

SEX-BASED DISCRIMINATION

TEXT, CASES AND MATERIALS
Second Edition

Herma H. Kay

American Casebook Series



TEXT, CASES AND MATERIALS
ON
SEX—BASED DISCRIMINATION

SECOND EDITION

By

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SECOND EDITION

of

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- King's The Law of Medical Malpractice in a Nutshell, 2nd Ed., 342 pages, 1986 (Text)

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- Shanor and Terrell's Military Law in a Nutshell, 378 pages, 1980 (Text)

MORTGAGES

- See Real Estate Transactions

NATURAL RESOURCES LAW

- See Energy and Natural Resources Law

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- Edwards and White's Problems, Readings and Materials on the Lawyer as a Negotiator, 484 pages, 1977 (Casebook)
Peck's Cases and Materials on Negotiation, 2nd Ed., (The Labor Law Group), 280 pages, 1980 (Casebook)
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See also Computers and Law, Interviewing and Counseling, Negotiation

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- Hemingway's Hornbook on Oil and Gas, 2nd Ed., Student Ed., 543 pages, 1983 with 1986 P.P. (Text)
Kuntz, Lowe, Anderson and Smith's Cases and Materials on Oil and Gas Law, 857 pages, 1986, with Forms Manual (Casebook)
Lowe's Oil and Gas Law in a Nutshell, 443 pages, 1983 (Text)
See also Energy and Natural Resources Law

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- See Agency—Partnership

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- Choate and Francis' Cases and Materials on Patent Law, 2nd Ed., 1110 pages, 1981 (Casebook)
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- Noel and Phillips' Cases on Products Liability, 2nd Ed., 821 pages, 1982 (Casebook)

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Cunningham, Stoebuck and Whitman's Hornbook on the Law of Property, Student Ed., 916 pages, 1984, with 1987 P.P. (Text)

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Moynihan's Introduction to Real Property, 254 pages, 1962 (Text)

Uniform Land Transactions Act, Uniform Simplification of Land Transfers Act, Uniform Condominium Act, 1977 Official Text with Comments, 462 pages, 1978

See also Real Estate Transactions, Land Use

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Osborne's Cases and Materials on Secured Transactions, 559 pages, 1967 (Casebook)

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Gellhorn and Pierce's Regulated Industries in a Nutshell, 2nd Ed., about 400 pages, 1987 (Text)

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See also Mass Communication Law, Banking Law

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- McNulty's Federal Income Taxation of Individuals in a Nutshell, 3rd Ed., 487 pages, 1983 (Text)
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- Selected Federal Taxation Statutes and Regulations, 1429 pages, 1986
- Solomon and Hesch's Cases on Federal Income Taxation of Individuals, about 800 pages, 1987 (Casebook)
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- Dobbs' Torts and Compensation—Personal Accountability and Social Responsibility for Injury, 955 pages, 1985 (Casebook)
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- Keeton, Keeton, Sargentich and Steiner's Cases and Materials on Torts, and Accident Law, 1360 pages, 1983 (Casebook)
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- See also Products Liability

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- McManis' Unfair Trade Practices in a Nutshell, 444 pages, 1982 (Text)
- Oppenheim, Weston, Maggs and Schechter's Cases and Materials on Unfair Trade Practices and Consumer Protection, 4th Ed., 1038 pages, 1983 with 1986 Supplement (Casebook)
- See also Antitrust, Regulated Industries

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- Appellate Advocacy, Handbook of, 2nd Ed., 182 pages, 1986 (Text)
- Bergman's Trial Advocacy in a Nutshell, 402 pages, 1979 (Text)
- Binder and Bergman's Fact Investigation: From Hypothesis to Proof, 354 pages, 1984 (Coursebook)
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- Averill's Uniform Probate Code in a Nutshell, 425 pages, 1978 (Text)
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McGovern's Cases and Materials on Wills, Trusts and Future Interests: An Introduction to Estate Planning, 750 pages, 1983 (Casebook)
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Simes' Hornbook on Future Interests, 2nd Ed., 355 pages, 1966 (Text)
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- Getches' Water Law in a Nutshell, 439 pages, 1984 (Text)

WATER LAW—Cont'd

- Sax and Abram's Cases and Materials on Legal Control of Water Resources in the United States, 941 pages, 1986 (Casebook)
Trelease and Gould's Cases and Materials on Water Law, 4th Ed., 816 pages, 1986 (Casebook)
See also Energy and Natural Resources Law, Environmental Law

WILLS

- See Trusts and Estates

WOMEN AND THE LAW

- Kay's Text, Cases and Materials on Sex-Based Discrimination, 2nd Ed., 1045 pages, 1981, with 1986 Supplement (Casebook)
Thomas' Sex Discrimination in a Nutshell, 399 pages, 1982 (Text)
See also Employment Discrimination

WORKERS' COMPENSATION

- See Social Legislation

PREFACE

In the Foreword to the First Edition of these materials, the three authors expressed the hope that "[c]onditions of contemporary living, among them curtailed population goals and reduction of necessary home-centered activity, have created a climate in which women and men who are not so captivated by traditional roles may be expected to create new traditions by their actions, if artificial barriers are removed, and avenues of opportunity held open to them." But in the short space of time that has elapsed since those words were written in 1974, the social and legal climate of the nation as it affects equality between men and women has changed dramatically. The Equal Rights Amendment, which more than any other single item on the national agenda carries the symbolic weight of the effort to abolish legal distinctions based on sex, failed to achieve ratification during the original seven year period set by the 92nd Congress in 1972. A three year, three month extension of the time available, approved by the 95th Congress in 1978, has itself more than half expired without any new ratifications; it faces a serious challenge to its own validity.¹

More pressing in its urgency on the human level is the gap between constitutional theory and medical practice affecting the free exercise by women dependent on public health care of their fundamental right to choose whether to bear children guaranteed to all women by the Supreme Court in 1973.² The willingness of the highest state courts in California³ and Massachusetts⁴ to accord their state constitutions a broader interpretation than the federal document has yet received on this point serves to highlight the severe tension created by the abortion funding questions between the appropriate spheres of legislative decision and judicial review.

A different gap is discernable in the field of employment discrimination: the wage gap between men and women, which has actually increased since the enactment in 1963 of the Equal Pay Act and in 1964 of Title VII of the Civil Rights Act. Accompanying

1. Compare Ginsburg, Ratification of the Equal Rights Amendment: A Question of Time, 57 Tex.L.Rev. 919 (1979), with Rees, Throwing Away the Key: The Unconstitutionality of the Equal Rights Amendment Extension, 58 Tex.L.Rev. 875 (1980).

2. Compare *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), with *Harris v. McRae*, — U.S. —, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980).

3. *Committee to Defend Reproductive Rights v. Myers*, 29 Cal.3d 252, 625 P.2d 779, 172 Cal.Rptr. 866 (1981).

4. *Moe v. Secretary of Administration & Finance*, — Mass. —, 417 N.E.2d 388 (1981).

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this recognition is a sense of limited options, a perception of seemingly intractable problems that cannot be solved by legal remedies alone. It has become increasingly plain that merely opening non-traditional jobs to women does not of itself decrease the high percentage of women workers who continue to cluster in the female ghettos of clerical, service and support positions. Women executives, engineers and scientists are still conspicuous by their absence, while women in police forces and the military services enjoy only limited opportunities for advancement. The concept of comparable worth, which goes beyond the notion of equal pay for equal work, is being explored as a more effective tool for ending the low pay associated with traditional sex-segregated occupations, even if that segregation itself remains impervious to legal change.

On the home front, too, the high expectations that men and women, given the opportunity to transform marriage into a true partnership or to elect freely among alternative lifestyles, would choose to eliminate the traditional patterns of dominance and submission in their daily lives have largely gone unfulfilled. Indeed, the failure of the Equal Rights Amendment to attain ratification during the original seven year period is attributed by some observers to opposition by women homemakers who were unprepared for and uncomfortable with the ideal of self-sufficiency. Even among those couples who seem personally most committed to sexual equality—participants in dual career marriages—there has been very little shifting of home and family responsibilities from women to men. The result is that many career women, forced in most fields to accommodate themselves to male patterns of training, recruitment and advancement, have found the home-work gap difficult to bridge. Increased pressure on the workplace or the government or both to provide facilities and support systems that will lessen the burden now placed on working mothers to cope with child care duties can be expected in future years.

During the brief interval from 1974 to 1981, feminists of both sexes have rediscovered massive institutional, social and cultural obstacles that hinder the progress of men and women toward the goal of a society in which both will be treated as equals. Primary among these are the continuing rigidity of sex roles, now expressed in sexual harassment at work and in school; domestic violence in the home; and the subtle disinclination of many males to treat females truly as colleagues and co-workers whether the job setting be a factory or a university faculty.

But, along with the defeats over familiar issues and the disturbing confrontation of new ones, has come a sense of challenge and renewed dedication. The number of women in leadership positions in the professions, government and business is slowly increasing, in no small part because of the pressure of litigation. These women will serve as role models and mentors for those who follow.

PREFACE

In the field of legal study devoted to sex-based discrimination, the growing number of women law students and professors is already making itself felt. The pages of this Second Edition reflect the fruits of their work through citation and quotation. The networks these legal scholars are creating with their colleagues in the social and behavioral sciences, as well as with those in the humanities and natural sciences will insure that the proper study of mankind will not in the future be limited to man, but will include woman as equally interesting and worthwhile.

On a personal note, I wish to register my own sense of disappointment at the loss of both my colleagues, Ruth Bader Ginsburg and Kenneth Davidson, who co-authored with me the First Edition of these materials. I cannot in good conscience regret the appointment of Judge Ginsburg to the United States Court of Appeals for the District of Columbia, or Kenneth Davidson's move into government service. Still, their willing hands and wise counsel is sorely missed. To them I respectfully dedicate the Second Edition of these materials.

HERMA HILL KAY

July, 1981

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