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Sex On Both Sides Of The Pond

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ABSTRACT: A female job applicant with pre-school aged children is asked by her employer about her children and eventually told that they are not accepting applications from women with pre-school aged children even though men are employed at the company with pre-school aged children. In the United States this violates the Civil Rights Act of 1964.[i] In the European Union, it appears that this would not be allowed, but in certain countries like Hungary, it is common and accepted.[ii]
A woman applies for a managerial position and although she is qualified, the employer rejects her application and continues to solicit applicants. Later, the employer hires a man. In the United States, this would establish a prima facie case of sex discrimination, in the European Union it would not.[iii]
Both of these situations revolve around issues of sex. No, these are not issues of sexual harassment or issues in the bedroom, but rather the boardroom, more specially in recruitment and hiring of employees.
For multinational corporations operating in the complex legal structures of various countries, gender discrimination suits can cause confusion and legal headaches. The United States and the European Union, while relatively similar in economic strength, global power, development, and commitment to protecting workers from gender discrimination, their laws and definitions of gender discrimination vary. This variation can result in the corporation learning and understanding different legal frameworks, that at first glance seem similar. Further, the European Union, a union of currently twenty-eight member states, has issued common laws, treaties, and directives on gender discrimination, but within the member countries things can differ.
This paper also deals with establishing prima facie cases in the United States and European Union and varied defenses a multinational corporation could take in suits of gender discrimination.

Keywords: Sex Discrimination, Title VII, European Union, United States, International Defense, Hiring, Firing, Promotion.

I. INTRODUCTION

A female job applicant with pre-school aged children is asked by her employer about her children and eventually told that they are not accepting applications from women with pre-school aged children, even though men are employed at the company with pre-school aged children. In the United States this is violates the Civil Rights Act of 1964.[iv] In the European Union, it appears that this would not be allowed, but in certain countries like Hungary, it is common and accepted.[v]

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For companies and corporations dealing on either side of the pond, this paper will look at the hallmark laws, cases, and directives for both the United States and the European Union on gender discrimination, while also addressing ways for corporations to avoid liability in such suits.

II. SEX & THE WORKPLACE IN THE UNITED STATES & THE EUROPEAN UNION

1. The United States

In the United States, Title VII of the Civil Rights Act of 1964 serves as the hallmark legislation regarding sex discrimination in the workplace. While Title VII has become the basis in suits alleging sex

discrimination, the early versions of Title VII did not include any mention of gender or sex. Prior to Title VII, President John F. Kennedy signed Executive Order 10925 in 1961, codifying "affirmative action," prohibiting discrimination by companies contracting with the government based on race, creed, color, or national origin as "discrimination because of race, creed, color, or national origin is contrary to the Constitutional principles of the United States."[vii] 10925 also set up the Equal Employment Opportunity Commission, which today deals with civil rights suits regarding employment discrimination. This Executive Order went on to become the basis for the Civil Rights Act of 1964, but neither the executive order nor early versions of the legislation included provisions for protecting from discrimination on the basis of sex.[viii] Sex ended up under Title VII when Howard Smith of Virginia added it as a late amendment. Smith's motivations have oft been called in to question as a district court once stated "In fact, the late amendment that added "sex" to one portion of the proposed civil rights law came from a powerful Congressman from Virginia who may have been attempting to derail the proposed law by adding a classification that would be seen as controversial."[ix] With sex entering Title VII under such circumstances, there is little initial direction on how sex discrimination should be interpreted under Title VII.

Title VII does make it illegal for an employer to refuse to hire or otherwise discriminate against any individual regarding compensation, conditions, or terms of employments or to segregate or classify employees or applicants in an adverse manner due to sex; however, this only applies to firms with fifteen or more employees.[x] This broad language ensures that women cannot be unfairly discriminated against in terms of being hired, promoted, compensated, and other terms of employment such that women and men are on a more even playing field for employment. The Equal Employment Opportunity Commission, EEOC, was establishedafter the passage of Title VII, in addition to other laws against workplace discrimination. The EEOC can advise plaintiffs as to their rights as they did in *Rosenfeld v. Southern Pacific Co*[xi]a case in which Leah Rosenfeld was denied a promotion to a man with lower seniority. The resulting suit was settled but women's protective laws, which once regulated women's hours and weight loads in hiring and promotion, were declared unconstitutional, forcing the railroad industry to hire women in all positions.[xii] Cases such as Rosenfeld's exemplify the purpose of Title VII in protecting against unfair discrimination; however, there are some caveats within Title VII that allow discrimination based on sex.

2. The European Union

The European Union's legislation on sex discrimination in the workplace is more complicated. The European Union as it is known today was formed under the 1992 Maastricht Treaty, but gender discrimination has been part of European legislation since the Treaty of Rome that established the precursor to the EU, the European Economic Community. The Treaty of Rome tackled discrimination through the form of equal pay, making it illegal to discriminate on the basis of gender.[xiii] This was further expanded through various directives, one of which, the Equal Treatment Directive, ensures that there will be no sex discrimination, either direct or indirect, nor by reference to marital or family status, in access to employment, training, working conditions, promotion or dismissal in any of the member states.[xiv] The EU Charter of Fundamental Rights clarifies previous directives and has become primary legislation for the Union by reiterating the importance of equality throughout the union in wages, hiring, promotion, termination, and working conditions.[xv] While Title VII in the United States only applies to firms with fifteen or more employees, the European Union's legislation applies to all employers.[xvi] In doing so, the EU's vast legislation applies to small businesses, which may not fully fall under Title VII in the United States. Furthermore, through *Bilka-Kaufhaus GmbH v. Karin Weber von Hartz* the European Court of Justice has asserted part-time workers need further protection against discrimination.[xvii] While in the United States, a female part-time employee cannot establish discrimination through comparison to a male full-time employee with a similar situation,[xviii]*Hellen Gerster v. Freistaat Bayern* established that in the European Union a female part-time employee could establish discrimination in such a way.[xix] Later, European Union legislation codified that discrimination on the basis of part-time status establishes gender discrimination.[xx] The European Union thus is broader in allowing part-employees to prove gender discrimination. Utilizing a full-time employee of the opposite gender as proof of discrimination would not be allowed in the United States, but given that women make up 76% of part-time workers in the European Union and 64% in the United States, the European Union's stance offers more protection to these predominantly female part-time employees.[xxi]

3. Bona Fide Occupational Qualifications

Title VII provides that it is legal to discriminate when sex is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[xxii] Bona fide Occupational Qualifications also referred to as BFOQ, provide a defense to employers such that if they can prove that a protected class characteristic, in the case of sex being male, is reasonably necessary for the job, discrimination is legal. For employers, BFOQs are rare, but nonetheless provide a legal avenue for discrimination of females in hiring or promoting as the argument stands that hiring someone outside of the protected class, e.g. a woman, would undermine the business. There are three general grounds to establish a

bona fide occupational qualification: authenticity, public safety, or privacy such that a protected class is established in a legal manner, rather than an employer just trying to get around the law. Establishing a protected class protects the public or employee in some way, and is necessary for privacy of the customer.[xxiii] The court has further reinforced these general criteria through cases such as *Dothard v. Rawlinson*, in which Alabama was allowed to hire only males for certain prison jobs, discriminating against females, because of the dangerous conditions of the prison resulting in potential harm to others.[xxiv] The desire to discriminate against women in this case follows two of the general criteria, as the exclusion of women was not due to preferences or malice, but rather caring for the safety of the employees and others. Similarly in the European Union, limitations on the Equal Treatment Directive of 1976 and later the Equal Treatment Directive of 2006, parallel the BFOQ defense by allowing employers to discriminate on the grounds of sex if sex constitutes a determining factor in the nature of the job.[xxv] Individual member states have gone on to adopt the language of bona fide occupational qualifications, such as Ireland, lending to similar language as the United States, while countries such as the United Kingdom, currently still part of the European Union have adopted different language.[xxvi] The United Kingdom allows genuine occupational qualifications, which are allowed for jobs in foreign countries with relevant customs, physiology or authenticity, privacy and decency such as labor and delivery nurses, private household's integrity with nannies or caregivers, single-sex accommodation, single-sex establishments, personal welfare and counseling, or when a pair of jobs are advertised for a married couple.[xxvii] As the European Union legislation on BFOQs is not identical to the United States, it has allowed interpretation among the member states.

4. State Interpretations

In addition to Title VII, various states have labor and discrimination laws in place that protect employees from sex discrimination in the workplace. Most states have statutes that ban discrimination in the workplace and as a result state courts are able to interpret state statutes more expansively than federal courts do of Title VII such as New York did in *Nicolo v. Citibank.*[xxviii]The ability for the state courts to interpret state statues more expansively means that sex discrimination in the workplace can take an even broader meaning in some states. State statutes also can be written to be interpreted in a manner consistent with the federal court's interpretation of Title VII such as it is with California's Fair Employment and Housing Act.[xxix]In those situations, the state statute and Title VII tend to lead to the same interpretations and conclusions. As discussed above in relation to BFOQs, there is often substantial variation among member states to European Union legislation and directives in gender discrimination. While general EU provisions prohibit gender discrimination in hiring, in Poland, Hungary, and Germany, these principles of anti-discrimination law are violated.[xxx] Nonetheless other European Countries such as the United Kingdom with genuine occupational qualifications expand upon general European Union law. Overall, state statutes in the United States and member country statutes in the European Union against sex discrimination in the workplace are often written with parallel language to Title VII to protect employees, but one must look at the language of the statute as not all general anti-discriminatory statutes are the same.

III. TYPES OF DISCRIMINATION

For those who allege a violation of Title VII, the Supreme Court has held that there are two forms of illegal discrimination: disparate treatment and disparate impact,[xxxi] which have particular legal implications on defenses for the parties, necessary to more fully understand the law. Similarly in the European Union, there are two forms of discrimination in direct discrimination and indirect discrimination.[xxxii]Disparate treatment, or direct discrimination, is the situation where employers intentionally discriminate in their behaviors, women are treated less favorably than men, while disparate impact, or indirect discrimination, is the theory of discrimination that focuses policies for selection procedures for hiring and promotion that may discriminate against a protected group. The law regarding these types of discrimination was formed around various types of discrimination, from racial to sex-based, but the procedures that resulted, apply to discrimination of any group protected under Title VII or under European Union law.

1. Disparate Treatment & Direct Discrimination

With disparate treatment cases, the Supreme Court case of *McDonnell Douglas Corp. v. Green*, confirmed in *Texas Department of Community Affairs v. Burdine.*[xxxiii] established procedures for the burden of proof especially for cases lacking direct evidence of discrimination. A plaintiff must first establish a prima facie showing of discrimination by showing that they belong to a group protected from discrimination under Title VII, was qualified for a job for which the employer was seeing applicants, despite being qualified was rejected, and after being rejected the position remained open and the employer continued to seek applicants.[xxxiv]In establishing this, the burden of proof of discrimination then shifts to the employer to show an authentic, nondiscriminatory reason for the alleged discrimination. Examples of legitimate reasons could be lesser comparative qualifications, inability to work with the team in harmony, or violation of employer rules.[xxxv] If a

legitimate reasoning is established, the burden of proof falls back on the plaintiff to explain the employer's motivation. The procedures under *McDonnell Douglas* provide the employer a defense if a prima facie case can be established by allowing them to give other reasons for why they did not hire or promote that particular candidate, forcing the plaintiff to more fully prove discrimination, but this is sometimes difficult as the disparate treatment is mixed with lawful treatment and reasoning. For example, if an employer had concerns about an applicant's ability to work in a team, but the final decision not to hire them was based on gender it would be difficult for a plaintiff to prove that disparate treatment was the actual motive. With multiple factors at play, it becomes less discernable in litigation what a company was trying to do. Under European Union law it is more difficult to establish a prima facie case of direct discrimination, as the plaintiff must show first that they were subjected to disparate treatment and secondly that gender more likely than not was the reason for the disparate treatment.[xxxvi] In these cases the European Union makes it difficult for someone to prevail without inside information from the corporation. Nonetheless, if a prima facie case is established the burden of proof is reversed as in the United States.[xxxvii]

2. Mixed Motive

Mixed-motive cases are cases where employers accused of sex discrimination demonstrate nondiscriminatory reasoning for not hiring or promotion, in which employees are still able to prove discrimination when they exist alongside the nondiscriminatory motives.[xxxviii] The framework for a mixed motive case was established in the Supreme Court case of *Price Waterhouse v. Hopkins*[xxxix]which dealt with a female employee not being promoted to partner with some evidence indicating that it was because of her abrasiveness, while other evidence indicated gender stereotyping played a role. The outcome of this case was that the Supreme Court held that employers could avoid liability if the employer could demonstrate that the same decision would have been taken on other considerations without discriminatory motives.[xl] This particular outcome gives employers a defense to allegations of discrimination if they can prove there were lawful motives in the situation. While this ruling was later partially overruled by the Civil Rights Act of 1991 in which the defense of the employer was limited to restrictions on the remedies available to the plaintiffs such that if the employer is able to demonstrate it would have taken the same action the plaintiff is only entitled to awarding attorney's fees, costs, and declaratory relief.[xli] The impact of the procedures surrounding mixed-motive cases is that they allow plaintiffs to show discrimination in situations that have multiple motives leading to the refusal to hire or promote. While plaintiffs may no longer be entitled to as many damages as before the Civil Rights Act of 1991, they are still entitled if employers cannot prove a reasonable lawful motive. Such cases are unique to the United States as the European Union has yet to provide legislation or case law allowing a mixed-motive defense.

3. Disparate Impact& Indirect Discrimination

Disparate impact, or indirect discrimination, cases are different than disparate treatment cases, as they deal with policies that on the surface appear neutral, but allegedly have an adverse impact on groups protected under Title VII and European Law. Under a EU Equality Directive, indirect discrimination occurs under an apparently neutral provision, where a specific criterion or practice would put protected persons at a particular disadvantage; however, there is the exception if this criterion or practice is objectively justified by something legitimate.[xlii]The burden of proof under disparate impact cases in the United States has been developed throughout various legal cases, most recently clarified under the Civil Rights Act of 1991. Under the 1991 Act, the plaintiff must statistically demonstrate that a particular practice used in hiring or promotion causes a disparate impact and then the employer may demonstrate that the practice does not cause such an impact or the practice is job-related and a business necessity.[xliii]The EEOC uniform guidelines require statistical and practical significance of disparate impact using a rule of thumb measurement known as the eighty percent rule. This rule states that disparate impact is evidenced when the selection rate for any group protected under Title VII is less than eighty percent of the rate for the group with the highest rate.[xliv] This rule can prove to be inadequate leading to more careful analysis at the situation at hand. For example there may be situations of disparate impact where the rate is just over .8 or situations where the rate falls within the eighty percent rule, but due to an atypical applicant pool or small applicant pool, the data is misleading.[xlv]The plaintiff can also prove a disparate impact by demonstrating less discriminatory practices that were refused by the employer. This burden of proof allows the employer a defense if they can prove that the policy or practice is a business necessity as was done in *Lanning v. SEPTA*[xlvi] where a timed run-test required for employment was deemed appropriate even though women were not initially passing the requirement at high rates as the requirement was truly needed to be successful and could be overcome through training. In the EU, the Court of Justice under cases such as *Danfoss*established that when a prima facie case of discrimination is shown with indirect discrimination, the burden of proof is reversed, and the employer must show that there are objective and non-discriminatory reasons for the seemingly neutral policies.[xlvii]

IV. DEFENSES FOR CORPORATIONS

With the state of the law and types of discrimination more fully defined, a corporation can protect themselves from liability in a variety of ways. Under Title VII, an employer assumes liability for economically adverse employment decisions made by its management, such that an employer is liable for the actions of those hiring and promoting applicants.[xlviii]To protect themselves, a corporation will want to ensure that their staff is preparing accurate written records regarding interviews, applications, performance evaluations, and has accurate written statements in termination letters.[xlix] With accurate records in writing, a corporation can provide evidence of making decisions for nondiscriminatory reasons. For example, if a female employee brings a suit alleging that they were not promoted because of gender and the corporation has written performance evaluations showing that they were not performing well or following company policy, the corporation then has evidence that their reasoning was not discriminatory. While keeping such records may involve more arduous record keeping and paperwork, the benefits, if such a suit were to be brought, far outweigh the costs. The costs for a company if they do lose a Title VII case can be extensive.Punitive damages can become a large liability, providing further incentive not to violate the statute. While damages are capped at various levels based on the number of employees, a company with over 500 employees could still be paying up to $300,000 per person in damages in a Title VII case.[l] Even for a large company, such a large financial liability is incentive enough to carefully follow Title VII, as often when one case of a Title VII violation comes to light, there are others to follow, compounding the cost to the company. For small business this cost could be especially difficult as damages are capped at $50,000 for companies with less than 100 employees.[li] For a small business $50,000 could result in resources being funneled into litigation that could have been spent elsewhere, or even effectively end the company. While accurate records are still needed under legislation in the European Union, they may not be as necessary for a variety of factors. In the United States when interviewers ask stereotyping questions such as if a position might interfere with childcare or their relationship with their spouse, if these questions are only asked to female applicants, they could be used against the corporation in a suit.[lii]In Hungary, it is still common and acceptable to advertise and tell female applicants that if they have children they will not be considered, and because women do not want to be viewed as 'troublesome' when looking for other employment they rarely follow the legal steps to obtain evidence and file suit.[liii] For European Countries such as Hungary, Greece, Croatia, Czech Republic, and Germany where such practices are common, it may not be necessary to keep such careful records. Furthermore, as it is more difficult to establish a prima facie case under European law and shift the burden of proof, it is less necessary for employers to keep meticulous records. As the corporation assumes liability for the actions of their employees, a multinational should be sure to train employees to ensure that they are not being discriminatory. Furthermore, training would be useful in ensuring that sex discrimination also stays out of emails where a supervisor may write something discriminatory in an email, not thinking of the implications. While these actions taken by corporations may prevent sex discrimination in the first place there are also steps that can be taken to protect a firm from liability once the discrimination has taken place.

Depending on the nature of the discrimination a corporation can take a variety of steps to prevent liability. Depending on the facts of the case a corporation in the United States or Ireland may choose to take the defense of a bona fide occupational qualification if they can prove the discrimination in hiring is necessary for authentic reasons for public safety or privacy such as with labor and delivery nurses. The European Union as a whole provides for a defense very similar in everything, but name to the BFOQ defense, while the United Kingdom provides for the GOQ defense that is at times slightly broader. The BFOQ defense would release the firm from liability. A corporation in the United States could also take the defense in a mixed-motive case that they would have chosen the same decision, e.g. to not hire to promote, in a circumstance without discriminatory conditions. Under the Civil Rights Act of 1991, this defense could allow an employer to avoid liability, potentially limiting the remedies available.[liv] In the case of disparate impact in the United States if a corporation can prove the policy that allegedly discriminates is a "business necessity" they can avoid liability.

One defense that can be used, but is slightly tricky is the defense of fraud in the application. In the case of *Russell v. Microdyne Corp.* the resume and job application were fraudulent in nature such that the defendant could use this fraud to defend the allegations of a violation of Title VII in promotion and compensation.[lv] For such a defense to be successful the fraud must be severe enough that the "plaintiff would have been terminated on those grounds alone."[lvi] While a company could use this defense, as Microdyne Corp. did, it is limited by only restricting the plaintiff's ability to be reinstated or collect front pay. In cases where this defense might be used, i.e. discrimination in promotion and compensation such as in the *Russell v. Microdyne Corp.* case, the employer may still be liable for lost wages due to discrimination.[lvii]The defense of fraud in applications thus may provide a viable defense for employers in certain situations, but may not fully excuse them from liability in a Title VII violation.

V. CONCLUSION

Sex discrimination in the workplace has been present to some degree since women entered the workforce. Following the passage of Title VII and the establishment of the Equal Employment Opportunity Commission in the United States, women gained the ability to bring suit against corporations for discrimination. While in the European Union, there has been a mixture of community wide legislation and particular laws within member states. With the increased globalization of the world, and various legislation passed nationally to deal with sex discrimination, multinational companies have had to struggle with ensuring that they legally understand the intricacies of each countries sex discrimination polices. There are still a number of steps corporations can take to protect themselves from liability both in preventing discrimination and through defenses of discrimination. If a corporation is vigilant in its actions and policies regarding discrimination, liability for such a suit can be avoided.

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