SEX DISCRIMINATION IN LAW SCHOOL PLACEMENT

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Discussions are habitually necessary in courts of justice, which are unfit for female ears. The habitual presence of women at these would tend to relax the public sense of decency and propriety. If, as counsel threatened, these things are to come, we will take no voluntary part in bringing them about—In re Motion to Admit Miss Lavinia Goodel to the Bar.¹

I. INTRODUCTION

In 1970, the University of Michigan Law School barred a New York City law firm from using its placement facilities the following academic year. This unanimous law faculty action was taken after an investigation of statements made on campus by a recruiter for the firm which indicated that the firm had a de facto hiring policy discriminatory to women.² In July 1971, 13 women law students filed complaints against ten New York City law firms with the New York City Commission on Human Rights, alleging discrimination against women in hiring and recruiting.³ In the 1970 survey of law schools conducted by the Association of American Law Schools (AALS) Special Committee on Women in Legal Education, over 26 law schools reported at least one incident of alleged discrimination against female students.⁴ These suits and complaints come at

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1. 39 Wis. 232, 246 (1875).
4. This statistic is taken from the preliminary statistical compilation (no formal report has been issued) of the responses to a questionnaire sent out by the AALS.
a time when there are a far greater number of women enrolled as law students than ever before. These actions indicate both a growing awareness by women students of their civil rights and an apparent inability of many law firms to recognize that women students can be capable associates and future partners. The interaction of these two forces has caught most law school placement offices unprepared, causing confusion as to their legal responsibilities and rights. The purpose of this Article is to examine briefly the law applicable to law school placement offices, to delineate the legal duties imposed on such offices, to discuss enforcement problems in administering nondiscrimination policies, and to suggest possible procedural approaches that might satisfy a law school's legal and moral obligations.

Special Committee. The questions covered all aspects of law school life, with emphasis on admissions procedures and placement problems. The questionnaire was answered by 76 schools; data from seven schools arrived after the compilation; eight schools returned the questionnaire either unanswered or too incomplete to be included; 35 schools (including Yale and Harvard) did not respond to the questionnaire. Of the responding schools, those reporting discriminatory incidents included: Boston University, University of California at Berkeley, University of California at Hastings, University of California at Los Angeles, Catholic University of America, University of Colorado, Cornell University, Cumberland School of Law of Samford University, Duke University, Duquesne University, University of Kansas, University of Louisville, Loyola University (New Orleans), University of Maine, University of Maryland, University of Michigan, University of Minnesota, University of North Carolina, New York University, Ohio State University, University of Oregon, University of Pennsylvania, University of Pittsburgh, Stanford University, University of Texas, Texas Tech. University, and the University of Wisconsin. The Special Committee's statistical report reinforces data contained in a 1965 survey. See White, Women in the Law, 65 MICH. L. REV. 1085 (1967), where the following responses were received from law school directors: six reported discrimination against females was insignificant; 43 reported discrimination was significant and 14 reported discrimination was extensive. The last two categories included representatives at six of nine institutions classified by the survey as prestige institutions. See also Barnes, Women and Entrance to the Legal Profession, 23 J. LEGAL ED. 276, 293-97 (1971).

5. The law schools responding to the AALS Special Committee's questionnaire indicated a variety of dispositions to complaints received: denial of further use of placement facilities; no action; personal contact with the firm; investigation; "pep talks" to hiring partners before women were sent to interview the firm; and conferences with recruiters, firms and students. Few schools reported that formal procedures for handling complaints existed at the time the complaints were received. Some schools added that procedures were subsequently adopted.
II. THE APPLICABLE LAW

A. Does Title VII Apply?

The federal concern for equal employment opportunities for women has been given expression in several statutory and administrative measures. The statute most important in curtailing employment discrimination against women is Title VII of the Civil Rights Act of 1964. The prohibition against sex discrimination in Title VII is part of a general effort to confront racial, religious, ethnic and sex discrimination. By creating the Equal Employment Opportunity Commission (EEOC), Title VII established a procedure for administrative review of complaints of discrimination. Title VII's rather restrictive jurisdictional requirements and its enforce-
ment mechanism have been subject to considerable criticism.\textsuperscript{11} Several recent legislative proposals have sought to equip EEOC with more powerful enforcement options, including the right to issue judicially enforceable cease and desist orders.\textsuperscript{12} Additional enforcement of the anti-discrimination provisions of Title VII is achieved through actions initiated by the Attorney General when he finds evidence of a "pattern or practice of resistance to the full enjoyment of . . . the rights" established under the Title.\textsuperscript{13}

The full implications of Title VII in confronting sex discrimination in the placement process are not known. Questions can even be raised as to the applicability of Title VII to law school placement offices. The argument that the law school placement office is within Title VII's coverage is based on the assumption that such an office would qualify as an employment agency within the Act's definition. Title VII defines an employment agency as follows:

The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person; but shall not include an agency of the United States, or an agency of a State or political subdivision of a State, except that such term shall include the United States Employment Service and the system of State and local employment services receiving Federal assistance.\textsuperscript{14}

Despite the popular association of the term "employment agency" with proprietary establishments undertaking a job referral function for compensation, the statute is clear that its coverage does not depend upon the commercial nature of the enterprise. Rather the feature which determines coverage by Title VII is the employment agency's efforts either to locate employment opportunities for applicants or to fill employer originated requisitions of new employees. The law school placement office engages in such activities and is therefore apparently within the definition of Title VII. For this reason, EEOC has taken the position that private college placement

\textsuperscript{11} See, e.g., Developments in The Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1200-16 (1971).
\textsuperscript{14} Id. § 2000e (c).
offices (and ipso facto private law school placement offices) must
conform to the restrictions imposed by the Act.\textsuperscript{16}

Despite the presently assumed certainty of coverage, the legisla-
tive history of Title VII is not unequivocal. Several aspects of that
history deserve consideration. When Congress indicated a willing-
ness in 1963 and 1964 to consider the need for legislative control
of racially discriminatory practices, its membership responded with
a variety of specific legislative proposals which numbered in the
hundreds.\textsuperscript{16} The thrust of most of these measures was to confront
questions of employer discrimination. As a result, the primary atten-
tion in hearings and debate was limited to the need for federal
control of employer practices. Many of the measures considered,
however, also included provisions relating to employment agencies
and the job-referral process, although in general these portions of
the legislative offerings were not as controversial as were those
affecting prohibition of employer discrimination. The specific lan-
guage of some of these bills was directly responsive to the question
of the extension of the discrimination prohibition to placement
offices. For example, Senate bill 1210, introduced by Senator Case,
included language similar to that found in Title VII, as later en-
acted; bill 1210 stated that an "'employment agency' means any per-
son undertaking with or without compensation to procure em-
ployees or opportunities to work for an employer."\textsuperscript{17} This definition
in bill 1210, however, included a specific exception for certain non-
profit organizations, including "any religious, charitable, fraternal,
social, educational or sectarian corporation or association."\textsuperscript{18} After
the Senate Committee on Labor and Public Welfare held hearings
on bill 1210 and other fair employment bills it recommended pas-
sage of bill 1937\textsuperscript{19} which did not specifically exempt educational
associations from coverage as employment agencies.\textsuperscript{20}

\begin{footnotes}
15. Letter from David Cashdan, Esq., (EEOC), to Assistant Professor John C.
Weistart, Nov. 9, 1970, stating that "it is the position of EEOC that private college
placement offices do fit within the Title's definition of 'employment agencies.'" EEOC
has also ruled that law firms with the requisite number of employees are covered
by Title VII. See White, supra note 4, at 1100 n.73.
18. \textit{Id. 26} (emphasis added).
20. \textit{See Hearings on S. 1937 Before the Subcomm. on Employment and Man-
power of the Senate Comm. on Labor and Public Welfare, 88th Cong., 1st Sess. 76}
(1963).
\end{footnotes}
The bill which eventually yielded the present version of Title VII was House of Representatives bill 7152. Because of the controversial nature of its subject matter, this bill was subject to extended efforts at amendment. The original version of the bill directed its prohibitions at racial, ethnic and religious discrimination; an amendment, added by Congressman Smith of Virginia, expanded its coverage to include sex-based distinctions. During this lengthy amending process, the attention of Congress was again focused on the application of the measure to educational placement services; in this regard, Senator Tower of Texas introduced amendment number 608 which sought to exempt "any student placement service of an educational institution which is exempt from taxation under § 501(a) of the Internal Revenue Code." At the time of this presentation, Senator Tower indicated that the bill in its original form had not been intended to cover placement offices. His proposal was suggested to clarify the Title's coverage and make it conform to what he perceived as the intent of the drafters of the original measure.

Senator Tower's move to exclude college placement offices was premised on two primary arguments. The first was the realization that regulatory schemes typically have the effect of increasing the costs incurred by the regulated body. In the case of the proposed regulation of discriminatory practices, these costs would include the

22. 110 CONG. REC. 2577, 2718 (1964) (remarks of Mr. Smith & Mrs. Frances P. Bolton).
24. Senator Tower said:

[T]his is a very simple amendment designed only to clarify a situation with which I think there is complete agreement. It specifically exempts university and college placement services from the civil rights bill definition of an "employment agency."

I do not believe that it ever was intended for placement services maintained by educational institutions for the assistance of their students to come under the term "employment agencies." But the bill leaves the matter uncertain. . . .

Assuming that "prospective employees" are intended to be covered by this act, then students certainly might be included if they are served by placement services in seeking initial work after their education. They almost certainly would be covered in seeking new opportunities through such a service in the later years of their employment. . . .

I feel that it is unrealistic to bring college placement services under this law, neither do I think it was intended.
record keeping which was likely to accompany the Act; the payment of legal fees for assistance in interpretation of the Act; and preparation of a defense should a charge of discrimination be brought against the placement office. Senator Tower indicated his appreciation of the financial difficulties which many schools were experiencing and stated that Congress should not undertake to increase that burden. In addition, he was concerned that the extension of the Act to such placement offices would impair the operation of schools which served predominantly minority populations.  

Although the Tower amendment was not adopted, the fact that it was even proposed is troublesome, because it suggests that the original version of the statute was not intended to include placement offices. While other aspects of the legislative history lend some slight support to this view, the literal language of the statute leaves little basis for doubt. The specific statement that the absence of compensation does not affect coverage provides a direct refutation of the idea that only commercial agencies were intended to be covered.

In addition to the clear language of Title VII, there is also a strong policy basis for extending Title VII's coverage to placement offices. Law school placement offices play a central role in providing access to the legal profession. One of the purposes of Title VII is to enhance the professional opportunities of previously oppressed societal classes. To effectuate such purposes, therefore, it is important to insure that channels of access to legal positions be opened as wide as possible. Control of discriminatory practices in law school placement offices will promote that objective. While it is true that improper hiring practices can be confronted directly on an individual employer basis, it is clearly more efficient to use the placement office as a control mechanism. Focusing attention on the placement office

25. Id. Senator Tower remarked on this point: [T]his provision would operate to the detriment of those remaining colleges which are primarily utilized for whatever reason by a majority of students of a so-called minority group. This could affect especially church supported schools.

Id. Senator Tower was concerned here with black schools and church schools. He does not mention women's colleges among minority schools. In fact, any implication that the Act in its original form would prohibit the operation of a placement program restricted to women or men only as a result of limitations in the composition of the student body is probably unfounded. The Act permits referrals on a nondiscriminatory basis and that standard seems to be met when the basis for discrimination is not the sex of the applicant, but rather his status as a non-student.

26. 110 Cong. Reg. 16,001 (daily ed. July 6, 1964) (offering by Senator Dirksen of the Comparative Analysis of Two Versions of the Civil Rights Bill (H.R. 7512)).
as the enforcement vehicle is not trouble free, however, for the
definition of "employment agencies" excludes most state agencies.\textsuperscript{27} This omission excludes placement offices at state-funded educational
institutions from Title VII coverage. Although placement offices at
state supported law schools are excluded, the greater number of law
schools are privately financed and are, therefore, subject to Title
VII.\textsuperscript{28} Furthermore, the exclusion of state supported schools would
not mean that their placement offices function free of restraint. Most
state supported schools are members of the Association of American
Law Schools (AALS) and their continued membership, and there-
fore their accreditation, by the AALS may be conditioned on con-
formity with AALS nondiscrimination policies.\textsuperscript{29}

State supported law schools are also subject to other types of
prohibitions, including those which might arise under Executive
Order 11,246 (as amended by Executive Order 11,375, Title VI of
the Civil Rights Act of 1964)\textsuperscript{30} or various state fair employment
practice laws. In addition, for certain types of discrimination direct
constitutional prohibitions are applicable.\textsuperscript{31} Unfortunately, the spe-

\begin{itemize}
\item \textsuperscript{27} 42 U.S.C. § 2000e (c) (Supp. V, 1970).
\item \textsuperscript{28} There are 64 private law schools accredited by both the AALS and the
American Bar Association (ABA); there are 60 publicly supported law schools ac-
credited by both the AALS and the ABA. In addition there are 17 private schools
and 6 publicly supported schools that are ABA approved only. See Directory of Law
Teachers (1971).
\item \textsuperscript{29} See note 56, infra for full quotation of appropriate AALS policy and cita-
tion to appropriate source. Because the articles and approved policy of the AALS
specifically state that "equality of opportunity in legal education includes equal op-
portunity to obtain employment," it can be argued that a school which does not afford
its female students equal employment opportunity is in violation of fundamental
AALS policy. \textit{Id.}
\item \textsuperscript{31} See Reed v. Reed, 92 S. Ct. 251 (1971) (mandatory provision of Idaho probate
code giving preference to men over women violative of the equal protection clause);
policy of school board requiring women teachers to take a leave of absence at begin-
ning of sixth month of pregnancy discriminatory and denies equal protection of the
laws); Kirstein v. Rector & Visitors of Univ. of Va., 309 F. Supp. 184 (E.D. Va.
1970) (denial to women, on the basis of sex, educational opportunities at the
Charlottesville campus not offered at other institutions in the state, violative of the
equal protection clause); Sail'\textsuperscript{e}r Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95
Cal. Rptr. 329 (1971) (classification created by statute barring women bartenders held
invidious, arbitrary and thus a denial of equal protection of the laws). \textit{But see}
cific impact of these other regulations upon discriminatory placement activities is ambiguous. Consequently their prohibitions cannot be translated into rules readily applicable to the placement process. Moreover, the necessity of resorting to a diverse body of law to control placement discrimination is confusing and could inhibit anti-discrimination efforts.

B. What Are the Legal Duties of Placement Offices Under Title VII?

Although state supported law school placement offices are not covered by Title VII, private law school placement offices are clearly within its scope. Therefore, an examination of the regulations for implementing operation of Title VII is in order.32

1. Notice Posters

The initial duty imposed on the placement office comes from section 711 (a) of the Act which requires that an employment agency . . . shall post and keep posted in conspicuous places upon its premises where notices to . . . applicants for employment . . . are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts from or, summaries of, the pertinent provisions of this [title] and information pertinent to the filing of a complaint.33

The statute reinforces its requirement by adding that each separate, willful violation of this section results in a fine.34 Pursuant to the statutory directive, EEOC issued a notice for posting in the placement office, to inform users of those placement facilities of their right to file complaints.35 The posted notice is intended to tell the applicant: (1) that he or she may have a basis of complaint.

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35. Id. § 2000e-10 (b).
against the employer; and (2) that he or she may also have a basis for a complaint against the placement office itself.

2. Advertisements

Besides requiring that the placement office disseminate information concerning its own and the employer's Title VII coverage, the statute lists several unlawful employment practices. One such prohibited practice is the printing or publishing by an agency of any notice or advertisement relating to employment . . . or . . . any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on . . . sex . . . [unless] such a notice or advertisement may indicate [a basis for] a bonafide occupation qualification (BFOQ).\(^{36}\)

This prohibition on the posting of discriminatory notices suggests that there is an implied duty of placement offices to scrutinize employer-supplied promotional materials so that the office itself will comply with the Act. Recently it has been suggested that this prohibition includes law firm resumes among promotional materials.\(^{37}\)

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\(^{36}\) 42 U.S.C. § 2000e-3 (b) (Supp. V, 1970). Regulation 1604.4 reflects the statute's proscription on sex-delineated job advertisements:

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


\(^{37}\) See Longo, Self Defense for Women Lawyers, 4 J. OF LAW REFORM 517, 529 (1971). Coverage of such materials by Title VII could put the placement offices of most law schools out of compliance with the above discussed section. An example of a suspect law firm resume is as follows:

Our firm has taken on an average of three new men a year for the past several years. We generally limit our recruitment to men in the upper 25 percent of their class. We hire a man with the intention that he will remain with us permanently and eventually join the partnership. Unlike some firms, it is not our practice to hire a relatively large number of young men and then have a “weeding out” after a few years. Our turnover has been relatively small; all but two of the men we have hired out of law school since 1950 are still with us. We hire at least two men for summer work between their second and third years of law school and naturally like to consider such men prospects for permanent employment. We also usually hire one or two men between their first and second year for summer work.
3. Referrals

Referrals constitute another area covered by Title VII and EEOC regulations. The statute makes it an unlawful employment practice for an "employment agency to fail or refuse to refer for employment . . . any individual because of . . . sex."38 Although law school placement offices do not function exactly like commercial placement agencies, the offices do make referrals similar to those made by their commercial counterparts. One such referral occurs when the placement office provides interviewing space for the prospective employer. The resulting coverage by the Act of this placement activity presents problems for placement officials. The first problem occurs when the employment agency receives a job order that contains an unlawful sex specification. EEOC regulations state that the employment agency "[w]ill share responsibility with the employer placing the job order if the agency fills the order knowing that the sex specification is not based upon a [BFOQ]."39 In addition, the guidelines recently issued by legal counsel for the College Placement Council, Inc. (CPC Guidelines) and prepared in conjunction with EEOC's Office of Technical Assistance, indicate that placement offices should not make referrals under discriminatory job orders.40 Rather, the CPC Guidelines suggest that the placement office should investigate the basis for the job order by asking the employer to substantiate his need for a BFOQ. In most situations involving women attorneys, there is probably little basis for the valid assertion of a BFOQ, and consequently, such job orders should not

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This excerpt, taken from the resume of a large law firm, was received in the Duke Law School Placement Office in the fall of 1971 (emphasis added). The employer's brochure, prepared solely to inform the interested law student about the firm, its policies, its location and nature of its practice, repeatedly refers to its future employees as "men." Read literally, the material implies that women law students will not be considered for permanent or part-time clerking positions. Undoubtedly the firm would argue that this interpretation is too narrow, and it is possible that it meant to use the generic meaning of the word "men." Given the past employment practices of law firms, however, the suspicion remains that such brochures discourage women attorneys from applying to the issuing firm. In such instances the authors suggest that the placement office, to protect itself from liability under Title VII, should notify the firm of the impression created by its material and ask for a clarification of the firm's position.

39. 29 C.F.R. § 1604.5 (b) (1970). See also id. § 1604.4.
40. Letter from Herbert E. Marks, Esq., member of the firm serving as counsel to the College Placement Council, Inc., to Assistant Professor John C. Weistart, July 20, 1971. This correspondence transmitted the guidelines.
be filled by law school placement agencies. A similar situation arises when the placement office "suspects" that the employer in fact discriminates. The statute can be construed narrowly to require no more than that a placement office refer people without regard to sex, but policy considerations suggest that the placement office should not make the referral if it anticipates discrimination against the referred applicant. Since EEOC regulations have construed the sex discrimination sections of Title VII broadly enough to cover private placement offices, it is doubtful that the Commission would accept a narrow reading of its position. Furthermore, regulation 1604.5 (b) states that only "[i]f the agency does not have reason to believe that the employer's claim of [BFOQ] is without substance . . ." will the agency be absolved from liability. Therefore, a placement office's suspicions may be sufficient to bring it under the regulation.

The CPC Guidelines not only advise council members on how to react to allegations of discrimination which relate to job referrals; they also suggest appropriate responses where the discrimination is not directly related to on-campus actions. In the latter cases the guidelines recommend: (1) a review of placement office records of the charged employer which would bear on any pattern of the employer's practices in hiring procedures, and (2) an investigation of the charge by asking for the employer's response to the allegation. If the charge is substantiated, the guidelines recommend that the employer be barred from using placement facilities until he furnishes suitable assurances that the discriminatory practices have been abandoned. These guidelines, however, are limited only to those employers who utilize the placement facilities. They do not cover any off-campus discrimination encountered by women students using individual efforts, such as letters directed to firms. Placement policies and guidelines of both EEOC

41. See 29 C.F.R. § 1604.1 (a) (1970) which reinforces this view, by stating "The Commission believes that the [BFOQ] exception as to sex should be interpreted narrowly." The test for the BFOQ articulated by EEOC is the need of this qualification for "purposes of authenticity or genuineness." Id. § 1604.1 (a) (2) (1970).

42. Id. § 1604.5 (b) (1970) (emphasis added).

43. This view is the one accepted by the CPC Guidelines. See note 40 supra. These guidelines urge the placement office to review the placement records of the employer for any pattern of discriminatory employment. In addition, these guidelines urge that the institution advise the employer that its facilities are not available for use in conjunction with discriminatory actions and that all practices of that employer when recruiting on campus be carefully reviewed.
SEX DISCRIMINATION and CPC do apply to those firms who send what are called "inquiry letters," indicating that they would like students to contact them regarding jobs, but that for various reasons the firm has not elected to interview on campus. Handling of such inquiries by the placement office constitutes a referral.

4. **Bona Fide Occupational Qualification**

One additional problem faced by the placement office arises when an employer who is discriminating asserts a BFOQ. Although this problem will probably be rare for law school placement offices, when and if it does occur the institution must know if it has a statutory duty to determine whether the employer's claim is legitimate. Regulation 1604.5 (b), probably based on the difficulties a placement office would encounter in a BFOQ investigation, states that there is no duty to investigate the claim "[i]f the agency does not have reason to believe" that the claim is without substance. Rather, the regulation requires only that the agency make and maintain a written record of each such job order available to the commission. Such record must include the name of the employer, a description of the job, and the basis of the claim of a BFOQ. This absence of a duty to investigate depends on the ability of the placement office to accept the employer's assertion in good faith. Such good faith requires that the placement office have no grounds to suspect that the assertion

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44. See notes 37, 38 & accompanying text supra.

45. The BFOQ problem confronted Duke Law School last year when FBI agents visited the placement office and requested recruiting notices be posted. Portions of that notice enumerated the qualifications required of prospective applicants, the first one being "they must be male citizens of the United States." The notice concluded with the statement that "The Federal Bureau of Investigation is an equal opportunity employer." Complaints of women students, who were not applicants for an FBI position, concerning the posting of the notice were filed with the faculty under the Law School's placement policy which had been adopted earlier in that year. The faculty, however, dismissed the complaints for lack of standing, determining that under the Law School's policy the adjudicative procedures could only be invoked by a person who was able to show concrete injury and no bona fide applicant for a job was involved. Complaints to EEOC after the dismissal under the School's own procedure were not filed since Title VII, § 701 (b) does not include the United States in the definition of an employer. The validity of a BFOQ for the FBI is now being challenged elsewhere in the courts. See Nemser v. Hoover, Civil No. 1569-71 (D.D.C. filed Aug. 18, 1971). Such a situation is probably one of the few examples where attorneys are recruited and the employer asserts a BFOQ to eliminate women applicants.

46. 29 C.F.R. § 1604.5 (b) (1970).
(when read in conjunction with EEOC Regulation 1604.1 which defines the circumstances where an asserted BFOQ is or is not valid) is an illegally made assertion of a BFOQ. In addition, this good faith determination must be an informed judgment, for a further regulation requires that the employment facility keep informed of opinions and decisions of EEOC on sex discrimination.47

III. LAW SCHOOL CONCERTED ACTION

In addition to the legal duties imposed by Title VII and related statutes, considerable attention has been devoted recently by law school groups to the problem of sex discrimination in law school placement. Twenty eastern schools48 (the consortium schools) have for years subscribed to a list of "Interviewing Procedures for Law Students and Prospective Employers" which is issued annually under the sponsorship of the Recruitment of Young Lawyers Committee of the Association of the City Bar of New York. These Interviewing Procedures have in reality established present norms in law school placement activities.49 In October 1969, after several incidents of discrimination against women had occurred in law school placement offices, correspondence was initiated among the consortium schools concerning the possibility of adopting a uniform approach to the problem of sex discrimination by law firms. In May 1970, the consortium schools added a new paragraph to the Interviewing Procedures which remains the most positive action yet taken by any law school group to require nondiscriminatory treatment of all law school students participating in law school placement activities. While the statement refers to "race, color, religious

47. Id. 1604.5 (c).
48. Boston University School of Law, Brooklyn Law School, Columbia University School of Law, Cornell Law School, Duke University School of Law, Fordham University School of Law, Georgetown University Law Center, George Washington University Law School, Harvard University Law School, Howard University School of Law, University of Michigan Law School, New York University School of Law, Northwestern University School of Law, University of Pennsylvania Law School, Rutgers (The State (N.J.) University School of Law), St. John's University School of Law, Syracuse University College of Law, Vanderbilt University School of Law, University of Virginia School of Law, Washington & Lee University School of Law, Yale Law School. Northwestern University School of Law recently subscribed to the procedures, thus increasing the consortium to 21 schools.
49. For an example of the kind of matters covered the 1971-72 issue requires employers to hold open offers of employment to senior law students until at least December 15 of the fall interviewing season.
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creed, or national origin"—in addition to sex—it was adopted as a direct result of concern over incidents of sex discrimination. It reads:

8. Each signatory law school is committed to a policy against discrimination based on sex, race, color, religious creed, or national origin. It is expected that employers will conform to this policy, expressed in law by Title VII of the Civil Rights Act of 1964, and take positive steps to assure that no such discrimination occurs in hiring, promotion, compensation or work assignment. Any complaints will be investigated [or referred to a proper agency for investigation], as the placement facilities of each signatory school are available only to employers whose practices are consistent with this policy.\(^{50}\)

Paragraph eight of the Interviewing Procedures subscribed to by the consortium schools is the only statement from any law school group that implies that sanctions will be employed against offending firms. The consortium schools specifically promise investigation of complaints and indicate that the placement facilities of signatory schools\(^ {51}\) are available only to firms whose practices are nondiscriminatory.

In late fall, 1969, when lively correspondence on sex discrimination in law school placement offices was circulating among the consortium schools, Professor F. Hodge O'Neal of Duke University Law School, then a member of the AALS Executive Committee, suggested that the AALS Executive Committee should sponsor a floor resolution dealing with the subject at its December 1969 annual meeting. As a result of Professor O'Neal's activity, the AALS without dissenting vote, formally recognized the problem of sex discrimination by adopting the following resolutions:

1. The Association urges that members of the legal profession provide equal employment opportunities to female applicants for legal positions.

2. The Association urges that member schools take steps

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\(^{50}\) Recruitment of Young Lawyers Committee of the Association of the City Bar of New York, Interviewing Procedures for Law Students and Prospective Employers, \S 8 (1971).

\(^{51}\) Only Fordham, of the 20 signatory schools did not subscribe to the sanction sentences of paragraph eight, set forth above in text. Id. (at signatories).
within their power to eradicate sex based discrimination within law schools and particularly in the placement process.\footnote{52}

Shortly thereafter, a Special AALS Committee on Women in Legal Education was formed with Professor Daniel G. Collins of New York University Law School as its first Chairman.\footnote{53} That committee immediately associated student members,\footnote{54} collected valuable statistical information,\footnote{55} and drafted proposed amendments to both the Articles and the Approved Policy of the AALS.

At the December 1970 annual meeting of the AALS, with one exception, all of the Special Committee's proposed amendments were adopted.\footnote{56} That one exception was the refusal of the Associa-
tion to adopt a requirement that each member law school impose sanctions when sex discrimination occurs in its placement office. Sanctions were not adopted, despite the Association's adoption of a policy statement condemning placement discrimination.67 Never-

(b) Denial of Law School Employment on the Ground of Race, Color, Religion, National Origin, or Sex. If the Executive Committee finds that a member school has denied employment on the ground of race, color, religion, national origin, or sex, the Committee shall recommend to the next annual meeting that the school be censured; provided, that the Committee may temporarily defer such action if it finds that there is a substantial prospect that within a reasonable time, the school will adopt an employment policy consistent with the Association's requirement of equal opportunity in legal education without regard to race, color, religion, national origin, or sex.

The denial by a member school of employment to a qualified individual shall be treated as made upon the ground of race, color, religion, national origin, or sex if the ground of denial relied upon is an employment policy of the member school which the Executive Committee finds to have been intended to prevent the employment of individuals on the ground of race, color, religion, national origin, or sex though not purporting to do so.

(c) Placement. Equality of opportunity in legal education includes equal opportunity to obtain employment. Each member school should communicate to every employer to whom it furnishes assistance and facilities for interviewing and other placement functions the school's firm expectation that the employer will observe the principle of equal opportunity, and to that end, will avoid objectionable practices such as:

i. Refusing to hire or promote members of the groups protected by this policy because of the prejudices of clients or of professional or official associates;

ii. Applying standards in the hiring and promoting of such individuals that are higher than those applied otherwise;

iii. Maintaining a starting or promotional salary scale as to such individuals that is lower than is applied otherwise;

iv. Disregarding personal capabilities by assigning, in a predetermined or mechanical manner, such individuals to certain kinds of work or departments.

57. Extensive debate from the floor occurred over the committee's inclusion of sanctions in its proposed amendment to the Association policy dealing with placement. Those opposed to the use of sanctions felt, among other things that it: (1) would be improper for the law school world to "coerce" people outside of the law school community; (2) would involve law schools in supervising law firm policies; and (3) would require all law schools to file charges and conduct hearings on complaints. See ASSOCIATION OF AMERICAN LAW SCHOOLS: 1970 PROCEEDINGS pt. 2, at 129, 147, 148, 151, 156, 157, 158 (1971) for remarks of Professors Murphy, Oaks, Merrill, and Gellhorn. Upon motion by Professor Walter Gellhorn of Columbia, the committee proposal was amended and the Association adopted the amended motion which is now the Association Policy on Placement. Id. at 160-62. This amended motion, according to Professor Gellhorn, leaves the decision of whether or not to hold hearings on complaints to each law school without Association advice. Id. at 158.
theless, the placement policy that was adopted still strongly affirms the moral goal of no sex discrimination in placement.58

IV. ENFORCEMENT PROBLEMS

The legal obligations imposed under Title VII and the moral obligations imposed by concerted law school action both require that the private law school placement office take some appropriate corrective action upon receipt of a complaint of sex discrimination.59 But what action should a law school take when an incident of alleged sex discrimination occurs through the use of its placement facilities? As a minimum, some form of enforcement machinery or policy should be established to give validity to nondiscrimination policies.

Three questions immediately arise with the problem of enforcement of equal opportunity standards in the conduct of placement activities: (1) What obligation, if any, does a law school owe interviewing firms to notify them of its nondiscrimination policies? (2) What procedures should a law school employ when one of its students alleges that a firm has violated its nondiscrimination policy? and (3) What sanctions for noncompliance are available to a law school, other than simply barring a firm from its facilities? Focusing on these three questions will reveal the problems that a law school will face as it attempts to formulate an effective means of enforcing its nondiscrimination obligations.

A. Notice

A law school might reason that it owes no obligation of notice to any firm using its placement facilities. The Civil Rights Act was passed in 1964 and law firms can be assumed to know of its existence. Nevertheless, minimal notice is affirmatively required by Title VII60 and law schools should be anxious to educate firms about their nondiscrimination policies. By an effective notice program, going beyond the bare requirements of Title VII, law schools can continu-

58. See note 56 & accompanying text supra.
59. The statistical data accumulated by the AALS Special Committee on Women in Legal Education shows that, by mid-1970, only 37 percent of the law schools answering the survey had written policies prohibiting sex discrimination by firms or other employers. Over 50 percent of the schools with written policies against sex discrimination had had incidents of alleged discrimination reported to them. See notes 2 & 3 supra.
60. See note 35 & accompanying text supra.
ously bring their policy of nondiscrimination to the attention of law firms. If a law school has to punish a firm for noncompliance, and perhaps bar it from using the school's facilities, it has perhaps forever lost the excluded firm as a prospective employer. It would be better to encourage the firm to reassess its attitudes and pledge compliance. Hopefully, a broad notice system will help make law school nondiscrimination policy positive rather than punitive, and will help both schools and firms avoid discriminatory conduct. Following are some rather obvious "notice" possibilities:

1. Place a copy of the school's nondiscrimination policy in the placement folder of every firm that visits the law school; the consortium statement on nondiscrimination is an ideal statement to include in all placement folders.

2. Print the school's nondiscrimination statement on its placement office stationery; thereafter each firm that receives a letter from the placement office is reminded of the policy.

3. Prepare a short article on the policy, its adoption and meaning and include the article as an item of news in the next alumni mailing.

4. Inform all students of the policy and its meaning. A law school's policy will need general student body support if any enforcement system established is to work.

B. Procedures

A more difficult problem than notice is the adoption of machinery to adjudicate discrimination claims. Assume that Blackstone Law School has adopted a nondiscrimination policy; the firm of Webster & Darrow comes to visit and Ms. Mary Jones, a female law student, signs up for an interview. After the interview, Ms. Jones tells the Placement Director that partner Horatio Webster, who interviewed her, has indicated he will not hire her because she is a "girl," that his firm has never hired a female associate before; that the other partners would never agree to hire her; and that moreover the firm's clients would not deal with a female attorney. What does Blackstone Law School do? Neither the AALS amendments nor Title VII tells the school what actual steps it should take. Each law school is apparently free to adopt its own adjudication procedures or to refer the complaint to an appropriate agency. It

61. It might be appropriate to observe that by reason of Title VII and AALS activities all law schools now have such a policy regardless of whether or not the school has formally adopted a nondiscrimination statement.
seems clear that the law school is not free to simply ignore the complaint without itself risking legal liability under Title VII. Blackstone Law School must formulate and effectuate adequate procedures for dealing with Ms. Jones' complaint.

To be effective any procedure adopted must meet two tests: (1) it must be fair to both parties—to the law firm and the student complainant alike; and (2) it must be speedy. The placement season covers two months in the fall at most schools and then, for all practical purposes, is concluded as a formal activity. Any procedure to determine the truth of a sex discrimination charge should be resolved as rapidly as possible or the results of any sanction will be deferred at best to the next placement season a year away. Furthermore, charges of discrimination can be disruptive to student tranquility and should be handled with dispatch. The procedure adopted must give a fair opportunity for each party to tell his or her side, establish some sort of tribunal that is able to make factual determinations impartially, and confine the operation of the entire procedure to a reasonably short time period. Superficially, it might seem that law schools, of all our institutions, should be best equipped to develop such procedures. On the contrary, it is more likely that most of our law schools, because of their institutional makeup, will be hard pressed to devise a procedure which meets the tests of fairness and of speed. At most law schools, all policy decisions are referred, at least ostensibly, to the full faculty for discussion if not decision. If a determination which could result in the ultimate barring of a firm from the use of school facilities is considered a policy decision, then it would, under present conditions in most schools, go to the full faculty for resolution. A faculty meeting, which might be ideal for debate and resolution of competing policy considerations, is certainly a less than ideal fact-finding tribunal. On the other hand, if the faculty merely adopts a policy of nondiscrimination and mandates the enforcement of that policy to the placement dean or some other administrative body, extremely important factual decisions are without the control of the faculty. Would not most faculties consider it important to retain some power over the decision-making process—at least by way of some sort of appellate review, if nothing else? Arguably yes, and consequently, if Blackstone Law School's first discrimination complaint occurs prior to adoption of a procedure to resolve factual disputes, that school probably faces a very difficult problem. Suppose that Dean Wigmore of Blackstone Law School receives the complaint on
Webster & Darrow and must decide how to proceed. Assume he is cautious and asks the faculty for advice. Such consultations take time: the firm has left the premises; the faculty has to be called together; some members may suggest that they resolve the dispute on the complaint only; others say the firm ought to be heard. Assume Dean Wigmore is then mandated to obtain the firm's side of the story. He writes Webster & Darrow who respond and deny everything, alleging that Ms. Jones was belligerent, refused to give her grades, and insisted on talking only about Women's Liberation. What then? What further facts are needed or available? Basically the question is whether to believe Ms. Jones or the firm. Who resolves that question? The Dean? The faculty by majority vote? These questions are difficult enough with settled, regularized procedures; they can be traumatic, if Blackstone Law School has to formulate procedures in the context of an existing controversy. Therefore, it is recommended that at a minimum, the following steps should be taken: (1) An appropriate student-faculty committee should be established well in advance of the next placement season to study in detail the formulation of procedures that are both fair and speedy;\(^\text{62}\) (2) any procedure adopted should have faculty approval, in order that those charged with the enforcement process can proceed without concern about reversals or lack of support by higher authority.

Any procedure adopted should contain the following minimal safeguards:

1. **Complaints:** A designated official should receive all complaints, and all complaints should be filed as soon as possible. There appears to be no reason why a complaint cannot be filed within 24 hours after the occurrence of the alleged violation.

2. **Probable Cause:** There should be some person or body set up to make a preliminary assessment of the probable validity of the complaint. This evaluation might consist of a careful oral examination of the complainant to screen frivolous charges.

3. **Notification to Firm:** This should be done immediately after probable cause is determined and, as a minimum, the firm should be notified of the charges against them and the name of the complainant. The firm then could be invited to appear or make a

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\(^{62}\) It seems imperative that students be involved in formulation of these procedures because their stake in the placement process is more immediate and vital than that of the faculty.
4. Findings: The finder of fact should consider the complaint, the supporting documents, and the response of the firm and then submit findings. If the complaint is well-founded, either the finder of fact or another body such as the faculty should impose sanctions. While the above suggestions appear simple, in the institutional framework of law school governance they can be most difficult to accomplish. Nevertheless, procedures should be decided before Blackstone Law School gets its first case. A copy of a very simple, yet perhaps sufficient procedure for adjudicating sex discriminating complaints that is now in effect at Duke Law School is included as Appendix A.

C. Sanctions

The kinds of sanctions available to an individual school range from reprimand, through compliance pledge, to suspension, to an absolute bar against future interviewing, to notification to other schools, and to financial support of litigation.

Rather than discussing such obvious sanctions, it might be profitable to broach the much more difficult subject of multi-school sanctions. Many women students have argued that even the absolute barring of a firm from one school can do little to prevent that firm's continued use of discriminatory practices. Webster & Darrow can write off Blackstone Law School and seek its legal talent from other schools where it has a clean slate. These students urge that the only effective sanction would be publication of every violation at every law school followed by a "full faith and credit" policy in all sister schools. For example, if Webster & Darrow were barred at Blackstone School after a decision following regularized procedures, it would then be Blackstone Law School's duty to inform other law schools that the firm had violated Blackstone's nondiscrimination policy and had been barred as a result. The other schools at which Webster & Darrow were to interview would thereafter also be required to close their facilities to that firm. While this kind of multi-school sanction can be called "full faith and credit," many law firms would undoubtedly call it a blacklist.

63. A similar type of "full faith and credit" would apply if a firm had been reprimanded; a sister school would be entitled to require a pledge of compliance.

64. In an article dealing with black law students and their difficulties with racial discrimination in the law school placement process, Professor E. Gellhorn sug-
Although persuasive arguments can be made for the use of a blacklist among law schools as the most effective sanction (there can be little doubt as to the effectiveness of a well-administered blacklist), there are also powerful countervailing questions that can be raised about such a list and the practical problems of obtaining the approval of law schools to employment of such a sanction. Is employment of such a list inherently unfair? Is it a case of serious overkill? Are there antitrust-type problems that could occur? What body would set up such a list and see that it was fairly and effectively administered? Once a firm was on the list, how could it remove itself?

In 1970, C. Delos Putz, then Assistant Dean for Placement at New York University, proposed to the AALS Special Committee for Women in Legal Education a program calling for AALS enforcement of nondiscrimination guidelines. He basically suggested the formulation by the AALS of regional hearing panels to try all discrimination complaints. He argued that such a procedure would remove from AALS member schools the problem of enforcement and the decision of an AALS panel might have greater weight with other AALS schools than the decision of a single school following its own internal procedure. Dean Putz's proposal deserves study as it perhaps avoids some of the distastefulness of a blacklist; it is included as Appendix B.

V. CONCLUSION

Every law school must face its obligation to enforce a policy of nondiscrimination in placement because of race, color, creed, national origin or sex. A school can base its obligation on the Civil Rights Act, morality, AALS policy, or all three—but however it is viewed, the obligation is there. Therefore, each school should be prepared to handle a charge of discrimination when it is lodged. It would be wise for all law schools to consider immediately such problems as notice, procedures, and sanctions and adopt an effective mechanism to handle sex discrimination complaints.

APPENDIX A

The facilities of the Duke Law School Placement Service are
65. Now Dean of the University of San Francisco School of Law.
not available to prospective employers who discriminate against Duke Law students on the basis of race, religion, sex or national origin. A written complaint that a prospective employer has violated this policy may be filed with the Placement Dean by any Duke student who claims that he has been discriminated against by this prospective employer, the complaint to be filed as soon as possible. The Dean of Placement shall then immediately endeavor to gather together at least as many as three members of the Placement Committee, one of whom must be a faculty member, in order to make a preliminary assessment of the validity of the complaint and, if further investigation is required in order to make this preliminary assessment, to appoint a member of the Placement Committee to conduct this further investigation. Upon a preliminary determination that a complaint is probably valid, the Dean of Placement shall advise the firm or interviewer involved of the nature of the complaint against them and the name of the person making the complaint; and he shall inform the firm or interviewer that the faculty would be pleased to consider any statement on the matter that they might wish to submit within some reasonable time. It would be anticipated that in most cases fifteen days would be an appropriate time limit. After completing its investigation and after considering any statement that a firm might care to submit to the faculty, the Placement Committee shall determine the relevant facts and, if it finds that a violation has occurred, prepare an appropriate report to the faculty, which shall consider the report as soon as possible.

If the Placement Committee determines that a violation of the Law School's policy has occurred, the faculty shall, if it decides that the violation is substantial or likely to occur again, either issue a warning to the firm or, in more serious cases, inform the firm or interviewer that the placement facilities of the Law School shall no longer be available to them.

**APPENDIX B**

To: Professor Daniel Collins, Chairman  
_AALS Committee on Women in Legal Education_

From: Delos Putz, Assistant Dean

Re: Proposal for Adjudication of Complaints Concerning Discrimination by Employers
I understand that your Committee is preparing to recommend that the AALS adopt a strong anti-discrimination statement on placement facilities based on the policy adopted by NYU last Fall. If the policy is to be effective, it must be accompanied by enforcement procedures. There ought to be some tribunal before which discrimination complaints can be "tried," and the tribunal should be such that its decisions can be given "full faith and credit" by law schools generally. It seems evident that state Human Rights Commissions and the Equal Employment Opportunities Commission are not adequate tribunals for enforcement of anti-discrimination policies adopted by law schools and their placement offices.

I would propose that the AALS, in conjunction with adoption of a strong anti-discrimination policy, undertake to assist in the enforcement of that policy by establishing procedures for the appointment of panels of "hearing examiners" in various regions throughout the country before whom discrimination complaints could be "tried." The proposal should spell out the categories of persons to be represented on the panels, e.g., a law professor from the area, a representative of the local bar association, a non-lawyer from business or government, and a specific requirement for women on the panel in sex discrimination cases, etc. Student complaints of discrimination are ordinarily brought initially to law school placement offices. If, after preliminary investigation, it appeared that there was at least a prima facie case, the placement office could refer the complaint to the appropriate organ of the AALS and request that a panel be convened to investigate the charge.

Although employers could only be invited to participate in such a hearing, it seems likely that most employers would do so. The refusal of an employer to participate would not prevent the panel from holding a hearing and making findings.

If the panel determined that the employer had violated the anti-discrimination policy promulgated by the AALS, it could impose appropriate sanctions, ranging from an admonition to prohibiting the employer from using the placement facilities of AALS members for a stated period of time or filing of a complaint by the AALS against the employer with appropriate governmental authorities, such as the Equal Employment Opportunities Commission.

I think this proposal offers a number of advantages. First, it would be something of an empty gesture to adopt an anti-discrimination policy without providing some meaningful enforcement procedures. Second, placing the judicial function in a broadly based
panel appointed by the AALS takes some of the enforcement burden off the individual law schools and reduces the probability that any particular school might be boycotted by potential employers (a fear which I have heard expressed by a number of placement officers). Third, the proposal reduces, although it does not eliminate the problem of the faith and credit that the various law schools can give to findings of employer discrimination. Most law schools would be extremely reluctant to bar an employer from using their placement facilities simply because unknown people at another law school, using unknown procedures, had concluded that the employer was guilty of discrimination at that school. A decision by an AALS appointed panel, independent of the school at which the alleged discrimination occurred, would probably be accepted and enforced by most member schools. Lastly, the proposal permits the school to retain a high degree of "prosecutorial discretion" in determining what complaints to refer to the AALS for hearing.

There are, of course, significant political problems to be overcome in obtaining AALS approval of the proposed statement of policy, even without enforcement procedures of the type proposed here. If your Committee finds some merit in recommending enforcement procedures, it would seem appropriate to seek the cooperation and support of the AALS Committee on Minority Groups, currently chaired by Dean McKay.