afscme Leadership letter

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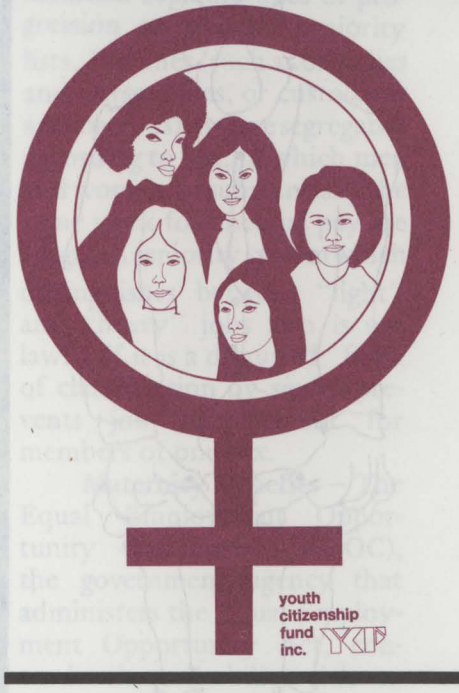
WHAT ABOUT SEX DISCRIMINATION?



The battle against discrimination on the basis of sex is growing more intense every day. Everyone knows it is illegal to discriminate on the basis of race, color, religion or national origin. It is just as illegal to discriminate on the basis of sex. Union leaders need to understand discrimination because it affects unions in several ways. To name one: your local union could find itself on the wrong end of a lawsuit.

That's why AFSCME is devoting this special edition of its **Leadership Letter** to the subject of illegal discrimination. The focus is on sex discrimination because it is often the least understood aspect of the problem. This report, in fact, is a summary of a paper prepared by the general counsel's office specifically for AFSCME's Interim Committee on Sex Discrimination, which was created in response to a resolution passed by the 19th International Convention in Houston two years ago.

SEX DISCRIMINATION— IT'S AGAINST THE LAW

Discrimination on the basis of sex, race, color, religion or national origin by employers or labor unions is against the law. It may affect any aspect of employment: recruitment, testing, hiring, transfers, upgrading, training, promotion, layoff, termination, seniority and fringe benefits.

Aside from the legal obligation to do so, fighting discrimination in all forms is one of the strongest traditions running throughout AFSCME's history. A labor union must fight discrimination in two roles — as representatives for workers and as employers. A union must also make sure that all internal programs and practices are free of illegal discrimination. The union may be expressly liable in cases of illegal contract provisions to which it is a party.

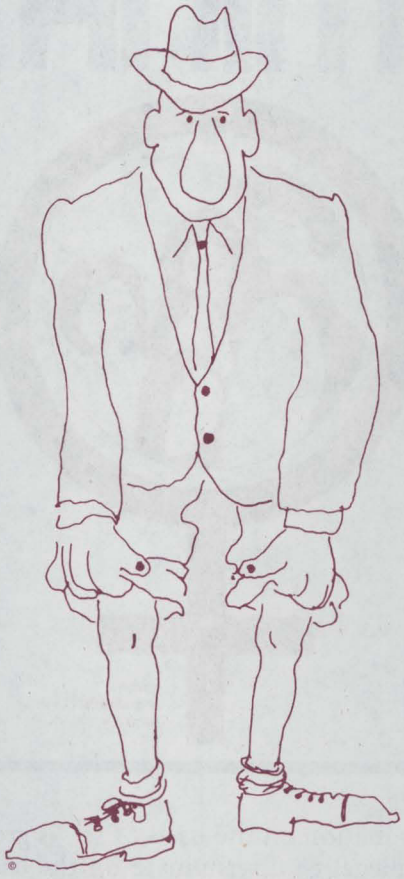
The following general principles have been applied in employment discrimination cases:

A complaining party need not show an **intent** to discriminate, but only that the challenged employment practice results in discrimination. In other words, it doesn't matter if the alleged discrimination is on purpose or not.

Statistics which show a proportion of men or women hired, promoted in a job classification, etc., considerably different from the proportion in the population or work force are very strong evidence of discrimination. The same goes for whites, blacks, Latinos, Orientals, etc.

Such statistics shift the burden to the defendant in question, to show that the situation is not the result of discrimination.

In order to justify any practice or policy which, however fairly administered and non-discriminatory on its face, affects employees of one sex (or race, etc.) substantially more than the other, a defendant employer must show that the practice or policy is a compelling "business necessity." On top of that, the employer must also prove that no alternative practice can achieve the required purposes.



"Hire him. He's got great legs."

NATIONAL ORGANIZATION FOR WOMEN

A current policy is unlawful — even though it may appear to be non-discriminatory — if it continues the effect of past discrimination, including discrimination that occurred before enactment of the federal law. For example, it may be illegal to base promotion solely on seniority in a job line now open to both men and women, but previously open to men only or women only.

The law protects individuals and unions who fight illegal discrimination from punishment or harassment by an employer.

Specific areas in which unlawful sex discrimination has been found include:

Employee Selection Procedures — Tests and other procedures for selecting or promoting employees may not be used to discriminate, accidentally or on purpose. This applies to tests, biographical information, background requirements, interviews, application forms and interview rating systems.

Generally, selection procedures which screen out a disproportionate number of individuals of either sex or of a particular race, color or religious group are not allowed unless (1) the procedures are significantly related to job performance and (2) no alternate standards can be developed.

Hiring and Firing — Employers sometimes expressly or implicitly categorize certain jobs as "men only" or "women only." Such sex requirements are generally acceptable only if there is a "factual basis for believing that all or substantially all

women (or men) would be unable to perform safely and efficiently the duties of the job involved."

For example, it is not permitted to refuse to hire a woman based on assumptions about women as a group, such as "women have a higher turnover rate than men," or "women's family obligations make them poorer workers than men," or "women are less capable of staying cool under pressure."

Pre-hire Inquiries – It is unlawful to request pre-employment information (such as child care information) only from female applicants.

Marital Status, Pregnancy – An employer may not forbid or restrict the employment of married women unless the same policy applies to married men, as well.

It is illegal to have a general policy excluding all pregnant women from employment. The Supreme Court also has recently ruled that an employer may not arbitrarily require all women to begin maternity leave at a predetermined point in time, such as in the fourth or fifth month of pregnancy.

Seniority – The law does permit differences in employee benefits based on a valid seniority system, so long as the system isn't a guise for unlawful discrimination.

Stereotyped Concepts in Job Assignments – An employer may not permit a female employee to perform lower-level duties and receive a lower pay scale than male employees with similar background and experience, because of stereotyped assumptions of what is "female" and "male" work.

Separate Job Lines – With a very few exceptions, an employer may not classify jobs as "male" or "female" or maintain separate lines of progression or separate seniority lists. Job lines (such as orderlies and nurses aides, or custodians and matrons) that are segregated according to sex, in which men and women do substantially the same work for unequal pay are illegal. A seniority system which distinguishes between "light" and "heavy" jobs also is unlawful if it is a disguised form of classification by sex or prevents job advancement for members of one sex.

Maternity Benefits – The Equal Employment Opportunity Commission (EEOC), the government agency that administers the Equal Employment Opportunity Act, contends that disability due to pregnancy or childbirth should be treated as other temporary disabilities for purposes of accrual of seniority, reinstatement rights, and payment under any health or temporary disability insurance or sick leave plan. This issue is strongly disputed. So far, some courts have agreed with the EEOC position, but others have refused to do so.

Child Care Leave – EEOC also holds that it is unlawful for an employer to grant child care leave to female employees but not to males. In at least two cases, lawsuits challenging this practice caused public employers to abandon their discriminatory policies.

Retirement – An employer may not have different retirement ages for female and male employees.

Insurance Benefits – An employer may not limit fringe benefits to "head of the household" or "principal wage earner." An employer may not provide health and accident insurance coverage to the wives of male employees, while denying it to husbands of female employees, or provide maternity insurance coverage to wives of male employees, but not to female employees.

Pension Plans – A pension plan may not have different standards or different benefits to survivors of female and male employees.

State "Protective" Laws – State "protective" laws for women conflict with federal equal employment law and therefore are illegal. (Such laws try to limit the employment of women in certain occupations, in jobs requiring the lifting of weights, during certain hours, for more than a specified number of hours, or for certain periods of time before or after childbirth.)

Discrimination Against Men – Most of the fight against sex discrimination has focused on removing obstacles to employment for women. The prohibition against sex discrimination applies equally on behalf of men.

Violations of the law require remedial action. Remedies most frequently used are:

Injunctions – An employer or union that has been found to have violated the law must stop discriminating or face contempt of court charges and penalties.

Back Pay – Back pay may be awarded to an entire group of employees for up to two years prior to the date a discrimination charge was filed. The back pay may be the amount of salary lost by someone or a group of people who were not hired, who did not receive a promotion, or who received a lower wage for equal work.

The employer or union that violates the law may have to pay a very large amount in a case involving extensive discrimination.

Affirmative Action – An employer or union which has violated the law must not only stop discriminating, but may be ordered to take positive steps toward eliminating employment barriers against a group victimized by discrimination. They may be required to hire, train and promote a specified number or percentage of females (or men, blacks, etc.) until certain goals are reached.

Attorney's Fees – While not a "remedy" to the person discriminated against, attorney's fees can be an added cost to potential defendants who lose a case.

RESPONSIBILITY OF UNIONS FOR FIGHTING DISCRIMINATION

A union is responsible for complying with equal employment provisions of the law as an employer if the union employs 15 or more people. A union is covered as a labor organization if it has 15 or more members.

Like any employer, AFSCME and other unions must not discriminate against their staff.

As a labor organization, a union may not, on the basis of sex (or race, color, religion or national origin):

Exclude or expel from membership or otherwise discriminate against an individual.

Deprive an individual of employment opportunities or otherwise adversely affect his or her status as an employee.

Cause an employer to discriminate against an individual.

Operate a training program in which discrimination is practiced.

Moreover, unions must do more than refrain from discriminating. Unions must challenge the discriminatory practices of employers with whom they bargain. Thus violations by unions have been found in these situations:

. . . unions must do more than refrain from discriminating.

A union shared responsibility equally with the employer for contract provisions that discriminated against female members when the court found no evidence indicating the union actively opposed inclusion of the unlawful provisions in the agreement.

A union failed to propose an alternative to a seniority system that continued the effects of past unlawful discrimination.

A union failed to challenge weight restrictions that excluded females from certain jobs.

A union became a party to a collective bargaining agreement requiring employers to discharge pregnant employees.

A union went along with an employer who segregated job classifications by sex and refused to promote females to full-time positions.

A union entered a collective bargaining agreement with higher sickness and accident benefits for men than for women.

This sampling of legal decisions indicates that a collective bargaining agreement does not shield a union from its legal obligations.

The fact that the current collective bargaining agreement may not be up for negotiation does not excuse a union from attempting to discuss discriminatory contract provisions with the employer. An employer may be urged to reopen the contract if the contract contains a contractual "savings" clause that directs the parties to renegotiate provisions which are found to be illegal.

Unions must challenge the discriminatory practices of employers with whom they bargain.

The fact that an employee has filed a charge with an agency or court protesting an alleged discriminatory practice does not excuse the union from its responsibility to represent the same or another employee who is grieving about the same practice through the contractual grievance machinery.

An employer who has been charged by an employee with discriminatory treatment stemming from a collective bargaining agreement, in some cases, may file charges against the union saying, in effect, "if I am liable, you (the union) are too."

Unions have a responsibility to see that the equal pay laws are carried out for their membership, especially at the bargaining table. The position of the U.S. Department of Labor which administers the Equal Pay Act is that:

Collective bargaining agreements must conform with the legal requirements for equal pay.

Eliminating differences in wage rates based on sex is a joint responsibility of the union and employer.

But can she type?

Seattle King County National Organization for Women

SEX DISCRIMINATION: THE LAW

Federal law barring sex discrimination in employment-related areas stems from four sources:

Title VII of the Civil Rights Act of 1964

This law prohibits sex discrimination in any term, condition or privilege of employment by employers or labor unions. It covers all private employers of 15 persons or more, including labor unions. It also covers labor unions with 15 or more members in their role as worker representatives. As amended in 1972, it covers states and local governments, except elected officials and their personal staff and policy-making appointees.

Title VII is enforced by the Equal Employment Opportunity Commission (EEOC) and the Department of Justice. A charge that Title VII has been violated may be filed by any person claiming to be aggrieved, or on behalf of that person by any individual or organization, including a union. If the state or locality where the challenged action occurred has a law comparable to Title VII and an agency to enforce that law, then the charge must be referred to that agency.

A court suit may be initiated by the government if the alleged violation is not corrected or resolved by conciliation. If the alleged violator is a private employer, including a labor union, the EEOC may sue. But if the alleged violator is a state or local government or its agency, the EEOC may not sue; it can only recommend that the Justice Department file suit.

An aggrieved individual also has the right to sue. If the EEOC dismisses the charge, or if a designated period of time has passed without the EEOC or the Justice Department filing a suit, then the individual may go to court directly to sue for alleged discrimination. In general, a suit may be filed by a union representing employees subjected to discrimination, although there are some limitations here.

The Equal Pay Act of 1963, as Amended

This law requires the employers that it covers to provide equal wages (including overtime) and equal employee contributions for fringe benefits or equal amounts of benefits to men and women who are performing substantially equal work.

The act covers all employees subject to the Fair Labor Standards Act which, as of May 1, 1974, includes almost all employees in the public sector. Individuals in executive, administrative or professional capacities are covered, except for certain high-level, non civil service employees.

This law specifically prohibits an employer from reducing the wage rate of any employee in order to equalize rates between the sexes. The act is enforced by the Wage and Hour Division of the Department of Labor.

The Education Amendments of 1972

This law provides that "no person in the U.S. shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." it is enforced by the federal department or agency which provides the financial assistance.

Executive Order 11246, as Amended

This order prohibits employment discrimination based on sex (as well as race, color, religion and national origin) by federal contractors or subcontractors and by contractors who perform work under a federally assisted construction contract exceeding $10,000.

Coverage includes all facilities of the contractor, whether or not they are involved in performance of the federal contract. However, the Labor Department, through the Office of Federal Contract Compliance (OFCC), which enforces the order, has limited coverage where state or local government is involved to the particular contracting agency.

AN ACTION PROGRAM

The following suggestions are to assist locals and councils in fighting sex discrimination on behalf of the female employees they represent as well as their own employees.

WHAT TO LOOK FOR

1. Examine collective bargaining agreements and look for possible evidence of sex discrimination, such as:

- Are females denied the same promotion and transfer rights as males?
- Are women unable to return to their old jobs with no loss of seniority following childbirth?
- Are females denied the use of paid sick leave, disability or insurance benefits due to childbirth or complications arising from pregnancy?
- Are pension plan benefits for women different than for male employees?

2. Check the workplace, looking at every area of employment, for discrimination in job situations, such as:

- Are women paid less for substantially the same work as men?
- Are certain jobs or departments all or nearly all male while others are all or nearly all female? (Statistics may be strong evidence of discrimination.)
- Are most females hired in at a lower rate of pay than most males?
- Are females denied training or promotion opportunities offered to males?

WHAT TO DO ABOUT IT

1. If there are discriminatory provisions in the contract, take the initiative to reopen the contract for negotiations. As new contracts are negotiated, make sure they do not contain provisions which are unlawfully discriminatory.

It is important that all union actions fighting discrimination are documented in writing, especially instances of the union's attempts to bargain.

2. The local should file a grievance through the normal procedures, if the problem is within a grievable area.

3. File a charge or bring a complaint to the proper agency. The vast majority of cases will come under two federal laws.

- Title VII of the 1964 Civil Rights Act covers discrimination in every aspect of employment. Locals should first file a complaint with the nearest office of the federal Equal Employment Opportunity Commission. Then the complaint should be filed with the state or local agency that enforces a law prohibiting sex discrimination in public employment, if there is such a law in your area.
- Employees who have a complaint concerning equal pay for substantially equal work are covered by the Equal Pay Act. Contact the nearest office of the Wage and Hour Division of the Department of Labor to file a complaint.

NOTE: For more specific information and for a detailed checklist on sex discrimination, contact AFSCME's Department of Program Development at International Headquarters. AFSCME strongly urges all local unions considering legal action to first contact AFSCME General Counsel A. L. Zwerdling in Washington, D.C. Locals and councils are also requested to keep the International informed of all action taken by sending copies of all documents to these two departments.