Opinion No. 72-22

May 3, 1972

BY: OPINION OF DAVID L. NORVELL, Attorney General James B. Mulcock, Jr., Assistant Attorney General

TO: Honorable Turner W. Branch, State Representative, 4308 Avenida La Resolana, N.E., Albuquerque, New Mexico 87110

QUESTIONS

QUESTIONS

In Section 59-5-1, N.M.S.A., 1953 Comp. (1971 P.S.) regulating the hours of employment for females enforceable against an employer in New Mexico who is subject to Title 7 of the Civil Rights Act of 1964?

CONCLUSION

No.

OPINION

*{*39}* ANALYSIS

Section 59-5-1, N.M.S.A., 1953 Comp. (1971 P.S.) states:

"Maximum hours of labor for certain occupations -- Exemptions. -- No females shall be employed in any industrial or mercantile establishment, hotel, restaurant, cafe or eating house; or in any laundry, or in any office as a stenographer, clerk, bookkeeper or in any other clerical position; or in any place of amusement; or in any telephone or telegraph office, within the state more than eight [8] hours in any one [1] day of twentyfour [24] hours, nor more than forty-eight [48] hours in any one [1] week of seven [7] days. The provisions of this act [59-5-1 to 59-5-9] shall not apply to hospitals or sanitariums, or to registered or practical nurses wherever employed; or to midwives while engaged in their duties as such; or to any female who signs a written agreement to work more than eight [8] hours a day or more than forty [40] hours a week; provided that every such agreement shall provide for an hourly rate of compensation equal to one and one-half [1+] times the regular hourly rate of pay, for each hour in excess of forty [40] hours which are worked in any one [1] week."

The New Mexico law does not, however, make an attempt to regulate the number of hours a male may work except insofar as 59-3-14, N.M.S.A., of 1953 Comp. restricts male employees from laboring more than 10 hours in any 24 hours of any one day or

more than 70 hours in any one week of seven days in a hotel, restaurant, cafe or eating house.

In 1964 Congress passed and the President signed what is commonly known as Title 7 of the Civil Rights Act of 1964 (Pub. L. 88-352, Title 7, codified at 42 U.S.C. 2000e). That act defines "employer" as "a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year."

Title 7 of the same Act goes on to state in 42 U.S.C. 2000e-2(a):

"It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; 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 race, color, religion, sex, or national origin."

The Equal Employment Opportunity Commission pursuant to the authority granted them by 42 U.S.C. 2000e-12 has interpreted the above language as follows:

(1) Many states have enacted laws * * * with respect to the employment of females. Among these laws are those which prohibit or limit the employment of females * * * for more than a specified number of hours per day or per week.

(2) The Commission believes that such State laws and regulations, although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect. Accordingly, the Commission has concluded that such laws and regulations conflict with Title VII of the Civil Rights Act of 1964 and will not be considered a defense to an otherwise established unlawful employment practice or as a basis for *{*40}* the application of the bona fide occupational qualification exception." See Equal Employment Opportunity Commission, **Sex Discrimination Guidelines,** § 1604.1 (b), 33 F.R. 3344, as amended, 34 F.R. 13367.

The question now presented is whether 59-5-1, N.M.S.A., 1953 Comp. (1971 P.S.) can be enforced to prohibit an employer subject to Title 7 of the Civil Rights Act of 1964 from employing a female in New Mexico more than eight hours in any one day or more than 48 hours in any one week. It is our opinion that the State statute is unenforceable.

42 U.S.C. 2000h-4 (Title 11 of the Civil Rights Act of 1964) specifies that nothing in it shall be construed as invalidating any provision of state law unless the state provision is inconsistent with any of the purposes of the Civil Rights Act. In this light, it is noted that the enforcement of the New Mexico Statute would have one of two results:

(1) Prohibit women from working in excess of 40 hours a week if the employer were unwilling to pay her time and a half for any hours she worked in excess of 40 hours per week; thereby discriminating against women vis-a-vis men from working in excess of 40 hours per week; or

(2) Require the employer to pay a woman time and a half for any time worked in excess of 40 hours a week; thereby discriminating against men vis-a-vis women in not requiring overtime pay for men.

It is our opinion therefore that the New Mexico Statute is contrary to the purposes of the Civil Rights Act of 1964. See **General Electric Co. v. Young,** 3 F.E.P. Cases 561 (U.S.D.C., W.D.Ky., 1971), at 565, in which it was held that the Kentucky laws relating to female employment and restricting such employment much the same as does New Mexico law did "directly conflict with and frustrate that principle and policy [of Title 7 of the Civil Rights Act of 1964] in that said statutes [the Kentucky Statutes] on their face operate to deny females employment opportunities extended to men on the basis of general characteristics attributable to females as a group."

The court went on to say "these Kentucky Statutes therefore compel an employer to make a prohibited classification of employees on the basis of a stereotyped characterization of the sexes in violation of Title 7 and said guidelines [the sex discrimination guidelines issued by the EEOC], and by virtue of the Supremacy Clause (Article VI) of the United States Constitution these statutes [the Kentucky Statutes regulating female employment] are made unlawful, null and void and unenforceable as to [those who meet the definition of employers under Title 7 of the Civil Rights Act of 1964].

Similar rulings can be found in **Rosenfeld v. Southern Pacific Co.,** 293 F. Supp. 1219 (C.D. Calif. 1968), affirmed 444 F.2d 1219 (9th Cir. 1971); **Caterpillar Tractor Co. v. Grabiec,** 317 F. Supp. 1304 (S.D. Ill. 1970) and **Garneau v. Raytheon Co.,** 323 F. Supp. 391 (Mass. 1971).

For the reasons stated above and the cases cited, it is our conclusion that New Mexico cannot enforce its law against those employers who meet the definition of an employer in Title 7 of the Civil Rights Act of 1964.