Employment Discrimination and Women in South Dakota: A Legislative Handbook

South Dakota Advisory Committee to the
U.S. Commission on Civil Rights

August 1993

This handbook was a project of the South Dakota Advisory Committee to the U.S. Commission on Civil Rights and information provided in it will be considered by the Commission. The contents of the handbook should not be attributed to the Commission but only to the South Dakota Advisory Committee.

The United States Commission on Civil Rights

The United States Commission on Civil Rights, first created by the Civil Rights Act of 1957, and reestablished by the United States Commission on Civil Rights Act of 1983, is an independent, bipartisan agency of the Federal Government. By the terms of the 1983 act, the Commission is charged with the following duties pertaining to discrimination or denials of the equal protection of the laws based on race, color, religion, sex, age, handicap, or national origin, or in the administration of justice: investigation of individual discriminatory denials of the right to vote; study of legal developments with respect to discrimination or denials of the equal protection of the law; appraisal of the laws and policies of the United States with respect to discrimination or denials of equal protection of the law; maintenance of a national clearinghouse for information respecting discrimination or denials of equal protection of the law; and investigation of patterns or practices of fraud or discrimination in the conduct of Federal elections. The Commission is also required to submit reports to the President and the Congress at such times as the Commission, the Congress, or the President shall deem desirable.

The State Advisory Committees

An Advisory Committee to the United States Commission on Civil Rights has been established in each of the 50 States and the District of Columbia pursuant to section 105(c) of the Civil Rights Act of 1957 and section 6(c) of the United States Commission on Civil Rights Act of 1983. The Advisory Committees are made up of responsible persons who serve without compensation. Their functions under their mandate from the Commission are to: advise the Commission of all relevant information concerning their respective States on matters within the jurisdiction of the Commission; advise the Commission on matters of mutual concern in the preparation of reports of the Commission to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public and private organizations, and public officials upon matters pertinent to inquiries conducted by the State Advisory Committee; initiate and forward advice and recommendations to the Commission upon matters in which the Commission shall request the assistance of the State Advisory Committee; and attend, as observeers, any open hearing or conference that the Commission may hold within the State.

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Letter of Transmittal

South Dakota Advisory Committee to the
U.S. Commission on Civil Rights

Members of the Commission
Arthur A. Fletcher, *Chairperson*
Charles Pei Wang, *Vice Chairperson*
Charles A. Anderson
Mary Frances Berry
Robert P. George
Constance Horner
Russell G. Redenbaugh
Cruz Reynoso

Bobby D. Doctor, Acting *Staff Director*

As part of its mandate to assist the Commission with its information-dissemination function, the South Dakota Advisory Committee by a vote of 13–0, approved submission of the attached legislative handbook on employment discrimination against women in its State. This document is the first part of a two-phase Advisory Committee project.

The second and final phase of the Advisory Committee's project, to be completed in 1993, will be an investigation of the effectiveness of antidiscrimination statutes in South Dakota, an analysis of the degree to which employment discrimination on the basis of sex exists in the State, and an assessment of its impact. This part of the project will culminate in two public factfinding meetings and a written report with findings and recommendations.

The first section of the attached handbook summarizes the predominant Federal, State, and local statutes that establish the rights of women to equal opportunity and freedom from discrimination in employment, both in the hiring process and on the job. Information is also provided regarding court decisions that interpret these laws and answers specific questions as to how these rights are assured. The second section of the handbook is a directory of civil rights enforcement agencies that are charged with assuring that women have equal opportunity and are accorded equal treatment in employment. Information is also pro-

vided regarding initial steps to be taken in filing a discrimination complaint, and the time framework within which this must be done.

The Advisory Committee requests the Commission to accept this handbook and authorize its publication.

Respectfully,

Rae Burnette, *Chairperson*
South Dakota Advisory Committee

South Dakota Advisory Committee to the U.S. Commission on Civil Rights

Rae Burnette, *Chairperson*
Sioux Falls

Charlotte Black Elk
Manderson

Dorothy M. Butler
Brookings

Phyllis Old Dog Cross
Black Hawk

Marc Stuart Feinstein
Aberdeen

B.J. Kim
Brookings

Frank R. Pommersheim
Vermillion

James G. Popovich
Rapid City

Julio "Mutch" Usera
Rapid City

Jonathan K. Van Patten
Vermillion

David Lawrence Volk
Sioux Falls

William Emmett Walsh
Deadwood

Kitty Werthmann
Pierre

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Preface

This legislative handbook provides in lay language an overview of aspects of State and Federal legislation and municipal ordinances that establish the rights of women to equal opportunity and freedom from discrimination in employment, both in the hiring process and on the job. Reference is made to specific laws, to court decisions that interpret the law, and to agency regulations for implementing legal requirements. The handbook answers basic questions about the rights of women, but it should not be considered a substitute for legal counsel or advice provided by civil rights enforcement agencies.

There are Federal statutes other than those included here that provide for equal opportunity for women, but that do not directly relate to discrimination in employment. The Disaster Relief Act, the Equal Credit Opportunity Act, the Omnibus Reconciliation Budget Act, the Americans With Disabilities Act of 1990, the Rehabilitation Act of 1973, and the Vietnam Era Veterans Readjustment Assistance Act of 1972 are examples. To avoid confusion, and to enhance the clarity, simplicity, and usefulness of the handbook, these pieces of legislation have not been summarized.

In addition to legislative summaries, the handbook lists Federal, State, and local agencies that enforce laws prohibiting employment discrimination. It provides information and outlines procedures for filing complaints with these agencies in situations where allegations of illegal discrimination are made.

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Part I
Legislation

Title VII of the Civil Rights Act of 1964

Title VII applies to employers and their employees, to job applicants, to unions and their members and potential members, to employment agencies and their clients, and to participants in joint employer-union apprenticeship programs. However, Title VII does not extend to all employers. For purposes of Title VII, an employer is defined as a person, engaged in industry affecting commerce, who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

A. What is prohibited? Who is protected?

It is unlawful for an employer—

(1) to fail or refuse to hire or to discharge a woman, or otherwise to discriminate against her with respect to her compensation, terms, conditions, or privileges of employment, because of her sex.

(2) to limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive a woman of employment opportunities, or otherwise adversely affect her status as an employee, because of her sex.[1]

Q. Are women specifically protected by Title VII?

A. Yes. Any person who is discriminated against in the workplace on the basis of sex is protected. However, an employer may consider sex in its employment decisions to benefit those who have historically suffered the effects of discrimination in the workplace.[2]

Q. What are some examples of sex discrimination covered by the act?

A. If a woman is not hired, or is fired, because of her sex, there may be a violation of Title VII and, if so, remedies for such a violation may be obtained. Certain conditions of employment may also be discriminatory, such as subjection to sexual harassment, unequal compensation, or unequal treatment because of pregnancy (See sections C and D).

Q. Is it illegal to provide a woman with assistance in obtaining employment as part of an affirmative action program?

A. Such an action is not necessarily illegal sexual discrimination if it is consistent with the provisions of Title VII, for it allows voluntary employer action which helps to eliminate "the vestiges of discrimination in the workplace."[3]

Q. Under Title VII, what may an employer do to provide assistance to a woman seeking employment?

A. The employer's action (i.e., decision) must be part of an acceptable affirmative action plan that represents a gradual improvement in the representation of women in the [employer's] work force.[4]

B. Discrimination in hiring

Title VII of the Civil Rights Act of 1964 makes it an unfair employment practice for an employer to discriminate against a woman with respect to hiring or the terms and conditions of employment because of her sex; or to limit, segregate or classify employees in ways that would adversely affect a woman because of her sex.[5]

Q. Will failure to formally apply for a job opening prevent a woman from proving discriminatory hiring under Title VII?

A. No, as long as she made every reasonable attempt to convey her interest in the job to the employer.[6]

Q. Are there any instances where gender may be considered as a disqualifying factor for employment?

A. Yes, Title VII permits only one circumstance when a woman's gender may be considered in employment decisions. That is when gender is a "bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of the particular business or enterprise."[7]

Q. How does an employee's sex qualify as a BFOQ?

A. The BFOQ exception has been interpreted narrowly.[8] In order for an employee's sex to be considered as a BFOQ, the employee's sex must be related to the employee's ability to do the job, the essence of the business, or to the central mission of the employer's business.[9]

Q. If a particular occupation poses a danger to an employee because she is a woman, is an employer justified in discriminating against her for reasons of safety?

A. Discrimination on the basis of sex because of safety concerns is allowed only in narrow circumstances. A danger to the female employee herself does not justify discrimination.[10]

C. Disparate treatment and disparate impact

Q. Is fertility a basis for discriminating against a woman?

A. An employer is prohibited "from discriminating against a woman because of her capacity to become pregnant unless her reproductive potential prevents her from performing the duties of her job."[11]

Q. What types of sexual discrimination are there?

A. There are two primary types of discrimination: disparate treatment and disparate impact.

Q. What is disparate treatment and how is it related to discrimination?

A. Disparate treatment for sexual discrimination occurs when "[t]he employer simply treats some people less favorable than others because of [sex]. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.[12]

Q. How can a woman prove she has been a victim of disparate treatment in the hiring process?

A. By showing that the employer intended to discriminate. This can be done by showing that (1) she is protected under Title VII; (2) she applied and was qualified for a job for which the employer was seeking applicants; (3) despite her qualifications, she was rejected; and (4) after her rejection the position remained open and the employer continued to seek applications from persons with qualifications equivalent to hers.[13]

Even if all four of these required conditions are shown, the employer may refute the charge by supplying a credible nondiscriminatory explanation for his/her action.[14]

If the employer is able do this, the woman must then persuade the court that the explanation provided by the employer is a pretext for discrimination.[15]

Q. Is this the only method under which a woman can circumstantially show evidence of disparate treatment?

A. No. Another method allows the introduction of evidence to infer that if the employer's actions remain unexplained, it is more likely than not that such actions were based on impermissible reasons. The employer retains the right to rebut this evidence.[16]

Q. Is there any other type of proof that a woman may submit as evidence of intent to discriminate?

A. The last two answers show indirect or circumstantial evidence of discriminatory motive. A woman may also submit proof of discrimination by direct evidence. Direct evidence of a discriminatory motive includes a written or verbal policy or statement made by the employer that on its face demonstrates a bias against a woman because of her sex and is linked to the employment decision made.[17]

Q. What are some examples of direct evidence?

A. 1. A memo by a company president requesting "a young man . . . between the age of 30 and 40 years old" to fill a vacant position. (age and gender discrimination)[18]

2. An employer who believes and acts on the belief that women cannot or should not be aggressive. (gender discrimination)[19]

3. An employer placing an employee on unpaid medical leave as a result of a "related medical condition" (the employee was pregnant) with the employer admitting his decision was based upon reasoning that the employee could not lift or push without assistance because of the employee's pregnancy.[20]

Q. Is direct evidence of discriminatory intent sufficient to show discriminatory intent for an employment decision?

A. No. Such direct evidence merely proves a bias or demonstrates an atmosphere for discrimination. It still must be shown that actual discrimination resulted.[21]

Q. Must an employer intend to discriminate for it to be illegal?

A. No. Under the disparate impact theory of discrimination, an employment practice with significant adverse effects that appears to be neutral on its face may be found to violate Title VII without evidence of intent on the part of the employer to discriminate.[22]

Q. How, then, does an individual prove discrimination under the disparate impact theory?

A. The individual must demonstrate that each challenged employment practice causes a disparate impact. However, if the individual can show that elements of a decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.[23] Then the individual must demonstrate adequate statistical evidence which demonstrates the exclusion of women applicants because of their gender. The statistical evidence must be substantial enough to infer it is the reason for the disparity.[24]

Q. Under what circumstances would statistical evidence not be accepted as reliable?

A. When the court or the employer is able to identify errors or omissions in the data offered, in which case evidence may be introduced to indicate that the statistics do not demonstrate discrimination.[25]

Q. What if the employer has mixed motives in making an employment decision? In other words, what if the employer acted with both lawful and unlawful reasons?

A. Title VII says that gender must not be considered in employment decisions. When an employer considers both gender and legitimate factors at the time of making a decision, that decision is considered to have been made "because of" sex.[26]

An unlawful employment practice can be established by demonstrating that sex was a motivating factor for any employment practice, even though other factors also motivated the practice.[27]

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Q. Under Title VII, what remedies is an individual entitled to if she is able to prove that discrimination was the sole reason for an employment decision?

A. At a minimum, the employer would be required to refrain from the discriminatory action and pay attorney fees. If an individual can prove intentional discrimination resulting from malice or reckless indifference, an employer may be liable for limited compensatory and punitive damages.[28]

D. Discrimination in compensation, terms, conditions, and privileges of employment

Q. In order to bring a sex-based wage discrimination claim under Title VII, must the employer have employed a man in an equal job, in the same establishment, at a higher rate of pay?

A. No. "Claims for sex-based wage discrimination can be brought under Title VII even though no member of the opposite sex holds an equal but higher paying job, provided that the challenged wage rate is not based on seniority, merit, quantity or quality or production, or 'any other factor other than sex.'"[29]

E. Sexual harassment.

Q. What does the term "sexual harassment" mean?

The EEOC's "Guidelines on Discrimination Because of Sex" define sexual harassment as:

A. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when submission to such conduct is made a term or condition of employment or a basis of employment decisions, or such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[30]

Q. Is there more than one type of sexual harassment?

A. Yes, there are two types of sexual harassment: "quid pro quo" and "hostile environment." "Quid pro quo" harassment occurs when "submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual."[31] Unwelcome sexual conduct "that unreasonably interfere(s) with an individual's job performance" or creates an "intimidating, hostile, or offensive working environment" consti-

tutes sexual harassment under the category of "hostile environment."[32]

Q. Are both types of sexual harassment illegal?

A. Yes. Both types of sexual harassment are prohibited under Title VII.[33]

Q. What factors determine whether unwelcome sexual conduct constitutes "hostile environment" harassment?

A. Factors to be considered include: (1) whether the conduct was verbal or physical, or both; (2) how frequently it was repeated; (3) whether the conduct was hostile and patently offensive; (4) whether the alleged harasser was a coworker, nonworker or a supervisor; (5) whether others joined in perpetrating the harassment; and (6) whether the harassment was directed at more than one individual.[34] Moreover, the employer must know or should have known of the hostile conduct and fail to take appropriate action.[35]

Q. For hostile environment discrimination, what type of action is required?

A. The conduct must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment'." Sexual language or innuendo may be insufficient for Title VII liability.[36]

Q. Can individuals who find their working environment hostile, offensive, and intimidating and yet have not suffered any financial loss still file a sexual harassment claim against their employer?

A. Yes, it is not a requirement that sexual harassment under the "hostile environment" theory result in any tangible or economic injury or job consequences.[37] An employee's protection under Title VII can extend beyond the economic aspects of employment.[38]

Q. Can charges be filed against an employer if the employee voluntarily submitted to sex-related conduct?

A. Yes. The real test of the validity of any sexual harassment claim is that the alleged sexual advances were "unwelcome."[39] The fact that the complainant was not forced to engage in sexual activity, and therefore voluntarily submitted to sexual conduct is not a

defense to a Title VII suit and will not necessarily defeat a claim of sexual harassment. The correct inquiry "is whether the employee, by her conduct, indicated that the alleged sexual advances were unwelcome, not whether her actual participation . . . was voluntary."[40]

Q. What if there are not any eyewitnesses to the alleged sexual harassment?

A. Sexual conduct often occurs in private, without any eyewitnesses. In these instances, the credibility of the parties may determine whether a complaint is valid or not. Supportive evidence, such as prior conduct and comments of other persons, may be significant.[41]

Q. What constitutes "unwelcome" conduct?

A. According to one Federal district court, conduct can be considered to be unwelcome if the employee did not solicit or incite it and regarded the conduct as undesirable or offensive.[42]

Q. What actions should a victim take to insure that the offensive conduct is not found to have been welcomed?

A. To assure that the alleged harasser does not have reason to believe that sexual advances will be welcomed, the victim needs to communicate that the conduct is unwelcome. At the same time, a complaint or protest to the employer may also be advisable as it constitutes persuasive evidence that sexual harassment in fact occurred.[43]

Q. Is a complaint or protest on the part of a victim at the time of the incident necessary in order for a victim to later file a claim of sexual harassment?

A. No. Though a timely complaint or protest is helpful, it is not a necessary element of a claim. The courts recognize that victims may fear repercussions from complaining about harassment, and that such fear may explain the failure to complain about or protest the harassment at an earlier time.[44]

Before bringing a lawsuit under Title VII in Federal court, a person must first file a complaint with the Equal Employment Opportunity Commission (EEOC) and receive a right-to-sue letter.[45] The complaint must be filed with EEOC within 180 days of the alleged harassment. However, if a State or local agency has

similar authority and has entered into an agreement with the EEOC (such as the South Dakota Division on Human Rights), a complaint must initially be filed with that agency, and the individual has 300 days to file the complaint with the EEOC.[46]

Q. What preventive steps should an employer take to limit harassment?

A. The EEOC has stated that all necessary steps should be taken by the employer, including (1) raising the issue and expressing strong disapproval, (2) developing appropriate sanctions, (3) informing employees of rights, and (4) developing methods to sensitize employees.[47]

Q. Is an employer protected from liability if the employer has a policy against sexual harassment coupled with a grievance procedure that the employee failed to utilize?

A. No. A stated policy against sexual harassment, or failure of the employee to utilize an employer implemented grievance procedure, does not necessarily protect that employer from liability.[48]

F. Discrimination in firing or temporary cessation of employment

In response to an interpretation of Title VII by the United States Supreme Court finding that Title VII did not prohibit discrimination based upon pregnancy, Congress passed *The Pregnancy Discrimination Act of 1978,* 42 U.S.C. § 2000e(k).

That act prohibits discrimination because of or on the basis of pregnancy, childbirth, or related medical conditions, within the definition of sexual discrimination. Thus, it is now unlawful for an employer to discriminate on the basis of pregnancy, childbirth, or related medical conditions with respect to compensation, terms, conditions, or privileges of employment.[49]

Q. Can an employee be fired because she is pregnant?

A. It is unlawful for an employer with 15 or more employees to discriminate against a female employee by firing her because she is pregnant, if she is able to work. A woman who is not able to work for medical reasons must be accorded the same rights, leave privileges, and other benefits as other workers who are not able to work because of temporary disabilities.[50]

Q. Does an employer's failure to provide employees with health insurance coverage for pregnancy-related conditions constitute a violation of the Pregnancy Discrimination Act?

A. Yes. If a fringe benefit of employment is health insurance coverage, and the policy does not provide coverage for pregnancy-related conditions, the health insurance coverage is discriminatory on the basis of sex.[51]

Q. Can a male employee claim discrimination under the Pregnancy Discrimination Act?

A. Yes. Unequal pregnancy benefits to the spouses of male and female employees can constitute discrimination. Also, a health insurance policy's failure to cover the pregnancy of an employee's wife constitutes sex discrimination against the male employee.[52]

G. Retaliation for discrimination complaints

Q. Can an employee be disciplined or discharged in retaliation for protesting an unlawful employment practice?

A. No. It is unlawful for an employer to discriminate against an employee because she has opposed any unlawful employment practice.[53]

Q. In order for a woman to prove that she was a victim of retaliation, what must she establish?

A. The woman must show that (1) she complained, testified, or participated in a discriminatory action forbidden by Title VII; (2) she experienced a detrimental employment decision; and (3) the detrimental employment decision resulted from such complaint, testimony, or participation.[54]

Title IX of the Education Amendments of 1972

This law[55] protects people from discrimination based on sex in education programs or activities that receive Federal financial assistance. It states that:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving financial assistance. . . .

The Office for Civil Rights of the U.S. Department of Education enforces Title IX.

Agencies and institutions whose activities and programs are covered by Title IX include 50 State education agencies, their subrecipients, and vocational rehabilitation agencies; 16,000 local education systems; 3,200 colleges and universities; 10,000 proprietary institutions; and other institutions, such as libraries and museums that receive U.S. Department of Education funds.

Employment in programs and activities covered may include, but are not limited to: admissions, recruitment, financial aid, academic programs, counseling and guidance, vocational education, recreation, physical education, athletics, and housing.

Equal Pay Act

The Equal Pay Act[56] of 1963 requires equal pay for equal work. Although the concept of "equal work" may be hard to define in every instance, the act defines it as a job "the performance of which requires equal skill, efforts, and responsibility, and which [is] performed under similar working conditions."[57]

Q. What must an individual show in order to prove discrimination under the act?

A. An individual must prove that an employer pays different wages to employees of opposite sexes:
(a) for equal work
(b) on jobs the performance of which requires equal skill, effort, and responsibility, which are performed under similar working conditions.[58]

Q. Does the term "equal," as used in the statute, imply that the skill, effort, and responsibility of the employee of the opposite sex must be identical?

A. No. "Insubstantial or minor differences in the degree or amount of skill, effort, and responsibility required for the performance of jobs will not render the equal pay standard inapplicable."[59]

Q. Are there any instances when an employer, covered by the act, is justified in having wage differentials?

A. Yes. The act exempts disparities in wages attributable to seniority, merit, quantity, or quality of production, and any other factor other than sex."[60]

Q. Can claims for wage discrimination based upon sex be brought even if no member of the opposite sex holds an equal but higher paying job?

A. Claims for wage discrimination based upon sex cannot be brought under the act if no member of the opposite sex holds an equal but higher paying job. However, these claims can be brought under Title VII of the Civil Rights Act of 1964 "provided that the challenged wage rate is not based on seniority, merit, quantity, or quality of production, or 'any other factor other than sex'."[61]

Small Business Act

Congress has found that although women-owned businesses have become major contributors to the American economy, women as a group are subjected to discrimination in entrepreneurial endeavors due to their gender. Because it is in the national interest to remove such discriminatory barriers to the creation and development of women-owned businesses, Congress has broadened the policy of the Small Business Act to include the vigorous promotion of the interests of small business concerns owned and controlled by women. It also promises governmental assistance in the removal of discriminatory barriers that are encountered by women as they compete in the economy.[62]

Federal-Aid Highway and Transit Programs

No person, on the basis of sex, may be excluded from participation or subject to discrimination under any program that received Federal-aid highway and transit funds.[63] Highway improvement, urban mass transportation, and airway programs are subject to the general rule that at least 10 percent of the authorized funds must be spent with Disadvantaged Business Enterprises, which includes Women's Business Enterprises. The organizations must be controlled by individuals who are socially or economically disadvantaged, and qualify as small business under the Small Business Act. Any State highway department wishing to utilize funds under the Federal-aid highway system is required to provide adequate assurances to the Federal Secretary of Transportation that employment in connection with proposed projects will be provided without regard to sex, as well as race, color, creed, or national origin.

Executive Orders No. 11246 and 11478

Executive Order No. 11246 prohibits discrimination in employment on the basis of sex, as well as because of race, color, religion, or national origin, by government contractors or subcontractors. This includes such acts of employment as recruitment, hiring, upgrading, rates of pay, layoffs, and training.[64]

Executive Order No. 11478 states that it is the policy of the Government of the United States to provide equal employment opportunity in Federal employment for all persons, and to specifically prohibit discrimination in employment because of sex, as well as because of race, color, religion, national origin, handicap, or age. This policy includes the realization of equal employment opportunity through a continuing affirmative program in each executive department and agency.[65]

South Dakota Human Relations Act of 1972

This law[66] states that it is unlawful discrimination to accord adverse or unequal treatment to any woman, because of her sex, with respect to job application, hiring, training, apprenticeship, tenure, promotion, upgrading, compensation, layoff, or any term or condition of employment. The law applies to all employers of one or more employees, and all employment agencies and labor organizations.[67]

Q. Who administers the South Dakota Human Relations Act?

A. The South Dakota Human Relations Act is administered by the South Dakota Division of Human Rights of the State Department of Commerce and Regulation.[68]

Q. What must an individual prove to establish unlawful employment discrimination under the South Dakota act?

A. The individual must show that she was the victim of intentional discrimination. She may do this either directly by showing that the employer was motivated by a discriminatory reason, or that the employer's explanation is not credible.[69]

Q. For sex discrimination to be found, must an individual's discharge be based solely upon sex?

A. No. It is sufficient to find sex discrimination in a discharge case if sex played any causal part in the discharge of the employee.[70]

Q. May a prospective employer administer an ability test?

A. Yes, a prospective employer may both give and take action based upon a professionally developed ability test. Such an action is not considered to discriminate against a woman provided it is not designed, intended, or used to discriminate because of sex.[71]

Q. May wage disparities be justified by a seniority or merit system?

A. Yes. It is not unfair or discriminatory practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment in accordance with the terms of a bona fide seniority or merit system, if such differences are not the result of an intention to discriminate.[72]

South Dakota Equal Pay Act

This statute mandates equal pay for equal work and disallows discrimination because of sex through unequal pay.[73] The statute provides that no employer shall discriminate between employees on the basis of sex, by paying wages to any employee in any occupation in this State at a rate less than the rate at which he pays any employee of the opposite sex for comparable work on jobs that have comparable requirements relating to skill, effort, and responsibility, but not to physical strength.

However, disparities in pay based upon seniority, merit, executive training, and differing job descriptions, which do not discriminate on the basis of sex, are not within the scope of this act.[74]

An employer found to have violated the provisions relating to equal pay is responsible to the employee for an amount equivalent to her unpaid wages. Additionally, the court may award the employee reimbursement for the expenses of reasonable attorney's fees and costs.[75]

Rapid City Code, Article XV

This law prohibits discriminatory employment practices by employers based on sex with regard to job application, hiring, training, apprenticeship, tenure, promotion, upgrading, or compensation, layoff, discharge, or any term or condition of employment. The ordinance provides similar limitations for employment agencies and labor organizations. Religious organizations are not exempt from provisions of this law prohibiting employment discrimination on the basis of sex.

The law is administered by the Rapid City Human Relations Commission.

Revised Ordinance of Sioux Falls, Chapter 13

This law prohibits discriminatory employment practices by employers based on sex with regard to job application, hiring, training, apprenticeship, tenure, promotion, upgrading, or compensation, layoff, discharge, or any term or condition of employment. The ordinance provides similar limitations for employment agencies and labor organizations. Religious organizations are not exempt from provisions of this law prohibiting employment discrimination on the basis of sex.

The law is administered by the Sioux Falls Human Relations Commission.

Part II
Enforcement Agencies and Complaint Procedures

South Dakota has two State agencies and two city commissions charged with enforcing laws prohibiting employment discrimination on the basis of sex. The Division of Human Rights of the South Dakota Department of Commerce enforces the State human rights statute and has a cooperative working relationship with the U.S. Equal Employment Opportunity Commission (EEOC) to process complaints related to Title VII of the Civil Rights Act of 1964. The Rapid City and Sioux Falls Human Relations Commissions enforce their own city ordinances and can also process complaints of alleged violations of the State statute. These commissions do not have a cooperative working agreement with EEOC.

Federal agencies in general are responsible for enforcing antidiscrimination provisions of Federal statutes in agencies and organizations to which they provide Federal funds or services. Complaints of discrimination from employees in such organizations may be referred for investigation by the EEOC, or by the Office of Federal Contract Compliance Programs (OFCCP).

Listed below are city, State, and the predominant Federal agencies that are charged with enforcing civil rights statutes. Women in South Dakota can file complaints of employment discrimination with these agencies. Though the U.S. Commission on Civil Rights does not enforce civil rights laws or investigate complaints, it assists by serving as a clearinghouse and providing information relative to discrimination complaints.

Procedures for receiving and investigating complaints may vary among enforcement agencies, and it is advisable to obtain more detailed information before filing a complaint. Usually, a complaint must be filed within 180 days of an alleged act of illegal discrimination. However, time allowances may vary depending upon specific circumstances.

City Agencies

Rapid City Human Relations Commission
300 6th Street
Rapid City, SD 57701
(605) 394–4110

Legal Basis:
Rapid City Code § 20-281; Rapid City, S.D. Ordinances, § 20-281 (1973)

S.D. Codified Laws Ann. Ch. 20-12 (1987)

Complaint Procedure:
Contact the commission for a complaint form which requires the following information:

1. Name, address, phone number, and notarized signature of the complainant.
2. Name and address of the respondent.
3. A statement describing how, why, and when the alleged discrimination occurred.

Human Relations Commission
City of Sioux Falls
224 West Ninth Street
Sioux Falls, SD 57102
(605) 339–7039

Legal Basis:
City of Sioux Falls, S.D. Revised Ordinances Ch. 13

Complaint Procedure:
A complaint must be filed within 6 months of the alleged act of discrimination. An appointment must be made with staff of the commission, who will assist the complainant in preparing the final complaint.

State Agencies

South Dakota Department of Commerce and Regulation
Division of Human Rights
222 E. Capitol, Suite 11
c/o State Capitol—500 E. Capitol
Pierre, SD 57501–5070
(605) 773–4493

Legal Basis:
Human Relations Act of 1972, S.D. Codified Laws Ann. Ch. 20-13 (eff. July 1, 1991).

Complaint Procedure:
Within 180 days of the alleged unlawful discrimination, contact the Division of Human Rights and provide the name, address, and telephone number of the respondent; the number of employees in the respondent's firm; and the basis of the allegation, describing the incident and harm that has occurred.

South Dakota Department of Transportation (SDDOT)
Division of Finance
700 E. Broadway
Pierre, SD 57501–2580
(605) 773–4085

Legal Basis:
23 U.S.C. § 324; 49 U.S.C. § 306 (1988). For regulations issued by the Federal Department of Transportation, see 49 C.F.R. part 23 (1992).

Complaint Procedures:
Women Business Enterprises (WBE) which allege discrimination in the letting of contracts receiving Federal-aid highway funds may file a written complaint with the SDDOT within 180 days of the alleged unlawful discrimination. The SDDOT may investigate the complaint or refer it to the Division Office of the Federal Highway Administration (FWHA). Alternatively WBEs may file such complaints directly with the U.S. Department of Transportation,

Departmental Office of Civil Rights S–30, 400 7th Street, S.W., Washington, D.C. 20590.

Individual women employees of contractors receiving Federal-aid highway funds who allege discrimination because of their gender have three alternatives. They may file a complaint with the employing contractor who is required to have a process to promptly respond to such complaints.[76] Alternatively, within 180 days they may file a written complaint with the SDDOT, which may investigate the complaint or refer it to the South Dakota Division of Human Rights. They may also choose to file their complaints with the FHWA Division Office in Pierre.

Federal Agencies

U.S. Commission on Civil Rights (USCCR)
Rocky Mountain Regional Office
1700 Broadway—Suite 710
Denver, CO 80290
(303) 866–1040

Legal Basis:
Civil Rights Act of 1957, as amended (42 U.S.C.A. § 1975) (1992 Sup.)

Duties of the USCCR include the study and collection of legal developments concerning discrimination on the basis of sex. The Commission does not have enforcement power that would enable it to apply specific remedies in individual cases, but it does serve as a clearinghouse to refer complaints to the appropriate government agency for action.

U.S. Department of Education (USDOE)
Office for Civil Rights
1244 Speer Blvd., Suite 310
Denver, CO 80204–3582
(303) 844–5695

Legal Basis:
Title IX of the Education Amendments of 1972, as amended 20 U.S.C. §§ 1981-88 (1988).

Nondiscrimination on the basis of sex in education programs and activities receiving or benefiting from Federal Financial Assistance. 34 C.F.R. part 100 (1992).

Complaint Procedure:
The complaint must be in writing and signed, received within 180 days from the last act of alleged discrimination, contain the name and address of the complainant, and the respondent, and describe the alleged discrimination.

U.S. Equal Employment Opportunity Commission (EEOC)
Denver District Office
1845 Sherman Street, 2nd Floor
Denver, CO 80203
(303) 866–1300
1–800–869–EEOC

Legal Basis:
Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e (1988).

The Equal Pay Act, 29 U.S.C. § 206(d) (1988).

Complaint Procedure:
Before bringing suit in court, the individual must bring a complaint before EEO within 180 days. However, if a State or local agency has similar authority and has entered into an agreement with the EEOC (such as the South Dakota Division of Human Rights), a complaint must initially be filed with that agency, and the individual has 300 days to file the complaint with EEOC. Complaints under the Equal Pay Act must be filed within 2 years of the unlawful discrimination, or within 3 years if the violation was willful.

Information provided must include the names and addresses of the complainant and the entity against whom discrimination is alleged, and the date and description of the discriminatory action.

U.S. Department of Health and Human Services (HHS)
Office for Civil Rights
1185 Federal Office Building
1961 Stout Street
Denver, CO 80294
(303) 844–2024

Legal Basis:
Title IX of the Education Amendments of 1972 (Title IX) 20 U.S.C., § 1681; 45 C.F.R. Part 86.

Titles VII and VIII of the Public Health Service Act 42 U.S.C. 298b-2 (nursing schools), 45 C.F.R. Part 83 (vocational schools).

The Nondiscrimination Provisions of Block Grant Programs of the Omnibus Budget Reconciliation Act of 1981 (Public Law 97-35) (OBRA).77

Complaint Procedures:
A complaint must be in writing and filed by the complainant or a representative within 180 days of the alleged discriminatory act. This period may be extended for good cause. The complaint must contain the name, address, telephone number and signature of the complainant; the name and address of the respondent; a statement describing how, why and when the alleged discrimination occurred; and any other relevant information.

Complaints of individual employment discrimination are referred to the Equal Employment Opportunity Commission (EEOC) in cases where that agency has jurisdiction under Title VII of the Civil Rights Act of 1964. See Title 28 C.F.R. Part 42.

U.S. Department of Housing and Urban Development (HUD)
Office of Fair Housing and Equal Opportunity (OFHEO)
Denver Regional Office
1405 Curtis Street
Denver, CO 80202–2349

Legal Basis:
Section 109 of Title I of the Housing and Community Development Act of 1974, as amended, 42 U.S.C. § 5309 (1988), and implementing regulations.

Complaint Procedure:
A complaint must be filed within 180 days after alleged discrimination in connection with entries receiving government funds under Section 109, although the time for filing may be extended for good cause. The agency will assist the complainant if it is contacted by letter, telephone, or in person and is provided information about the complainant, the nature and time of the incident, and the alleged discriminatory institution or organization. Complaints of systemic discrimination will be investigated by OFHEO, complaints of individual discrimination may be referred to the Equal Employment Opportunity Commission for processing.

U.S. Department of Labor (DOL)
Office of Federal Contract Compliance Programs (OFCCP)
1490 Federal Office Building
Denver, CO 80294

Legal Basis:
Executive Order 11246, 3 C.F.R. § 339 (1964-65), as amended by Executive Order 11375, 3 C.F.R. § 684 (1966-70), reprinted in 42 U.S.C. § 2000e (1988).

Complaint Procedure:
Complaints must be filed within 180 days of the alleged unlawful discrimination and contain the name, signature, address, and telephone number of the complainant; the name and address of the contractor or subcontractor committing the alleged unlawful discrimination; a description of the acts considered to be discriminatory; and any other pertinent information.

U.S. Small Business Administration (SBA)
Area Civil Rights Commission for SBA
1114 Commerce Street, Room 822
Dallas, TX 75242-2896
(214) 767-2000

Legal Basis:
Part 113 of the Small Business Act

Complaint Procedure:
The complainant must, personally or through a representative, file with SBA a written complaint not later than 180 days from the date of alleged discrimination unless the time is extended by SBA.

Endnotes

1. 42 U.S.C. § 2000e-2(a) (1988).
2. See *Johnson,* 480 U.S. at 630 (discussing Title VII's purpose of eliminating the effects of discrimination in the workplace).
3. *Johnson v. Transportation Agency,* 480 U.S. 616, 642 (1987); *Wygant v. Jackson Bd. of Educ.,* 476 U.S. 267, 290 (1986)(emphasized voluntary efforts to further the law).
4. *Johnson,* 480 U.S. at 642.
5. 42 U.S.C. § 2000e-2(a) (1988); *Wards Cove Packing Co. v. Antonio,* 490 U.S. 642, 645 (1985).
6. *E.E.O.C. v. Metal Service Co.,* 892 F.2d 341 (3rd Cir. 1990). See *Holsey v. Armour & Co.,* 743 F.2d 199, 208-09 (4th Cir. 1984), *cert. denied,* 476 U.S. 1028 (1985) (where employee was never asked to fill out an application and employer discouraged blacks from applying); *Paxton v. Union Nat'l Bank,* 688 F.2d, 552, 568 (8th Cir. 1982), *cert. denied,* 460 U.S. 1083 (1983) (plaintiff's expressed interest in promotion was enough where vacancy was not posted and plaintiff did not hear of the opening until it was filled). The Eighth Circuit, in dictum, stated in *Easley v. Empire Inc.,* 757 F.2d 923, 930 n. 7 (1985), that "formal application for a job will be excused when a known discriminatory policy . . . deters potential jobseekers."
7. Pursuant to Title VII, section 703(e)(1), an employer may discriminate on the basis of "religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . ." 42 U.S.C. § 2000e-2(e)(1) (1988) See *Price Waterhouse v. Hopkins,* 490 U.S. 228, 242 (1989). *Price Waterhouse* states that "[t]he only plausible inference to draw from [the statutory BFOQ] provision is that, in all other circumstances, a person's gender may not be considered in making [employment] decisions that affect her. Indeed, Title VII even forbids employers to make gender an indirect stumbling block to employment opportunities." *Id.*
8. *International Union, UAW v. Johnson Controls,* 111 S.Ct. 1196, 1204 (1991); *Dothard V. Rawlinson,* 433 U.S. 321, 332-37 (1977); *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 122-25 (1985). The EEOC issued guidelines on sex discrimination that reached the same conclusion. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2 (1992). Additionally, the similar language in

the Age Discrimination in Employment Act of 1967 has been interpreted narrowly. *Western Airlines v. Criswell,* 472 U.S. 400 (1985) (age discrimination case stating BFOQ is a concept borrowed from Title VII).

9. *Johnson Controls,* 111 S.Ct. at 1205. In *Dothard,* 433 U.S. 321, the Court, accepting this view, permitted a maximum security prison to hire only male guards because the safety of female guards was not the sole concern. A female guard could endanger others if an inmate uprising occurred.
10. *Johnson Controls,* 111 S.Ct. at 1205.
11. *Johnson Controls,* 111 S.Ct. at 1207. The Court reviewed case law, legislative history, and Title VII and concluded that "the safety exception is limited to instances in which sex or pregnancy actually interferes with the employee's ability to perform the job." *Id.* at 1206.
12. *International Bhd. of Teamsters,* 431 U.S. 324, 335 n. 15 (1977).
13. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973); cf. *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 254 (1981).
14. *McDonnell Douglas,* 411 U.S. at 802.
15. *McDonnell Douglas,* 411 U.S at 804.
16. *International Bhd. of Teamsters,* 431 U.S. at 358-59; *Metal Service Co.,* 892 F.2d at 347–49.
17. EEOC, Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory, EEOC Notice No. N-915-002 (July 14, 1990); see *Thurston,* 469 U.S. at 121 (age discrimination).
18. *Grant v. Hazelett Strip Casting Corp.,* 880 F.2d 1564 (2d Cir. 1989).
19. *Price Waterhouse,* 490 U.S. 228.
20. *Carney v. Martin Luther Home, Inc.,* 824 F.2d 643, 648 (8th Cir. 1987).
21. *Price Waterhouse,* 490 U.S. at 1791.
22. *Watson v. Fort Worth Bank and Trust,* 487 U.S. 977 (1988); *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971).
23. 42 U.S.C.A. § 2000e-2(k)(A)&(B) (West Supp. 1992).
24. *Watson,* 487 U.S. at 994-95.
25. *Watson,* 487 U.S. 977 at 996.
26. *Price Waterhouse,* 490 U.S. at 1785.
27. 42 U.S.C.A. § 2000e-2(m) (West Supp. 1992).
28. 42 U.S.C.A. §§ 1981a, 2000e-5(g) (West Supp. 1992).
29. *County of Washington v. Gunther,* 452 U.S. 161, 168 (1981).
30. 29 C.F.R. § 1604.11(a) (1992).

31. *Id.* 1604.11(a)(2). Note: 29 C.F.R. § 1604.11 is cited with approval in *Meritor Savings Bank v. Vinson,* 477 U.S. 57 (1986); Cf. Sexual Harassment 21-22.
32. 29 C.F.R. § 1604.11(a)(3) (1992); see *Vinson,* 477 U.S. at 65-67.
33. *Vinson,* 477 U.S. 57.
34. EEOC, Policy Guidance on Current Issues of Sexual Harassment 14, EEOC Notice No. N-915-050 (Mar. 9, 1990) (hereinafter Sexual Harassment).
35. 29 C.F.R. § 1604.11(c)&(d) (1992); *Bundy v. Jackson,* 641 F.2d 934 (D.C. Cir. 1981).
36. *Vinson,* 477 U.S. at 67, quoting *Henson v. City of Dundee,* 682 F.2d 897, 902 (1982) (brackets in original); Sexual Harassment, at 14.
37. *Vinson,* 477 U.S. at 65-66; 29 C.F.R. § 1604.11(a)(3) (1992) (sufficient that harassment interferes with work performance).
38. *Vinson,* 477 U.S. at 67-68.
39. *Vinson,* 477 U.S. at 68, citing 29 C.F.R. § 1604.11(a) (1985) (section has not been amended).
40. *Vinson,* 477 U.S. at 68.
41. See, e.g.,*Morris v. American National Can Corp.,* 730 F.Supp. 1489, 1494 (E.D. Mo. 1989); *Perkins v. General Motors Corp.,* 709 F.Supp. 1487, 1499 (W.D. Mo. 1989); 29 C.F.R. § 1604.10(b) (1992).
42. *Moylan v. Maries County,* 792 F.2d 746, 749 (8th Cir. 1986): 29 C.F.R. § 1604.11(a)-(b) (1992).
43. *Baker v. Weyerhaeuser Co.,* 903 F.2d 1342, 1345 (10th Cir. 1990) (employer notified of plaintiff's complaints concerning supervisor's sexual harassment); *Valdez v. Church's Fried Chicken, Inc.,* 683 F.Supp. 596, 619 (W.D. Tex. 1988) (employer's knowledge of harassment can be established by complaints or a showing of pervasive action.
44. *Shrout v. The Black Clawson Co.,* 689 F.Supp. 774, 777-78 (S.D. Ohio 1988).
45. *Alexander v. Gardner Denver Co.,* 415 U.S. 36, 47 (1974); *McDonnell Douglas Corp.,* 411 U.S. at 798.
46. 42 U.S.C. § 2000e-5(e) (1988).
47. 29 C.F.R. § 1104(f) (1992).
48. *Vinson,* 477 U.S. at 72. See generally Sexual Harassment.
49. *Newport News Shipbuilding & Dry Dock Co.,* 462 U.S. 669 (1983); *E.E.O.C. v. South Dakota Wheat Growers Ass'n,* 683 F. Supp. 1302, 1303 (D.S.D. 1988).
50. See Sexual Harassment at 11-13; *E.E.O.C. v. Hacienda Hotel,* 881 F.2d 1504, 1511 (9th Cir. 1989) citing S. Rep. No. 331, 95th Cong. 2d Sess. 3-4 (1977).

51. *South Dakota Wheat Growers,* 683 F. Supp. at 1304.
52. *Newport News Shipbuilding & Dry Dock Co.,* 462 U.S. at 679-84.
53. 42 U.S.C. § 2000e-3 (1988): *Hacienda Hotel,* 881 F.2d 1504 (9th Cir. 1989).
54. *Hacienda,* 881 F.2d at 1513-14 citing *Wrighten v. Metropolitan Hospitals,* 726 F.2d 1346, 1354, (9th Cir. 1984).
55. 20 U.S.C. §§ 1981-88 (1988).
56. 29 U.S.C. § 206(d) (1988).
57. *Id.* §§ 206(d)(1).
58. *Corning Glass Works v. Brennan,* 417 U.S. 188, 195 (1974), quoting 29 U.S.C. § 206(d)(1) (1988).
59. 29 C.F.R. § 1620.14 (1992); *Shultz v. Wheaton Glass Co.,* 421 F.2d 259, 265 (3rd Cir. 19xx), cert. denied 398 U.S. 905 (1970). One employment discrimination text observed that *Wheaton Glass* was probably the single most influential case interpreting" the Equal Pay Act. Shulman & Abernathy, THE LAW OF EQUAL OPPORTUNITY 13-7 (1990).
60. *County of Washington v. Gunther,* 452 U.S. at 168.
61. *Id.*
62. 15 U.S.C. 631(h) (1989), added by the Women's Business Ownership Act of 1988, P.L. 100–533, 102 Stat. 2689-90
63. 23 U.S.C. § 324 (1988). This provision was added by the Highway Act of 1973, P.L. 93–87.
64. Exec. Order No. 11246, 3 C.F.R. § 339 (1964-65), as amended by Exec. Order No. 11375, 3 C.F.R. § 684 (1966-70, reprinted in 42 U.S.C. § 2000e (1988).
65. Exec. Order No. 11478, 3 C.F.R. § 803 (1966-70), reprinted in 42 U.S.C. § 2000e (1988).
66. [S.D. Codified Laws Ann. Ch. 20-13 (1987 & Supp. 1991)] 20-13.
67. *Id.* §§ 20-13-10-12.
68. *Id.* 20-13-5.
69. *Matter of Gannon,* 315 N.W.2d at 480 (1982), citing *Burdine,* 450 U.S. at 256.
70. General Commission Policies and Guidelines on discrimination in employment.
71. S.D. Codified Law § 20-13-15 (Supp. 1991).
72. *Id.* § 20-13-16.
73. *Id.* § 60-12-15 (1987).
74. *Id.* § 60-12-16 and § 20-13-17.
75. *Id.* § 60-12-18.
76. 23 C.F.R. 230, Subpt. A, App. A, § 6a.
77. See 45 C.F.R. 86.71 (Title IX); 45 C.F.R. 83.20 (PHS Act).

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