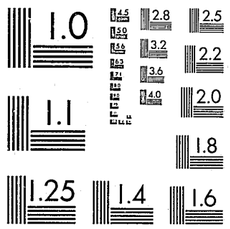

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Female Professionals in Corrections

Equal Employment Opportunity Issue

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ONE OF THE MOST significant events in corrections personnel administration has been in the 1972 extension of title VII of the Civil Rights Act of 1964 to public sector employers. Title VII prohibits discrimination in employment on the bases of race, religion, sex, and national origin. In enforcing the equal employment opportunity mandate, the United States Supreme Court has identified two forms of illegal discrimination. On the one hand, there is disparate treatment. This is the more direct form of discrimination and it involves treatment of a member of a protected group or a group itself less favorably than other individuals or groups. On the other hand, there is disparate impact. This form of discrimination involves use of employment criteria which, although apparently neutral, have more adverse effect on members of a protected group.

The purpose of this article is to examine application of the equal employment opportunity mandate to correctional employment policies affecting women. It will outline the major legal points which have been developed which impact the administration of correctional personnel administration and the employment opportunities and conditions of female professionals in corrections. It will, first, address the aspects in which female correctional employment policy has been treated similarly to other public agencies. It will then analyze the effect of the exclusion from title VII coverage of gender-specific policies when sex is a bona fide occupational qualification (BFOQ) — the major effect of which is that correctional employment, almost uniquely, has been characterized by acceptance of disparate treatment of female employees. Finally, it will evaluate the contribution to full equal employment opportunity for female professionals of the pattern of judicial application of the EEO mandate to corrections.

Disparate Impact and Individual Disparate Treatment

Equal employment case law dealing with female corrections professionals has conformed to the general trend of the law when the issue for adjudication is disparate impact or individual disparate treatment. In correctional cases in these two issue-areas the courts have most often decided cases on the side of the employers but in doing so have applied the law the same way it applied in other professions. Women have raised disparate impact challenges to corrections employment policies on two basic grounds: (1) use of general policies which have a more negative effect on women than on men, and (2) use of specific instruments which have a more negative effect on women than on men. An example of an issue centering on general policy is minimum height and weight requirements. In the leading case in this area (*Dothard* v. *Rawlinson* 433 U.S. 321, 1977) the Alabama Department of Corrections' requirement that correctional officers be at least 5 feet 2 inches tall and weigh at least 120 pounds was held to constitute illegal sex discrimination. The court found the requirement to have a clearly disparate impact on female applicants. The minima imposed excluded more than 41 percent of potential female applicants but less than 1 percent of potential male applicants. The effect on the personnel composition of the Department of Corrections was apparent. The population of Alabama was 53 percent female; the State's workforce was 37 percent female; the corrections officer workforce was only 13 percent female.

The State tried to justify the height and weight requirements on the ground that corrections officers are responsible for maintaining order and that larger officers are better equipped to do so. The court

agreed that the ability to maintain prison security was the essence of the correctional officer's job. Nevertheless, it also said that the State had failed to demonstrate a connection between height and weight and the ability to exercise suitable control over inmates. Unless that connection could be proved, the disparate impact rendered the requirements illegal.

The same consideration has arisen with regard to specific selection instruments or procedures. An employment practice that has an adverse impact on a protected group must be proven to be valid (EEOC, 1978:148–166). That is, the employer must prove that the instrument evaluates necessary, job relevant factors. Furthermore, however, even if the necessity and job relevance issues are resolved, the employer must also prove that the instrument is the best means available; that there is no alternative instrument which would have a less discriminatory effect (EEOC, 1978: 149).

An example of such a case is *Williams* v. *San Francisco* (483 F. Supp. 335, 1979). In this case female applicants for promotion to senior and supervisor juvenile probation officer had a selection rate substantially lower than male applicants. Not all applicants were interviewed by the same group of interviewers nor was the number of interviewers in each group the same. There was no standard set of questions. The interviewers varied greatly in ratings of individual applicants so that it was highly unlikely that actual differences ability were measured. There was, according to the Court, no reason to believe that the test had validity.

The question of validity also arises in disparate treatment cases but there is also a question of intent. The court inquires into whether women (or other protected groups) have been treated adversely because of their group status. Basically, this means that evidence that a decision was based on considerations directly related to valid job requirements, will exonerate an employer. The problem is that the courts have also recognized that apparently valid criteria can be used as pretexts for discrimination. If the plaintiff can show a pattern of discrimination, she may be able to show that the criteria are subterfuge for discrimination. The issues in disparate treatment and disparate impact come close together at this point and again highlight the need for administrators to not only deal fairly and nondiscriminatorily with their employees but also to be able to show that they do so.

There has been only one corrections case which has turned on the issue of subterfuge and it was decided in favor of the employer. It does illustrate the potential problems for policies which are not supportable by objective data. In *Gunter* v. *Washington County* (602 F. 2d 882, CA 9 1979) the county had moved female prisoners from the women's detention facility to a regional center in order to bring in male prisoners from an overcrowded men's detention facility. The plaintiffs alleged that the ensuing dismissal of female custodial personnel from the county's previously all - women facility was punishment for the women having filed an unfair labor practices complaint based on differential pay rates between male and female custodial personnel (to be discussed below). The court ruled that there was a legitimate governmental purpose in effecting the transfer, that the transfer was necessary and, therefore, that it was not a subterfuge for firing the women. The key determinant was the ability of the county to show the need for the transfer. The very fact that the women were able to get the case to trial demonstrates the potential pitfalls of unsupported, even if nondiscriminatory, policies.

The more typical type of individual disparate treatment complaint is based on a charge that the plaintiff was discriminated against by being subjected to different and harsher treatment than similarly situated members of the opposite sex. These are perhaps the easiest kinds of cases for the courts to dispose of. The only question is whether the different treatment was, in fact, imposed. When, for example, a female applicant for the position of assistant superintendent of a prison did not get the job and it was proved that the hiring officer violated established policy in order to hire a man instead, the issue was rather clear (*Kennedy* v. *Landon* 598 F. 2d 337, CA 4 1979). The record of correctional employers in this type of suit is, nevertheless, markedly positive notwithstanding *Kennedy* v. *Landon*.. This is because defendant institutions have been able to present convincing evidence of the validity of their policies.

Examples of the kinds of actions giving rise to sex discrimination suits where the bases for exoneration were sound administrative decisions supportable by the facts are instructive as to the need for good recordkeeping: The transfer of a female correctional social worker to an assignment inside a jail was not illegal even though it was a less desirable location. The transfer was only a temporary assignment and was necessitated by conditions within the jail and a pendant law suit. It was, therefore, neither punitive nor a case of constructive dismissal (*Windom* v. *St. Louis* 427 F. Supp. 806, 1977). Termination from employment was not discriminatory (1) in the case of a matron with a record of prolonged absences from work and evidence of chronic physical ailments rendering her unable to perform her duties fully (*Gunther* v. *Washington County* 602 F. 2d 882, CA9 1979), (2) in the case of a female correctional social worker whose work record clearly showed a total inability to accept the directions of her supervisor and

an inability to perform her duties inside a medium security institution (*Windom* v. *St. Louis* 427 F. Supp. 806, 1977). Withdrawal of a recommendation for promotion for a male correctional treatment specialist and promotion of a woman instead was not discriminatory since evidence showed convincing reason to doubt the man's emotional stability and loyalty and it was shown that he was generally less competent to work independently (*Rogers* v. *McCall* 48 F. Supp. 689, 1980). Just as clearly, a woman who objected to creation of a new position of correctional manager and who said during an interview that she was not interested in the position could not support a charge of sex discrimination by failure to promote her (*Windom* v. *St. Louis* 427 F. Supp. 806, 1977).

Categorical Disparate Treatment

Sex discrimination law would appear to be clear. As one Federal court has stated, the purpose of title VII with regard to sex is to eliminate the entire spectrum of differential treatment of men and women resulting from sexual stereotyping (*Sprogis* v. *United Airlines* 444 F. 2d 1194, CA7 1971). The cases cited in the previous section illustrate the fact that disparate impact resulting from facially neutral criteria is unacceptable and that differential treatment of individuals is illegal if the treatment is not based on business necessity. In two areas of alleged sex discrimination, however, special circumstances in correctional employment have been identified by a variety of Federal and state courts which amount to justification of explicit differential treatment of female employees as a group.

Differential Pay: Equal Pay Issues

If female employees are paid less than male employees for the same work the employer is guilty of violation of both title VII and the Equal Pay Act of 1963. The Equal Pay Act requires that men and women receive the same pay when their jobs require "equal skill, effort and responsibility... under similar working conditions." Equal work does not mean exactly the same job. The result is that problems of interpretation arise when it is claimed that different jobs are substantially the same. In corrections this has meant that just as some employers have attempted to justify use of height and weight standards by claiming that they are bona fide occupational qualifications, some correctional employers have attempted to justify differential pay for men and women on the ground that their work is not the same.

When the differential pay rates exist between female jail matrons and male jailers the argument that their work is not equal is unlikely to be supported. A claim that women guard women while men guard men which requires more strength does not justify lower pay for the women (*Janich* v. *Sheriff of Yellowstone County* 17 EPD 8390, USDC Mont. 1977). It may be possible to justify differential pay grades for different assignments but sex cannot be the basis for the different rates when the assignments are themselves based on sex.

The situation is somewhat different when the comparisons between female and male employees involve formally different jobs. In this situation the court will attempt to determine whether actual job differences exist or whether the use of different classifications is subterfuge for sex discrimination. When the classifications do not reflect substantial differences the employer will be held liable for discrimination. For example, the City of Milwaukee attempted to justify different pay rates for matrons and jailers on the ground that matron was a task-specific position while jailer was an assignment not a position classification. The jailers were police officers with law enforcement training and were eligible for transfer to other police assignments. The court determined that (1) although law enforcement training was provided to the jailers, it was extremely rare for a jailer to use that training; and that (2) jailer duty was, in fact, a permanent assignment. Furthermore, the city's contention that the men had more responsibility than the women was also rejected. The occasional assistance provided by jailers to matrons in subduing insubordinate female prisoners did not amount to unequal effort and the fact that the men oversaw 15 to 20 prisoners while the women oversaw only 5 to 7 prisoners was a matter of hiring policy (*U.S.* v. *Milwaukee* 441 F. Supp. 1371, 1977).

The *Milwaukee* decision may be contrasted with *Ruffin* v. *Los Angeles County* (607 F.2d 1276, CA9, 1979). In *Ruffin* differential pay rates for deputy sheriffs and jailers were upheld. In this case the genders were reversed (the deputies were women and the jailers were men). The county argued, as had Milwaukee, that the higher pay for deputies was recognition of their greater training and broader responsibility. The differences from *Milwaukee* were that the law enforcement training for the deputies was material to their position since transfers to other law enforcement duty assignments were routinely made. The male correctional officers, in contrast, were not eligible for transfer and, unlike the deputies, had no legal authority outside the center.

The same principles are involved when the job titles are the same but additional work is required. The New Jersey Supreme Court, for example, ruled that female supervisors at a youth guidance center who had housekeeping duties not assigned to male supervisors were entitled to more pay than the men (*Terry* v.

Mercer County Board of Chosen Freeholders 414 A. 2d 30, 1980).

These cases again point up the need for correctional officials responsible for personnel policy to maintain good records and to insure that pay rates, like other terms and conditions of employment, are valid. Just as it is not enough to claim good faith or obviousness in setting policy like height and weight standards, it is not enough to claim subtle differences in jobs justify different pay grades. There must be sound evidence of actual differences.

Differential Pay: The Equitable Pay Issue

Recently, the issue of appropriate pay levels for female professionals in corrections has become even more complex. There is now concern with equitable pay for women. The focus is on whether it is legitimate to pay females less than men even when it is acknowledged that the women have less burdensome jobs. Although the courts have shown no willingness to consider pure equity challenges to differential pay rates, they have been willing to consider relative equity challenges. That is, they have not recognized legal authority to order that equal pay be provided to women in traditionally female jobs compared to traditionally male jobs. An employer who segregates female employees into all-women departments violates title VII (*Taylor* v. *Charley Brothers* 25 FEP 602, USDC WDPa. 1981) but simple undervaluation of positions filled predominantly by women is not illegal without the element of intent to discriminate.

The relative equity issue has been accepted by the courts in *Washington County* v. *Gunther* (101 S.Ct. 2242, 1981). Four matrons employed by Washington County, Oregon, argued that they were the victims of illegal sex discrimination because they were paid $525–$668 per month but male deputy sheriffs were paid $668–$812 per month. The U.S. District Court for Oregon ruled that the women were not entitled to equal pay because their work was not the same as that of the deputies. The matrons did have duties requiring the same skills as the duties of the deputy sheriffs assigned to jail duty. There was, nevertheless, a significant difference in responsibilities. The matrons' staff-inmate ratio was approximately 1:4. Moreover, as a result of the vastly different ratios, the matrons had only intermittent corrections duties. A significant portion of their work time was spent performing general clerical tasks for the sheriff's office.

The Ninth Circuit Court of Appeals upheld the District Court's determination that there was no violation of the equal pay for equal work principle but also ruled that title VII is broader in coverage than the Equal Pay Act. The plaintiffs had alleged that they were entitled to relief under title VII since their rate of pay was depressed because they were women. The District Court had dismissed the claim of intentional discrimination based on sex by holding the equal pay for equal work issue to be the only germane point of law. The Court of Appeals took the position that the fact that jobs are unequal does not preclude a title VII suit when there are gender-specific classifications that differ significantly in pay since the classifications could be subterfuge.

The Supreme Court upheld the decision without addressing the equity question but its opinions may have important consequences. The Court explicitly stated that the complainants were not arguing the equal worth position. Rather, the gravamen of the issue is discrimination in setting wages at differing levels of parity with comparable jobs. The county had conducted a wage survey in the labor market and had determined that the matrons should receive compensation equivalent to 95 percent of that of the deputies. Instead, the matron's pay was set at only 70 percent of the deputy's rate. The discrimination claim was, therefore, not based on the fact that the women received less than the men but that the women were paid at a rate lower than the county's own market survey determined to be proper while the deputies were paid at the full appraised value established by the survey.

The Court said that the issue is whether the differential percentages of parity are based on sex discrimination. The decision was not unanimous, however. In fact, it was very narrowly decided. Justice Rehnquist's dissent (joined by the Chief Justice and Justices Stewart and Powell) rejected the position that title VII could apply to any wage discrimination claim except that of equal pay as defined by the Equal Pay Act. It said the Court was ignoring the legislative history of title VII and instead substituting its own interpretation of the social equity purposes of the law. Ironically, the ultimate effect of this dissent (if the majority opinion is followed in subsequent cases) may be to bring the equity issue to the fore. While the dissenters argued that Congress had rejected the equity approach, they may be providing a sanction for the equity consideration by attributing it to the Court.

Even though the *Gunther* suit was settled out of court early in 1982, there are important implications for administrators. The willingness of courts in at least some cases to go beyond equal pay questions to equitable pay questions again highlights the need for all forms of disparate treatment (no matter how apparently justified) to be subjected to internal validation. Good faith is not sufficient.

Disparate Treatment: Sex as a BFOQ in Job Assignments

It is in the explicit use of sex for personnel decisions that corrections case law on discrimination is most notable. Title VII exempts gender-specific employment criteria from the nondiscrimination mandate where sex can be shown to be "reasonably necessary to the normal operation of an enterprise." Sex is a BFOQ, and sex discrimination is legal, when an employer can prove that it is both job relevant and essential to fulfillment of the mission of the enterprise. To meet this requirement the employer must be able to demonstrate on a factual basis that all or substantially all members of the excluded sex would be unable to perform the essential duties of the position safely and efficiently. In corrections three bases for recognition of sex as a BFOQ have been accepted by a number of courts.

Sex-Specific Jeopardy

In *Dothard* v. *Rawlinson* (discussed earlier) the court set out the prevailing standards for evaluation of disparate treatment claims. In the same case, beside the height and weight requirements, the Court was called upon to test the validity of Regulation 204 of the Alabama Board of Corrections which forebade assignment of female officers to the State's maximum-security prisons.

The Court recognized the intent of title VII is to preclude employment practice decisions based on stereotyping. It recognized that women should have freedom of choice in determining the extent to which they will assume risks associated with putatively dangerous work. In spite of those premises, however, the Court stated that women could be excluded from positions as correctional officers in a maximum-security all-male penal institution because of their sex. The majority decision argued that a woman's ability to maintain order in such an institution could be severely impaired "by her womanhood." The decision is seemingly based on the essence of the job principle. The essence of a correctional officer's job is to maintain prison security and a woman's sex would directly undermine her ability to provide security. Accordingly, more was at stake in this case than an individual woman's freedom to accept risks, the overriding governmental purpose of maintaining prisons was open to compromise.

The problem with the *Dothard* ruling is the basis of the Court's decision that women could detract from the essential purpose of the institution. The Court noted that a "jungle atmosphere" prevailed in the prison. Many of the inmates had been convicted of the most serious violent offenses and no system of classification and segregation of such offenders was utilized. Female officers would be in constant danger from inmates who had been convicted of criminal assaults on women and who would be moved to make such assaults again if provided access to women within the institution. Furthermore, other inmates with violent pasts could be moved to assault female officers as a result of deprivation of heterosexual relations.

The juxtaposition of the essence-of-the-job principle and the temptation-to-assault rationale raises the question of primacy. Does the temptation to assault constitute the basis for the essence-of-the-job test? Or, does the essence-of-the-job test merely dovetail with the temptation-to-assault rationale? At any rate, for the most part, the dangerousness of a corrections job of itself cannot support a claim that sex is a BFOQ. There can be no general restriction of female officers to guarding female prisoners in order to protect the officers from hazardous work nor can women be excluded from minimum contact duties which do not have security maintenance as the essence of the job.

Institutional Mission

The California State Supreme Court has said that in testing the legitimacy of sex-exclusive position classifications three interests must be considered: (1) the equal protection rights of the female petitioner, (2) the right of inmates to strict evaluation of any policy which may impact rehabilitation, and (3) the need of the administration to provide rehabilitation to protect the public and to maintain public confidence (*Long* v. *California State Personnel Board* 116 Cal. Rpt. 562, 1974).

This issue in *Long* was a decision by the California Adult Authority to deny a female applicant a position as protestant chaplain in a youthful offenders facility housing 400 male wards in non-contiguous dormitories. The chaplain was required (1) to move from building to building during hours in which the wards were allowed unrestricted movement about the facility (i.e., until 9:00 p.m.), (2) to counsel wards in a private office, and (3) to take wards off the grounds for a variety of purposes.

Given the circumstances of the job and the three tests of the BFOQ exemption, the Court upheld the exclusion. It recognized that the need for the chaplain to move about the grounds alone and to counsel wards in private in an isolated office posed risks. Fear for the woman's safety was rejected as ground for exclusion. The gravamen of the case was, instead, the impact of employment of a female upon rehabilitation of the wards. The court said a rape would have a "disastrous" effect on the ward. It would, therefore, both from a correction and a political perspective, be foolish to put temptation before the wards when that can be avoided.

In other cases, the institutional mission ground for sex-specific assignments has been framed in terms of service to clientele. In a youth facility case, for exam-

ple, the Supreme Court of Pennsylvania has ruled that to subject a 7– to 16–year-old girl to a thorough body search by a man or to allow surveillance of similarly aged boys during showering and using the toilet could cause not only temporary trauma but also irreparable, permanent psychological harm. In effect, to give primacy to equal employment opportunity considerations would be tantamount to sanctioning emotional impairment of clientele under guise of equality for staff (*Philadelphia* v. *Pennsylvania Human Relations Commission* 300 A. 2d 97, 1973). From a more positive perspective, courts have also taken the position that correctional counselors, more than guards, must have positive rapport with clients. For inmate children with emotional and social problems it is essential to have adult exemplars in whom they can confide. Even for adult inmates sexual differences between counselors and clientele may require that both male and female counselors be employed even when there are many more male prisoners (*Franklin County Sheriff's Office* v. *Sellers* 621 P. 2d 751, Wash. CA 1980).

Clientele Privacy Rights

The third judicially recognized ground for acceptance of sex as a BFOQ in corrections is inmates' right to privacy. While prisons and jails are clearly unprivate places, the courts have taken the position that an inmate's surrender of personal privacy is not total. It may not be possible to determine the precise dimensions of the residual right to privacy of inmates. It is sufficient to note that Federal and State courts recognize the existence of such a residuum and at the same time recognize a need to balance that right of privacy against the claims to the right to equal employment opportunity. There is, in fact, a tendency of many courts to put the major weight in the balancing effort on the side of privacy. The Oregon Court of Appeals has even said that the prisoner's constitutional right to privacy prevails over staff's statutory right to equal employment opportunity (*Sterling* v. *Cupp* 607 P. 2d 206, 1980).

The more common approach has been to limit compromise of equal employment opportunity rights only as far as absolutely necessary to protect inmates' privacy. After all, the U.S. Supreme Court has never explicitly extended a general right of privacy to penal facilities and title VII was itself enacted under authority of the 14th amendment. The result of these crosspressures has been to follow the suggestion laid out in *Reynolds* v. *Wise* (375 F. Supp. 145, 1974) that "selective work assignments" are a reasonable way to protect both inmate and staff rights.

Subsequent to the *Reynolds* decision a number of state and Federal courts have held that although it may not be proper to order sexually segregated correctional work forces, other steps can be taken to protect inmates' rights. Typically, this has been done by directing institutions to develop suitable regulations to forbid staff entry into shower, toilet, and living areas of the opposite sex without warning and to allow inmates adequate time during the night to use toilets and adequate time morning and evening to change clothes without opposite sex observation. The implication for administrators is that they cannot justify gender-specific personnel policies simply by asserting they are protecting inmates' privacy nor may they entirely disregard gender on the ground that they are protecting staff employment rights. Validation of policies is an absolute necessity. Neither good faith nor obvious (but untested) validity is sufficient to avoid discrimination litigation.

The Uncertain Status of Equal Employment Opportunity for Female Professionals in Corrections

Female professionals in corrections employment are formally protected from invidious employment discriminiation to the same extent as in other occupations. With regard to disparate impact discrimination, corrections employers must use validated, job relevant criteria and valid, reliable selection instruments. Individual female employees and groups of specific female employees are protected from disparate treatment. Nevertheless, female employees in general have been affected by judicial acceptance of sex as a BFOQ in corrections on grounds of danger to women, potential negative impact of female employment on institutional mission and inmates' right to privacy.

The jeopardy ground sanctioned by the United States Supreme Court in *Dothard* v. *Rawlinson* has not been of major significance since that opinion was "limited to a peculiarly inhospitable Alabama maximum security prison" (*Gunther* v. *Iowa State Men's Reformatory* 612 F.2d 1079, CA8 1980). The institutional mission ground has been applied most often to juvenile and youthful offenders facilities. The existence of any inmate constitutional right to privacy has been disputed (*Sterling* v. *Cupp* 607 P.2d 206, Ore. CA 1980, Joseph and Richardson, JJ., dissenting @ 209).

In spite of the not unambiguous bases for each of the three justifications for the sex BFOQ in prisons the confluence of the three has had a definite impact. Categorical rejection of women from correctional employment is precluded. Each of the three grounds, or all of them together, do, nonetheless, justify selective job assignments. While it may be argued that the selective assignment policy has equal impact on men and on women, that is not necessarily the case. In the first place, there are far more male inmates than there are female inmates: Men constitute approximately 96 percent of the inmates of prisons (Bureau of Justice Statistics, 1982:2) and approximately 94 percent of the inmates of local jails (Bureau of Justice Statistics, 1981:3). Prisons are domiciles and they are designed for security. If women are to be precluded from working in living areas and from conducting searches of male inmates, there may not be much left for them to do. Moreover, men may be left with all the high-risk jobs and women with the low-risk jobs. This creates additional equity problems, enhances hostility of male staff toward female staff, and ends up hurting female officers even further.

Not only does excluding women from high-risk and many surveillance assignments limit their access to positions, it has an impact on female pay rates. In some cases won by female plaintiffs in which the defendants attempted to justify differential pay rates on the ground that male officers had the major burden for maintaining security, failure to prove the claim not the legitimacy of such a claim was the determining factor. Indeed, in *Washington County* v. *Gunther* (101 S.Ct. 2242, 1981) the matron complainants did not dispute that the duties of male deputy sheriffs assigned to jail duty merited higher pay. Restricting female corrections officers to less dangerous, less demanding and less strenuous duties clearly poses a basis for continuing to depress their wages vis-a-vis male officers.

Corrections employment is beset by very high turnover rates, both at the jail level (Ford & Kerle, 1981:-34) and at the prison level (CONTACT, 1982:1). High turnover could potentially be advantageous for women by providing openings on a regular basis into a predominately male occupation. As long as the sexual composition of the workforce is tied to the sexual composition of the inmate population, turnover cannot have that effect. This latter problem is compounded, moreover, since it is apparent that affirmative action efforts to bring more women into corrections face an uncertain future.

The Michigan Court of Appeals did uphold an affirmative action program for corrections officers in October 1981. It said that race and sex may legitimately be considered by employers in employment decisions in an effort to correct the effects of past discrimination (*Local 526–M Michigan Corrections Organization, SEIU,* v. *State of Michigan* 313 N.W.2d 143). The California Supreme Court had earlier ruled that an affirmative action program with a goal of 38 percent women and 36 percent minorities in the corrections workforce within 5 years did not violate equal protection. It found that the goals were not quotas, rather, sex and minority status were plus factors and did not control decisionmaking. There was no evidence that such limited preference resulted in promotion, transfer, or hiring of anyone who was not qualified (*Minnick* v. *Department of Corrections* 157 Cal. Rpt. 260, 1979).

Signals from the Federal level are that any optimistic conclusions drawn from the *Minnick* and *Local 526–M* cases are probably unwarranted. The U.S. Department of Justice has recently agreed to consent decrees with two states to settle sex discrimination complaints against state police forces (*U.S.* v. *Vermont* GERR 944:31, 1–4–82; *U.S.* v. *New Hampshire* GERR 932:18, 10–12–81). Both states agreed to make good faith efforts to recruit women to bring the composition of the uniformed service to 20 percent female. In each case, however, no timetable was set and the goals were explicitly stated not to be treated as quotas. All that was pledged by the states is to eliminate unlawful barriers to female employment (which they have been obligated to do by law since the Equal Employment Opportunity Act of 1972). More importantly the United States Supreme Court recently chose to neither uphold nor reject the California Department of Corrections affirmative action program (*Minnick* v. *California Department of Corrections* 101 S.Ct. 2211 cert. dism. 1981). The case was turned back to the State court for further consideration but Justice Stewart said the lower court decision should simply be reversed since any consideration of race or sex is illegal. The claim to be redressing past discrimination is irrelevant: "Two wrongs do not make a right. Two wrongs simply make two wrongs." (101 S. Ct. @2223 n.3).

Conclusions

Two major sets of conclusions emerge from this review of equal employment opportunity for female professionals in correctons. One set has to do with the rights and obligations imposed by law. Female personnel have the right to equal access to jobs and equal treatment in conditions of employment. Correctional administrators are obligated to have validated any personnel policy or standard which has an adverse impact on the employment opportunities of women. Good faith and obvious validity are insufficient.

The other set of conclusions has to do with the overall impact on actual equal employment opportunity for female professionals in corrections. The basically positive implications of the first set of conclusions are in large part vitiated by the implications of the pattern of application of the BFOQ exemption for sex corrections. To an extent unmatched by almost any other occupation, sex has been accepted as a bona fide occupational qualification in corrections for either specific positions (correctional counselors and chap-

lains) or specific job assignments (living area surveillance and body searches).

Although the BFOQ exemptions are applicable to both men and women, the nature of corrections clientele means that women are more adversely impacted. Female officers may be limited to the less demanding positions, either because of threats to their safety or because of their own threat to violate inmates' privacy. With limited duties they may be subjected to lower pay than male officers. In facilities where all duties involve contact or where no privacy can be afforded prisoners except by exclusion of women, females can be precluded from all or nearly all professional positions. The prospects for full equal employment opportunity for women in corrections are dim. Corrections is an overwhelmingly male occupational field (approximately 87 percent of the state and Federal correctional officers are men. CONTACT, 1982:1). In spite of equal employment opportunity requirements it will likely remain that way.

Perhaps the most important final point to be made is that the second set of conclusions does not obviate the first set. The courts may frequently have been willing to accept the BFOQ exemption under certain circumstances but correctional administrators must be able to provide that those circumstances exist. On the other side, female corrections professionals must recognize that they do have legal protections from discrimination and can invoke those protections when they suffer unlawful disparate treatment or disparate impact from unvalidated policies and standards.

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