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Labor and Industry Statutes (26 M.R.S.A. §§ 731-735) Making sex-based discriminations in conflict with Title VII, Civil Rights Act of 1964.

SYLLABUS:

26 M.R.S.A. §§ 731-735, limiting working hours and conditions for female employees, are in conflict with Title VII, Civil Rights Act of 1964, and are inoperative in an industry affecting commerce which has 15 or more employees.

FACTS:

Stated in the question.

QUESTION:

Whether or not any or all of Sections 731-735 of Title 26, Maine Revised Statutes Annotated, are inoperative as being in conflict with Title VII, Civil Rights Act of 1964, with regard to an industry affecting commerce and having 15 or more employees?

ANSWER:

They are all inoperative in the area in which Title VII operates.

REASONS:

26 M.R.S.A. §§ 731-735 provides:

Section 731 prohibits employment of females in certain specified places for more than 9 hours in any one day;

Section 732 prohibits a female from working for more than 6 1/2 hours without a consecutive 30 minute rest period;

Section 733 prohibits employment of a female in certain specified places for more than 54 hours;

Section 734 prohibits employment by a female in certain specified places for more than 50 hours;

Section 735 requires the proprietor of certain specified places to provide a seat for the use of a female employee.

42 U.S.C. § 2000e-2(a) (Title VII, Civil Rights Act of 1964, Section 703(a)) provides:

> "(a) It shall be an unlawful employment practice for an employer--
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> "(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 or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's * * * sex * * *."
>
> "The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees . . . ." 42 U.S.C. § 2000e-(b). (Title VII, Section 701(b)).

The Supreme Court of the United States has declared that the purpose of Title VII is that:

> ". . . persons of like qualifications be given employment opportunities irrespective of their sex." Phillips v. Martin Marietta Corp. (1971), 400 U.S. 542.

The Equal Employment Opportunity Commission guidelines provide the following interpretation of the "exception" to the prohibition of discrimination when "sex . . . is a bona fide occupational qualification":

> "(a) The Commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. * * *
>
> "(1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:
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> * * * * * * *
>
> (ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less

> capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.
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> * * * * * * *
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> "(2) Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress." 29 C.F.R. § 1604.1.

The administrative interpretation of this Act by the EEOC has been declared to be "entitled to great deference." Griggs v. Duke Power Co., 401 U.S. 424 (1971).

The scope of this "exception" has been explained in these words:

> "Based on the legislative intent and on the Commission's interpretation, sexual characteristics, rather than characteristics that might, to one degree or another, correlate with a particular sex, must be the basis for the application of the BFOQ exception." Rosenfeld v. Southern Pacific Company, 444 F.2d 1219 (9th Cir., 1971).

It is obvious that 26 M.R.S.A. §§ 731-735 are all based upon an assumption that women, as a group, can neither work as long, nor as continuously, nor under the same conditions as men. The statutory provisions preclude all women from demonstrating their actual capacity to perform equally with men. This barrier conflicts with the requirement of Title VII that:

> "Each individual, otherwise entitled to the position is afforded an opportunity to demonstrate that he has the capacity to perform the work." Jones Metal Products Co. v. Walker, 29 Ohio St.2d 173, 281 N.E.2d 1, 5 (1972).

26 M.R.S.A. § 731, 733 and 734, restrict the employment opportunity of women by limiting the length of hours in which they can work. This denies them the equal treatment with men which is required by Title VII.

26 M.R.S.A. § 732 and 735 requires an employer to afford certain "privileges" to females which are not afforded to males, i.e., a thirty minute rest period and a seat. However,

> "Section 2000e-2(a) (1) makes it an unlawful employment practice for an employer to discriminate against any individual with respect to his conditions or privileges of employment because of such individual's sex. Title VII applies equally to males as well as females."

Accordingly, it is clear that 26 M.R.S.A. §§ 731-735 are all in conflict with Title VII of the Civil Rights Act of 1964, and by virtue of the Supremacy Clause (Paragraph Two, Article VI, Constitution of the United States) such statutory provisions are preempted in the area in which Title VII is operative.

Similar state statutory provisions have been held to be in conflict with Title VII, and similarly inoperative in many recent Federal and State court decisions. For example, see Rosenfeld and Jones Metal Products Co., both cited above, and Schaeffer v. San Diego Yellow Cab, Inc., 462 F.2d 1002 (9th Cir., 1972); Manning v. International Union, 466 F.2d 812 (6th Cir., 1972); Hays v. Potlatch Forests, Inc., 465 F.2d 1081 (8th Cir., 1972); Garneau v. Raytheon Company, 323 F.Supp. 391 (1971); and Leblanc v. Southern Bell Telephone and Telegraph Company, 333 F.Supp. 602 (1971).

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