

California's F.E.P.A. Remedies for Sex Discrimination— Are They Working?

I. INTRODUCTION

Much has been written describing the ways in which women are discriminated against in employment, and the administrative and legal remedies available.¹ The purpose of this article is to evaluate the effectiveness of California's Fair Employment Practice Act (F.E.P.A.), as administered by the Fair Employment Practice Commission (F.E.P.C.),² in dealing with the problem, and to make recommendations for improvement.

The approach is first, to describe the official policy of the F.E.P.C. relative to sex discrimination, and then to examine the agency's actual implementation of that policy in its three basic

¹See, e.g., Landau and Dunahoo, *Sex Discrimination in Employment: A Survey of State and Federal Remedies*, 20 DRAKE L. REV. 417 (1971); McDaniel, *Sex Discrimination in Employment or Can Nettie Play Professional Football?*, 4 U. SAN. AN'S PLACE: *Diminishing Justifications for Sex Discrimination in Employment*, 42 S. CAL. L. REV. 183 (1968); Murphy, *Female Wage Discrimination: A Study of the Equal Pay Act 1963-1970*, 39 U. CIN. L. REV. 615 (1970); Comment, *Sex Discrimination in Employment or Can Nettie Play Professional Football?* 4 U. SAN. FRAN. L. REV. 323 (1970); Comment, *The Elimination of Sex Discrimination in Employment: Alternatives to a Constitutional Amendment*, 12 B. C. IND. & COM. L. REV. 723 (1971); Oldham, *Sex Discrimination and State Protective Laws*, 44 DENVER L.J. 344 (1967); Comment, *The Mandate of Title VII of the Civil Rights Act of 1964: To Treat Women as Individuals*, 59 GEO. L.J. 221 (1970); Note, *Equal Rights for Women: The Need for a National Policy*, 46 INDIANA L.J. 373 (1971); L. KANOWITZ, *WOMEN AND THE LAW: THE UNFINISHED REVOLUTION* (1969).

²CAL. LAB. CODE § 1410 *et seq.* (West 1971).

procedures³ for handling employment discrimination cases: 1) the individual complaint;⁴ 2) the "Section 1421 investigation;" which is initiated by a request that the agency investigate an alleged discriminatory practice;⁵ and 3) the voluntary affirmative action program.⁶ The final section of this article presents recommendations for improving the agency's record in reducing sex discrimination.

II. F.E.P.C. POLICY ON SEX DISCRIMINATION

The sex discrimination amendment to F.E.P.A. became effective November 23, 1970.⁷ In December, 1970, the F.E.P.C. adopted most of the sex discrimination guidelines of the U.S. Equal Employment Opportunity Commission,⁸ which have not

³For a detailed description of these procedures, see Comment, *California's Approach to Racial Discrimination in Employment: The Complaint vs. Voluntary Affirmative Action*, 5 U. SAN FRAN. L. REV. 404 (1971).

⁴CAL. LAB. CODE § 1421 (West 1971):

The Commission shall have the following functions, powers and duties:

...

(f) To receive, investigate and pass upon complaints alleging discrimination in employment because of race, religious creed, color, national origin, ancestry, or sex.

⁵CAL. LAB. CODE § 1421 (West 1971):

... When it shall appear to [the commission] that an unlawful employment practice may have been committed, the chairman of the commission shall designate one of the commissioners to make, with the assistance of the commission's staff, prompt investigation in connection therewith. If such commissioner determines after such investigation that further action is warranted, he shall immediately endeavor to eliminate the unlawful employment practice complained of by conference, conciliation and persuasion.

⁶CAL. LAB. CODE § 1431 (West 1971):

The Division of Fair Employment Practices may engage in affirmative actions with employers, employment agencies, and labor organizations in furtherance of the purposes of this part as expressed in Section 1411.

⁷CAL. LAB. CODE §§ 1411, 1412, 1419, 1420 and 1432 (West 1971).

⁸A letter sent by Pier Gherini, Chairman, F.E.P.C., in January, 1971, to all employment agencies states, "the California Fair Employment Practice Commission endorses those sections [29 C.F.R. § 1604.1(a), 1604.2-1604.31 (1971)] of the Guidelines that are attached to this letter, and will observe them in carrying out its new responsibilities under the amended F.E.P. Act . . ." This letter is on file at the F.E.P.C. offices in San Francisco.

as yet been replaced by the F.E.P.C.'s own guidelines, currently under preparation.⁹

As the general rule, the E.E.O.C. guidelines require that all persons be evaluated objectively on the basis of their individual capacities, and not on the basis of characteristics generally ascribed to the sexes. The only exception which is allowed is the case where sex is a bona fide occupational qualification (BFOQ), and this exception is narrowly defined.¹⁰ For example, assumptions of the comparative employment characteristics of the sexes (such as that women have a higher turnover rate) and stereotyped characterizations (such as that men are less capable of assembling intricate equipment or that women are less capable of aggressive salesmanship) do not invoke the exception; nor do the preferences of co-workers, the employer, clients, or customers, or the need to provide separate facilities unless the expense would be "clearly unreasonable."¹¹ The only specific BFOQ authorized is for the purpose of authenticity or genuineness, for example, actors and actresses.¹²

California protective legislation raised special BFOQ problems for the F.E.P.C. For example, should sex be considered a bona fide occupational qualification for a position requiring the lifting of weights in excess of that permitted by the state statute? The E.E.O.C.'s answer is clearly negative: "[state protective legislation] conflict[s] 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 the application of the bona fide occupational qualification exception."¹³ The E.E.O.C.'s position was affirmed by both state and federal courts. In *Rosenfeld v. Southern Pacific Company*, a federal district court in 1968 eliminated California's weights and hours legislation.¹⁴ In May, 1971, the California Supreme Court overturned the state prohibition against hiring female bartenders, finding that the law violated the equal protection clauses of the

⁹Telephone interview with B. J. Miller, F.E.P.C. Field Consultant, on April 3, 1972 (hereinafter cited as Miller).

¹⁰29 C.F.R. § 1604.1(a) (1971).

¹¹*Id.* § 1604.1(a)(1).

¹²*Id.* § 1604.1(a)(2).

¹³*Id.* § 1604.1(b).

¹⁴*Rosenfeld v. Southern Pacific Company*, 293 F. Supp. 1219 (C. D. Calif. 1968).

state and federal constitutions, Article XX, section 18 of the state constitution, and section 2000e-2 of the Civil Rights Act.¹⁵ In making the last determination, the court applied the E.E.O.C. Sex Discrimination Guidelines, noting particularly § 1604.1(b) (2): "The Commission believes that [protective] 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"¹⁶

The F.E.P.C. did not begin accepting complaints involving state protective legislation until *Rosenfeld* was affirmed by the Ninth Circuit Court of Appeals in June, 1971. This change in policy, although announced in the *F.E.P.C. News*,¹⁷ is not reflected in informational materials distributed by the Commission as late as November, 1971—the E.E.O.C. sex discrimination guidelines which were included in these materials were abridged to omit the section dealing with protective laws.¹⁸ Among the various explanations for this omission which may be posited is the possibility that the agency is unwilling to disseminate literature critical of state legislation. Nonetheless, the Commission should be providing employers with up-to-date information on their legal obligations.

In addition to the stringent limitations on the BFOQ exception, the E.E.O.C. Guidelines adopted by the F.E.P.C. prohibit separate lines of progression and separate seniority systems for men and women,¹⁹ discrimination against married women,²⁰

¹⁵*Sail'er Inn, Inc. v. Kirby*, 5 Cal. 2d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

¹⁶*Id.* at 14 n. 11, 485 P.2d at 537, 95 Cal. Rptr. at 337.

¹⁷"Since the Federal court decision earlier this year which struck down state protective laws limiting hours women may work and weights they may be required to lift on the job, F.E.P.C. has accepted complaints which involve such matters." FAIR EMPLOYMENT PRACTICE COMMISSION, *First Analysis of Sex Bias Complaints*, F.E.P.C. News, No. 43, Sept. - Oct. 1971, at 2, col. 1. The decision referred to is *Rosenfeld v. Southern Pacific Company*, 444 F.2d 1219 (9th Cir. 1971).

¹⁸Materials sent by Marian Tracy, Assistant Information Officer, from the F.E.P.C. offices in San Francisco.

¹⁹29 C.F.R. § 1604.2 (1971).

²⁰*Id.* § 1604.3.

discriminatory pension and retirement plans,²¹ and job opportunities advertisements indicating a sex preference unless the BFOQ exception is applicable.²² The guidelines also provide that an employment agency will share responsibility with the employer if the agency fills a job order containing an unlawful sex specification, and, further, that employment agencies may not deal exclusively with one sex unless sex is a BFOQ for the jobs involved.²³

The above-described, avowed policy of the F.E.P.C. appears to be calculated to obtain genuinely equal employment opportunities for both sexes, and little criticism may be made of it. It is to be hoped that the new guidelines now being formulated by the Commission will be as strict. However, the crucial questions which remain are the extent to which the policy is followed in practice, and the extent to which the agency has been successful in reducing sex discrimination.

III. F.E.P.C. PRACTICE WITH REGARD TO SEX DISCRIMINATION—AFFIRMATIVE ACTION SURVEYS AND SECTION 1421 INVESTIGATIONS

Affirmative action surveys (voluntary educational programs) and Section 1421 investigations (initiated by a complaint of a general practice of discrimination) which commenced prior to the effective date of the sex discrimination amendment to the F.E.P.A. do not take up sex discrimination at all. Therefore, of the reports issued by the F.E.P.C. between November, 1970, and March, 1972, only three purport to deal with the problem: affirmative action surveys of Metals Resources, Inc. and of Marin County,²⁴ and a Section 1421 investigation of the City of Long Beach.²⁵

²¹*Id.* § 1604.31.

²²*Id.* § 1604.4.

²³*Id.* § 1604.5.

²⁴CALIFORNIA FAIR EMPLOYMENT PRACTICE COMMISSION, METALS RESOURCES, INC. AFFIRMATIVE ACTION SURVEY (June 1971) (hereinafter cited as METALS RESOURCES) AND MARIN COUNTY AFFIRMATIVE ACTION SURVEY (February, 1972) (hereinafter cited as MARIN COUNTY), authorized under CAL. LAB. CODE § 1431 (West 1971).

²⁵CALIFORNIA FAIR EMPLOYMENT PRACTICE COMMISSION, CITY OF LONG BEACH, AN INVESTIGATION UNDER SECTION 1421 OF THE CALIFORNIA LABOR CODE. July 1971) (hereinafter cited as LONG BEACH).

The first report to consider sex bias was that on Metals Resources, Inc.²⁶ This company, a producer of thermal-formed titanium aircraft parts and related tooling, is located in four separate facilities in the greater Los Angeles metropolitan area.²⁷ The report indicates the following pattern of employment of women:

<i>Occupational Category</i>	<i>Males</i>	<i>Females</i>
1. Administrative, Managerial		
A. Non-Supervisory		
B. Supervisory	6	1
2. Technical		
A. Non-Supervisory	7	
B. Supervisory	3	
3. Craftsman, Skilled		
A. Non-Supervisory	208	
B. Supervisory	14	
4. Service, Sales, Clerical, Skilled		
A. Non-Supervisory	10	36
B. Supervisory	8	1
5. Operatives, Semi-Skilled		
A. Non-Supervisory	50	1
B. Supervisory		
6. Laborers, Unskilled		
A. Non-Supervisory	16	
B. Supervisory		
TOTALS	322	39²⁸

Thus, there are 39 women out of 361 total employees, or 10.8%.²⁹ Thirty-seven of these women are in the "Service, Sales, Clerical, Skilled" category (one in a supervisory capacity),³⁰ and one woman is the personnel manager.³¹

The company's own employment tabulation appended to the

²⁶METAL RESOURCES, *supra* note 24, at 1.

²⁷*Id.* at 4.

²⁸*Id.* at 12.

²⁹There are some minor arithmetic errors in the tables included in the report; *see id.*

³⁰METALS RESOURCES, *supra* note 24, at 12.

³¹*See id.* at 1 and 12.

F.E.P.C. report shows that there are *no* females in any of the following areas: accountants, industrial relations, engineers, marketing, programmers, engineering aides, lab technicians, draftsmen, and salesmen.³² Under the E.E.O.C. Guidelines, sex is not a bona fide occupational qualification for any of these positions.

In short, the figures reveal an archetype of sex discrimination, with women confined for the most part to clerical positions. The F.E.P.C. report, however, largely ignores this fact. The four-page evaluation section is concerned almost exclusively with ethnic discrimination; the only comment on sex discrimination is the inaccurate statement, "Females number 39, or 10.7%, and only four are supervisors. There is a female manager, however."³³ The employment tabulations included in the F.E.P.C. portion of the report show only two women in supervisory positions, one of whom is the personnel manager.³⁴ The company's tabulation indicates that the *only* female supervisor is the personnel manager.³⁵ Furthermore, personnel traditionally has been an area in which women are employed as "managers;" thus the presence of a female personnel manager cannot be interpreted to indicate an absence of sex discrimination.

The recommendations section of the report, as well, is concerned almost exclusively with ethnic discrimination. Although specific means of recruiting minorities are suggested, no such measures are proposed to increase the number of women employed, or the number in technical, professional and administrative categories.³⁶ For example, it is recommended that job announcements be sent to *minority* community groups, and that an "affirmative action file" be established to keep applications from *minority* job seekers separate from the general files. This assures that qualified minority applicants will come to the attention of the employer.³⁷ Similar procedures are not recommended to reduce sex discrimination. The report also suggests that "[s]pecific goals and time-tables be established to increase

³²*Id.* at 30.

³³*Id.* at 16.

³⁴*See id.* at 1, 9-13, and 30.

³⁵*Id.* at 30.

³⁶*See id.* at 17-19.

³⁷*Id.* at 18.

the utilization of minorities and correct identifiable deficiencies,"³⁸ again ignoring women.

The employer's response to the F.E.P.C. study likewise indicates an obliviousness to the problem of sex discrimination. The affirmative action program adopted by the company includes numerous procedures to recruit minority applicants, and none to recruit women for positions to which they have traditionally been denied access.³⁹ Where sex is mentioned, it seems to be as an afterthought, added to the text with little or no consideration of the problem of sex discrimination. Compare, for example, the following provisions (emphasis added):

3. *UPGRADING AND PROMOTIONS*

- a. Promotion, upgrading and transfer activities are constantly monitored to insure that full consideration is given to qualified *ethnic group employees*.

4. *LAYOFFS, TERMINATIONS AND DOWNGRADING*

- a. Layoffs, terminations, downgradings and recalls from layoffs have always been made on a merit basis without regard to race, color, religion, age, *sex*, or national origin.

5. *EMPLOYEE BENEFITS*

- a. Employee benefits, services and facilities are provided to employees without regard to *minority group* identification.

6. *COMPENSATION*

- a. By continuing examination of individual rates of pay and annual earnings the Company is able to insure that there will be no disparity in the compensation received by *minority group employees* and other employees for performing equivalent duties, and that opportunities for performing overtime work, or other-

³⁸*Id.* at 19.

³⁹The company's personnel procedures formulated to end discrimination are appended to the F.E.P.C. report; *see id.* at 21-32. It is noteworthy that a memorandum included in this section, addressed "To All Employees" from George J. Morton, President, Metals Resources Incorporated, does not express a policy of non-discrimination on the basis of sex: "It is the policy of Metals Resources Incorporated to afford equal opportunity for employment to individuals of all races, creeds, colors and national origins with due regard to their relative qualifications and abilities." *Id.* at 21.

wise earning increased compensation, continue to be available to all on a non-discriminatory basis.⁴⁰

The most blatant evidence of continuing sex discrimination at Metals Resources is provided by the goals and timetables established by the company relative to discrimination (emphasis added):

a. ...[O]ur goal is to promote to [officials and managers] three *male* Negroes and one *male* Spanish surname.

b. ...[W]e anticipate increasing our technical force by one *male* Negro.

...

d. *Office and Clerical:* Our *female* employees are long term employees and no turnover is projected, however *one female vacancy* is projected and it will be filled by a Spanish surname female.

e. Due to the nature of work performed in the shop a limited number of female employees are used.⁴¹

These goals indicate that the company is looking for *men* to fill technical and management positions, and for *women* to fill clerical positions. Although there is more evidence in the report to indicate obvious, continuing sex discrimination at Metals Resources, the above is ample to support the proposition that the F.E.P.C. affirmative action survey did nothing to enhance employment opportunities for women in that company.

The second report dealing with both sex and ethnic discrimination, the Section 1421 investigation of the City of Long Beach, was the result of a request in December, 1970, from the Long Beach Chapter of the National Association for the Advancement of Colored People.⁴² The report indicates the following pattern of employment of women (all city departments included):

⁴⁰*Id.* at 23.

⁴¹*Id.* at 27-28.

⁴²LONG BEACH, *supra* note 25, at 1.

<i>Occupational Category</i>	<i>Male</i>	<i>Female</i>
1. Administrative, Managerial		
A. Supervisory	321	28
B. Non-Supervisory	7	
2. Professional		
A. Supervisory	128	30
B. Non-Supervisory	623	107
3. Technical		
A. Supervisory	206	9
B. Non-Supervisory	808	53
4. Craftsmen, Skilled		
A. Supervisory	76	1
B. Non-Supervisory	237	15
5. Service, Sales, Clerical, Skilled		
A. Supervisory	23	38
B. Non-Supervisory	266	424
6. Operatives, Semi-Skilled		
A. Supervisory	42	1
B. Non-Supervisory	520	60
7. Laborers, Unskilled		
A. Supervisory	29	
B. Non-Supervisory	432	92
8. Other		
A. Supervisory		
B. Non-Supervisory	15	
<i>TOTALS</i>	3733	858 ⁴³

These figures indicate that there are 858 females out of 4591 total employees, or about 18.9%; women in supervisory positions total 107 out of 932 total supervisory personnel, or about 11.5%. Women in the "Service, Sales, Clerical, Skilled" category number 462, or 53.8%, of total female personnel. These percentages themselves bespeak sex discrimination, but the actuality is even worse than the tabulation above suggests. If the Public Library, Health, and Recreation Departments (traditionally open to female librarians, nurses, physical education personnel and the like), are excluded the tabulation of administrative, professional and technical personnel is as follows:

⁴³See *id.* at 46-47.

<i>Occupational Category</i>	<i>Male</i>	<i>Female</i>
1. Administrative, Managerial		
A. Supervisory	310	7
B. Non-Supervisory	7	
2. Professional		
A. Supervisory	96	3
B. Non-Supervisory	597	42
3. Technical		
A. Supervisory	205	4
B. Non-Supervisory	802	48
<i>Totals</i>	2017	104 ⁴⁴

Under this tabulation (derived from the F.E.P.C. figures, but not tabulated by the agency in this manner), women account for only 4.9% of all administrative, professional and technical personnel. Furthermore, there are no females in these positions in the Building and Safety, Franchises, City Manager, Community Development, Oil Properties and Public Service Departments, and there are no professional or administrative positions held by women in the Engineering and Law Departments.⁴⁵ Yet, the F.E.P.C. report overlooks the seriousness of sex discrimination in the City of Long Beach, making the following analysis:

Females are represented in all of the City's 33 departments. Although they make up approximately 19% of the City's work force (858) over half of these women (462) are employed in one job category—clerical. Only 7% of the City's administrators and managers are female and 15% are employed in the professional category.⁴⁶

In other words, like the Metals Resources survey described above, this report understates and largely ignores the problem of sex discrimination. The evaluation section focuses on minority discrimination,⁴⁷ and the recommendations made suggest the same lack of concern with enhancing employment opportunities for women.⁴⁸

⁴⁴See *id.* at 31, 33, 44 and 46.

⁴⁵See *Id.* at 17-42.

⁴⁶*Id.* at 48.

⁴⁷See *id.* at 50-53.

⁴⁸See *id.* at 54-55.

There is an additional criticism which applies equally to both of the above reports. The F.E.P.C.'s employment tabulations tend to obscure, rather than reveal, sex discrimination. The occupational categories used in the tabulations are vague and broad, and often give little indication of what positions are included. Male-female comparisons are not made except within the ethnic group categories. To illustrate the obscurity which results, a portion of one of the Metals Resources tabulations is reproduced below:

Occupational Category	Negro		Oriental		Other Non-White		Spanish Surname		Other Caucasian	
	M	F	M	F	M	F	M	F	M	F
	4. Service, Sales Clerical, Skilled									
A. Non-Supervisory		1	1	2			2		9	31
B. Supervisory									8	1 ⁴⁹

It is only by totaling the figures horizontally (which the Commission did not do) that one can conclude that there are 37 women and 18 men in this particular occupational category.⁵⁰ But even this statistic veils the fact that 28 of these women are secretaries, typists, stenos, or office clerks, and two hold "other" office or clerical jobs; the latter figures are taken from the *company's* employment tabulation which was appended to the F.E.P.C. report. The employer's tabulation also shows 8 women employed as "semi-skilled operatives" without further specification as to the nature of the work. The 18 male employees in the "Service, Sales, Clerical, Skilled" category apparently include some of 9 "other" office or clerical workers, 1 clerk, 5 salesmen, and 5 "service" employees. (The discrepancies in the totals arise from the differences in the employer's categorization.)⁵¹

In short, the Commission failed to make a meaningful analysis of Metals Resources' female employment pattern, even though clearly it could have done so on the basis of the data provided by the employer. Indeed, the company's tabulation was more revealing than that prepared by the Commission.

The third F.E.P.C. report dealing with sex discrimination, the

⁴⁹METALS RESOURCES, *supra* note 24, at 12.

⁵⁰This is the procedure followed to produce the male-female employment tabulations included in this article.

⁵¹See METAL RESOURCES, *supra* note 24, at 30.

affirmative action survey of the Marin County government, was published in February, 1972. The result of complaints and agitation by the Marin County Chapter of the National Organization for Women (NOW),⁵² it is, according to F.E.P.C. Assistant Information Officer Marian Tracy, the first study in which full attention was given to the problem of sex discrimination.⁵³ As such, the study is seriously inadequate.

NOW charged that the majority of the County's female employees are "employed in secretarial and clerical jobs and in departments historically reserved for women, such as the Department of Public Social Services and Personnel," and that women who held supervisory or managerial positions "supervised departments traditionally reserved for women."⁵⁴ To support these allegations, NOW compiled and submitted to the Commission a tabulation of males and females employed in each County department, the average monthly wage for each sex, and the differential between these average wages.⁵⁵ The Commission accumulated no further data to determine the existence or degree of sex discrimination in Marin County, except for a list of management and supervisory positions held by women. The investigator made no attempt to determine (as was done in the Long Beach and Metals Resources studies) either the specific or the general categories of work performed by women.⁵⁶ In other words, the F.E.P.C.'s analysis of the female employment pattern in Marin County is even more superficial than that made in the previous studies.

The Commission did conclude that "[t]he figures... would tend to indicate that the allegations by the NOW group were substantially correct."⁵⁷ However, this conclusion was immediately qualified:

[T]here appear to be several basic factors which have and will continue to contribute to the situation alleged to by the NOW group. It must be taken into consideration that Marin County,

⁵²MARIN COUNTY, *supra* note 24, at 1.

⁵³Interview at the F.E.P.C. offices in San Francisco on January 6, 1972.

⁵⁴MARIN COUNTY, *supra* note 24, at 2.

⁵⁵*See id.* at 1, 5, and 8.

⁵⁶*See id.* at 5, 10, and *passim*.

⁵⁷*Id.* at 5.

like most civil service employers, experiences very little turnover by the employees, especially among females in the upper job classifications. Department heads in almost every instance spoke of a low turnover rate and the length of tenure enjoyed by their workers, especially females. It was estimated that the average tenure for female employees was approximately 10-15 years. Another factor which tends to stabilize existing conditions would be the absence of complaints from females working within the system relative to their positions, classifications, and salaries.⁵⁸

It is difficult to comprehend the connection alleged to exist between a low turnover rate among female employees and a low representation of females in the upper job classifications. Indeed, if all hiring and promoting were done on a non-discriminatory basis and the females hired remained longer, an *over*-representation of females would be the logical result. At least, given the acknowledged higher turnover rate for men in the upper classifications, the County should be able to show steady progress toward eliminating the under-representation of women. Thus, this "factor which contribute[s] to the situation" should be construed as an indication of sex discrimination, rather than as an acceptable explanation for the inequities which exist.

The second factor cited (absence of complaints from present female employees) is also unacceptable as a justification for these inequities. Among the reasons why an employed woman will not complain about working conditions is fear of losing the job she has. Moreover, the F.E.P.C. report cites no source for the allegation that there is such an absence of complaints—did the investigator interview the female employees? (The report suggests the contrary.) Or did he rely on interviews with department heads?⁵⁹

In any case, complaints from without have been sufficient to draw the County's attention to sexual bias in its employment practices. In 1970, NOW complained to the County Board of Supervisors, without success, before going to the F.E.P.C. in January, 1971.⁶⁰ A successful, individual case against the County

⁵⁸*Id.* at 5-6.

⁵⁹*See id.* at 4.

⁶⁰*Id.* at 1.

for sex bias in hiring was settled in May, 1971.⁶¹ In short, it is unacceptable to suggest, as the report does, that the lack-of-complaints factor understandably may continue to “stabilize existing conditions.”⁶²

The most probable explanation for the pattern of sexual discrimination which exists in the County offices is suggested by the following quotation:

It was the general consensus of the Department Heads, with few objections, that NOW's charges of bias in relation to females were completely unfounded and without justification. . . . The terms, “frustrated females,” “troublemakers,” etc. and other negative connotations (sic) were used quite frequently when referring to the NOW group.⁶³

The F.E.P.C.'s recommendations for reducing sex discrimination comprised the following:

Sex Discrimination:

Recruitment and Advertisement:

- a. As an employer engaged in recruiting activities, every effort should be made to recruit employees of both sexes for all jobs unless sex is a bona fide occupational qualification.
- b. Advertisement in newspapers and other media of employment should not express a sex preference unless sex is a bona fide qualification for the job. Placement of advertisement under the heading “Male” or “Female” is often considered an expression of preference limitation, specification, or discrimination based on sex.

Job Policies and Practices:

- a. Written personnel policies relating to this subject area should expressly indicate that there shall be no discriminating against employees on account of sex.
- b. Employees of both sexes should have an equal opportunity

⁶¹See note 82, *infra*.

⁶²MARIN COUNTY, *supra* note 24, at 5.

⁶³*Id.* at 6.

to any available job that he or she is qualified to perform unless sex is a bona fide occupation qualification.

c. No employee should be restricted because of sex to certain job classifications. Steps should be taken to see that all jobs are available to all qualified employees in all classifications without regard to sex.

d. The County should have an affirmative action program to recruit women to apply for those jobs where they have been previously excluded. This can be done by various methods, such as including in itineraries recruiting trips to women's colleges where graduates with skills desired can be found, and by designing the advertisement to indicate that women will be considered equally with men for jobs.

e. Distinction based on sex should not be made in any training program. Both sexes should have equal access to all training programs.

f. Each manager and supervisor should be held personally responsible for providing equal opportunity for all of his or her employees with regard to work assignments, training, transfers, advancement, and other conditions and privileges of employment.

Supervisors in all levels of management should be required to regularly review the progress of their subordinates and be sure that no discrimination occurs.

An analysis of all major job classifications within the County should be made with an explanation required if minorities or women are currently being underutilized. Underutilization is defined as having fewer minorities or women in a particular job classification than would be reasonably expected by their availability. In making this analysis, the Personnel Department should conduct such analysis separately for minorities and women.⁶⁴

These general, vague recommendations are little more than a restatement of the law relative to sex discrimination. The last

⁶⁴*Id.* at 13-14.

paragraph suggests that the County do what the Commission should have done in making the affirmative action survey!

In sharp contrast are the minority discrimination recommendations, similar in all three reports, which include specific, concrete suggestions for eliminating racial inequities. Moreover, the County is asked to submit an annual report to the F.E.P.C. to evaluate the ethnic affirmative action program; no such report is requested on the subject of sex discrimination. For purposes of comparison, the minority recommendations are also reproduced in full below. (Note that for each, an analogous recommendation to deal with sex discrimination could have been formulated.)

Racial Discrimination:

1. An Equal Opportunity Coordinator, or Equal Employment Officer, should be designated for the purposes of administering an active affirmative action program. This individual should report directly to the County Administrative Officer and be given the necessary authority to insure effective implementation and compliance with the program.

Such a person should have knowledge of minority communities, social action programs, civil rights organizations and activities, as well as knowledge relating to personnel methods and practices.

2. Increased efforts in minority recruitment must be instituted. This process should be flexible and decentralized, and individual departments must take a more active role.

Minority community organizations should receive announcements of all job opportunities in the County. A more concerted effort should be made to develop personal contacts with these community organizations.

The County should actively seek to involve the State Department of Human Resources Development in the recruitment of personnel. This involvement should include utilizing all services provided by the HRD Center.

An "affirmative action file" should be established wherein applications from minority group members are placed in separate

file. When positions become available, a review of this file should be conducted to determine if qualified applicants are available. The use of this file should not require the exclusion from consideration of other applicants, but should be utilized only as another recruitment procedure.

A major source for new applicants is referral by present employees; therefore, minority employees should be encouraged to refer their friends when opportunities become available.

3. A review of all written examinations being utilized should be conducted to determine (1) the relevancy of the test to the actual duties of the position, (2) evidence of content and criterion validity, and (3) the actual effect the examination has on minorities.

Minority community representatives should be regularly invited to serve on oral interview panels.

4. Regular in-service training classes should be developed for employees, at all levels, in the area of human relations and communications as they relate to the minority communities. This training should be provided on a continuing basis and attendance should be mandatory.

5. All application forms and pre-employment devices and measures should be reviewed to determine if illegal inquiries are included, e.g., "juvenile arrest records," "sex," "age," "personal and private activities," etc.

6. A continued review of job classifications should be conducted to determine if training programs can be developed or if trainees from other organizations, e.g., WIN, NYC, New Careers, can be employed.

7. Specific goals and timetables should be established to increase the utilization of minorities and females and correct identifiable deficiencies. Any established goals should be realistic and obtainable.

8. A review of qualifications and abilities of present minority and female employees should be conducted to determine the possibility of upgrading or lateral movement into other job classifications that would be commensurate with the employees' abilities.

9. A contract compliance program should be developed to insure the utilization of minorities on all future County construction projects.

10. An annual report should be submitted to the California F.E.P.C. This report should include a current ethnic survey as well as an analysis of procedures attempted to institute the aforementioned recommendations. The success of any program depends on the ability to accurately evaluate its progress periodically, and make adjustments and changes wherever necessary.

This comprehensive minority affirmative action program was recommended despite the fact that race discrimination in Marin County employment is apparently minimal. While Blacks comprise only 2.4% of the population of Marin County, they hold 5% of the county jobs. Moreover, 45% of the Blacks employed hold professional, administrative, managerial or supervisory positions.⁶⁵

It is interesting that recommendations 5, 7, and 8 appear to be aimed at sex bias as well as racial discrimination, despite their inclusion under the heading "Racial Discrimination." It is not clear if this is intentional, or, given the "boilerplate" nature of these recommendations,⁶⁶ the result of an oversight on the part of the author, who could have forgotten to delete the words "sex" and "females."

The disparity between the two sets of recommendations strongly evidences a lack of concern with, or ignorance of, the problems of women in obtaining equal employment opportunity. This conclusion is supported as well by the Commission's unwillingness to institute a Section 1421 investigation. NOW first requested such an investigation in January, 1971. The Commission took no action. On April 1, NOW representatives made a personal appearance before the Commission in San Francisco, presented the statistics incorporated in the report, and again requested a formal 1421 investigation.⁶⁷ Several months later, still in the absence of any action by the Commission, NOW again appeared

⁶⁵See *Id.* at 6 and 15-17.

⁶⁶See, e.g., *METALS RESOURCES*, *supra* note 24, at 19 and *LONG BEACH*, *supra* note 25, at 55.

⁶⁷*MARIN COUNTY*, *supra* note 24, at 1.

personally before the Commission and threatened a mass demonstration if an investigation was not undertaken.⁶⁸ Nonetheless, “[t]he Commission, after extensive deliberation, decided to withhold a 1421 Investigation and would (sic) first attempt to pursue an affirmative action course with the County.”⁶⁹ The County Board of Supervisors formally consented to an affirmative action survey on June 29.⁷⁰

The crucial difference between an affirmative action evaluation and a Section 1421 investigation is that the latter approach includes enforcement powers whereas the former is merely an educational program.⁷¹ Paul Meaney, F.E.P.C. Division Chief, has stated that Section 1421 investigations “by Commission policy and practice are undertaken only at the request of a responsible individual or group, such as a civil rights organization, with reason to believe that discrimination exists in certain employment.”⁷² No explanation is given in the Marin County report for its deviation from this “policy and practice” in the face of a complaint by NOW, supported by statistical evidence of sex discrimination. The Berkeley Chapter of NOW encountered similar resistance from the Commission when the group requested an investigation of the Berkeley Consumer Co-op. The Commission took no action until NOW made its third personal appearance accompanied by several Co-op directors who also felt that such an investigation was warranted. Even then, Meaney warned the group that because of the substantial work backlog, it might be quite some time before the Commission could do any investigative work.⁷³

The ultimate question, of course, is whether the affirmative action evaluation will lead to decreased sex discrimination in the Marin County offices. The best available indicator of the study’s likely effectiveness is the County’s reaction to the

⁶⁸Telephone interview with Barbara Padilla, former President of the Marin County Chapter of NOW, on April 3, 1972.

⁶⁹MARIN COUNTY, *supra* note 24, at 1.

⁷⁰*Id.* at 4.

⁷¹See CAL. LAB. CODE §§ 1423 and 1431 (West 1971).

⁷²Letter from Meaney to the Honorable Willie L. Brown, Jr., Chairman of the California State Assembly Ways and Means Committee, February 25, 1972.

⁷³Telephone interview with Ruth McElhinney of the Berkeley Chapter of NOW on April 12, 1972.

evaluation. Appended to the F.E.P.C. report is an Addendum by the Marin County Personnel Director, excerpts from which follow:

Some of the statements made in the report are somewhat misleading as to the actual status of women and Blacks in County employment. ..[T]he following comparisons with general employment patterns should be noted:

1. 1970 data compiled by the Federal Equal Employment Opportunity Commission shows that 2.7 per cent of all women working hold managerial positions. As of February, 1972, 4 per cent of women employed by the County hold administrative/managerial positions and an additional 3.1 per cent hold supervisory positions.
2. A recent private industry survey of 163 firms including 98 with more than 1,000 employees revealed that: a) 76 per cent of the firms have no women in top management jobs, b) women account for 5 per cent or less of middle management supervisory positions in over two-thirds of the sample and c) women occupy only 5 per cent of professional positions in 65 companies.

In Marin County, women account for 15 per cent of the administrative and management positions, 26 per cent of first level supervisory positions and 39 per cent of professional and technical positions...

The survey recommendations...envision a far more extensive and expensive recruiting program than the County has ever utilized for any occupation.

...We are pleased to note that many of the County's practices comply with the recommendations. The objective review...has identified areas which need particular attention as well as provided a number of practical suggestions for corrective measures to fully implement the County's commitment to its equal employment opportunity policy.⁷⁴

The Addendum seems to suggest that in Marin County, dis-

⁷⁴MARIN COUNTY, *supra* note 24, at 17-18.

crimination against women is somewhat less than the national average. That, obviously, is no defense. Moreover, the figures cited should be compared with those following, which were derived from the tabulation in the Commission's report:⁷⁵ There are 542 females employed by the County, and 514 males. Thus, women comprise over 51% of the County's work force, although they hold only 15% of all administrative and management positions. Furthermore, 181 women, or more than 33%, are employed in *one* of the County's 39 departments—the Department of Public Social Services which employs only 16 males.

The conclusion to be drawn from the foregoing is that the Commission, not surprisingly, failed to convince the County that there was significant sex bias in its employment practices, despite the clear evidence of discrimination. Consequently, few changes are likely to result.

IV. F.E.P.C. PRACTICE WITH REGARD TO SEX DISCRIMINATION— INVESTIGATION OF INDIVIDUAL COMPLAINTS

During the first 10 months since the effective date of the sex discrimination provision of the F.E.P.A., 348 complaints alleging sex bias were filed with the Commission, representing about 20% of all employment discrimination cases. The discriminatory practices most commonly complained of by women were: salaries or titles incommensurate with those given men doing the same work; exclusion from "men's jobs"—for example, from jobs as cab drivers, life guards, radio announcers and engineering assistants; denial of promotions; exclusion from management training programs; and lack of advancement in the educational fields and government positions. About 10% of all sex discrimination cases were filed by men, whose most prevalent complaint was exclusion from "women's jobs." Complaints involving shift assignments were filed by both sexes.

⁷⁵*Id.* at 8-9.

No public hearings have been held as a result of any sex-based complaint. The only case for which a hearing was scheduled was conciliated before the hearing date.⁷⁶

To determine the efficacy of the complaint procedure, an examination was made of the 116 sex discrimination cases closed by the San Francisco office of the F.E.P.C. during the period November 23, 1970 to November 1, 1971. These cases are summarized in the following tables:

<i>Type of Case</i>	<i>No. of Cases</i>
Unequal working conditions	77
Hiring	24
Dismissal	8
Upgrading	5
Employment agency	1
Union membership	1
	<hr/>
	116

<i>F.E.P.C. Findings</i>	<i>No. of Cases</i>
Specific complaint sustained, no other inequities found	6
Specific complaint sustained, other inequities found	23
Specific complaint not sustained, no other inequities found	10
Specific complaint not sustained, other inequities found	5
No determination as to inequities	72
	<hr/>
	116

<i>Results</i>	<i>No. of Cases</i>
No jurisdiction	3
Withdrawn/dismissed	2
Adjustment effected	47
No adjustment	64
	<hr/>
	116

⁷⁶FAIR EMPLOYMENT PRACTICE COMMISSION, *First Analysis of Sex Bias Complaints*, F.E.P.C. News, No. 43, Sept.-Oct. 1971, at 2, col. 1. The case conciliated before the scheduled hearing involved a female gas station attendant who was refused promotion to the position of assistant manager because it involved working at night. The employer claimed that the woman would be vulnerable to robbery despite the German shepherd watchdog she kept with her. The settlement comprised monetary compensation for the wages lost because of the discrimination.

These 116 cases include 17 identical cases against the University of California and 48 similar cases against a public utility.⁷⁷

In considering these figures, it should be noted that the category "no determination as to inequities" includes cases where the investigating consultant was unable to make further contact with the complainant and where the complaint was the result of a quickly resolvable misunderstanding, as well as cases where a settlement was reached before the F.E.P.C. made its investigation. The figure for "adjustment effected" includes those cases resolved without F.E.P.C. action (although the fact that a complaint had been filed may have been a factor in the resolution).⁷⁸

To illustrate the types of cases where the F.E.P.C. has and has not, been able to effect adjustments, and the nature of the adjustments, 30 cases were selected from the 116 closed San Francisco cases. These cases are described below.

(1) *Alleged discrimination:* Maintenance by a university of two classifications for jobs involving identical duties: "maids" (all female) and "custodians" (99% male). Maids were paid 20% less and were laid off without pay during summer and academic holidays (custodians in general were not). This case is representative of 17 identical complaints filed against the university.

Outcome: The union involved signed an agreement which eliminated the lay-off inequities and raised the maids' pay by 7½%. Although the discriminatory classifications and a 12% pay discrepancy remained, F.E.P.C. Commissioner C. L. Dellums directed that the case be closed. These cases account for 17 of the 47 cases recorded as "adjustment effected."⁷⁹

(2) *Alleged discrimination:* Denial of a position as a full-time professor at a state college on the basis of sex. (The female complainant had been lecturing there part time.)

Outcome: The Commission did not sustain the specific complaint, although it noted a pattern of sex discrimination (75% of the teaching staff was male). No adjustment was effected.⁸⁰

(3) *Alleged discrimination:* Denial of tenure on the basis of sex.

⁷⁷Information provided by Marian Tracy, Assistant Information Officer, at the F.E.P.C. offices in San Francisco, on January 6, 1972 (hereinafter cited as Tracy).

⁷⁸See sex discrimination complaint files closed by the San Francisco office of the F.E.P.C. prior to November 1, 1971.

⁷⁹Complaint No. FEP 70-71 A6503s (Aug. 31, 1971).

⁸⁰Complaint No. FEP 70-71 A6662s (June 14, 1971).

Outcome: After the complainant threatened the employer (a private college) with both a private suit and F.E.P.C. action, she was granted tenure. No investigation was made by the Commission.⁸¹

(4) *Alleged discrimination:* Refusal to hire women as deputy district attorneys.

Outcome: The county involved hired its first female deputy district attorney.⁸²

(5) *Alleged Discrimination:* Refusal to hire women for display advertising work.

Outcome: The employer asserted that the display man currently employed refused to work with female assistants. No adjustment was effected.⁸³

(6) *Alleged discrimination:* Refusal of a public library to hire women as "shelvers."

Outcome: One woman was hired as a shelver, but the Commission noted that a pattern of discrimination, especially in professional positions, remained.⁸⁴

(7) *Alleged discrimination:* Denial of a promotion on the basis of sex.

Outcome: The employer said that the promotion had been denied because the company had no sanitary facilities for women at the location involved. However, the employer agreed to modify the existing facilities and the complainant was granted the promotion with retroactive pay.⁸⁵

(8) *Alleged discrimination:* Sex bias in promotions to consultant positions.

Outcome: Although the F.E.P.C. report noted that only 26 out of 275 consultant positions were held by women and that there were very few women in management positions, the specific complaint was not sustained because the promotional opportunity was granted on the basis of an oral examination. It was felt that there was no way to determine sex bias in an individual case under this circumstance. However, the complainant was allowed to retake the examination under a new procedure. (The final outcome was not noted.)⁸⁶

(9) *Alleged discrimination:* Demotion from a position as premise salesman on the basis of sex.

⁸¹Complaint No. FEP 71-72 A7044s (Oct. 21, 1971).

⁸²Complaint No. FEP 70-71 A6505s (May 4, 1971).

⁸³Complaint No. FEP 70-71 A6323s (July 7, 1971).

⁸⁴Complaint No. FEP 70-71 A6448s (Aug. 9, 1971).

⁸⁵Complaint No. FEP 71-72 A7066s (Aug. 27, 1971).

⁸⁶Complaint No. FEP 70-71 A6636es (June 22, 1971).

Outcome: A financial settlement was made.⁸⁷

(10) *Alleged discrimination:* Refusal to interview a male for a position as supervisor of hostesses.

Outcome: The complainant was paid \$500 damages and his application is being kept on file for consideration for future openings.⁸⁸

(11) *Alleged discrimination:* Refusal to hire waitresses.

Outcome: The restaurant agreed in writing to hire qualified women when openings occurred.⁸⁹

(12) *Alleged discrimination:* Policy of take-out restaurant chain of hiring only males.

Outcome: The company agreed to begin hiring women.⁹⁰

(13) *Alleged discrimination:* Denial of re-employment after maternity leave (two cases).

Outcome: In one case, the employer found a higher-grade position for the woman.⁹¹ In the other, the employer agreed to rehire the complainant only if a suitable opening occurred.⁹²

Several general conclusions can be drawn from the tables above:

—Significant F.E.P.C. action was involved only in about 1/3 of the cases. That is, there was “no determination as to inequities” in 72 of the 116 cases.

—The complaint was sustained in 2/3 of the cases in which there was an investigation.

—Adjustments were effected only in about 2/5 of the cases filed, including those resolved prior to official action by the F.E.P.C.⁹³

Some of the adjustments effected are questionable. For example, the case filed by the maids against the university (see case 1 above) was considered “adjusted” despite the blatant discriminatory practices remaining. Since the union agreement allowing these practices is unlawful,⁹⁴ it would have served

⁸⁷Complaint No. FEP 70-71 A6548e (July 2, 1971).

⁸⁸Complaint No. FEP 70-71 A6498se (Nov. 1, 1971).

⁸⁹Complaint No. FEP 70-71 A6677s (Sept. 10, 1971).

⁹⁰Complaint No. FEP 71-72 A7025s (Aug. 6, 1971).

⁹¹Complaint No. FEP 70-71 A6690s (Oct. 6, 1971).

⁹²Complaint No. FEP 70-71 A6450se (April 26, 1971).

⁹³This figure was less than 1/3 (25/83 cases) for the Southern California (Los Angeles) office. Tracy, *supra* note 77.

⁹⁴CAL. LAB. CODE § 1420(b) (West 1971).

better as a basis for F.E.P.C. action against the union than as an excuse for closing a case involving such conspicuous sex discrimination.

It is also doubtful whether a promise to hire if a "suitable" opening occurs (see cases 10 and 13 above) is a satisfactory adjustment. It gives great discretion to the employer and leaves the complainant, who has no assurance of employment, with no practical alternative to seeking work elsewhere. The financial settlements worked out in several cases (see cases 9 and 10 above) are also of doubtful efficacy. These may reflect nothing more than the employer's judgment that it is worth a few hundred dollars to avoid trouble with the Commission.

Case 5 suggests that an uncooperative employer may be able to escape F.E.P.C. sanction even when there is manifest discrimination. Cases 2 and 8 indicate the ineffectiveness of the individual complaint procedure in dealing with those situations in which there is a clear pattern of discrimination but where positions are filled primarily on the basis of subjective judgments.

The figures above include only cases which were closed prior to November 1, 1971; not included are many cases in which, although serious sex discrimination was found and conciliation efforts have failed, the assigned Commissioner thus far has been unwilling to file an accusation.⁹⁵

V. CONCLUSIONS AND RECOMMENDATIONS

A broad gap between theory and practice is revealed by the analysis of the F.E.P.C.'s handling of sex-bias complaints, investigations and affirmative action surveys. The actual, as opposed to the avowed, policy of the agency relative to sex discrimination appears to be that expressed by F.E.P.C. Commissioner Jacob Stuchen:

Why are you so concerned about the women? I know it's part of the law, but I personally think that it's adding a great deal of confusion to a very serious situation. If we can't give all our energy toward the alleviation of what we think racial discrimination is—the women—you've mentioned the women quite often—I think most of us—at least I feel—that they are con-

⁹⁵Miller, *supra* note 9.

fusing this whole thing, a serious thing...and [are] adverse to the interests of minority groups.⁹⁶

The sexism revealed by Mr. Stuchen's remarks is also reflected in discriminatory practices within the agency itself. Only three of the Commission's 25 consultants are women, and no women are engaged in affirmative action work. The only woman on the state staff (the Assistant Information Officer) holds the lowest-status staff position and does not attend staff meetings. Thus, none of the female employees participated in policy-making.⁹⁷

Certainly, until the Commissioners and staff are committed to the objective of reducing sex discrimination, the F.E.P.C. can make no significant contribution toward that goal. The following changes are suggested:

- Examine the record of each of the Commissioners and remove those who have been unwilling to enforce the law prohibiting sex discrimination.
- Fill vacancies on the Commission with qualified women who are sympathetic with and sensitive to both sex and minority discrimination problems until there are at least four such commissioners (out of a total of seven).
- Establish liaison with women's groups, such as NOW, to aid in uncovering and developing methods of dealing with sex discrimination.
- Fill F.E.P.C. consultant positions with qualified women until a 50-50 ratio of males and females is achieved. State staff positions should be similarly filled so that women are represented in policy-making.
- Sensitize investigating consultants to the problems of women in attempting to gain equal employment opportunity, through workshops, seminars, or other educational programs, perhaps in conjunction with women's organizations.

⁹⁶Remarks made to William Brown III, Chairman of the Equal Employment Opportunity Commission, at the Aug. 6, 1971, meeting of the F.E.P.C. in San Francisco. The meeting was tape recorded by a member of the audience. To Mr. Brown's explanation of why the E.E.O.C. thought it important to fight all kinds of discrimination, Mr. Stuchen replied, "Well, I guess you can't convince me and I can't convince you...."

⁹⁷Miller, *supra* note 9.

- Attempt to recruit males for traditionally female positions within the Commission, such as secretarial and clerical jobs.
 - Develop recommended programs for reducing sex discrimination, including suggestions as to goals and timetables, analogous to those developed for minority discrimination for use in consultations with employers.
 - Adopt a policy of taking firm action to eliminate sex discrimination which comes to the attention of the Commission, including use of written accusations, cease and desist orders, and injunctions if necessary.⁹⁸

As the agency charged with the enforcement of anti-discrimination laws, the F.E.P.C. should be itself a model of non-discrimination. Changes such as those recommended would do much to alleviate the sexism which at present characterizes the Commission, and would as well provide a foundation for effective action to enhance employment opportunities for California women.

Geraldine M. Randall

⁹⁸CAL. LAB. CODE §§ 1423, 1426 and 1429 (West 1971).