OPINION
69-193

April 18, 1969 (OPINION)

Mr. J. M. Glaser

Deputy Commissioner of Labor

RE: Labor - Discrimination Because of Sex - Hours of Employment

This is in reply to your letter enclosing other materials with particular emphasis on what is designated as "EEOC Guidelines on Discrimination Because of Sex - Maximum Working Hours for Women."

As we understand the background of the problem, 42 USCA, Section 2000e-2., provides in part:

> (a) It shall be an unlawful employment practice for an employer -
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * sex, * * * ; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's * * * sex, * * * ."
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> (b) * * *
>
> (c) * * *
>
> (d) * * *
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> (e) Notwithstanding any other provision of this subchapter,
>
> (1) It shall not be an unlawful employment practice for an employer to hire and employ employees, * * * on the basis of his * * * sex, * * * in those certain instances where * * * sex, * * * is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, * * * ."

Section 34-06-06 of the North Dakota Century Code provides in part:

> * * * it shall be unlawful to employ any female within this state in any manufacturing, mechanical, or mercantile establishment, or in any hotel or restaurant, or in any telephone or telegraph establishment or office, or in any express or transportation company, for more than eight and one-half hours in any one day, or for more than six days, or

for more than forty-eight hours in any one week. * * * ."

The attorney making inquiry of your office apparently represents an express or transportation company and informs you that because of the press of business the company is having the men employees work longer than 8 1/2 hours and more than a 48 hour week. The problem thus relates to whether refusing to allow the women employees to work beyond 8 1/2 hours in a day or more than 48 hours in a week in compliance with said section 34-06-06 would be discrimination as prohibited by 42 USCA, Section 2000e-2.

Apparently the provisions of 42 USCA, 2000e-2, are administered by the Equal Employment Opportunity Commission (EEOC) which has promulgated the EEOC Guidelines on Discrimination Because of Sex, copy of which is also forwarded with your letter.

The more relevant portion of these guidelines submitted would appear to be that portion stating:

"1604.1 * * *

(3) Most States have enacted laws or administrative regulations with respect to the employment of women. These laws fall into two general categories:

(i) Laws that require that certain benefits to be provided for female employees, such as minimum wages, premium pay for overtime, rest periods for physical facilities;

ii) Laws that prohibit the employment of women in certain hazardous occupations, in jobs requiring the lifting of heavy weights, during certain hours of the night, or for more than a specified number of hours per day or per week.

(b) The Commission believes that some state laws and regulations with respect to the employment of women, although originally for valid protective reasons, have ceased to be relevant to our technology or to the expanding role of the woman worker in our economy. We shall continue to study the problems posed by these laws and regulations in particular factual contexts, and to cooperate with other appropriate agencies in achieving a regulatory system more responsive to the demands of equal opportunity in employment.

(c) The Commission does not believe that Congress intended to disturb such laws and regulations which are intended to, and have the effect of, protecting women against exploitation and hazard. Accordingly, the Commission will consider limitations or prohibitions imposed by such state laws or regulations as a basis for application of the bona fide occupational qualification exception. However, in cases where the clear effect of a law in current circumstances is not to

protect women but to subject them to discrimination, the law will not be considered a justification for discrimination. So, for example, restrictions on lifting weights will not be deemed in conflict with Title VII except where the limit is set at an unreasonably low level which could not endanger women.

(1) An employer, accordingly, will not be considered to be engaged in an unlawful employment practice when he refuses to employ a woman in a job in which women are legally prohibited from being employed or which involve duties which women may not legally be permitted to perform because of hazards reasonably to be apprehended from such employment.

(2) On the other hand, an employer will be deemed to have engaged in an unlawful employment practice if he refuses to employ or promote a woman in order to avoid providing a benefit for her required by law - such as minimum wage or premium overtime pay.

(3) Where state laws or regulations provide for administrative exceptions, the Commission will expect an employer asserting a bona fide occupational qualification pursuant to this paragraph to have attempted in good faith, to obtain an exception from the agency administering the state law or regulation."

Your letter also encloses a copy of a Commerce Clearing House, Inc., report of the case of Leah Rosenfeld v. Southern Pacific Company, decided by the United States District Court, Central District of California, November 22, 1968. We note that this case is not as yet reported in the Federal Supplement Reporter.

To attempt to cover some of the more pertinent facts of that case we will attempt to summarize the Court's findings of fact as follows:

1. Plaintiff is a woman. At all times since October 25, 1944, plaintiff has been employed by defendant Southern Pacific Company, a Delaware corporation (hereinafter referred to as 'Company').

2. In March 1966, an opening occurred in the position of Agent-Telegrapher at defendant company's facilities at Thermal, California. * * * Plaintiff placed a timely bid for the Thermal position. * * *

3. On March 21, 1966, plaintiff was denied the Thermal position by defendant * * *.

4. At all times herein relevant, plaintiff has been a member of defendant Transportation - Communication Employees Union * * *.

5. At all times herein relevant, there has been in effect between defendant Company and Union a Collective Bargaining

Agreement."

At this point we have some difficulty making out the statement in the findings of fact but it appears to provide that the said Collective Bargaining Agreement includes a statement that:

> Employees shall be regarded as in line for promotion, advancement depending upon faithful discharge of duties, and capacity for increased responsibility. Where ability is sufficient, seniority shall govern."
>
> 6. Plaintiff was the most senior employee bidding for the Thermal position. Plaintiff was fully qualified for the Thermal position by all standards established by the Collective Bargaining Agreement. Plaintiff was fully qualified for the Thermal position by all standards established by the defendant Company, except that plaintiff is a female. Plaintiff is fully qualified to perform the services required by the Thermal position including the overtime work and physical duties required for said position.
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> 7. A male employee, with less seniority than plaintiff, was assigned to the Thermal position on or about March 21, 1966.
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> * * *
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> 9. At no time did defendant Company test or evaluate plaintiff's ability to perform the work required by the Thermal position. The sole basis for defendant Company's refusal to assign plaintiff to the Thermal position was that, by reason of plaintiff's sex, her assignment to that position would:
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> (i) Violate Section 1350 of the California Labor Code (relating to number of hours per day and per week of employment), and Section 1251 of the California Labor Code and paragraph 17 of the California Industrial Welfare Commission Order No. 9-63 Regulating Wages, Hours, and Working Conditions for Women and Minors in the Transportation Industry (referring to the number of pounds a female employee may be required to life). * * *
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> ii) Be contrary to the exercise of the Company's discretion as an employer.
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> * * *
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> 5. The duties required by the Thermal position are not such as to create a bona fide occupational qualification based upon sex within the meaning of Section 703 of Title VII of the Civil Rights Act of 1964 (42 USCA, Section 2000c-2(e))"

Rather than going into further details of the facts and conclusions reached by this Court its final determination can perhaps best be

summarized by repeating two headnotes from Commerce Clearing House, Inc., enclosure as follows:

> STATE HOURS AND WEIGHTS LEGISLATION - SEX DISCRIMINATION - REFUSAL OF ASSIGNMENT TO POSITION SOUGHT - FEDERAL SUPREMACY CLAUSE. A state statute that limits daily and weekly working hours for female employees in the transportation industry and a state regulation that bars women in that industry from lifting weights in excess of a specified number of pounds discriminates against women on the basis of sex and did not constitute a bona fide occupational qualification and a defense to a railroad's refusal to assign a female to a position which she sought. Since the state hours and weights legislation violates the provisions of the 1964 Civil Rights Act banning sex discrimination in employment, the measures were contrary to the supremacy clause of the federal Constitution and, therefore, were void and of no effect. Accordingly, the railway's refusal to assign the complainant to the position she sought solely because of her sex constituted unlawful sex discrimination.
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> STATE HOURS AND WEIGHTS LEGISLATION - SEX DISCRIMINATION - EEOC SEX DISCRIMINATION GUIDELINES. To the extent that Sex Discrimination Guidelines of the Equal Employment Opportunity Commission on the subject of sex as a bona fide occupational qualification are inconsistent with findings that state protective legislation constitutes sex discrimination, such guidelines are void and of no force and effect. In addition, the state protective legislation established standards which were 'unreasonably low' within the meaning of EEOC Sex Discrimination Guidelines that provide that state laws that set unreasonably low weight lifting levels for women shall not be honored as a bona fide occupational qualification justifying a denial of employment."

At this point the California hours and weights legislation seems to be of interest.

Section 1350 of their Labor Code, until the 1967 amendments, provided:

> 1350. MAXIMUM HOURS PER DAY AND WEEK. No female shall be employed in any * * * telegraph or telephone establishment or office * * * or by any express or transportation company in this State, more than eight hours during any one day of 24 hours, or more than 48 hours in one week."

As of 1967 this section was amended by adding the following underlined material at the end of the statutory section:

"except as provided in section 1350.5"

> Section 1350.5 EMPLOYEES COVERED UNDER FAIR LABOR STANDARDS ACT; OVERTIME; EXCEPTIONS; AIRLINE FEMALE EMPLOYEES.
>
> (a) Employers of employees covered under the provisions of the Fair Labor Standards Act may employ females up to 10 hours during any one day of 24 hours or up to 58 hours in one

week, provided that they are compensated at the rate of 1/2 times the regular rate of pay for time worked for one employer in excess of eight hours in any one day or 40 hours in any one week.

(b) The provisions of subdivision (a) shall not apply to:

(1) employers whose employees are exempted in Section 13 of the Fair Labor Standards Act as amended through February 1, 1967, from the provisions of Section 7 of the Fair Labor Standards Act.

(2) employers whose employees are exempted in Section 7 of the Fair Labor Standards Act as amended through February 1, 1967, from the provisions of Section 7 of the Fair Labor Standards Act if the employers are not entitled under such exemption in Section 7 to 1 1/2 times their regular rate of pay until they have worked more than 48 hours in one week and

(3) employers whose employees are engaged in the laundering, cleaning or repairing of clothing, or in the clothing manufacturing industries.

(c) The provisions of subdivisions (a) and (b) of this section shall not effect or change the provisions of any existing collecting bargaining agreement.

(d) Notwithstanding the provisions of subdivision (b) of this section, the provisions of subdivision (a) of this section - shall apply to the employment of females by railroads or airlines certificated by the federal or state government."

Section 1251 of the California Labor Code throughout the time involved in the proceedings heretofore mentioned provided:

1251. MAXIMUM WEIGHT OF OBJECTS LIFTED. No female employee shall be requested or permitted to lift any object weighing 50 pounds or over."

We note no other similar cases with regard to special statutory provisions as to hours for females. We do note with interest, however, the case of Bowe v. Colgate-Palmolive Co., D.C. Ind. 1967, 272 F. Supp. 332, shown in the footnotes to 42 USCA 2000e-2, as holding in part:

It was not practical or pragmatically possible for employer, in operation of its plant, to assess physical abilities and capabilities of each female who might seek particular job, as a unique individual with a strength and a stamina below average or above average or to consider special female individuals as uniquely qualified among women in general as suited to performance of certain general labor jobs which she might seek by means of her preference.

Under this chapter it was legal and proper for employer to fix 35-pound maximum weight for lifting or carrying by female

employees.

In circumstances weight limit for lifting or carrying by female employees at employer's plant was necessary and particular weight limit of 35 pounds was reasonable and proper.

Under this chapter traditional roles and stereotype characteristics of taste or talent or emotions or tactile facility and the like cannot be made basis for generic classification but generally recognized physical capabilities and physical limitations of the sexes may be made basis for occupational qualification in generic terms."

The attorney making inquiry of your office also mentions an opinion of this office of date 25 October 1956 which we assume was one written on that date to the Cass County State's Attorney. The concluding sentence of that opinion states:

> Since the state statute applicable in the facts stated is not inconsistent with any federal statutes we are of the opinion that it is controlling in this situation."
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> The letter to your office from the attorney states in part:
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> That opinion implies that if there were federal law on the subject, the federal law would apply. As the matter now stands, there is federal law on the subject prohibiting discrimination and the question is: may we safely follow the federal law on this subject without fear of prosecution from the state?"

We do not find the precise implication mentioned in the opinion of this office just cited though we do find a sentence stating in part:

> Enclosed herein you will find two opinions issued by this office * * * which in substance hold that where our state laws are not inconsistent with the federal statutes, the state statutes are controlling."

We certainly will agree with any suggestion that the applicable federal law applies to the situations to which it is applicable and to the extent state labor laws may be held to be sex discriminatory in circumstances similar to those heretofore considered herein it may in effect be overruled by federal law prohibiting sex discrimination.

We feel, however, that the Rosenfeld case should be considered on the basis of the situation there actually concerned. The applicable California statute as of the commencement of the difficulty put an absolute limit on the hours of female labor. It would appear as of that time to be very similar to section 34-06-06 of the North Dakota Century Code. If, in the course of its consideration by the Federal District Court it had not changed in nature, it seems entirely possible it would have received consideration comparable to that of said section 34-06-06 of the North Dakota Century Code received before the Supreme Court of this state in State v. Ehr, 57 N.D. 310, decided in 1928, where said Supreme Court stated at pages 313, 314 of the North Dakota Reports:

> It is well settled that a state may, under the police power, regulate and limit the hours of labor for women, where work of long-continued duration is detrimental to health, provided that such regulation or limitation is reasonable."

However, it would appear that while the case was pending, the California legislature so amended the statute so that rather than containing an absolute prohibition of excess hours it merely provided that some excess hours would require overtime pay. We would assume that the Federal District Court was familiar with the change in the state legislation while the case was pending before it. We note also the statement in the Court's findings of fact to the effect that: "Plaintiff is fully qualified to perform the services required by the Thermal position including the overtime work and physical duties required for said position." We would assume that the evidence before the Court fully supported that finding of fact. Likewise we note the finding of fact that: "At no time did defendant Company test or evaluate plaintiff's ability to perform the work required by the Thermal position."

These findings of fact are not explicit enough to disclose whether they are based on evidence that the plaintiff was so extraordinarily capable, possessing a larger than average degree of stamina or otherwise so qualified, as to place her personally beyond the usual criteria of such employment, or whether on the contrary they indicate that the job itself was found to have such a nature as to not justify the application of the standards contained in the state law to the situation.

We do note in title 42 USCA, section 2000e-7, providing:

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

We recognize that in these circumstances definite problems can exist for the employer. The fact that his employment practices may apparently be justified by the fact that such practices strictly comply with the letter of state wages and hours, statutory regulation would not be a sufficient defense to a civil suit brought on behalf of an employee able to show sex discrimination as was shown in the Rosenfeld case. Likewise we would assume that the mere fact that the Rosenfeld case exists would not in itself declare that the North Dakota statute was superseded by Federal law and would therefore not prevent the possibility of prosecution for violation under the state law though presumably if the North Dakota statute were found in a particular instance to require discrimination between male and female employees in such instance this could result in its inapplicability to such situation.

We note with interest that the guidelines of the EEOC contain the statement that "So, for example, restrictions on lifting weights will not be deemed in conflict with Title VII except where the limit is

set at an unreasonably low level which could not endanger women." We note also that the Federal District Court for Indiana in Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332 held in effect that the weight lifting limit there concerned, 35 pounds, was not set at an unreasonably low level though we note that the Federal District Court for California in the decision forwarded to us did not consider the 50 pound limit the railroad was utilizing as a part of its reason for not granting the job to the complaining employee sufficient of itself to justify the failure to grant the job to the employee. The findings of fact in the California District Court decision are not explicit enough to show whether the 50 pound limit would actually be violated in the job desired by the complaining employee, however. On such basis the two decisions are not necessarily conflicting. This is perhaps borne out further by the conclusions of the California Federal District Court as follows:

> The California hours and weights legislation violates the provisions of Civil Rights Act of 1964. Accordingly, such legislation is contrary to the supremacy clause (Article VI, Clause 2) of the United States Constitution and therefore, is void and of no force and effect.
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> * * *

"The effect of the California hours and weights legislation is to subject women to discrimination and such legislation establishes standards which are 'unreasonably low' within the meaning of the EEOC 'Guidelines on Discrimination Because of Sex'."

We do not find similar authority with regard to state "hours" legislation though in the California instance the "hours" legislation argument was unquestionably found to be not a sufficient ground to refuse the job in question to the complaining employee. The EEOC guideline to the effect that:

> The Commission does not believe that Congress intended to disturb such laws and regulations which are intended to, and have the effect of, protecting women against exploitation and hazard.",

might well at some future time be found to have a direct relation to state "hours" legislation and in a proper case be supportive of decisions to the effect that as previously indicated by our North Dakota Supreme Court hours legislation conducive to "health" of employees is not necessarily sex discriminatory.

We do feel that the Federal Legislation and decisions heretofore considered may have the result of preventing a prosecution that might have previously been undertaken solely on the basis of the strict letter of section 34-06-06 of the North Dakota Century Code; however, we do not feel that the Federal legislation or decisions indicate that said section 34-06-06 can be blithely ignored by an employer regardless of factual circumstances and conditions actually detrimental to a female employee's health.

HELGI JOHANNESON

Attorney General