

LITIGATING SEX DISCRIMINATION CASES IN THE 1970s

HARRIET S. RABB*

Title VII of the Civil Rights Act of 1964¹ made it unlawful for an employer to hire or fire an employee or to discriminate by classifying, compensating, or denying opportunity to an employee on the basis of race, color, religion, sex, or national origin. Sex as a protected category was an afterthought. The bill was opposed by many in Congress, among them a Virginia representative who caused the bill to be amended to add sex—perhaps expecting that the protection of women-workers would result in killing the bill. Another Congressman proposed that a woman should not be permitted to claim sex discrimination unless she filed a sworn statement that her spouse was unemployed. Those maneuvers failed, and the Act passed. It went into effect on July 1, 1965.

Though Title VII promised women equality of employment opportunity, even many supporters of women's rights were committed to protecting women as workers while preserving their traditional roles as wives and mothers. I recommend to you the scholarship of Cary Franklin for a wonderful and illuminating look back at these times.²

At the initiative of Columbia Law Professor George Cooper, in the fall of 1971, Columbia opened the Employment Rights Project, a clinical course offering, “staffed,” as it were, by our students, with George and me, newly hired, as its instructors. One of the students in our early semesters—Howard Rubin—after graduation, joined me as an instructor, and George returned to classroom teaching.

In those early days, cases were made largely by looking at the defendant employer's job structure and finding blatant segregation and resulting salary discrimination. Two of the Clinic's earliest cases—against *Newsweek* magazine and the New York Telephone Company—succeeded largely on that foundation. The *Newsweek* women were pioneers who filed their first complaint with the Equal Employment Opportunity Commission in 1970. Those working on *Newsweek*'s editorial side were all too personally familiar with the widely-known truth that, at a national news magazine, a man behind a typewriter was a “Writer,” while a woman behind a typewriter was a “Researcher.” Though *Newsweek*

* Harriet Rabb is Vice President and General Counsel at The Rockefeller University.

1 42 U.S.C. § 2000e (1964).

2 Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307 (2012).

signed a Memorandum of Understanding with its women employees, little in the workplace changed. Disappointed by management's broken promises to desegregate the magazine's jobs, in May–June 1972, fifty *Newsweek* women filed charges at the Equal Employment Opportunity Commission and the New York State Division of Human Rights. The settlement, one year later, provided many positive management commitments, among them hiring and assignment goals—including the appointment of a woman in editorial management. Lynn Povich, lead *Newsweek* plaintiff, tells the whole story in her book to be published in the fall of this year.³

The plaintiff class at the New York Telephone Company⁴ was composed of 2200 management level women in the Traffic Department of the Company where, for example, women held 98% of the lowest management jobs earning half the salary of men who held 80% of the top management jobs. Useful testimony supplemented our statistical case. The company's General Personnel Supervisor, for example, testified that military experience—but not teaching experience—showed “supervisory skill,” and when asked how the company had validated that measure, he replied, “I guess I’m paid to make this type of judgment.” The case settled before trial with goals and timetables and salary increases for women in the class.

Somewhat closer to home, in 1971 and 1972, at the close of late summer interviewing season, women at NYU School of Law and Columbia Law School were filing administrative employment discrimination complaints against major New York City law firms. The Clinic represented them. What those women were up against was captured at the end of a negotiation session just prior to our filing two of the cases in federal court. The Royall Koegel & Wells attorney representing his own firm closed the meeting by saying, “I do see what you’re saying. Our firm is like a meadow on which there are too many bulls and not enough cows.”

Both the Royall Koegel class action,⁵ starring a Columbia plaintiff, and a class action against Sullivan & Cromwell,⁶ starring an NYU plaintiff, were built on similar facts. In 1970–71, New York City's fifty largest firms employed 3900 lawyers. Only 161 of them were women. Of 1400 partners at those firms, nine were women. The judge we drew in the Sullivan case was Constance Baker Motley. Sullivan's counsel filed a

3 LYNN POVICH, *THE GOOD GIRLS REVOLT: HOW THE WOMEN OF NEWSWEEK SUED THEIR BOSSES AND CHANGED THE WORKPLACE* (2012).

4 *Leisner v. N.Y. Tel. Co.*, 358 F. Supp. 359 (S.D.N.Y. 1973).

5 *Kohn v. Royall Koegel & Wells*, 59 F.R.D. 515 (S.D.N.Y. 1973), *aff'd by* 496 F.2d 1094 (2d Cir. 1974).

6 *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1 (S.D.N.Y. 1975).

motion asking the judge to recuse herself because she was a woman and a lawyer. Judge Motley refused—need I explain why?—and the firm's appeal to the Second Circuit on that issue was summarily dismissed. Ultimately, both cases settled before trial, with the firms committing to hiring and promotion goals and timetables.

Women at the *Readers' Digest*, headquartered in Pleasantville, New York, were represented by the Clinic in their case filed in the Southern District of New York in 1973.⁷ The *Digest* drew the Clinic into a new universe of clients and challenges.

After the named plaintiffs filed their complaints alleging class-wide discrimination, they arranged for a meeting where I would explain to members of the putative class the merits of the case, their rights, and the process for pursuing them. The meeting room was packed. Some weeks later, the *Digest* moved to have me professionally sanctioned for speaking to its employees about the suit. The evidence presented was a tape recording made by women employees of the *Digest* who attended the informational meeting and were hostile to the case. The sanction motion was argued and dismissed from the bench. Not surprisingly, the *Digest* case was then certified as a 23(b)(3) class action, one in which persons who were eligible to be members of the class could opt out if they so chose. Fifty percent of the women employed at the *Digest* opted out. Why, you may wonder, was that?

Digest employees were divided into 316 job titles, 235 of which were totally sex-segregated. Hundreds of the *Digest* women worked in the ironically-named Fulfillment Division where they processed subscriptions and renewals. Many of those women were brought to work from communities across Westchester County in *Readers' Digest* buses. The *Digest* cafeteria prepared for employees low-cost family dinners to be retrieved from the cafeteria and taken home at the close of work before the women boarded the *Digest* buses for their return trips. Perks such as these were important to these working women and their families. The women were grateful. But what about the men?

Annual salary increase memos at the *Digest* routinely commented—for men, but not for women—that special pay increases should be provided as the male (assumed to be the breadwinner), for example, had recently married or had a child. Such documents littered the discovery landscape.

When the case settled in 1977, on the eve of trial, the front page of *The New York Times* carried the story, announcing that the plaintiff class members had chosen to share their \$1.5 million dollars in back pay with the women who had opted out of the suit.

⁷ Smith v. Reader's Digest Ass'n., No. 73 Civ. 4833, 1974 U.S. Dist. LEXIS 5930 (S.D.N.Y. Nov. 6, 1973).

Goals and timetables, again, were the core of the settlement.

The New York Times itself had been sued by a class of 545 of its women employees in 1974.⁸ Here again, the Clinic represented the class and the statistics were the core of the case. As of 1977, only three out of thirty-one foreign correspondents were women. No women were political columnists. Of thirty-five journalists in the Washington, D.C. bureau, only five were women, and none of them was an editor. Only one out of twenty-five regional correspondents was a woman. Pay differentials in the thousands of dollars a year distinguished men and women holding the same job titles. But there was more. The Director of Personnel had written of a candidate, "She would be good as a female supervisor. I would make her my first assistant if she were a man." The Executive Editor of the newspaper had written a memo noting the need for more women on the Metropolitan staff. When asked during his deposition why women were needed, he said that women add variety to a staff; they may have different knowledge and different perceptions because they are women. He went on, and I quote, "I think it's self evident We have a column for instance, called 'Hers'. . . written by a woman . . . we feel there are such things as male perceptions and female perceptions. . . ." Asked whether *The Times* had any columns written by men to express a male perception, he answered, "No, we didn't think it necessary because so many of our reporters are men." So, like those before them, in 1978 the company settled for back pay annuities and for an aggressive set of goals that reached to the very top jobs of *The New York Times*.

You now have the special privilege of meeting the named plaintiff class representatives and other heroes who opened those doors in the 1970s through which many fortunate, deserving women have followed. [The following persons stood when their names were called.] Lynn Povich, *Newsweek* magazine; Jane Booth, the New York Telephone Company; Diane Serafin Blank, Sullivan & Cromwell; Margy Kohn, Royall Koegel & Wells had to be in court today so couldn't be with us; Betsy Wade Boylan, *The New York Times*; Minna Schrag, student lawyer on the *Readers Digest* case; and Howard Rubin, my colleague and co-counsel. For everyone here today, we thank you all.

8 Boylan v. N.Y. Times Co., No. 74 Civ. 4891, 1977 U.S. Dist. LEXIS 17243 (S.D.N.Y. Feb. 23, 1977).