\(^3\) 137 F.2d 37 (3d Cir. 1943).
\(^5\) Id. But cf. Fagot v. Flintkote Co., 305 F. Supp. 407, 410 (E.D. La. 1969), where a district court held that a private action for injunctive relief from a section 215(a)(3) violation regarding discharge for filing a complaint or testifying may be enforced on general "federal question" jurisdiction because the mere silence of section 215(a)(3) regarding a private remedy for breach is not decisive.
\(^6\) FLSA § 11(a), 29 U.S.C. § 211(a) (1964).
\(^7\) Wirtz v. Hayes Indus., Inc., 58 CCH Lab. Cas. 43,556 (N.D. Ohio 1968).
\(^0\) Moran, Reducing Discrimination: Role of the Equal Pay Act, MONTHLY LAB. REV., June, 1970, at 31. Proposals have been made to extend the coverage to administrative, professional, and executive employment. Hearings on § 805 of H.R. 16098
Because of the few cases decided under section 206(d)(2), it is difficult to determine the effectiveness of prohibitions against union caused wage discrimination. This is true of both direct actions against unions and of indirect actions by employers seeking contribution. As has been pointed out, no union has yet been held liable. Furthermore, Miller Brewing may have weakened the intended strength of the act. Yet, even with its limitations and exemptions, the Equal Pay Act probably provides the best relief available for wage discrimination.

Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 is also available as a basis of relief from union sex discrimination. Generally, any union, as well as any private employer, which has twenty-five or more members or employees engaged in an industry affecting interstate commerce comes within the purview of the act. Section 703(c) of Title VII enumerates those union practices which are declared unlawful. The section adopts the same causation test used by the Equal Pay Act, namely that it shall be unlawful “to cause or attempt to cause an employer to discriminate against an individual in violation of the sec-

41. 42 U.S.C. §§ 2000e to -12 (1964) [hereinafter cited as Title VII].
42. Lansdale v. Airline Pilots Ass'n Int'l, 430 F.2d 1341 (5th Cir. 1970).
Some union-management agreements have adopted the wording of Title VII for use in the contract itself. For example, the General Motors Corp.—UAW Collective Bargaining Agreement of Nov. 11, 1970 provides: “General Motors Corp. and the UAW recognize their respective responsibilities under federal, state, and local laws relating to fair employment practices.

“The Company and the Union recognizes the moral principles involved in the area of civil rights and have reaffirmed in their Collective Bargaining Agreement their commitment not to discriminate because of race, creed, color, age, sex or national origin.” CCH LAB. L. REP. ¶ 59,905, at 85,024 (1971).
44. Title VII § 703, 42 U.S.C. § 2000e-2(c) (1964), which provides in part: “It shall be unlawful employment practice for a labor organization (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin; (2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive . . . any individual of employment opportunities . . ., because of such individuals race, color, religion, sex, or national origin; or (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.”
However, Title VII's coverage is much broader than that of the Equal Pay Act since it includes all forms of discriminatory employment practices, not just wage discrimination. Moreover Title VII has the advantage that it is not limited by the FLSA exemptions. Because of the overlap with the Equal Pay Act wage provisions, the Equal Employment Opportunity Commission (EEOC), an agency created to enforce Title VII, will consider and adopt any relevant opinions of the Labor Department's Wage and Hour Division Administrator which interpret "equal pay for equal work" provisions. This should insure uniformity in wage discrimination cases. Despite other procedures available to curb discriminatory activities by unions, women have turned increasingly to the EEOC for redress of alleged grievances. There are two principle attractions to this approach. First, an individual may easily file for relief from a violation. The complaint procedures are simple and do not necessitate the aid of attorneys or the joining of the secretary of labor. Second, people are most likely to pursue alternatives providing the greatest chance of success. The commission has not hesitated to find union violations, and this may have encouraged use of the Title VII procedures. In addition, in-

46. See notes 41-42 & accompanying text supra.
48. 29 C.F.R. § 1604.7 (1971).
50. EEOC Decision No. 71-1325, CCH EMP. PRAC. GUIDE ¶ 6214 (Mar. 2, 1971) (union failed to protest an employer's unlawful practice which discriminated against women); EEOC Decision No. 71-687, CCH EMP. PRAC. GUIDE ¶ 6186 (Dec. 16, 1970) (union party to an employment contract that restricted women to certain jobs); EEOC Decision No. 71-362, CCH EMP. PRAC. GUIDE ¶ 6169 (1970) (union failed to oppose the inclusion of seniority provisions in a collective bargaining contract that unlawfully discriminated against women); EEOC Decision No. 71-49, CCH EMP. PRAC. GUIDE ¶ 6162 (1970) (union first excluded female clerical workers, as a class, from a proposed collective bargaining unit, and then attempted to include these employees in the unit but with restricted job opportunities); EEOC Decision No. 70-676, CCH EMP. PRAC. GUIDE ¶ 6144 (1970) (union refused to admit women into apprenticeship programs); EEOC Decision No. 70-600, CCH EMP. PRAC. GUIDE ¶ 6122 (1970) (union entered into and supported an agreement by which airline stewardesses were automatically terminated upon pregnancy without being offered an alternative leave of absence); EEOC Decision No. 70-375, CCH EMP. PRAC. GUIDE ¶ 6081 (1969) (union maintained separate male and female hiring halls and restricted job assignments of qualified females); EEOC Case No. YSF 9-120, CCH EMP. PRAC. GUIDE ¶ 6037 (1969) (union failed to equally represent females despite the fact that the union knew of an employer's discriminatory policy); EEOC Case No. CH 7-3-133, CCH EMP. PRAC. GUIDE ¶ 6018 (1969) (job classification system, maintained under a union contract, designated some jobs for males and other jobs for females with seniority based on this alone).
junctive relief is available, the district courts have jurisdiction, and the procedural requirements are minimal.

Title VII provisions have also been used successfully by employers attempting to acquire contribution or indemnification from representative unions. In *Bowe v. Colgate-Palmolive Co.* an action was brought by female employees against both their employer and their union, alleging a system of segregation and classification by sex, especially in the seniority system. The company filed a cross-claim against the union for indemnity or contribution in the event any liability was imposed for discriminatory employment practices. The district court found no basis on which the union could be held liable under the cross-complaint. However, dicta in that case and in a subsequent one, indicate that under other circumstances an employer may have a right to contribution or even indemnification from a labor organization involved in the discrimination.

The National Labor Relations Act

Protection of employment rights, concurrent to that offered by

53. As would be expected in any provision for equitable relief, exhaustion of legal remedies is required. If a state has laws prohibiting the challenged employment practice, the EEOC must wait until 60 days after state proceedings have been commenced or until such proceedings have been terminated. Title VII § 706(b), 42 U.S.C. § 2000e-5(b) (1964). Where subsection (b) is involved, the charge must be filed with the EEOC within 210 days rather than within the regular 90 days after the occurrence of the alleged practice. Title VII § 706(d), 42 U.S.C. § 2000e-5(d) (1964). In EEOC v. Union Bank, 408 F.2d 867, 869 (9th Cir. 1969), it was held that the EEOC had no jurisdiction to receive a complaint by female employees alleging discrimination until the available state remedies were first exhausted. *Cf. Love v. Pullman Co.*, 430 F.2d 49, 53 (10th Cir. 1969). However, in *Crosslin v. Mountain States Tel. & Tel. Co.*, 422 F.2d 1028 (9th Cir. 1970), the Ninth Circuit stated that there was no requirement for exhaustion of state remedies. The statement in *Union Bank* concerning "exhaustion of remedies" was interpreted as requiring only "pursuit of state remedies to the extent required by subsection (b)." *Id.* at 1031 n.5. The statute of limitations is 90 days. Title VII § 705(d), 42 U.S.C. § 2000e-5(d) (1964). However, if an unlawful practice has continuing ramifications and "perpetuates the effects of prior discrimination," the period will be effectively extended. Tippett v. Liggett & Meyers Tobacco Co., 316 F. Supp. 292, 295-96 (M.D. N.C. 1970). The action in that case was brought by female employees against both the local and international unions alleging sex discrimination due to a loss of seniority and failure of the union to process a grievance in violation of Title VII. *See also* United States v. Dillon Supply Co., 429 F.2d 800 (4th Cir. 1970); Papermakers Local 189 v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

55. *Id.* at 358.
Title VII, is also available under sections 7 and 8 of the National Labor Relations Act (NLRA).\footnote{29 U.S.C. §§ 157, 158 (1964).} The act guarantees workers the right to organize, to form, join or assist unions, to bargain collectively through representatives of their own choosing, and to refrain from any or all of these activities.\footnote{NLRA § 7, 29 U.S.C. § 157 (1964).} It also sets forth unfair labor practices,\footnote{NLRA § 8, 29 U.S.C. § 158 (1964).} and for labor organizations these include any restraint or coercion of employees in the exercise of their guaranteed rights.\footnote{NLRA § 8(b)(1), 29 U.S.C. § 158(b)(1) (1964).} To be unlawful, the coercion need not be successful. The union will violate the provisions by causing or attempting to cause an employer to discriminate against an employee in regard to hiring or tenure or any term or condition of employment which would constitute an employer unfair labor practice.\footnote{NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1964).}

A labor organization, as the bargaining agent for employees, has a statutory affirmative duty to represent all employees in its collective bargaining unit equally and without discrimination\footnote{Vaca v. Sipes, 386 U.S. 171 (1967); Humphrey v. Moore, 375 U.S. 335, 342 (1964); Syres v. Oil Workers Local 23, 350 U.S. 892 (1955), rev'g per curiam 223 F.2d 739 (5th Cir. 1955); Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1952); Steele v. Louisville & N.R.R., 323 U.S. 192 (1944); Tunstall v. Brotherhood of Locomotive Firemen Local 76, 323 U.S. 210, 211 (1944). It must be noted that Steele and Tunstall involved the Railway Labor Act, 45 U.S.C. §§ 151-88 (1964), as amended, 45 U.S.C. § 157(h) (Supp. V, 1970), but the wording of section 2 of that act is similar to section 7 of the NLRA. Section 2 provides in part: “Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter . . . .” 45 U.S.C. § 152 (1964).}—the so-called duty of fair representation. Although unions have been charged with breaching their duty to fairly represent women,\footnote{See, e.g., Sciaraffa v. Oxford Paper Co., 310 F. Supp. 891 (D. Me. 1970), where section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1964), which confers federal jurisdiction over suits for violations of collective bargaining contracts, was held to support no federal cause of action for a breach of a union's statutory duty to fairly represent all its members regardless of sex.} there seem to be no cases decided on the merits of the issue. The first case to declare any
form of discrimination an unfair labor practice was not decided until 1962 when a sharply divided National Labor Relations Board made its holding in *NLRB v. Miranda Fuel Co.* The discrimination involved was union coercion of an employer which resulted in the reduction of an employee-union member's seniority status. Although the Second Circuit refused to enforce the board's order, subsequent NLRB and court decisions have found racial discrimination by bargaining representatives to be an unfair labor practice. Since these unfair labor practice sections are not to be interpreted narrowly and have already been given broad constructions, there should be no reason why sex discrimination cannot be included.

Additionally, the duty of fair representation proscribes discrimination in grievance processing as well as in collective bargaining. Contrary to the passive standards of the Equal Pay Act, employer discrimination must be resisted. Since *Miranda Fuel*, board decisions have found violations of the fair representation concept whenever unions have refused to process member grievances because of race or whenever they have encouraged racial segregation. This basic approach should also impose union liability for similar activities resulting in sex discrimination.

Individual employees have standing to enjoin the enforcement of union-management agreements which violate a union's duty of fair representation. Generally, before an action may be brought, an employee must first exhaust the grievance procedures set forth in a collective bargaining agreement. However, in the case of discrimination charges, going through union channels may be inappropriate where

64. 140 N.L.R.B. 181 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963).
65. *NLRB v. Miranda Fuel Co.*, 326 F.2d 172 (2d Cir. 1963). The court of appeals was of the opinion that the alleged discrimination was wholly unrelated to "union membership, loyalty, the acknowledgement of union authority, or the performance of union obligations ...." *Id.* at 175 (quoting from the dissenting opinion of the NLRB decision).
66. *Metal Workers Locals 1 & 2, 147 N.L.R.B. 1573 (1964); Rubber Workers Local 12 v. NLRB, 368 F.2d 12 (5th Cir. 1966); NLRB v. Longshoremen Local 1367, 54 CCH Lab. Cas. 17,911 (1966).
67. To interpret the National Labor Relations Act narrowly "would to a large degree render such right meaningless in the area of union administration of the bargaining agreement." *Rubber Workers 12 v. NLRB, 368 F.2d 12, 20 (5th Cir. 1966)*.
68. See, e.g., *International Ladies Garment Workers v. NLRB, 366 U.S. 731 (1961); Communications Workers v. NLRB, 362 U.S. 479 (1960); Radio Officers v. NLRB, 347 U.S. 17 (1954); NLRB v. Clark & Lewis Co., 274 F.2d 817 (5th Cir. 1960); NLRB v. International Woodworkers, 243 F.2d 745 (5th Cir. 1957)*.
the charge is against the union itself. Under such circumstances, a suit may be brought without exhausting the contractual remedies. As the court said in \textit{Vaca v. Sipes}:

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\text{[B]ecause these contractual remedies have been devised and are often controlled by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant. The problem then is to determine under what circumstances the individual employee may obtain judicial review of his breach-of-contract claim despite his failure to secure relief through the contractual remedial procedures.}
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Since 1944, the courts have not required employees charging racial discrimination to submit their grievance to a “group which is in large part chosen by the [party] against whom their real complaint is made.” Therefore, the doctrine of exhaustion of remedies is not controlling where efforts would be futile and application would defeat federal labor relations policy.

As should be apparent at this point, there are overlaps between the NLRA and Title VII. \textit{Bowe v. Colgate-Palmolive Co.} considered the election of remedies question and established that a plaintiff could pursue parallel prosecutions, both in court and by arbitration, provided he made an election of remedies after final adjudication by both tribunals. Title VII offers expansive protections but “there continues to exist a broad potential range of arbitrary union conduct not specifically covered . . . which may violate the union's duty of fair representation.” It is in filling those gaps that the NLRA becomes important. It is especially important as a basis of relief when unions or employers do not have the requisite number of members

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\item \textbf{73.} Vaca v. Sipes, 386 U.S. 171, 185 (1967).
\item \textbf{74.} Steele v. Louisville & N.R.R. Co., 323 U.S. 192 (1944).
\item \textbf{75.} \textit{Id.} at 206.
\item \textbf{77.} 416 F.2d 711 (7th Cir. 1969).
\item \textbf{78.} \textit{Id.} at 715. The National Labor Relations Board (NLRB) is the administrative agency that guarantees enforcement and protection of rights under the NLRA. Investigation and certification of bargaining representatives for employees is one of its duties and in the process of carrying out these duties, discrimination based on sex or race by unions is sometimes encountered. However, the NLRB has no authority to investigate an unfair labor practice charge or issue a complaint against a party charged. This duty is left to the general counsel and when he issues a complaint a hearing is conducted before a trial examiner who issues a report on the hearing. The report is then reviewed by the board which makes a final decision whether an unfair labor practice has been committed. If it is decided one has been committed the board then usually issues a cease and desist order requiring the violator to refrain from the unlawful conduct which is in violation of the NLRA. \textit{See CCH EMP. PRAC. GUIDE ¶ 1060} (1969).
\item \textbf{79.} Rubber Workers Local 12 v. NLRB, 368 F.2d 12, 24 (5th Cir. 1966); \textit{accord} Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir. 1970); Packinghouse Workers v. NLRB, 416 F.2d 1126 (D.C. Cir. 1969).
\end{itemize}
or employees for Title VII jurisdiction.\textsuperscript{80}

**California Statutory Remedies**

Notwithstanding the federal relief available, state remedies may also exist for union sex discrimination. California has its own provision regarding equal pay which provides, as does the federal legislation, that there shall be equal pay for equal work.\textsuperscript{81} The Division of Industrial Welfare is authorized to investigate claims and seek conciliation.\textsuperscript{82} If a settlement is not arranged, it may bring suit to recover the difference in wages.\textsuperscript{83} Alternatively, the aggrieved woman may herself bring an action to recover lost wages and the costs of bringing the suit.\textsuperscript{84} Another provision makes “every employer or other person” guilty of a misdemeanor for violation of the equal pay conditions.\textsuperscript{85} Unfortunately, the penalty is negligible and too weak to discourage discrimination. The statute of limitations for all these actions is two years if the employee was unaware of the discriminatory wage rates, or 180 days after obtaining such knowledge.\textsuperscript{86} As yet, no cases have been decided under these statutory provisions.

California also has a Fair Employment Practices Act which prohibits discrimination in employment because of race, religion, color, sex, national origin, or ancestry.\textsuperscript{87} It is an unlawful employment practice for a labor organization to exclude, expel, or restrict a person on any of those criteria.\textsuperscript{88} Thus, it is unlawful to have a segregated membership or to discriminate against a person because of sex in the election of union officers.\textsuperscript{89} If a member feels there has been a sex-

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\textsuperscript{80} The jurisdictional number of employees is 25 or more. Title VII § 701(b), 42 U.S.C. § 2000e(b) (1964).

\textsuperscript{81} CAL. LAB. CODE § 1197.5(a) (West 1971) provides: “No employer shall pay any individual in his employ at wage rates less than the rates paid to employees of the opposite sex in the same establishment for the same quantity and quality of the same classification of work.”

\textsuperscript{82} Id. § 1197.5(c).

\textsuperscript{83} Id. § 1197.5(f).

\textsuperscript{84} Id. § 1197.5(g).

\textsuperscript{85} Id. § 1199 which provides in pertinent part: “Every employer or other person acting either individually or as an officer, agent, or employee of another person is guilty of a misdemeanor and is punishable by a fine of not less than fifty dollars ($50) or by imprisonment for not less than 30 days, or by both, who does any of the following:

(d) Pays or causes to be paid any employee a wage less than the rate paid to an employee of the opposite sex as required by Section 1197.5 of this code.”

\textsuperscript{86} Id. § 1197.5(1).

\textsuperscript{87} Id. §§ 1410-1433.

\textsuperscript{88} Id. § 1420(b).

\textsuperscript{89} Id.
discriminatory practice, she may file a complaint with the Fair Employment Practices Commission (FEPC) which possesses the power to issue cease and desist orders.\textsuperscript{90} It is also unlawful to discriminate because the member opposes such union practices or files a complaint.\textsuperscript{91} There is a one year period from the time the unlawful practice took place in which to file a complaint.\textsuperscript{92} Operating Engineers Local 12 \textit{v. FEPC} is the only case wherein the court has found a union violation but it involved racial rather than sexual discrimination. The lack of case law in these areas is probably due to the federal relief available and because federal law has historically pre-empted much of the labor field. Since all the federal acts have "affecting commerce" requirements, state law is applicable to workers, members, or industries that do not affect interstate commerce.\textsuperscript{94}

Federal and state legislation are concurrently available provided the jurisdictional requirements of each particular act are met. This may present a complaining employee or attorney with the dilemma of choosing whether to use the state or federal courts for relief. In regards to equal pay, the federal Equal Pay Act provides a larger body of case law. That act also provides relief from union caused sexual discrimination in wages whereas the California equal pay statute does not. However, the Equal Pay Act is hampered in its effectiveness because it is subject to the FLSA exemptions.\textsuperscript{95} If a female union member is so excluded from coverage she may turn to the state legislation, which has no such exclusions. But a misdemeanor charge is the only California sanction available against unions.\textsuperscript{96} This insubstantial penalty may not give a complainant the relief desired and may leave a woman subject to the FLSA exemptions without any effective remedy.

The state does provide prohibitions against union sex discrimination with regard to union membership.\textsuperscript{97} Nevertheless, both Title VII and the NLRA provide such protection at the national level without the exemptions that hamper the Equal Pay Act. Thus, the state remedy is of secondary importance and of limited usefulness unless a person is in someway excluded from federal coverage.

\textsuperscript{90} \textit{Id.} § 1426.  
\textsuperscript{91} \textit{Id.} § 1420(e).  
\textsuperscript{92} \textit{Id.} § 1422.  
\textsuperscript{95} See text accompanying note 39 \textit{supra}.  
\textsuperscript{96} CAL. LAB. CODE § 1199 (West 1971).  
\textsuperscript{97} \textit{Id.} § 1420(b).
Conclusion

Unions have a strong influence on the state of the nation's economy, politics, and labor-management relations. However, although women comprise about two-fifths of the workers in this country and are all potential union members, they have not received, for the most part, adequate consideration when unions have formulated policy. Fairer representation will become increasingly important since a major shift in women's employment patterns seems inevitable.

To prompt unions out of their general reluctance to recognize women's rights, specific remedies are available, each with various

98. Some large trade unions in this country as well as foreign nations have gone forward with progressive programs. For example, Swedish labor organizations have prepared programs which will make it possible for men to share in child care along with the women. These unions and employer organizations also have a joint collaboration body which works for equality between the sexes in accordance with this principle. Address by Olof Palme, Prime Minister of Sweden, Women's National Democratic Club in Washington, D.C., June 8, 1970. Among the labor unions in this country demonstrating special concern for the problems of women workers—due primarily to the large number of women members in those unions—are the Amalgamated Clothing Workers of America, the International Ladies Garment Workers Union, Office and Professional Employees Int'l Union, the American Federation of Teachers, and the American Newspaper Guild. The latter labor organization had a convention in November 1970 on sexual discrimination and women's rights in which local unions were urged to protect female rights in the newspaper industry and to put more women in union positions. The convention members felt that equal pay for women may be the first thing bargained off by unions and urged unions not to do so. The Guild Reporter, Jan. 22, 1971, at 1. The UAW and the American Federation of Teachers also had conventions which dealt extensively with the problems of women and unionization.

99. "The role of women as permanent members of the work force must be recognized and the obstacles to their full employment removed, in part through collective bargaining but in other ways as well. Since attitudes towards the employment of women are so important in determining their opportunities, the unions have an educational role to play, providing information on the demographic and cultural evolution that has taken place on new types of job opportunities and training possibilities. But since many of the obstacles to the employment of women can only be solved by the community as a whole, the trade unions will also have to act as a pressure group in bringing about the political changes that are required." Trade Unions and the Problems of Women Workers, The OECD Observer, June 1969 at 24, 27.

100. "Many more women workers in the 1970's must prepare to enter work outside the traditional women's occupations if they are to find jobs in keeping with their abilities." It is expected that there will be new sources of employment for women without college degrees in the growing skilled trades. The skilled trades are notable because they require lengthy training periods. Unionization efforts in those fields will have to consider the female in negotiations. Furthermore, there are widely held prejudices, especially in the skilled trades area, that some jobs are "feminine" while others are "masculine." If women are ready to enter those fields which have traditionally been considered "masculine," unions must also be ready to stand behind their female members in combating such artificial restrictions. Hedges, Women Workers and Man Power Demands in the 1970's, Monthly Lab. Rev., June 1970, at 19.
strengths and weaknesses. The Equal Pay Act guarantees the basic right of equal pay for equal work and, as an amendment to the FLSA, it benefits from the large body of interpretive case law; but, nearly half the work force is excluded, injunctive relief is extremely restricted, and the Miller Brewing decision has considerably weakened its impact. Title VII offers simple filing procedures, expanded coverage, private injunctive relief and EEOC conciliation efforts; but it has limited jurisdiction. The National Labor Relations Act has recognized a duty of fair representation prohibiting unfair labor practices, and makes provisions for injunctive relief; but no cases have been decided on the basis of sex and it is not yet clear whether race and sex will be found analogous. Statutory state remedies have also been enacted but, in any event, the penalties are negligible.

Despite the limitations of each of these procedures, the absence of litigation is surprising. With the exception of Title VII cases, few direct actions have been brought against union violations. Thus, a few recommendations may be appropriate. Working women should seek union support in enforcing their employment rights, but if unions are recalcitrant in exercising their obligation of fair representation, women should be encouraged to file direct actions against those same unions. Also, current legislation might be amended to eliminate some of its weaknesses. Possibly the Equal Pay Act could be exempted from the FLSA coverage exclusions and could be amended to grant private injunctive relief powers. Sex discrimination could be established as an unfair labor practice under the NLRA either by statutory amendment or by a strong test case. And the state provisions, however, limited their usefulness, might provide a more attractive procedure if the penalties were increased and became more realistic. Other, more effective approaches should be explored but one theory should remain basic to any re-evaluation of this specific area of equal employment legislation—unions should be held accountable if they fail to adequately represent women.

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