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Permissive Veterans' Preference

A New Act to Permit Private Employers to Voluntarily
Exercise a Preference for Veterans in Employment

9/27/2010

*Currently, Title VII of the Civil Rights Act of 1964, amended 1991, at 42 U.S.C. Section 2000e et seq., prohibits voluntary veterans' preferences in employment as unlawfully discriminatory under Title VII due to the potential disparate impact on female employees and applicants. See **EEOC Policy Statement**. (Appendix 1, attached). Section 11 of Title VII permits voluntary veterans preference if permitted by state or local law. 42 U.S.C. 2000e-11. (Appendix 2, attached). See, also **Massachusetts v. Feeney**, 442 U.S. 256 (1979) (upholding constitutionality of veteran's preference laws) and **Bannerman v. Department of Youth Authority**, 436 F. Supp. 1273 (N.D.Cal.1977) ("Veterans' preference statutes have as their purpose the rewarding of veterans who have served their country and, recognizing that military experience may enhance a candidate's qualifications, the easing of their re-entry into the civilian job market.") aff'd 615 F.2d 847 (9th Cir. 1980) (Appendix 3, attached).*

Washington public employers are subject to mandatory veterans' preference by operation of state statute. See, RCW 73.16.010. (Appendix 2, attached). However, there is no preference applicable to the private sector. The legislation proposed below is designed to legalize veterans' preference in private sector employment and is modeled after the public employment preference statute, but is permissive, rather than mandatory.

PROPOSED HOUSE BILL _____

State of Washington 63rd Legislature 2011 Regular Session

By Representatives _____; by request of Joint
Committee on Veterans' and Military Affairs

Prefiled 12/___ /10.

Read first time 01/___/11.

Referred to Committee on

1 AN ACT Relating to veterans' relief; and adding RCW
2 73.16.025, permitting private employers to exercise a voluntary
3 veterans' preference in employment.
4

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:
6

7 **Sec. 1.** RCW 73.16.025 is adopted to read as follows:
8

9 Permissive preference in private employment.
10

11 (1) In every private, non-public employment in this state,
12 honorably discharged soldiers, sailors, and marines who are
13 veterans of any war of the United States, or of any military
14 campaign for which a campaign ribbon shall have been awarded,
15 and their widows or widowers, may be preferred for employment.
16 PROVIDED, That spouses of honorably discharged veterans who have
17 a service connected permanent and total disability may also be
18 preferred for employment. Such preferences shall not be
19 considered violations of any local and/or state equal employment
20 opportunity law, including but not limited to any statute or
21 regulation under RCW Chapter 49.60.
22

23 (2) "Veteran" has the same meaning as defined in RCW
24 41.04.005 and 41.04.007, and includes a current member of the
25 national guard or armed forces reserves who has been deployed to
26 serve in an armed conflict.
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APPENDIX 1

The U.S. Equal Employment Opportunity Commission

		Number
EEOC	NOTICE	N-915.056
		Date
		8/10/90

1. SUBJECT. Policy Guidance on Veterans' Preference Under Title VII.
2. PURPOSE. This policy document sets forth the Commission's position on the scope of the veterans' preference provision contained in Section 712 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-11 (1982).¹
3. EFFECTIVE DATE. Upon issuance.
4. EXPIRATION DATE. As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § a(5), this notice will remain in effect until rescinded or superseded.
5. ORIGINATOR. Title VII/EPA Division, Office of Legal Counsel.
6. INSTRUCTIONS. This notice supplements the discussion in Section 604.10(e) of the EEOC Compliance Manual, Volume II, Section 604, Theories of Discrimination. The notice should be filed as an appendix to that section.
7. SUBJECT MATTER.

Statutory Preferences

The federal government and virtually all of the states grant some form of employment preference to veterans.² Veterans' preference laws have traditionally been justified as measures designed to reward veterans for the sacrifice of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well-disciplined people to civil service occupations.³ However, as a result of long-standing federal statutes, regulations, and policies that have excluded women or sharply limited women's eligibility to serve in the armed forces and also of the fact that women have never been subjected to a military draft, only a very small percentage of veterans are women⁴ and, consequently, veterans' preference statutes operate overwhelmingly to the advantage of men.⁵

Despite their potential for adversely affecting the employment opportunities of women, veterans' preferences accorded pursuant to statute are not subject to challenge under Title VII by virtue of the exception provided in Section 712 of the Act.⁶ That section states:

Nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

42 U.S.C. § 2000e-11 (1982).

In light of Section 712, both the Commission and the courts have found no Title VII violation where a statutory basis exists for an employment preference granted to veterans, even though the preference disadvantages women. For example, in *Bannerman v. Department of Youth Authority*, 436 F. Supp. 1273, 16 EPD ¶ 8145 (N.D. Cal. 1977), *aff'd per curiam*, 615 F.2d 847, 22 EPD ¶ 30,772 (9th Cir. 1980), the court upheld the defendants' practice of awarding veterans additional points to increase their oral interview scores in making hiring selections for parole agent positions, a practice which competitively disadvantaged female plaintiffs. Under state law, a veteran who receives a

passing score on an entrance examination for a civil service position is allowed a credit of 10 points (15 points in the case of disabled veterans) to enhance the rank he achieved. The court held that Section 712 precludes the plaintiffs from attacking the state veterans' preference under Title VII. Nevertheless, the court took judicial notice of the fact that, although the statute was neutral on its face, in practical effect it benefitted male applicants more frequently than female applicants since males have served in the armed forces in disproportionately greater numbers than females. Consequently, when veterans' points were counted, the differences between the scores of men and women were statistically significant. 436 F. Supp. at 1279.

Similarly, in *Skillern v. Bolger*, 725 F.2d 1121, 33 EPD ¶ 34,064 (7th Cir.), *cert. denied*, 469 U.S. 835, 35 EPD ¶ 34,663 (1984), the court affirmed the involuntary dismissal of the plaintiff's complaint brought under Title VII and the Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq.* (1982), where the plaintiff's inability to obtain employment as a janitor with the Post Office resulted from a federal law that restricts Post Office hirings for custodial positions to veterans as long as veterans remain available, the plaintiff was not a veteran, and the Post Office had a surfeit of applications from veterans. Finding that Section 712 precluded the plaintiff's Title VII challenge of the defendant's hiring practices, the court proceeded to hold that section also precluded recovery under the Rehabilitation Act, even though the latter did not specifically adopt Title VII's veterans' preference provision.⁷ The court reasoned that, since the Rehabilitation Act incorporated the rights and remedies provided under Title VII, failure to impute Section 712 to actions brought under the Rehabilitation Act would expand the reach of that Act beyond that of Title VII, a result the court concluded that Congress did not intend. 725 F.2d at 1123.

Like the courts, the Commission has relied on Section 712 in upholding otherwise discriminatory employment preferences for veterans. See Commission Decision Nos. 74-64 and 80-21, CCH EEOC Decisions (1983) ¶¶ 6419 and 6812, respectively. In Commission Decision No. 74-64, the Commission concluded that a state employment agency's policy of referring veterans first when filling job orders was not subject to the coverage of Title VII where the policy was based on a combination of both federal and state law, the federal law conditioning the receipt of federal assistance on the state agency's acceptance of certain veterans' preference provisions and the state law incorporating those provisions. Likewise in Commission Decision No. 80-21, the Commission held that Section 712 foreclosed a sex discrimination challenge to the state personnel agency's utilization of an additional credit of 20% of a veteran's total score on a civil service examination where the veterans' preference points were invoked pursuant to state law.

Voluntary Preferences

In contrast to the foregoing, however, where an employment preference is conferred upon veterans on the employer's own initiative and is not mandated by statute, the discriminatory impact of the preference is not shielded from scrutiny under Title VII. As the language of Section 712 makes clear, the deference provided by that section applies only to veterans' preferences that are created by law and not to those that are voluntarily accorded to veterans by employers. Falling outside the terms of Section 712, voluntary preferences are subject to Title VII adverse impact analysis.

Based on recent national statistics,⁸ it is the Commission's position that voluntarily adopted veterans' preferences have an adverse impact on women. Accordingly, in charges raising this issue, the Commission will presume the existence of adverse impact. The presumption may be rebutted, however, where an employer shows that the preference does not adversely affect female applicants or employees based on either more narrowly drawn statistics (e.g., regional or local statistics) or its own applicant flow data/workforce statistics.⁹

Voluntary veterans' preferences have been invalidated on the basis of adverse impact by both the Commission and the courts.¹⁰ For example, in *Krenzer v. Ford*, 429 F. Supp. 499, 14 EPD ¶ 7514 (D.D.C. 1977), the court concluded that the Veterans Administration's policy of appointing only veterans to positions on the Board of Veterans Appeals violated Title VII where the policy was not founded on any statute, had a disproportionate impact on female attorneys and female physicians, and was not sufficiently job-related to constitute an absolute precondition to appointment despite its impact on women.

Similarly, the court in *Bailey v. Southeastern Area Joint Apprenticeship Committee*, 561 F. Supp. 895, 31 EPD ¶ 33,604 (N.D. W.Va. 1983), found that defendant's screening mechanism for selecting apprentice boilermakers, which included awarding applicants points on the basis of prior military service, had a disparate impact on women in general and the two female plaintiffs in particular, and that the defendant had not met its burden of showing a legitimate business necessity for the practice. In so holding, the court stated:

Title VII, unlike various other statutes and government regulations which have been enacted since World War II, does not accord veterans any employment preferences. Rather, Title VII seeks to secure equality of employment opportunity for members of certain protected classes. Inasmuch as veterans are not a protected class under Title VII, the statute leaves no room for a veteran preference which has a disparate impact on a protected class, e.g., women.

561 F. Supp. at 912.¹¹

At issue in *Brown v. Puget Sound Electrical Apprenticeship & Training Trust*, 732 F.2d 726, 34 EPD ¶ 34,338 (9th Cir. 1984), *cert. denied*, 469 U.S. 1108, 35 EPD ¶ 34,854 (1985), was the defendant's extension of a veterans' age credit adopted in good faith reliance on policies promulgated and endorsed by the U.S. Department of Labor. Although nonveteran applicants to the defendant's apprenticeship program were considered eligible only from age 18 to 26, veterans were allowed to deduct one year from their age for each year of military service, up to a maximum of four years. Noting that the defendant's reliance on Section 712 was misplaced since no law created the veterans' age credit, the court stated: "The [defendant's] age credit was adopted by a non-governmental private organization. The fact that it was encouraged to do so by an agency that is part of the executive branch of the federal government cannot convert the veterans' age credit into an act of Congress." 732 F.2d at 730-31.

In a divided decision in *Brown*, the Ninth Circuit nonetheless reversed the district court's holding that the age credit violated Title VII, finding that the credit did not have a discriminatory impact on nonveterans. The majority reasoned that the age credit had no adverse effect whatsoever on women since it provided no preference for veterans but, rather, only allowed some veterans the same amount of time (i.e., eight years) to apply for apprenticeship training as was available to nonveterans, compensating veterans for the time spent in military service during which they were unable to apply for apprenticeship training. *Id.* at 731-32. The dissenting opinion argued, however, that the age credit did have a disparate impact on women since, in the area covered by the program, 8% of males and only 0.2% of females were Vietnam or post-Vietnam veterans and since the effect of the age credit was that, of all applicants aged 26 through 29, only veterans were eligible for apprenticeships. The dissent concluded that, because the preferential treatment had a disparate impact on women, the age credit violated Title VII. *Id.* at 732-33.

Applying an adverse impact analysis, the Commission invalidated voluntary veterans' preferences in Commission Decision Nos. 77-27 and 77-40, CCH EEOC Decisions (1983) ¶¶ 6577 and 6591, respectively. In Commission Decision No. 77-27, an employer, an international union, and a local union were held jointly responsible for a training program procedure of awarding Vietnam-era veterans a 10% bonus on their test scores in selecting new and inexperienced applicants for entry into the elevator constructor trade. The Commission held the veterans' bonus unlawful in that case since it benefitted men far more often than women and since there was no business justification for it.

By the same token, in Commission Decision No. 77-40, the Commission found a Title VII violation in the respondent's practice, pursuant to an agreement with a teachers association, of granting experience credit for up to three years of military service in determining an employee's starting salary, resulting in the female charging party's being paid less than a male employee performing the same work. Since there was no law in operation that would bring Section 712 into play, the Commission noted that, because the agreement entered into by the respondent was purely voluntary, the respondent was responsible for any unlawfully discriminatory impact it might have. After reviewing the history of restrictions placed on women's access to military service, the Commission concluded:

The impact of any employment policy favoring veterans of the armed services is clear; women have far fewer opportunities to become veterans. In this case, the blanket, neutral policy of according veterans credit for military experience, irrespective of whether that experience is related to the job in question, operates to discriminate against women generally.

Commission Decision No. 77-40, CCH ¶ 6591 at 4462.

The Commission's position on this issue remains as set forth in Commission Decision Nos. 77-27 and 77-40. Where an employer *voluntarily* accords veterans any form of employment preference, without statutory authorization, the protections contained in Section 712 are inapplicable. Consequently, where the evidence shows that the veterans' preference has an adverse impact on female employees or applicants for employment, the preference constitutes sex discrimination violative of Title VII unless the employer can show that the preference serves, in a significant way, the legitimate employment goals of the employer. See *Wards Cove Packing Co., Inc. v. Atonio*, 109 S. Ct. 2115, 50 EPD ¶ 39,021 (1989), citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 3 EPD ¶ 8137 (1971).

In this regard, the Commission takes administrative notice of the fact that veterans' preferences, by their very nature, have historically placed women as a class at a disadvantage. As the cited statistics show, that disadvantage continues to date. Therefore, it is the Commission's view that such preferences have an adverse impact on women for Title VII purposes. Further, where a preference operates to totally exclude women from employment, an employer's burden of showing business justification for the preference is an especially heavy one.¹²

Preference as Pretext

In closing, the Commission notes that, even in circumstances under which a veterans' preference is authorized by law and the provisions of Section 712 apply, the preference may still run afoul of Title VII where the evidence shows disparate treatment in its application, transforming a valid preference into a pretext for unlawful discrimination. See Commission Decision No. 74-64, CCH EEOC Decisions (1983) ¶ 6419 (veterans' preference governed by law is covered by Section 712 where "there is no evidence that it has been administered disparately").¹³

The issue of pretext also arose in *Woody v. City of West Miami*, 477 F. Supp. 1073, 1080, 22 EPD ¶ 30,605 (S.D. Fla. 1979). In *Woody*, the court held that the city's policy of hiring retired 20-year service veterans as police officers, which was not based on a veterans' preference statute, was not justified by business necessity and was a pretext for sex discrimination against the female plaintiff since (1) the policy was not uniformly applied, (2) the policy was not necessary to the safe and efficient operation of the police department, (3) the policy was quickly discarded when the lawsuit was filed, and (4) the city hired its first policewoman, a nonveteran, immediately after the suit was filed.¹⁴

Charge Processing

In accordance with the foregoing discussion, a charge raising the issue of veterans' preference should be investigated and resolved in the following manner:

- 1) Where the veterans' preference is granted under the authority of a federal, state, territorial, or local law, the preference comes within the exception provided in Section 712 and is not subject to challenge under Title VII. A no cause LOD should be issued after:
 - a) obtaining a copy of the relevant statute and verifying that the preference extended by the employer is authorized by the statute, and
 - b) determining that the preference is accorded in a nondiscriminatory manner (i.e., without regard to an individual's protected class status).

Note: if the investigation reveals that the preference was not authorized by law or that it was applied in a discriminatory manner, see instructions below at Nos. 2 and 3, respectively.

2) Where the preference is voluntary (i.e., not authorized by law), it is subject to adverse impact analysis under Title VII. As discussed above, it is the Commission's position based on national statistics that veterans' preferences have an adverse impact on women. *See supra* notes 4, 8 and 9 and accompanying text. Where the employer fails to successfully rebut the Commission's presumption of adverse impact, a cause LOD should be issued unless the employer satisfies its burden of showing business justification. *See supra* note 10 and accompanying text on business justification under Wards Cove.

3) Even where the preference is authorized by law and, thus, otherwise within the scope of Section 712, it is still violative of Title VII if the investigation discloses that the preference is a pretext for discrimination. A cause LOD should be issued where the evidence reveals disparate treatment in the extension or application of the preference.

Questions concerning the application of this policy statement to the facts of a particular charge should be directed to the Regional Attorney for the Commission office in which the charge was filed.

____8/10/90_____ Approved: _____/s/_____
 Date Evan J. Kemp, Jr.
 Chairman

Footnotes

¹ For a discussion of veterans' preference under the Age Discrimination in Employment Act of 1967, as amended (ADEA), and the Equal Pay Act of 1963 (EPA), see *infra* note 14.

² *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 261 & nn.6-7, 19 EPD ¶ 9240 (1979). Although the forms vary, veterans' preferences generally fall into one of four categories: (1) preference in appointment, (2) preference in promotion, (3) preference in retention, and (4) additional substantive and procedural protections in disciplinary or removal actions not accorded to nonveterans. B. Schlei and P. Grossman, *Employment Discrimination Law*, 434 & nn.295-99 (2d ed. 1983).

³ *Feeney*, 442 U.S. at 265 & n.12. *See also Bannerman v. Department of Youth Authority*, 436 F. Supp. 1273, 1280, 16 EPD ¶ 8145 (N.D. Cal. 1977), *aff'd per curiam*, 615 F.2d 847, 22 EPD ¶ 30,772 (9th Cir. 1980).

⁴ Recent statistics show that, of a total veteran population of 27,227,000, there are 26,019,000 (95.6%) male veterans and 1,208,000 (4.4%) female veterans. Office of Information Management and Statistics, Department of Veterans Affairs, *Veteran Population* (semi-annual report, 3/31/89).

⁵ *See Feeney*, 442 U.S. at 269-70; *Krenzer v. Ford*, 429 F. Supp. 499, 502, 14 EPD ¶ 7514 (D.D.C. 1977); *Anthony v. Commonwealth of Massachusetts*, 415 F. Supp. 485, 489-90, 12 EPD ¶ 10,991 (D. Mass. 1976). For an historical overview of limitations placed on women seeking entry into the U.S. armed services, see *Feeney*, 442 U.S. 269 n.21, and *Anthony*, 415 F. Supp. at 489-90. *See also* Commission Decision No. 77-40, CCH EEOC Decisions (1983) ¶ 6591.

⁶ In *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), the Supreme Court upheld a Massachusetts statute that granted an absolute, lifetime hiring preference to veterans against attack under the Equal Protection Clause of the Fourteenth Amendment. In a two-step analysis, the court concluded that the statutory classification was gender-neutral and that, notwithstanding its adverse impact upon the employment opportunities of women, it was not enacted with discriminatory intent. *Id.* at 274-80. The Court noted that the Massachusetts statute was not challenged under Title VII, presumably because of the provision in Section 712 of the Act. *Id.* at 256 n.2.

⁷ The Commission notes that the court in *Skillern* analyzed the discrimination alleged by the plaintiff, a male who suffered from dyslexia, under the disparate treatment rather than the adverse impact theory. The Commission further notes, however, that, although the plaintiff's Title VII basis was not disclosed by the decision, his sex would clearly not give rise to an adverse impact claim under Title VII since veterans' preferences disproportionately favor males. Finally, although the Commission is unaware of any evidence that a veterans' preference would result in discriminatory impact on persons protected by the Rehabilitation Act, the Commission takes no position on whether Title VII's veterans' preference provision extends to the Rehabilitation Act, as held by the Seventh Circuit.

⁸ See *supra* note 4.

⁹ Cf. EEOC Compl. Man., Vol. II, Section 604, Theories of Discrimination, Appendix B (Conviction Records - Statistics).

¹⁰ Although the court cases and Commission decisions discussed in this section were decided prior to the Supreme Court's recent decision in *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), and in reliance upon the earlier decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), it is the Commission's position that, for purposes of these veterans' preference cases, the business justification standard set forth in *Wards Cove* is not dissimilar to that in *Griggs* and would not alter the outcome of these cases.

¹¹ *But cf. EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264, 39 EPD ¶ 35,853 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302, 45 EPD ¶ 37,681 (7th Cir. 1988). In performing its multiple regression analyses to disprove alleged sex discrimination against women with regard to compensation, Sears' model included, *inter alia*, veteran status. Finding that the inclusion of a veteran status variable was justified, the court stated:

Although there are many conflicting opinions of the value of military service in civilian employment, at least in some cases, military service is related to higher starting salaries, and can be related to higher job performance. If nothing else, the variable measures a type of pre-Sears experience which, like any pre-Sears experience, can affect checklist starting salary.

628 F. Supp. at 1349.

¹² Cf. *Krenzer v. Ford*, 429 F. Supp. 499, 503 (D.D.C. 1977) (relying on *Griggs*, court noted that employer's burden of showing that "veterans only" policy was job-related was a particularly heavy burden where the requirement, if not met, was an absolute bar to employment).

¹³ See also *Skillern v. Bolger*, 725 F.2d 1121, 1123 (7th Cir.), *cert. denied*, 469 U.S. 835 (1984) (plaintiff did not present one shred of evidence that the real reason he was not hired grew out of his handicap and not his failure to have served in the armed forces).

¹⁴ Although this policy guidance addresses the issue of veterans' preferences solely in a Title VII context, the Commission notes that a related issue may arise under the Age Discrimination in Employment Act of 1967, as amended (ADEA), 29 U.S.C. § 621 *et seq.* (1982), where a veterans' preference is challenged as discriminating against persons in the protected age group. Even though the ADEA, unlike Title VII, contains no veterans' preference provision, an employer might assert in defense to such a claim that veteran status is a "reasonable factor other than age" under Section 4(f) (1) of the ADEA. See, e.g., *Marshall v. Goodyear Tire & Rubber Co.*, 19 EPD ¶ 8973 at 6050 (W.D. Tenn. 1979) (employer failed to establish reasonable factor other than age defense in state employment office's referral preference for Vietnam veterans where, *inter alia*, Vietnam veterans over age 40 were rejected); *Hodgson v. Approved Personnel Service, Inc.*, 529 F.2d 760, 767-68 n.14, 10 EPD ¶ 10,472 (4th Cir. 1975) (no ADEA violation in employment agency's help-wanted ads addressed to returning veterans where ads time-related to end of Vietnam war and not all returning veterans were young). The Commission further notes that a similar issue may be presented under the Equal Pay Act of 1963 (EPA), 29 U.S.C. § 206(d) (1) (1982). While the EPA, like the ADEA, is silent on the issue of veterans' preferences, veteran status may also be claimed to constitute a "factor other than

sex" for purposes of justifying a pay differential between male and female employees. *See, e.g., Fallon v. State of Illinois*, 882 F.2d 1206, 1211-12, 51 EPD ¶ 39,255 (7th Cir. 1989) (where state statute required that Veterans Service Officers (VSOs), but not Veterans Service Officer Associates (VSOAs), be wartime veterans, state employer's defense that difference in pay between VSOs (all male) and VSOAs (all female) was based on VSOs' veteran status was improperly rejected by district court as matter of law; reversing and remanding, appellate court noted the relation between veteran status and job at issue in that case and stated: "If applied in good faith and in nondiscriminatory manner, we believe that wartime veteran status can be a legitimate factor other than sex"). Because veteran status is so closely connected to sex, however, it is the Commission's position that, if such status bears no relationship to the requirements of the job or to the individual's performance of the job, the employer will probably not be able to sustain the defense. *Cf. Commission's EPA Interpretations*, 29 C.F.R. § 1620.21 (1989) ("head of household" status). Generally, to qualify as a valid factor other than sex, veteran status should be job-related and applied nondiscriminatorily. *See EEOC Compl. Man. § 708, EPA Defenses* (particularly §§ 708.5 and 708.6).

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APPENDIX 2

the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.

(d) Consultation and coordination between Commission and interested State and Federal agencies in prescribing recordkeeping and reporting requirements; availability of information furnished pursuant to recordkeeping and reporting requirements; conditions on availability

In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies and shall endeavor to coordinate its requirements with those adopted by such agencies. The Commission shall furnish upon request and without cost to any State or local agency charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection.

(e) Prohibited disclosures; penalties

It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty, of a misdemeanor and upon conviction thereof, shall be fined not more than \$1,000, or imprisoned not more than one year.

(Pub. L. 88-352, title VII, §709, July 2, 1964, 78 Stat. 262; Pub. L. 92-261, §6, Mar. 24, 1972, 86 Stat. 107.)

AMENDMENTS

1972—Subsec. (b). Pub. L. 92-261 inserted provisions authorizing the Commission to engage in and contribute to the cost of research and other projects undertaken by State and local agencies and provisions authorizing the Commission to make advance payments to State and local agencies and their employees for services rendered to the Commission, and struck out provisions relating to agreements between the Commission and State and local agencies prohibiting private civil actions under section 2000e-5 of this title in specified cases.

Subsec. (c). Pub. L. 92-261 struck out “Except as provided in subsection (d) of this section,” before “every employer, employment agency, and labor organization subject to this subchapter shall (1)”, required the party seeking an exemption to bring an action in the district court only after the Commission denied the application for the exemption, and inserted provision which authorized the Commission, or the Attorney General in a case involving a government, etc., to apply for a court

order compelling compliance with the recordkeeping and reporting obligations set out in this subsection.

Subsec. (d). Pub. L. 92-261 substituted provisions requiring consultation and coordination between Federal and State agencies in prescribing recordkeeping and reporting requirements pursuant to subsec. (c) of this section, and authorizing the Commission to furnish information obtained pursuant to subsec. (c) of this section to interested State and local agencies, for provisions exempting from recordkeeping and reporting requirements employers, etc., required to keep records and make reports under State or local fair employment practice laws, except for the maintenance of notations by such employers, etc., which reflect the differences in coverage or enforcement between State or local laws and the provisions of this subchapter, and dispensing with recordkeeping and reporting requirements where the employer reports under some Executive Order prescribing fair employment practices for Government contractors or subcontractors.

§ 2000e-9. Conduct of hearings and investigations pursuant to section 161 of title 29

For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 161 of title 29 shall apply.

(Pub. L. 88-352, title VII, §710, July 2, 1964, 78 Stat. 264; Pub. L. 92-261, §7, Mar. 24, 1972, 86 Stat. 109.)

AMENDMENTS

1972—Pub. L. 92-261 substituted provisions making applicable section 161 of title 29 to all hearings and investigations conducted by the Commission or its authorized agents or agencies, for provisions enumerating the investigatory powers of the Commission and the procedure for their enforcement.

§ 2000e-10. Posting of notices; penalties

(a) Every employer, employment agency, and labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts, from or, summaries of, the pertinent provisions of this subchapter and information pertinent to the filing of a complaint.

(b) A willful violation of this section shall be punishable by a fine of not more than \$100 for each separate offense.

(Pub. L. 88-352, title VII, §711, July 2, 1964, 78 Stat. 265.)

§ 2000e-11. Veterans' special rights or preference

Nothing contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

(Pub. L. 88-352, title VII, §712, July 2, 1964, 78 Stat. 265.)

§ 2000e-12. Regulations; conformity of regulations with administrative procedure provisions; reliance on interpretations and instructions of Commission

(a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provi-

RCW 73.16.010

Preference in public employment.

In every public department, and upon all public works of the state, and of any county thereof, honorably discharged soldiers, sailors, and marines who are veterans of any war of the United States, or of any military campaign for which a campaign ribbon shall have been awarded, and their widows or widowers, shall be preferred for appointment and employment. Age, loss of limb, or other physical impairment, which does not in fact incapacitate, shall not be deemed to disqualify them, provided they possess the capacity necessary to discharge the duties of the position involved: PROVIDED, That spouses of honorably discharged veterans who have a service connected permanent and total disability shall also be preferred for appointment and employment.

[1975 1st ex.s. c 198 § 1; 1973 1st ex.s. c 154 § 107; 1951 c 29 § 1; 1943 c 141 § 1; 1919 c 26 § 1; 1915 c 129 § 1; 1895 c 84 § 1; Rem. Supp. 1943 § 10753.]

Notes:

Severability -- 1973 1st ex.s. c 154: See note following RCW [2.12.030](#).

APPENDIX 3



LEXSEE 442 U.S. 256

PERSONNEL ADMINISTRATOR OF MASSACHUSETTS ET AL. v. FEENEY

No. 78-233

SUPREME COURT OF THE UNITED STATES

442 U.S. 256; 99 S. Ct. 2282; 60 L. Ed. 2d 870; 1979 U.S. LEXIS 128; 19 Fair Empl. Prac. Cas. (BNA) 1377; 19 Empl. Prac. Dec. (CCH) P9240

February 26, 1979, Argued
June 5, 1979, Decided

SUBSEQUENT HISTORY: On remand at *Feeney v. Massachusetts*, 475 F. Supp. 109, 1979 U.S. Dist. LEXIS 10327 (D. Mass., 1979)

PRIOR HISTORY: APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. *Feeney v. Massachusetts*, 451 F. Supp. 143, 1978 U.S. Dist. LEXIS 17967 (D. Mass., 1978)

DISPOSITION: 451 F. Supp. 143, reversed and remanded.

CORE TERMS: veteran, Mass Acts, male, civil service, military, classification, nonveteran, female, hiring, gender, sex, discriminatory, gender-based, public employment, formula, appointment, wartime, score, employment opportunities, reaffirmed, army, armed forces, adverse effect, disabled veterans, absolute-preference, discriminate, requisition, eligible list, disproportionate, discharged

DECISION:

Massachusetts law operating to advantage of males by giving veterans lifetime preference for state employment, held not violative of equal protection.

SUMMARY:

A female nonveteran who had taken and passed a number of open competitive examinations for civil service positions with the state of Massachusetts failed to secure employment for positions on several occasions because of the Massachusetts Veterans Preference Sta-

tute, which grants an absolute lifetime preference to veterans by requiring that "any person, male or female, including a nurse," qualifying for a civil service position, who was honorably discharged from the United States Armed Forces after at least 90 days of active service, at least one day of which was during wartime, must be considered for appointment to a civil service position ahead of any qualifying nonveterans. Alleging that the absolute preference formula, by inevitably operating to exclude women from consideration for the best Massachusetts civil service jobs, denied women equal protection of the laws in violation of the United States Constitution, the woman brought an action in the United States District Court for the District of Massachusetts. The District Court declared the law unconstitutional and enjoined its operation (415 F Supp 485), but on direct appeal from the decision of the three-judge District Court, the United States Supreme Court vacated the judgment and remanded the case for further consideration in light of an intervening Supreme Court decision holding that a neutral law does not violate the *Fourteenth Amendment's equal protection clause* solely because it results in a racially disproportionate impact, it being necessary to trace such disproportionate impact to a purpose to discriminate. On remand, the District Court reaffirmed its original judgment, concluding that a veterans' hiring preference is inherently nonneutral because it favors a class from which women have traditionally been excluded, and that the consequences of the Massachusetts absolute preference formula for the employment opportunities of women were too inevitable to have been unintended (451 F Supp 143).

On direct appeal from the decision of the three-judge District Court, the United States Supreme Court reversed and remanded. In an opinion by Stewart, J., joined by

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Burger, Ch. J., and White, Powell, Blackmun, Rehnquist, and Stevens, JJ., it was held that the Massachusetts Veterans Preference Statute does not violate the *equal protection clause of the Fourteenth Amendment* on sex discrimination grounds, since the distinction drawn by the statute between veterans and nonveterans is not a pretext for gender discrimination, and it had not been shown that the law in any way reflects a purpose to discriminate on the basis of sex.

Stevens, J., joined by White, J., concurring, expressed the view that the claim that the law was intended to benefit males as a class over females as a class was refuted by the fact that the number of males disadvantaged by the law (1,867,000) was sufficiently large and sufficiently close to the number of disadvantaged females (2,954,000).

Marshall, J., joined by Brennan, J., dissenting, expressed the view that Massachusetts' choice of an absolute veterans preference system evinced purposeful gender-based discrimination and could not withstand scrutiny under the *equal protection clause* because the statutory scheme bore no substantial relationship to a legitimate governmental objective.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

LAW §325

equal protection -- state employment -- veterans preference -- sex discrimination --

Headnote:[1A][1B][1C][1D]

A state law granting an absolute lifetime preference to veterans, by requiring that "any person, male or female, including a nurse," qualifying for a civil service position, who was honorably discharged from the United States Armed Forces after 90 days of active service, at least one day of which was during wartime, must be considered for appointment to a civil service position ahead of any qualifying nonveterans, does not violate the *equal protection clause of the Fourteenth Amendment* as discriminating on the basis of sex, notwithstanding that the preference operates to the advantage of males, where the distinction drawn by the statute between veterans and nonveterans is not a pretext for gender discrimination, and it is not shown that the law in any way reflects a purpose to discriminate on the basis of sex. (Marshall and Brennan, JJ., dissented from this holding.)

[***LEdHN2]

LAW §317

Fourteenth Amendment -- equal protection -- classification --

Headnote:[2]

The equal protection guarantee of the *Fourteenth Amendment* does not take from the states all power of classification.

[***LEdHN3]

COURTS §92.7

legislative and judicial responsibility -- effects of law --

Headnote:[3]

The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility.

[***LEdHN4]

LAW §317

equal protection -- legislative classification --

Headnote:[4]

In assessing an equal protection challenge, a court is called upon only to measure the basic validity of the legislative classification.

[***LEdHN5]

RIGHTS §4.5

racial classification -- equal protection --

Headnote:[5]

A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification, and such applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination; however, even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the *equal protection clause of the Fourteenth Amendment* only if that impact can be traced to a discriminatory purpose.

[***LEdHN6]

LAW §325

sex classification --

Headnote:[6]

Classifications based upon gender must bear a close and substantial relationship to important governmental objectives.

[***LEdHN7]

LAW §325

OFFICERS §5

public employment -- states' discretion -- preference of males -- equal protection --

Headnote:[7]

Although public employment is not a constitutional right, and the states have wide discretion in framing employee qualifications, any state law overtly or covertly designed to prefer males over females in public employment will require an exceedingly persuasive justification to withstand a constitutional challenge under the *equal protection clause of the Fourteenth Amendment*.

[***LEdHN8]

LAW §314

Fourteenth Amendment --

Headnote:[8]

The *Fourteenth Amendment* guarantees equal laws, not equal results.

[***LEdHN9]

LAW §325

gender-based distinctions -- equal protection --

Headnote:[9]

For purposes of equal protection, when a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionately adverse, a two-fold inquiry is appropriate: the first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based; if the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination, and in the second inquiry, impact provides an important starting point, although purposeful discrimination is the condition that offends the United States Constitution.

[***LEdHN10]

LAW §316

equal protection -- discrimination -- intent -- degree of discrimination --

Headnote:[10]

For purposes of equal protection, invidious discrimination does not become less so because the discrimina-

tion accomplished is of a lesser magnitude than that intended; discriminatory intent is not amenable to calibration.

[***LEdHN11]

EVIDENCE §166

presumption -- intent -- criminal and civil law --

Headnote:[11]

In both criminal and civil law, it is presumed that a person intends the natural and foreseeable consequences of his voluntary actions.

[***LEdHN12]

LAW §316

equal protection -- discriminatory intent --

Headnote:[12A][12B]

For purposes of equal protection analysis, the inevitability or foreseeability of consequences of a neutral rule may bear upon the existence of discriminatory intent, and when the adverse consequences of a law upon an identifiable group are inevitable, a strong inference that the adverse effects were desired can reasonably be drawn, but in such inquiry--made as it is under the United States Constitution--an inference is a working tool, not a synonym for proof, and when the impact is essentially an unavoidable consequence of a legislative policy that has always been deemed legitimate in itself, and when the statutory history and all of the available evidence affirmatively demonstrate the opposite of the inference, the inference does not ripen into proof.

SYLLABUS

During her 12-year tenure as a state employee, appellee, who is not a veteran, had passed a number of open competitive civil service examinations for better jobs, but because of Massachusetts' veterans' preference statute, she was ranked in each instance below male veterans who had achieved lower test scores than appellee. Under the statute, all veterans who qualify for state civil service positions must be considered for appointment ahead of any qualifying nonveterans. The statutory preference, which is available to "any person, male or female, including a nurse," who was honorably discharged from the United States Armed Forces after at least 90 days of active service, at least one day of which was during "wartime," operates overwhelmingly to the advantage of males. Appellee brought an action in Federal District Court, alleging that the absolute-preference formula established in the Massachusetts statute inevitably operates to exclude women from consideration for the best state civil service jobs and thus discriminates against

women in violation of the *Equal Protection Clause of the Fourteenth Amendment*. A three-judge court declared the statute unconstitutional and enjoined its operation, finding that while the goals of the preference were legitimate and the statute had not been enacted for the purpose of discriminating against women, the exclusionary impact upon women was so severe as to require the State to further its goals through a more limited form of preference. On an earlier appeal, this Court vacated the judgment and remanded the case for further consideration in light of the intervening decision in *Washington v. Davis*, 426 U.S. 229, which held that a neutral law does not violate the *Equal Protection Clause* solely because it results in a racially disproportionate impact and that, instead, the disproportionate impact must be traced to a purpose to discriminate on the basis of race. Upon remand, the District Court reaffirmed its original judgment, concluding that a veterans' hiring preference is inherently non-neutral because it favors a class from which women have traditionally been excluded, and that the consequences of the Massachusetts absolute-preference formula for the employment opportunities of women were too inevitable to have been "unintended."

Held: Massachusetts, in granting an absolute lifetime preference to veterans, has not discriminated against women in violation of the *Equal Protection Clause of the Fourteenth Amendment*. Pp. 271-281.

(a) Classifications based upon gender must bear a close and substantial relationship to important governmental objectives. Although public employment is not a constitutional right and the States have wide discretion in framing employee qualifications, any state law overtly or covertly designed to prefer males over females in public employment would require an exceedingly persuasive justification to withstand a constitutional challenge under the *Equal Protection Clause*. Pp. 271-273.

(b) When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionately adverse, a twofold inquiry is appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. Pp. 273-274.

(c) Here, the appellee's concession and the District Court's finding that the Massachusetts statute is not a pretext for gender discrimination are clearly correct. Apart from the facts that the definition of "veterans" in the statute has always been neutral as to gender and that Massachusetts has consistently defined veteran status in a way that has been inclusive of women who have served in the military, this is not a law that can plausibly, or

even rationally, be explained only as a gender-based classification. Significant numbers of nonveterans are men, and all nonveterans -- male as well as female -- are placed at a disadvantage. The distinction made by the Massachusetts statute is, as it seems to be, quite simply between veterans and nonveterans, not between men and women. Pp. 274-275.

(d) Appellee's contention that this veterans' preference is "inherently nonneutral" or "gender-biased" in the sense that it favors a status reserved under federal military policy primarily to men is wholly at odds with the District Court's central finding that Massachusetts has not offered a preference to veterans for the purpose of discriminating against women; nor can it be reconciled with the assumption made by both the appellee and the District Court that a more limited hiring preference for veterans could be sustained, since the degree of the preference makes no constitutional difference. Pp. 276-278.

(e) While it would be disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable, nevertheless "discriminatory purpose" implies more than intent as volition or intent as awareness of consequences; it implies that the decisionmaker selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group. When the totality of legislative actions establishing and extending the Massachusetts veterans' preference are considered, the law remains what it purports to be: a preference for veterans of either sex over nonveterans of either sex, not for men over women. Pp. 278-280.

(f) Although absolute and permanent preferences have always been subject to the objection that they give the veteran more than a square deal, the *Fourteenth Amendment* "cannot be made a refuge from ill-advised . . . laws." *District of Columbia v. Brooke*, 214 U.S. 138, 150. The substantial edge granted to veterans by the Massachusetts statute may reflect unwise policy, but appellee has simply failed to demonstrate that the law in any way reflects a purpose to discriminate on the basis of sex. Pp. 280-281.

COUNSEL: Thomas R. Kiley, Assistant Attorney General of Massachusetts, argued the cause for appellants. With him on the brief were Francis X. Bellotti, Attorney General, and Edward F. Vena, Assistant Attorney General.

Richard P. Ward argued the cause for appellee. With him on the brief were Stephen B. Perlman, Eleanor D. Acheson, John H. Mason, and John Reinstein. *

* Briefs of amici curiae urging reversal were filed by Solicitor General McCree, Deputy Solicitor General Easterbrook, and William C. Bryson for the United States; and by John J. Curtin, Jr., for the American Legion.

Samuel J. Rabinove and Phyllis N. Segal filed a brief for the National Organization for Women et al. as amici curiae urging affirmance.

Briefs of amici curiae were filed by Deanne Siemer for the United States Office of Personnel Management et al.; and by Paul D. Kamenar for the Washington Legal Foundation.

JUDGES: STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, in which WHITE, J., joined, post, p. 281. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, post, p. 281.

OPINION BY: STEWART

OPINION

[*259] [***875] [**2285] MR. JUSTICE STEWART delivered the opinion of the Court.

[***LEdHR1A] [1A]This case presents a challenge to the constitutionality of the Massachusetts veterans' preference statute, *Mass. Gen. Laws Ann., ch. 31, § 23*, on the ground that it discriminates against women in violation of the *Equal Protection Clause of the Fourteenth Amendment*. Under ch. 31, § 23, ¹ all [**2286] veterans who qualify for state civil service positions must be considered for appointment ahead of any qualifying nonveterans. The preference operates overwhelmingly to the advantage of males.

1 For the text of ch. 31, § 23, see n. 10, *infra*. The general Massachusetts Civil Service law, *Mass. Gen. Laws Ann., ch. 31*, was recodified on January 1, 1979, 1978 *Mass. Acts*, ch. 393, and the veterans' preference is now found at *Mass. Gen. Laws Ann., ch. 31, § 26* (West 1979). Citations in this opinion, unless otherwise indicated, are to the ch. 31 codification in effect when this litigation was commenced.

The appellee Helen B. Feeney is not a veteran. She brought this action pursuant to 42 U. S. C. § 1983, alleging that the absolute-preference formula established in ch. 31, § 23, inevitably operates to exclude women from

consideration for the best Massachusetts civil service jobs and thus unconstitutionally denies them the equal protection of the laws. ² The three-judge District Court agreed, one judge dissenting. *Anthony v. Massachusetts*, 415 *F.Supp.* 485 (Mass. 1976). ³

2 No statutory claim was brought under Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.* Section 712 of the Act, 42 U. S. C. § 2000e-11, provides that "[nothing] contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial or local law creating special rights or preference for veterans." The parties have evidently assumed that this provision precludes a Title VII challenge.

3 The appellee's case had been consolidated with a similar action brought by Carol A. Anthony, a lawyer whose efforts to obtain a civil service Counsel I position had been frustrated by ch. 31, § 23. In 1975, Massachusetts exempted all attorney positions from the preference, 1975 *Mass. Acts*, ch. 134, and Anthony's claims were accordingly found moot by the District Court. *Anthony v. Massachusetts*, 415 *F.Supp.*, at 495.

[*260] The District Court found that the absolute preference afforded by Massachusetts to veterans has a devastating impact upon the employment opportunities of women. Although it found that the goals of the preference were worthy and legitimate and that the legislation had not been enacted for the purpose of discriminating against women, the court reasoned that its exclusionary impact upon women was nonetheless so severe as to require the State to further its goals through a more limited form of preference. Finding [***876] that a more modest preference formula would readily accommodate the State's interest in aiding veterans, the court declared ch. 31, § 23, unconstitutional and enjoined its operation. ⁴

4 The District Court entered a stay pending appeal, but the stay was rendered moot by the passage of an interim statute suspending ch. 31, § 23, pending final judgment and replacing it with an interim provision granting a modified point preference to veterans. 1976 *Mass. Acts*, ch. 200, now codified at *Mass. Gen. Laws Ann., ch. 31, § 26* (West 1979).

Upon an appeal taken by the Attorney General of Massachusetts, ⁵ this Court vacated the judgment and remanded the case for further consideration in light of our intervening decision in *Washington v. Davis*, 426 U.S. 229. *Massachusetts v. Feeney*, 434 U.S. 884. The *Davis* case held that a neutral law does not violate the *Equal Protection Clause* solely because it results in a

racially disproportionate impact; instead the disproportionate impact must be traced to a purpose to discriminate on the basis of race. 426 U.S., at 238-244.

5 The Attorney General appealed the judgment over the objection of other state officers named as defendants. In response to our certification of the question whether Massachusetts law permits this, see *Massachusetts v. Feeney*, 429 U.S. 66, the Supreme Judicial Court answered in the affirmative. *Feeney v. Commonwealth*, 373 Mass. 359, 366 N. E. 2d 1262 (1977).

Upon remand, the District Court, one judge concurring and one judge again dissenting, concluded that a veterans' hiring preference is inherently nonneutral because it favors a class from which women have traditionally been excluded, and that [*261] the consequences of the Massachusetts absolute-preference formula for the employment opportunities of women were too inevitable to have been "unintended." Accordingly, the court reaffirmed its original judgment. *Feeney v. Massachusetts*, 451 F.Supp. 143. The Attorney General again appealed to this Court pursuant to 28 U. S. C. § 1253, and probable jurisdiction of the [*2287] appeal was noted. 439 U.S. 891.

I

A

The Federal Government and virtually all of the States grant some sort of hiring preference to veterans.⁶ The Massachusetts preference, which is loosely termed an "absolute lifetime" preference, is among the most generous.⁷ It [*262] applies to all positions in the State's classified civil [***877] service, which constitute approximately 60% of the public jobs in the State. It is available to "any person, male or female, including a nurse," who was honorably discharged from the United States Armed Forces after at least 90 days of active service, at least one day of which was during "wartime."⁸ Persons who are deemed veterans and who are otherwise qualified for a particular civil service job may exercise the preference at any time and as many times as they wish.⁹

6 The first comprehensive federal veterans' statute was enacted in 1944. Veterans' Preference Act of 1944, 58 Stat. 387. The Federal Government has, however, engaged in preferential hiring of veterans, through official policies and various special laws, since the Civil War. See, e. g., Res. of Mar. 3, 1865, No. 27, 13 Stat. 571 (hiring preference for disabled veterans). See generally House Committee on Veterans' Affairs, The Provision of Federal Benefits for

Veterans, An Historical Analysis of Major Veterans' Legislation, 1862-1954, 84th Cong., 1st Sess., 258-265 (Comm. Print 1955). For surveys of state veterans' preference laws, many of which also date back to the late 19th century, see State Veterans' Laws, Digests of State Laws Regarding Rights, Benefits, and Privileges of Veterans and Their Dependents, House Committee on Veterans' Affairs, 91st Cong., 1st Sess. (1969); Fleming & Shanor, Veterans Preferences in Public Employment: Unconstitutional Gender Discrimination?, 26 Emory L. J. 13 (1977).

7 The forms of veterans' hiring preferences vary widely. The Federal Government and approximately 41 States grant veterans a point advantage on civil service examinations, usually 10 points for a disabled veteran and 5 for one who is not disabled. See Fleming & Shanor, *supra* n. 6, at 17, and n. 12 (citing statutes). A few offer only tie-breaking preferences. *Id.*, at n. 14 (citing statutes). A very few States, like Massachusetts, extend absolute hiring or positional preferences to qualified veterans. *Id.*, at n. 13. See, e. g., N. J. Stat. Ann. § 11: 27-4 (West 1976); S. D. Comp. Laws Ann. § 3-3-1 (1974); Utah Code Ann. § 34-30-11 (1953); Wash. Rev. Code §§ 41.04.010, 73.16.010 (1976).

8 *Massachusetts Gen. Laws Ann., ch. 4, § 7*, Forty-third (West 1976), which supplies the general definition of the term "veteran," reads in pertinent part:

"Veteran" shall mean any person, male or female, including a nurse, (a) whose last discharge or release from his wartime service, as defined herein, was under honorable conditions and who (b) served in the army, navy, marine corps, coast guard, or air force of the United States for not less than ninety days active service, at least one day of which was for wartime service"

Persons awarded the Purple Heart, ch. 4, § 7, Forty-third, or one of a number of specified campaign badges or the Congressional Medal of Honor are also deemed veterans. *Mass. Gen. Laws Ann., ch. 31, § 26* (West 1979).

"Wartime service" is defined as service performed by a "Spanish War veteran," a "World War I veteran," a "World War II veteran," a "Korean veteran," a "Vietnam veteran," or a member of the "WAAC." *Mass. Gen. Laws Ann., ch. 4, § 7*, Forty-third (West 1976). Each of these terms is further defined to specify a period of service. The statutory definitions, taken together, cover the entire period from September 16, 1940, to May 7, 1975. See *ibid.*

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"WAAC" is defined as follows: "any woman who was discharged and so served in any corps or unit of the United States established for the purpose of enabling women to serve with, or as auxiliary to, the armed forces of the United States and such woman shall be deemed to be a veteran." *Ibid.*

9 The Massachusetts preference law formerly imposed a residency requirement, see 1954 Mass. Acts, ch. 627, § 3 (eligibility conditioned upon Massachusetts domicile prior to induction or five years' residency in State). The distinction was invalidated as violative of the *Equal Protection Clause* in *Stevens v. Campbell*, 332 F.Supp. 102, 105 (Mass. 1971). Cf. *August v. Bronstein*, 369 F.Supp. 190 (SDNY 1974) (upholding, *inter alia*, nondurational residency requirement in New York veterans' preference statute), summarily aff'd, 417 U.S. 901.

[*263] Civil service positions in Massachusetts fall into two general categories, labor and official. For jobs in the official service, with which the proofs in this action were concerned, the preference mechanics are uncomplicated. All applicants for employment must take competitive examinations. [**2288] Grades are based on a formula that gives weight both to objective test results and to training and experience. Candidates who pass are then ranked in the order of their respective scores on an "eligible list." Chapter 31, § 23, requires, however, that disabled veterans, veterans, and surviving spouses and surviving parents of veterans be ranked -- in the order of their respective scores -- above all other candidates.¹⁰

10 Chapter 31, § 23, provides in full:

"The names of persons who pass examinations for appointment to any position classified under the civil service shall be placed upon the eligible lists in the following order: --

"(1) Disabled veterans . . . in the order of their respective standing; (2) veterans in the order of their respective standing; (3) persons described in section twenty-three B [the widow or widowed mother of a veteran killed in action or who died from a service-connected disability incurred in wartime service and who has not remarried] in the order of their respective standing; (4) other applicants in the order of their respective standing. Upon receipt of a requisition, names shall be certified from such lists according to the method of certification prescribed by the civil service rules. A disabled veteran shall be retained in employment in preference to all other persons, including veterans."

A 1977 amendment extended the dependents' preference to "surviving spouses," and "surviving parents." 1977 Mass. Acts, ch. 815.

Rank [***878] on the eligible list and availability for employment are the sole factors that determine which candidates are considered for appointment to an official civil service position. When a public agency has a vacancy, it requisitions a list of "certified eligibles" from the state personnel division. Under formulas prescribed by civil service rules, a small number of candidates from the top of an appropriate list, three if there is only one vacancy, are certified. The appointing agency [*264] is then required to choose from among these candidates.¹¹ Although the veterans' preference thus does not guarantee that a veteran will be appointed, it is obvious that the preference gives to veterans who achieve passing scores a well-nigh absolute advantage.

11 A 1978 amendment requires the appointing authority to file a written statement of reasons if the person whose name was not highest is selected. 1978 Mass. Acts, ch. 393, § 11, currently codified at *Mass. Gen. Laws Ann., ch. 31, § 27* (West 1979).

B

The appellee has lived in Dracut, Mass., most of her life. She entered the work force in 1948, and for the next 14 years worked at a variety of jobs in the private sector. She first entered the state civil service system in 1963, having competed successfully for a position as Senior Clerk Stenographer in the Massachusetts Civil Defense Agency. There she worked for four years. In 1967, she was promoted to the position of Federal Funds and Personnel Coordinator in the same agency. The agency, and with it her job, was eliminated in 1975.

During her 12-year tenure as a public employee, Ms. Feeney took and passed a number of open competitive civil service examinations. On several she did quite well, receiving in 1971 the second highest score on an examination for a job with the Board of Dental Examiners, and in 1973 the third highest on a test for an Administrative Assistant position with a mental health center. Her high scores, however, did not win her a place on the certified eligible list. Because of the veterans' preference, she was ranked sixth behind five male veterans on the Dental Examiner list. She was not certified, and a lower scoring veteran was eventually appointed. On the 1973 examination, she was placed in a position on the list behind 12 male veterans, 11 of whom had lower scores. Following the other examinations that she took, her name was similarly ranked below those of veterans who had achieved passing grades.

[*265] Ms. Feeney's interest in securing a better job in state government did not wane. Having been consistently eclipsed by veterans, however, she eventually concluded that further competition for civil service positions of interest to veterans would be futile. In 1975, shortly after her civil defense job was abolished, she commenced this litigation.

[***879] [**2289] C

The veterans' hiring preference in Massachusetts, as in other jurisdictions, has traditionally been justified as a measure designed to reward veterans for the sacrifice of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well-disciplined people to civil service occupations.¹² See, e. g., *Hutcheson v. Director of Civil Service*, 361 Mass. 480, 281 N. E. 2d 53 (1972). The Massachusetts law dates back to 1884, when the State, as part of its first civil service legislation, gave a statutory preference to civil service applicants who were Civil War veterans if their qualifications were equal to those of nonveterans. 1884 Mass. Acts, ch. 320, § 14 (sixth). This tie-breaking provision blossomed into a truly absolute preference in 1895, when the State enacted its first general veterans' preference law and exempted veterans from all merit selection requirements. 1895 Mass. Acts, ch. 501, § 2. In response to a challenge brought by a male nonveteran, this statute was declared violative of state constitutional provisions guaranteeing that government should be [*266] for the "common good" and prohibiting hereditary titles. *Brown v. Russell*, 166 Mass. 14, 43 N. E. 1005 (1896).

12 Veterans' preference laws have been challenged so often that the rationale in their support has become essentially standardized. See, e. g., *Koelfgen v. Jackson*, 355 F.Supp. 243 (Minn. 1972), summarily aff'd, 410 U.S. 976; *August v. Bronstein*, supra; *Rios v. Dillman*, 499 F.2d 329 (CA5 1974); cf. *Mitchell v. Cohen*, 333 U.S. 411, 419 n. 12. See generally Blumberg, De Facto and De Jure Sex Discrimination Under the Equal Protection Clause: A Reconsideration of the Veterans' Preference in Public Employment, 26 Buffalo L. Rev. 3 (1977). For a collection of early cases, see Annot., Veterans' Preference Laws, 161 A. L. R. 494 (1946).

The current veterans' preference law has its origins in an 1896 statute, enacted to meet the state constitutional standards enunciated in *Brown v. Russell*. That statute limited the absolute preference to veterans who were otherwise qualified.¹³ A closely divided Supreme Judicial Court, in an advisory opinion issued the same year, concluded that the preference embodied in such a statute would be valid. *Opinion of the Justices*, 166 Mass. 589,

44 N. E. 625 (1896). In 1919, when the preference was extended to cover the veterans of World War I, the formula was further limited to provide for a priority in eligibility, in contrast to an absolute preference in hiring.¹⁴ See *Corliss v. Civil Service Comm'rs*, 242 Mass. 61, [***880] 136 N. E. 356 (1922). In *Mayor of Lynn v. Commissioner of Civil Service*, 269 Mass. 410, 414, 169 N. E. 502, 503-504 (1929), the Supreme Judicial Court, adhering to the views expressed in its 1896 advisory opinion, sustained this statute against a state constitutional challenge.

13 1896 Mass. Acts, ch. 517, § 2. The statute provided that veterans who passed examinations should "be preferred in appointment to all persons not veterans . . ." A proviso stated: "But nothing herein contained shall be construed to prevent the certification and employment of women."

14 1919 Mass. Acts, ch. 150, § 2. The amended statute provided that "the names of veterans who pass examinations . . . shall be placed upon the . . . eligible lists in the order of their respective standing, above the names of all other applicants," and further provided that "upon receipt of a requisition not especially calling for women, names shall be certified from such lists . . ." The exemption for "women's requisitions" was retained in substantially this form in subsequent revisions, see, e. g., 1954 Mass. Acts, ch. 627, § 5. It was eliminated in 1971, 1971 Mass. Acts, ch. 219, when the State made all single-sex examinations subject to the prior approval of the Massachusetts Commission Against Discrimination, 1971 Mass. Acts, ch. 221.

Since 1919, the preference has been repeatedly amended to cover persons who served in subsequent wars, declared or [*267] undeclared. See 1943 Mass. Acts, ch. 194; 1949 Mass. Acts, ch. 642, § 2 (World War II); 1954 Mass. Acts, ch. 627 (Korea); 1968 Mass. Acts, ch. 531, § 1 (Vietnam).¹⁵ The [**2290] current preference formula in ch. 31, § 23, is substantially the same as that settled upon in 1919. This absolute preference -- even as modified in 1919 -- has never been universally popular. Over the years it has been subjected to repeated legal challenges, see *Hutcheson v. Director of Civil Service*, supra (collecting cases), to criticism by civil service reform groups, see, e. g., Report of the Massachusetts Committee on Public Service on Initiative Bill Relative to Veterans' Preference, S. No. 279 (1926); Report of Massachusetts Special Commission on Civil Service and Public Personnel Administration 37-43 (June 15, 1967), and, in 1926, to a referendum in which it was reaffirmed by a majority of 51.9%. See *id.*, at 38. The present case is apparently the first to challenge the Mas-

sachusetts veterans' preference on the simple ground that it discriminates on the basis of sex.¹⁶

15 A provision requiring public agencies to hire disabled veterans certified as eligible was added in 1922. 1922 Mass. Acts, ch. 463. It was invalidated as applied in *Hutcheson v. Director of Civil Service*, 361 Mass. 480, 281 N. E. 2d 53 (1972) (suit by veteran arguing that absolute preference for disabled veterans was arbitrary on facts). It has since been eliminated and replaced with a provision giving disabled veterans an absolute preference in retention. See *Mass. Gen. Laws Ann., ch. 31, § 26* (West 1979). See n. 10, *supra*.

16 For cases presenting similar challenges to the veterans' preference laws of other States, see *Ballou v. State Department of Civil Service*, 75 N. J. 365, 382 A. 2d 1118 (1978) (sustaining New Jersey absolute preference); *Feinerman v. Jones*, 356 F.Supp. 252 (MD Pa. 1973) (sustaining Pennsylvania point preference); *Branch v. Du Bois*, 418 F.Supp. 1128 (ND Ill. 1976) (sustaining Illinois modified point preference); *Wisconsin Nat. Organization for Women v. Wisconsin*, 417 F.Supp. 978 (WD Wis. 1976) (sustaining Wisconsin point preference).

D

The first Massachusetts veterans' preference statute defined the term "veterans" in gender-neutral language. See [*268] 1896 Mass. Acts, ch. 517 § 1 ("a person" who served in the United States Army or Navy), and subsequent amendments have followed this pattern, see, e. g., 1919 Mass. Acts, ch. 150, § 1 ("any person who has served . . ."); 1954 Mass. Acts, ch. 627, § 1 ("any person, male or female, including a nurse"). Women who have served in official United States military units during wartime, then, have always been entitled to the benefit of the preference. In addition, Massachusetts, through a 1943 amendment to the definition of "wartime service," extended the preference to women who served in unofficial auxiliary women's units. 1943 Mass. Acts, ch. 194.¹⁷

17 The provision, passed shortly after the creation of the Women's Army Auxiliary Corps (WAAC), see n. 21, *infra*, is currently found at *Mass. Gen. Laws Ann., ch. 4, § 7, cl. 43* (West 1976), see n. 8, *supra*. "Wartime service" is defined as service performed by a member of the "WAAC." A "WAAC" is "any woman who was discharged and so served in any corps or unit of the United States established for the purpose of enabling women to serve with, or as auxiliary to,

the armed forces of the United States and such woman shall be deemed to be a veteran." *Ibid*.

When [***881] the first general veterans' preference statute was adopted in 1896, there were no women veterans.¹⁸ The statute, however, covered only Civil War veterans. Most of them were beyond middle age, and relatively few were actively competing for public employment.¹⁹ Thus, the impact of [*269] [**2291] the preference upon the employment opportunities of nonveterans as a group and women in particular was slight.²⁰

18 Small numbers of women served in combat roles in every war before the 20th century in which the United States was involved, but usually unofficially or disguised as men. See M. Binkin & S. Bach, *Women and the Military* 5 (1977) (hereinafter Binkin and Bach). Among the better known are Molly Pitcher (Revolutionary War), Deborah Sampson (Revolutionary War), and Lucy Brewer (War of 1812). Passing as one "George Baker," Brewer served for three years as a gunner on the U. S. S. Constitution ("Old Ironsides") and distinguished herself in several major naval battles in the War of 1812. See J. Laffin, *Women in Battle* 116-122 (1967).

19 By 1887, the average age of Civil War veterans in Massachusetts was already over 50. Massachusetts Civil Service Commissioners, Third Annual Report 22 (1887). The tie-breaking preference which had been established under the 1884 statute had apparently been difficult to enforce, since many appointing officers "prefer younger men." *Ibid*. The 1896 statute which established the first valid absolute preference, see *supra*, at 266, again covered only Civil War veterans. 1896 Mass. Acts, ch. 517, § 1.

20 In 1896, for example, 2,804 persons applied for civil service positions: 2,031 were men, of whom only 32 were veterans; 773 were women. Of the 647 persons appointed, 525 were men, of whom only 9 were veterans; 122 were women. Massachusetts Civil Service Commissioners, Thirteenth Annual Report 5, 6 (1896). The average age of the applicants was 38. *Ibid*.

Notwithstanding the apparent attempts by Massachusetts to include as many military women as possible within the scope of the preference, the statute today benefits an overwhelmingly male class. This is attributable in some measure to the variety of federal statutes, regulations, and policies that have restricted the number of women who could enlist in the United States Armed Forces,²¹ and largely to the [***882] simple [*270]

fact that women have never been subjected to a military draft. See generally Binkin and Bach 4-21.

21 The Army Nurse Corps, created by Congress in 1901, was the first official military unit for women, but its members were not granted full military rank until 1944. See Binkin and Bach 4-21; M. Treadwell, *The Women's Army Corps* 6 (Dept. of Army 1954) (hereinafter Treadwell). During World War I, a variety of proposals were made to enlist women for work as doctors, telephone operators, and clerks, but all were rejected by the War Department. See *ibid.* The Navy, however, interpreted its own authority broadly to include a power to enlist women as Yeoman F's and Marine F's. About 13,000 women served in this rank, working primarily at clerical jobs. These women were the first in the United States to be admitted to full military rank and status. See *id.*, at 10.

Official military corps for women were established in response to the massive personnel needs of World War II. See generally Binkin and Bach; Treadwell. The Women's Army Auxiliary Corps (WAAC) -- the unofficial predecessor of the Women's Army Corps (WAC) -- was created on May 14, 1942, followed two months later by the WAVES (Women Accepted for Voluntary Emergency Service). See Binkin and Bach 7. Not long after, the United States Marine Corps Women's Reserve and the Coast Guard Women's Reserve (SPAR) were established. See *ibid.* Some 350,000 women served in the four services; some 800 women also served as Women's Airforce Service Pilots (WASPS). *Ibid.* Most worked in health care, administration, and communications; they were also employed as airplane mechanics, parachute riggers, gunnery instructors, air traffic controllers, and the like.

The authorizations for the women's units during World War II were temporary. The Women's Armed Services Integration Act of 1948, 62 Stat. 356, established the women's services on a permanent basis. Under the Act, women were given regular military status. However, quotas were placed on the numbers who could enlist, 62 Stat. 357, 360-361 (no more than 2% of total enlisted strength), eligibility requirements were more stringent than those for men, and career opportunities were limited. Binkin and Bach 11-12. During the 1950's and 1960's, enlisted women constituted little more than 1% of the total force. In 1967, the 2% quota was lifted, § 1 (9)(E), 81 Stat. 375, *10 U. S. C.*

§ 3209 (b), and in the 1970's many restrictive policies concerning women's participation in the military have been eliminated or modified. See generally Binkin and Bach. In 1972, women still constituted less than 2% of the enlisted strength. *Id.*, at 14. By 1975, when this litigation was commenced, the percentage had risen to 4.6%. *Ibid.*

When this litigation was commenced, then, over 98% of the veterans in Massachusetts were male; only 1.8% were female. And over one-quarter of the Massachusetts population were veterans. During the decade between 1963 and 1973 when the appellee was actively participating in the State's merit selection system, 47,005 new permanent appointments were made in the classified official service. Forty-three percent of those hired were women, and 57% were men. Of the women appointed, 1.8% were veterans, while 54% of the men had veteran status. A large unspecified percentage of the female appointees were serving in lower paying positions for which males traditionally had not applied. ²² [*271] On each of 50 sample [**2292] eligible lists that are part of the record in this case, one or more women who would have been certified as eligible for appointment on the basis of test results were displaced by veterans whose test scores were lower.

22 The former exemption for "women's requisitions," see nn. 13, 14, *supra*, may have operated in the 20th century to protect these types of jobs from the impact of the preference. However, the statutory history indicates that this was not its purpose. The provision dates back to the 1896 veterans' preference law and was retained in the law substantially unchanged until it was eliminated in 1971. See n. 14, *supra*. Since veterans in 1896 were a small but an exclusively male class, such a provision was apparently included to ensure that the statute would not be construed to outlaw a pre-existing practice of single-sex hiring explicitly authorized under the 1884 Civil Service statute. See Rule XIX.3, Massachusetts Civil Service Law and Rules and Regulations of the Commissioners (1884) ("In case the request for any . . . certification, or any law or regulation, shall call for persons of one sex, those of that sex shall be certified; otherwise sex shall be disregarded in certification"). The veterans' preference statute at no point endorsed this practice. Historical materials indicate, however, that the early preference law may have operated to encourage the employment of women in positions from which they previously had been excluded. See Thirteenth Annual Report, *supra* n. 20, at 5, 6; Third Annual Report, *supra* n. 19, at 23.

At the outset of this litigation appellants conceded that for "many of the permanent positions for which males and females have competed" the veterans' preference has "resulted in a substantially greater proportion of female eligibles than male eligibles" not being certified for consideration. The impact of the veterans' preference law upon the public employment opportunities of women has thus been severe. This impact lies at the heart of the appellee's federal constitutional claim.

II

[***LEdHR1B] [1B]The sole question for decision [***883] on this appeal is whether Massachusetts, in granting an absolute lifetime preference to veterans, has discriminated against women in violation of the *Equal Protection Clause of the Fourteenth Amendment*.

A

[***LEdHR2] [2] [***LEdHR3] [3] [***LEdHR4] [4]The equal protection guarantee of the *Fourteenth Amendment* does not take from the States all power of classification. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314. Most laws classify, and many affect certain groups [*272] unevenly, even though the law itself treats them no differently from all other members of the class described by the law. When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern. *New York City Transit Authority v. Beazer*, 440 U.S. 568; *Jefferson v. Hackney*, 406 U.S. 535, 548. Cf. *James v. Valtierra*, 402 U.S. 137. The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility. *Dandridge v. Williams*, 397 U.S. 471; *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1. In assessing an equal protection challenge, a court is called upon only to measure the basic validity of the legislative classification. *Barrett v. Indiana*, 229 U.S. 26, 29-30; *Railway Express Agency v. New York*, 336 U.S. 106. When some other independent right is not at stake, see, e. g., *Shapiro v. Thompson*, 394 U.S. 618, and when there is no "reason to infer antipathy," *Vance v. Bradley*, 440 U.S. 93, 97, it is presumed that "even improvident decisions will eventually be rectified by the democratic process . . ." *Ibid*.

[***LEdHR5] [5]Certain classifications, however, in themselves supply a reason to infer antipathy. Race is the paradigm. A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification. *Brown v. Board of Education*, 347 U.S. 483; *McLaughlin v. Florida*, 379 U.S. 184. This rule applies as well to a classification that is ostensibly neutral but is an obvious pre-

text for racial discrimination. *Yick Wo v. Hopkins*, 118 U.S. 356; *Guinn v. United States*, 238 U.S. 347; cf. *Lane* [**2293] *v. Wilson*, 307 U.S. 268; *Gomillion v. Lightfoot*, 364 U.S. 339. But, as was made clear in *Washington v. Davis*, 426 U.S. 229, and *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the *Equal Protection Clause* only if that impact can be traced to a discriminatory purpose.

[*273] [***LEdHR6] [6] [***LEdHR7] [7]Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often [***884] subtle discrimination. *Caban v. Mohammed*, 441 U.S. 380, 398 (STEWART, J., dissenting). This Court's recent cases teach that such classifications must bear a close and substantial relationship to important governmental objectives, *Craig v. Boren*, 429 U.S. 190, 197, and are in many settings unconstitutional. *Reed v. Reed*, 404 U.S. 71; *Frontiero v. Richardson*, 411 U.S. 677; *Weinberger v. Wiesenfeld*, 420 U.S. 636; *Craig v. Boren*, *supra*; *Califano v. Goldfarb*, 430 U.S. 199; *Orr v. Orr*, 440 U.S. 268; *Caban v. Mohammed*, *supra*. Although public employment is not a constitutional right, *Massachusetts Bd. of Retirement v. Murgia*, *supra*, and the States have wide discretion in framing employee qualifications, see, e. g., *New York City Transit Authority v. Beazer*, *supra*, these precedents dictate that any state law overtly or covertly designed to prefer males over females in public employment would require an exceedingly persuasive justification to withstand a constitutional challenge under the *Equal Protection Clause of the Fourteenth Amendment*.

B

[***LEdHR8] [8]The cases of *Washington v. Davis*, *supra*, and *Arlington Heights v. Metropolitan Housing Dev. Corp.*, *supra*, recognize that when a neutral law has a disparate impact upon a group that has historically been the victim of discrimination, an unconstitutional purpose may still be at work. But those cases signaled no departure from the settled rule that the *Fourteenth Amendment* guarantees equal laws, not equal results. *Davis* upheld a job-related employment test that white people passed in proportionately greater numbers than Negroes, for there had been no showing that racial discrimination entered into the establishment or formulation of the test. *Arlington Heights* upheld a zoning board decision that tended to perpetuate racially segregated housing patterns, [*274] since, apart from its effect, the board's decision was shown to be nothing more than an application of a constitutionally neutral zoning policy. Those principles

apply with equal force to a case involving alleged gender discrimination.

[**LEdHR9] [9]When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionately adverse, a twofold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. See *Arlington Heights v. Metropolitan Housing Dev. Corp.*, *supra*. In this second inquiry, impact provides an "important starting point," 429 U.S., at 266, but purposeful discrimination is "the condition that offends the Constitution." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16.

It is against this background of [***885] precedent that we consider the merits of the case before us.

III

A

[**LEdHR1C] [1C]The question whether ch. 31, § 23, establishes a classification that is overtly or [**2294] covertly based upon gender must first be considered. The appellee has conceded that ch. 31, § 23, is neutral on its face. She has also acknowledged that state hiring preferences for veterans are not *per se* invalid, for she has limited her challenge to the absolute lifetime preference that Massachusetts provides to veterans. The District Court made two central findings that are relevant here: first, that ch. 31, § 23, serves legitimate and worthy purposes; second, that the absolute preference was not established for the purpose of discriminating against women. The appellee has thus acknowledged and the District Court has thus found [*275] that the distinction between veterans and nonveterans drawn by ch. 31, § 23, is not a pretext for gender discrimination. The appellee's concession and the District Court's finding are clearly correct.

If the impact of this statute could not be plausibly explained on a neutral ground, impact itself would signal that the real classification made by the law was in fact not neutral. See *Washington v. Davis*, 426 U.S., at 242; *Arlington Heights v. Metropolitan Housing Dev. Corp.*, *supra*, at 266. But there can be but one answer to the question whether this veteran preference excludes significant numbers of women from preferred state jobs because they are women or because they are nonveterans. Apart from the facts that the definition of "veterans" in the statute has always been neutral as to gender and that Massachusetts has consistently defined veteran status in a way that has been inclusive of women who

have served in the military, this is not a law that can plausibly be explained only as a gender-based classification. Indeed, it is not a law that can rationally be explained on that ground. Veteran status is not uniquely male. Although few women benefit from the preference, the nonveteran class is not substantially all female. To the contrary, significant numbers of nonveterans are men, and all nonveterans -- male as well as female -- are placed at a disadvantage. Too many men are affected by ch. 31, § 23, to permit the inference that the statute is but a pretext for preferring men over women.

Moreover, as the District Court implicitly found, the purposes of the statute provide the surest explanation for its impact. Just as there are cases in which impact alone can unmask an invidious classification, cf. *Yick Wo v. Hopkins*, 118 U.S. 356, there are others, in which -- notwithstanding impact -- the legitimate noninvidious purposes of a law cannot be missed. This is one. The distinction made by ch. 31, § 23, is, as it seems to be, quite simply between veterans and nonveterans, not between men and women.

[*276] B

The dispositive question, then, is whether the appellee has shown that a gender-based discriminatory purpose has, at least in some measure, shaped the Massachusetts veterans' preference legislation. As did the [***886] District Court, she points to two basic factors which in her view distinguish ch. 31, § 23, from the neutral rules at issue in the *Washington v. Davis* and *Arlington Heights* cases. The first is the nature of the preference, which is said to be demonstrably gender-biased in the sense that it favors a status reserved under federal military policy primarily to men. The second concerns the impact of the absolute lifetime preference upon the employment opportunities of women, an impact claimed to be too inevitable to have been unintended. The appellee contends that these factors, coupled with the fact that the preference itself has little if any relevance to actual job performance, more than suffice to prove the discriminatory intent required to establish a constitutional violation.

1

The contention that this veterans' preference is "inherently nonneutral" or "gender-biased" presumes that the State, by favoring veterans, intentionally incorporated into its public employment policies the panoply of sex-based and assertedly discriminatory [**2295] federal laws that have prevented all but a handful of women from becoming veterans. There are two serious difficulties with this argument. First, it is wholly at odds with the District Court's central finding that Massachusetts has not offered a preference to veterans for the purpose of discriminating against women. Second, it

cannot be reconciled with the assumption made by both the appellee and the District Court that a more limited hiring preference for veterans could be sustained. Taken together, these difficulties are fatal.

[**LEdHR10] [10]To the extent that the status of veteran is one that few [*277] women have been enabled to achieve, every hiring preference for veterans, however modest or extreme, is inherently gender-biased. If Massachusetts by offering such a preference can be said intentionally to have incorporated into its state employment policies the historical gender-based federal military personnel practices, the degree of the preference would or should make no constitutional difference. Invidious discrimination does not become less so because the discrimination accomplished is of a lesser magnitude.²³ Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not. The District Court's conclusion that the absolute veterans' preference was not originally enacted or subsequently reaffirmed for the purpose of giving an advantage to males as such necessarily compels the conclusion that the State intended nothing more than to prefer "veterans." Given this finding, simple logic suggests that an intent to exclude women from significant public jobs was not at work in this law. To reason that it was, by describing the preference as "inherently nonneutral" or "gender-biased," is merely to restate the fact of impact, not to answer the question of intent.

23 This is not to say that the degree of impact is irrelevant to the question of intent. But it is to say that a more modest preference, while it might well lessen impact and, as the State argues, might lessen the effectiveness of the statute in helping veterans, would not be any more or less "neutral" in the constitutional sense.

To be sure, this case is unusual in [**887] that it involves a law that by design is not neutral. The law overtly prefers veterans as such. As opposed to the written test at issue in *Davis*, it does not purport to define a job-related characteristic. To the contrary, it confers upon a specifically described group -- perceived to be particularly deserving -- a competitive headstart. But the District Court found, and the appellee has not disputed, that this legislative choice was legitimate. The basic distinction between veterans and nonveterans, having been found not gender-based, and the goals of the [*278] preference having been found worthy, ch. 31 must be analyzed as is any other neutral law that casts a greater burden upon women as a group than upon men as a group. The enlistment policies of the Armed Services may well have discriminated on the basis of sex. See *Frontiero v. Richardson*, 411 U.S. 677; cf. *Schlesinger*

v. Ballard, 419 U.S. 498. But the history of discrimination against women in the military is not on trial in this case.

2

[**LEdHR11] [11]The appellee's ultimate argument rests upon the presumption, common to the criminal and civil law, that a person intends the natural and foreseeable consequences of his voluntary actions. Her position was well stated in the concurring opinion in the District Court:

"Conceding . . . that the goal here was to benefit the veteran, there is no reason to absolve the legislature from awareness that the means chosen to achieve this goal would freeze women out of all those state jobs actively sought by men. To be sure, the legislature did not wish to harm women. But the cutting-off of women's opportunities was an inevitable concomitant of the chosen scheme -- as inevitable as the proposition that if tails is up, heads must be down. Where a law's consequences are *that* inevitable, [*2296] can they meaningfully be described as unintended?" 451 F.Supp., at 151.

This rhetorical question implies that a negative answer is obvious, but it is not. The decision to grant a preference to veterans was of course "intentional." So, necessarily, did an adverse impact upon nonveterans follow from that decision. And it cannot seriously be argued that the Legislature of Massachusetts could have been unaware that most veterans are men. It would thus be disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable.

[*279] "

[**LEdHR12A] [12A]Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. See *United Jewish Organizations v. Carey*, 430 U.S. 144, 179 (concurring opinion).²⁴ It implies that [**888] the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.²⁵ Yet nothing in the record demonstrates that this preference for veterans was originally devised or subsequently re-enacted because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place in the Massachusetts Civil Service.

24 Proof of discriminatory intent must necessarily usually rely on objective factors, several of which were outlined in *Arlington Heights v.*

442 U.S. 256, *; 99 S. Ct. 2282, **;
60 L. Ed. 2d 870, ***; 1979 U.S. LEXIS 128

Metropolitan Housing Dev. Corp., 429 U.S. 252, 266. The inquiry is practical. What a legislature or any official entity is "up to" may be plain from the results its actions achieve, or the results they avoid. Often it is made clear from what has been called, in a different context, "the give and take of the situation." *Cramer v. United States*, 325 U.S. 1, 32-33 (Jackson, J.).

[***LEdHR12B] [12B]

25 This is not to say that the inevitability or foreseeability of consequences of a neutral rule has no bearing upon the existence of discriminatory intent. Certainly, when the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences of ch. 31, § 23, a strong inference that the adverse effects were desired can reasonably be drawn. But in this inquiry -- made as it is under the Constitution -- an inference is a working tool, not a synonym for proof. When, as here, the impact is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate, and when, as here, the statutory history and all of the available evidence affirmatively demonstrate the opposite, the inference simply fails to ripen into proof.

To the contrary, the statutory history shows that the benefit of the preference was consistently offered to "any person" who was a veteran. That benefit has been extended to women under a very broad statutory definition of the term veteran.²⁶ The preference formula itself, which is the focal [*280] point of this challenge, was first adopted -- so it appears from this record -- out of a perceived need to help a small group of older Civil War veterans. It has since been reaffirmed and extended only to cover new veterans.²⁷ When the totality of legislative actions establishing and extending the Massachusetts veterans' preference are considered, see *Washington v. Davis*, 426 U.S., at 242, the law remains what it purports to be: a preference for veterans of either sex over [**2297] nonveterans of either sex, not for men over women.

²⁶ See nn. 8, 17, *supra*.

²⁷ The appellee has suggested that the former statutory exception for "women's requisitions," see nn. 13, 14, *supra*, supplies evidence that Massachusetts, when it established and subsequently reaffirmed the absolute-preference legislation, assumed that women would not or should not compete with men. She has further suggested that the former provision extending the preference to certain female dependents of veter-

ans, see n. 10, *supra*, demonstrates that ch. 31, § 23, is laced with "old notions" about the proper roles and needs of the sexes. See *Califano v. Goldfarb*, 430 U.S. 199; *Weinberger v. Wiesenfeld*, 420 U.S. 636. But the first suggestion is totally belied by the statutory history, see *supra*, at 267-271, and nn. 19, 20, and the second fails to account for the consistent statutory recognition of the contribution of women to this Nation's military efforts.

IV

[***LEdHR1D] [1D] Veterans' hiring preferences represent an awkward -- and, many argue, unfair -- exception to the widely shared view that merit and merit alone should prevail in the employment policies of government. After a war, such laws have been enacted virtually without opposition. During peacetime, they inevitably have come to be viewed in many quarters as undemocratic and unwise.²⁸ Absolute and permanent preferences, [***889] as the troubled history of this law demonstrates, have always been subject to the objection that they give the veteran [*281] more than a square deal. But the *Fourteenth Amendment* "cannot be made a refuge from ill-advised . . . laws." *District of Columbia v. Brooke*, 214 U.S. 138, 150. The substantial edge granted to veterans by ch. 31, § 23, may reflect unwise policy. The appellee, however, has simply failed to demonstrate that the law in any way reflects a purpose to discriminate on the basis of sex.

²⁸ See generally Hearings on Veterans' Preference Oversight before the Subcommittee on Civil Service of the House Post Office and Civil Service Committee, 95th Cong., 1st Sess. (1977); Report of Comptroller General, *Conflicting Congressional Policies: Veterans' Preference and Apportionment vs. Equal Employment Opportunity* (Sept. 29, 1977).

The judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

CONCUR BY: STEVENS

CONCUR

MR. JUSTICE STEVENS, with whom MR. JUSTICE WHITE joins, concurring.

While I concur in the Court's opinion, I confess that I am not at all sure that there is any difference between the two questions posed *ante*, at 274. If a classification is not overtly based on gender, I am inclined to believe the question whether it is covertly gender based is the

same as the question whether its adverse effects reflect invidious gender-based discrimination. However the question is phrased, for me the answer is largely provided by the fact that the number of males disadvantaged by Massachusetts' veterans' preference (1,867,000) is sufficiently large -- and sufficiently close to the number of disadvantaged females (2,954,000) -- to refute the claim that the rule was intended to benefit males as a class over females as a class.

DISSENT BY: MARSHALL

DISSENT

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

Although acknowledging that in some circumstances, discriminatory intent may be inferred from the inevitable or foreseeable impact of a statute, *ante*, at 279 n. 25, the Court concludes that no such intent has been established here. I cannot agree. In my judgment, Massachusetts' choice of an absolute veterans' preference system evinces purposeful [*282] gender-based discrimination. And because the statutory scheme bears no substantial relationship to a legitimate governmental objective, it cannot withstand scrutiny under the *Equal Protection Clause*.

I

The District Court found that the "prime objective" of the Massachusetts veterans' preference statute, *Mass. Gen. Laws Ann., ch. 31, § 23*, was to benefit individuals with prior military service. *Anthony v. Commonwealth*, 415 F.Supp. 485, 497 (Mass. 1976). See *Feeney v. Massachusetts*, 451 F.Supp. 143, 145 (Mass. 1978). Under the Court's analysis, this factual determination "necessarily compels the conclusion that the State intended nothing more than to prefer 'veterans.' Given this finding, simple logic suggests that an intent to exclude women from significant public jobs was not at work in this law." *Ante*, at 277. I find the Court's logic neither simple nor compelling.

That a legislature seeks to advantage one group does not, as a matter of logic or of common sense, exclude the possibility that it also intends to [***890] disadvantage another. Individuals in general and lawmakers in particular [**2298] frequently act for a variety of reasons. As this Court recognized in *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977), "[rarely] can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern." Absent an omniscience not commonly attributed to the judiciary, it will often be impossible to ascertain the sole or even dominant purpose of a given statute. See *McGinnis v.*

Royster, 410 U.S. 263, 276-277 (1973); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L. J. 1205, 1214 (1970). Thus, the critical constitutional inquiry is not whether an illicit consideration was the primary or but-for cause of a decision, but rather whether it had an appreciable role in shaping a given legislative enactment. Where there is [*283] "proof that a discriminatory purpose has been a motivating factor in the decision, . . . judicial deference is no longer justified." *Arlington Heights v. Metropolitan Housing Dev. Corp.*, *supra*, at 265-266 (emphasis added).

Moreover, since reliable evidence of subjective intentions is seldom obtainable, resort to inference based on objective factors is generally unavoidable. See *Beer v. United States*, 425 U.S. 130, 148-149, n. 4 (1976) (MARSHALL, J., dissenting); cf. *Palmer v. Thompson*, 403 U.S. 217, 224-225 (1971); *United States v. O'Brien*, 391 U.S. 367, 383-384 (1968). To discern the purposes underlying facially neutral policies, this Court has therefore considered the degree, inevitability, and foreseeability of any disproportionate impact as well as the alternatives reasonably available. See *Monroe v. Board of Commissioners*, 391 U.S. 450, 459 (1968); *Goss v. Board of Education*, 373 U.S. 683, 688-689 (1963); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Griffin v. Illinois*, 351 U.S. 12, 17 n. 11 (1956). Cf. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

In the instant case, the impact of the Massachusetts statute on women is undisputed. Any veteran with a passing grade on the civil service exam must be placed ahead of a nonveteran, regardless of their respective scores. The District Court found that, as a practical matter, this preference supplants test results as the determinant of upper level civil service appointments. 415 F.Supp., at 488-489. Because less than 2% of the women in Massachusetts are veterans, the absolute-preference formula has rendered desirable state civil service employment an almost exclusively male prerogative. 451 F.Supp., at 151 (Campbell, J., concurring).

As the District Court recognized, this consequence follows foreseeably, indeed inexorably, from the long history of policies severely limiting women's participation in the military. ¹ [*284] Although neutral in form, [***891] the [**2299] statute is anything but neutral in application. It inescapably reserves a major sector of public employment to "an already established class which, as a matter of historical fact, is 98% male." *Ibid*. Where the foreseeable impact of a facially neutral policy is so disproportionate, the burden should rest on the State to establish that sex-based considerations played no part in the choice of the particular legislative scheme. Cf. *Castaneda v. Partida*, 430 U.S. 482 (1977); *Washington v. Davis*, 426 U.S. 229, 241 (1976); *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972); see generally *Brest*,

Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive, 1971 Sup. Ct. Rev. 95, 123.

1 See *Anthony v. Massachusetts*, 415 F.Supp. 485, 490, 495-499 (Mass. 1976); *Feeney v. Massachusetts*, 451 F.Supp. 143, 145, 148 (Mass. 1978). In addition to the 2% quota on women's participation in the Armed Forces, see *ante*, at 270 n. 21, enlistment and appointment requirements have been more stringent for females than males with respect to age, mental and physical aptitude, parental consent, and educational attainment. M. Binkin & S. Bach, *Women and the Military* (1977) (hereinafter Binkin and Bach); Note, *The Equal Rights Amendment and the Military*, 82 Yale L. J. 1533, 1539 (1973). Until the 1970's, the Armed Forces precluded enlistment and appointment of women, but not men, who were married or had dependent children. See 415 F.Supp., at 490; App. 85; Exs. 98, 99, 103, 104. Sex-based restrictions on advancement and training opportunities also diminished the incentives for qualified women to enlist. See Binkin and Bach 10-17; Beans, *Sex Discrimination in the Military*, 67 Mil. L. Rev. 19, 59-83 (1975). Cf. *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975).

Thus, unlike the employment examination in *Washington v. Davis*, 426 U.S. 229 (1976), which the Court found to be demonstrably job related, the Massachusetts preference statute incorporates the results of sex-based military policies irrelevant to women's current fitness for civilian public employment. See 415 F.Supp., at 498-499.

Clearly, that burden was not sustained here. The legislative history of the statute reflects the Commonwealth's patent appreciation of the impact the preference system would have on women, and an equally evident desire to mitigate that impact only with respect to certain traditionally female occupations. Until 1971, the statute and implementing civil service [*285] regulations exempted from operation of the preference any job requisitions "especially calling for women." 1954 Mass. Acts, ch. 627, § 5. See also 1896 Mass. Acts, ch. 517, § 6; 1919 Mass. Acts, ch. 150, § 2; 1945 Mass. Acts, ch. 725, § 2 (e); 1965 Mass. Acts, ch. 53; *ante*, at 266 nn. 13, 14. In practice, this exemption, coupled with the absolute preference for veterans, has created a gender-based civil service hierarchy, with women occupying low-grade clerical and secretarial jobs and men holding more responsible and remunerative positions. See 415 F.Supp., at 488; 451 F.Supp., at 148 n. 9.

Thus, for over 70 years, the Commonwealth has maintained, as an integral part of its veterans' preference system, an exemption relegating female civil service applicants to occupations traditionally filled by women. Such a statutory scheme both reflects and perpetuates precisely the kind of archaic assumptions about women's roles which we have previously held invalid. See *Orr v. Orr*, 440 U.S. 268 (1979); *Califano v. Goldfarb*, 430 U.S. 199, 210-211 (1977); *Stanton v. Stanton*, 421 U.S. 7, 14 (1975); [***892] *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975). Particularly when viewed against the range of less discriminatory alternatives available to assist veterans,² Massachusetts' choice of a formula that so severely restricts public employment opportunities for women cannot reasonably be thought gender-neutral. Cf. *Albemarle Paper Co. v. Moody*, *supra*, at 425. The Court's conclusion to the contrary -- that "nothing in the record" evinces a "collateral goal of keeping women in a stereotypic and predefined place in the [*286] Massachusetts Civil Service," *ante*, at 279 -- displays a singularly myopic view of the facts established below.³

2 Only four States afford a preference comparable in scope to that of Massachusetts. See Fleming & Shanor, *Veterans' Preferences and Public Employment: Unconstitutional Gender Discrimination?*, 26 Emory L. J. 13, 17 n. 13 (1977) (citing statutes). Other States and the Federal Government grant point or tie-breaking preferences that do not foreclose opportunities for women. See *id.*, at 13, and nn. 12, 14; *ante*, at 261 n. 7; Hearings on Veterans' Preference Oversight before the Subcommittee on Civil Service of the House Committee on Post Office and Civil Service, 95th Cong., 1st Sess., 4 (1977) (statement of Alan Campbell, Chairman, United States Civil Service Commission).

3 Although it is relevant that the preference statute also disadvantages a substantial group of men, see *ante*, at 281 (STEVENS, J., concurring), it is equally pertinent that 47% of Massachusetts men over 18 are veterans, as compared to 0.8% of Massachusetts women. App. 83. Given this disparity, and the indicia of intent noted *supra*, at 284-285, the absolute number of men denied preference cannot be dispositive, especially since they have not faced the barriers to achieving veteran status confronted by women. See n. 1, *supra*.

II

[**2300] To survive challenge under the *Equal Protection Clause*, statutes reflecting gender-based discrimination must be substantially related to the achievement of important governmental objectives. See *Cal-*

442 U.S. 256, *; 99 S. Ct. 2282, **;
60 L. Ed. 2d 870, ***; 1979 U.S. LEXIS 128

fano v. Webster, 430 U.S. 313, 316-317 (1977); *Craig v. Boren*, 429 U.S. 190, 197 (1976); *Reed v. Reed*, 404 U.S. 71, 76 (1971). Appellants here advance three interests in support of the absolute-preference system: (1) assisting veterans in their readjustment to civilian life; (2) encouraging military enlistment; and (3) rewarding those who have served their country. Brief for Appellants 24. Although each of those goals is unquestionably legitimate, the "mere recitation of a benign, compensatory purpose" cannot of itself insulate legislative classifications from constitutional scrutiny. *Weinberger v. Wiesenfeld*, *supra*, at 648. And in this case, the Commonwealth has failed to establish a sufficient relationship between its objectives and the means chosen to effectuate them.

With respect to the first interest, facilitating veterans' transition to civilian status, the statute is plainly overinclusive. Cf. *Trimble v. Gordon*, 430 U.S. 762, 770-772 (1977); *Jimenez v. Weinberger*, 417 U.S. 628, 637 (1974). By conferring a permanent preference, the legislation allows veterans to invoke their advantage repeatedly, without regard to their date of discharge. As the record demonstrates, a substantial [*287] majority of those currently enjoying the benefits of the system are not recently [***893] discharged veterans in need of readjustment assistance.⁴

4 The eligibility lists for the positions Ms. Feeney sought included 95 veterans for whom discharge information was available. Of those 95 males, 64 (67%) were discharged prior to 1960. App. 106, 150-151, 169-170.

Nor is the Commonwealth's second asserted interest, encouraging military service, a plausible justification for this legislative scheme. In its original and subsequent re-enactments, the statute extended benefits retroactively to veterans who had served during a prior specified period. See *ante*, at 265-267. If the Commonwealth's "actual purpose" is to induce enlistment, this legislative design is hardly well suited to that end. See *Califano v. Webster*, *supra*, at 317; *Weinberger v. Wiesenfeld*, *supra*, at 648. For I am unwilling to assume what appellants made no effort to prove, that the possibility of obtaining an *ex post facto* civil service preference significantly influenced the enlistment decisions of Massachusetts residents. Moreover, even if such influence could be presumed, the statute is still grossly overinclusive in that it bestows benefits on men drafted as well as those who volunteered.

Finally, the Commonwealth's third interest, rewarding veterans, does not "adequately justify the salient features" of this preference system. *Craig v. Boren*, *supra*, at 202-203. See *Orr v. Orr*, *supra*, at 281. Where a particular statutory scheme visits substantial hardship on a

class long subject to discrimination, the legislation cannot be sustained unless "carefully tuned to alternative considerations." *Trimble v. Gordon*, *supra*, at 772. See *Caban v. Mohammed*, 441 U.S. 380, 392-393, n. 13 (1979); *Mathews v. Lucas*, 427 U.S. 495 (1976). Here, there are a wide variety of less discriminatory means by which Massachusetts could effect its compensatory purposes. For example, a point preference system, such as that maintained by many States and the Federal Government, [*288] see n. 2, *supra*, or an absolute preference for a limited duration, would reward veterans without excluding all qualified women from upper level civil service positions. Apart from public employment, the Commonwealth, can, and does, afford assistance to veterans in various ways, including tax abatements, educational subsidies, and special programs for needy veterans. [***2301] See *Mass. Gen. Laws Ann.*, ch. 59, § 5, Fifth (West Supp. 1979); *Mass. Gen. Laws Ann.*, ch. 69, §§ 7, 7B (West Supp. 1979); and *Mass. Gen. Laws Ann.*, chs. 115, 115A (West 1969 and Supp. 1978). Unlike these and similar benefits, the costs of which are distributed across the taxpaying public generally, the Massachusetts statute exacts a substantial price from a discrete group of individuals who have long been subject to employment discrimination,⁵ and who, "because of circumstances totally beyond their control, have [***894] [had] little if any chance of becoming members of the preferred class." 415 *F.Supp.*, at 499. See n. 1, *supra*.

5 See *Frontiero v. Richardson*, 411 U.S. 677, 689 n. 23 (1973); *Kahn v. Shevin*, 416 U.S. 351, 353-354 (1974); United States Bureau of the Census, Current Population Reports, No. 107, Money Income and Poverty Status of Families and Persons in the United States: 1976 (Advance Report) (Table 7) (Sept. 1977).

In its present unqualified form, the veterans' preference statute precludes all but a small fraction of Massachusetts women from obtaining any civil service position also of interest to men. See 451 *F.Supp.*, at 151 (Campbell, J., concurring). Given the range of alternatives available, this degree of preference is not constitutionally permissible.

I would affirm the judgment of the court below.

REFERENCES

Validity, under *equal protection clause of Fourteenth Amendment*, of gender-based classifications arising by operation of state law

77 *Am Jur 2d, Veterans and Veterans' Laws* 122

USCS, *Constitution, 14th Amendment*

442 U.S. 256, *; 99 S. Ct. 2282, **;
60 L. Ed. 2d 870, ***; 1979 U.S. LEXIS 128

Annotation References:

US L Ed Digest, Constitutional Law 325

L Ed Index to Annos, Equal Protection of the Laws; Sex;
Veterans' Preference Act; Women

ALR Quick Index, Sex Discrimination; Veterans

Federal Quick Index, Civil Service; Equal Protection of
the Laws; Sex Discrimination; Veterans

Validity, under *equal protection clause of Fourteenth Amendment*, of gender-based classifications arising by operation of state law. 60 L Ed 2d 1188.

Sex discrimination. 27 L Ed 2d 935.

Race discrimination. 94 L Ed 1121, 96 L Ed 1291, 98 L Ed 882, 100 L Ed 488, 3 L Ed 2d 1556, 6 L Ed 2d 1302, 10 L Ed 2d 1105, 15 L Ed 2d 990, 21 L Ed 2d 915.



LEXSEE 436 F. SUPP. 1273

Dorothy BANNERMAN and Willie Mae McGovern, Individually and on behalf of all others similarly situated, Plaintiffs, v. DEPARTMENT OF YOUTH AUTHORITY, Allen F. Breed, Individually and in his official capacity as Director of the Department of Youth Authority, Al Owyong, Individually and in his official capacity as Chief of the Division of Personnel Management, Webster Williams, Individually and in his official capacity as Program Manager for Talliver Community Center, Nita Ashcroft, May Layne Davis, Samuel V. Leask, Robert M. Wald and Frank M. Woods, Individually and in their official capacity as Members of the State Personnel Board, Richard L. Camilli, Individually and in his official capacity as Executive Officer of the State Personnel Board, Defendants

No. C-73-1377-WWS

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

436 F. Supp. 1273; 1977 U.S. Dist. LEXIS 14208; 17 Fair Empl. Prac. Cas. (BNA) 820; 16 Empl. Prac. Dec. (CCH) P8145

August 31, 1977

CORE TERMS: veteran, score, interview, parole agent, certification, rank, hired, ranked, candidate's, male, discriminatory, hiring, full-time, female, sex, discriminate, promotional, male-only, interviewed, eligible, ranking, basis of sex, written examination, female-only, select, sex discrimination, discriminatory effect, statistically, facially, youths

COUNSEL: [**1] Curtis G. Oler, San Francisco, California, for plaintiffs.

Evelle J. Younger, Atty. Gen., Harold W. Teasdale and Charlton G. Holland, Deputy Attys. Gen., San Francisco, California, for defendants.

JUDGES: Schwarzer, District Judge.

OPINION BY: SCHWARZER

OPINION

[*1274] MEMORANDUM OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

SCHWARZER, District Judge.

This action came on for trial before the Court on June 30 and July 6 and 7, 1977. The complaint charges that the Department of Youth Authority (DYA) and the State Personnel Board (SPB), and various employees of those agencies, engaged in unlawful employment practices by discriminating against plaintiffs on the basis of sex in hiring for the position of Parole Agent I, in violation of Section 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), and the Civil Rights Act of 1871, 42 U.S.C. § 1983. Plaintiffs attack the following practices of defendants: (1) the requirement of a written test for the position of Parole Agent I; (2) the procedure for oral interviews; (3) the former practice of hiring for Parole Agent I from male-only or female-only lists of applicants; (4) the awarding of veterans' preference points to [**2] increase the oral interview scores; and (5) the preferential use of promotional lists to make appointments. In addition to these charges, plaintiff Bannerman, who was hired by DYA, alleges that she was harassed and given negative performance evaluations, and that she was not allowed to apply for the position of Parole Agent III because of her sex.

I. *The Screening and Evaluation Process Used By Defendants*

A. *Testing and Interviewing*

In order to obtain a pool of qualified candidates for the position of Parole Agent I, SPB administers a written examination approximately every two years. Applicants receiving a passing score of 70 on the written test become eligible for an oral interview, conducted by a Qualifications Appraisal Panel (QAP). A passing score on the interview is a prerequisite for consideration for employment. The QAPs for the relevant periods consisted of a representative from SPB, a representative from DYA, and a person from the community knowledgeable about the qualities desirable in an applicant for the position of Parole Agent I. In addition to applying certain general criteria to be used in evaluating applicants for a variety of positions, the [**3] QAPs for the Parole Agent I position were instructed to judge each applicant in relation to the critical class requirements of that position. These requirements were as follows:

- (a) Demonstrated interest in working with youths and the rehabilitation of delinquent youths,
- (b) Demonstrated ability to relate to youths and to gain their respect and confidence,
- (c) An awareness of the street environment,
- (d) Acceptance of the various racial, ethnic, and cultural differences existing in every community, and
- (e) Ability to make independent decisions and to take effective action, particularly in emergency situations.¹

Each QAP member rated the applicants according to the enumerated criteria, assigning a score ranging from 70 to 100 to passing applicants and a uniform score of 65 to failing applicants.

¹ A validation study conducted by SPB in June, 1975, concluded that the critical class requirements positively correlated with the actual on-the-job skills needed by a Parole Agent I.

Upon completion [**4] of the oral interviews, SPB placed those applicants who passed the interview on one of four open lists, depending upon the geographical area from which they applied. Separate lists were maintained [*1275] for Northern California, the San Francisco Bay Area, Southern California, and Los Angeles County. Applicants were ranked on the lists according to the scores received on the oral interview alone, the

written test score having been used solely for the purpose of qualifying an individual to take the oral interview. The rankings of veterans were raised by the addition of a 10 point veterans' preference (15 points in the case of disabled veterans) to their oral interview scores.

B. *Results of Tests and Interviews*

At issue here are the 1971 and 1973 examinations and interviews. The 1971 written examination for Parole Agent I was taken by 492 persons, of whom 314 were males and 178 females. A total of 440 passed, with 276 males (87.9%) and 164 females (92.1%) passing. Of those passing, 362 took the QAP interviews, and 306 were placed on the open list. Of the 238 males who were interviewed, 200 (84%) were placed on the open list. Of the 124 females interviewed, 106 [**5] (85.5%) were placed on the open list.

In 1973, 407 males and 207 females took the written examination. Of the 614 persons who took it, 347 passed, with 218 males (53.5%) and 129 females (62.3%) passing. Oral interviews were given to 271 persons, and a total of 189 -- 132 men (79%) and 57 women (54.8%) -- were found eligible and placed on the open list.

C. *Hiring*

DYA did not hire applicants directly from the regional open lists. When positions became available, DYA requested SPB to prepare a certification list of the top applicants. A certification list contained the names of any employee of DYA eligible for promotion to Parole Agent I, as well as the names of the top-ranking applicants from the applicable open list. In filling positions, DYA gave preference to promotional candidates over all outside applicants on the open list, even when the promotional candidate scored lower on the oral interview than the other applicants.

It was the practice of DYA until February, 1972, to hire from male-only or female-only certifications, depending upon the particular type of Parole Agent I position available. Sex-segregated certifications were used when DYA anticipated that [**6] the parole agent would deal primarily with parolees of his or her own sex. The number of male parolees has always far exceeded the number of females; consequently, fewer positions became available through female-only than male-only certifications. The use of these segregated lists was discontinued in 1972.

Until 1973, DYA used the "rule of three persons" to select candidates from the certification lists. SPB listed the candidates on the certifications in the order of the scores they received on the oral interview. DYA could then hire any of the three top-ranked applicants. If all three were uninterested or unavailable for the job, the

next highest applicant on the certification list who was available and interested could be hired. In 1973, DYA adopted the "rule of three ranks." Under this rule, scores from the oral interview were rounded to the nearest whole percent, and all candidates achieving that score were placed in the same rank. Certifications listed the names of all persons in the top three ranks, and an additional number of lower-ranked persons depending on hiring needs. DYA's hiring supervisors had discretion to select from among candidates in the top three ranks, [**7] but could not hire from lower ranks until the top three ranks had been exhausted.

II. *Treatment of Plaintiffs*

A. *Hiring From the 1971 Open List*

Turning to the particular situations in which plaintiffs Bannerman and McGowen claim to have experienced sex discrimination, Mrs. Bannerman took and passed the written examination for Parole Agent I in 1971, and was then interviewed by a QAP composed of one woman, Betty Lankford, and two men, J. D. Embree and Kenneth Smith. Mrs. Lankford assigned Bannerman a score of 85, while Embree gave her a 78, [*1276] and Smith an 80, for an average score of 81. Bannerman was interviewed on September 15, 1971, and on that day a man received the lowest score of the six applicants interviewed by Bannerman's QAP. Bannerman's score of 81 placed her 40th out of 61 candidates on the SPB San Francisco Bay Area open list effective October 12, 1971. If veterans' point preferences had not been given to veteran applicants, Bannerman would have ranked 37th on that list.

Shortly after the 1971 open list was published, Bannerman was hired from a female-only certification for a permanent part-time position and began work on November 29, 1971. [**8] On December 4, 1972, Bannerman was hired for a limited term full-time position in San Francisco, but she returned to part-time status on August 1, 1973. She served in that capacity until she was promoted to a full-time permanent position on June 1, 1977, having become eligible for promotion through four years of service.

Mrs. McGowen took and passed the same 1971 written examination for the position of Parole Agent I. On September 23, 1971, she was interviewed by the QAP, which in her case also consisted of Lankford, Embree, and Smith. She received a score of 84 from Lankford, 80 from Embree, and 89 from Smith, for an average score of 84.33. Of the five applicants interviewed that day, McGowen received the third highest average score. The score of 84.33 was sufficient to rank her 32nd on the San Francisco Bay Area open list for October, 1971. If veterans' preference points had not been added to scores, she would have ranked 30th.

McGowen's name did not appear on the various certifications which were issued during the period for part-time or limited term full-time positions (while the names of other women did appear). Although the record is not entirely clear on the matter, [**9] it appears from a preponderance of the evidence that McGowen had indicated a desire to be employed on a full-time permanent basis only and for that reason was omitted from other certifications. Accordingly, the Court concludes that Mrs. McGowen has no claim based on defendants' failure to employ her in anything other than a permanent full-time position.

In the following paragraphs, the Court analyzes the employment of men from the 1971 San Francisco Bay Area open list in the light of plaintiffs' charges.

Thirteen men and one woman were hired as Parole Agent I from certifications prepared on the basis of the 1971 Bay Area open list. Of the men, eleven were appointed to permanent full-time positions (Johnson, Hayes, Reddick, Koga, Nakamura, Moore, Abercrombie, Lockwood, Kennen, Bacon, and Clark). Four of these were appointed from male-only certifications (Johnson, Bacon, Hayes, Reddick, and Moore), two from a promotion list (Hayes and Clark), and five received veterans' points (Johnson, Reddick, Koga, Bacon, and Clark). In only one case (Bacon) did the application of these procedures (promotional preference, male-only certification or veterans' preference) result in the hiring [**10] of an applicant who ranked below either plaintiff on the open list.

Jewel Bacon had an interview score which, before the addition of veterans' points, ranked him below Bannerman and McGowen. With the addition of veterans' points, his score was higher than plaintiffs' scores. Hence, even had the certification been a combined male-female list, Bacon would have ranked ahead of plaintiffs by reason of his status as a veteran. The validity of Bacon's hiring, therefore, turns on the lawfulness of the veterans' preference, which is discussed below. Each of the other male applicants who were hired had interview scores which, without regard to veterans' points or promotional preference, caused them to be ranked substantially above plaintiffs. Accordingly, plaintiffs have no basis for complaint concerning those cases unless the ranking process itself was discriminatory, a question which will be discussed below.

In addition, two men were hired for limited term positions as Parole Agent I. Rodger LaFleur was first hired for a full-time, nine-months limited term position on November [*1277] 1, 1971, from a male-only certification. That certification appears to have been prepared from [**11] a list other and earlier than the 1971 open list since none of the names on the latter appears on the

former. Hence it appears that plaintiffs were not applicants when this certification was prepared and therefore have no claim.

LaFleur was again hired in May, 1972, for a full-time, twelve-months limited term position. He was hired from a male-female certification which, for the reasons stated, did not include McGowen's name. Bannerman ranked fifth behind LaFleur who was third. LaFleur received veterans' points; without them, Bannerman would have ranked higher than LaFleur. Thus, the validity of the veterans' preference is at issue here.

LaFleur was again hired in May, 1973, for a full-time, two-months term position. At that time, Bannerman held a full-time, limited term position with DYA. Neither plaintiff has a claim based on this employment. Accordingly, the only possible claim arising from the employment of LaFleur concerns the use of the veterans' preference to give LaFleur an advantage over Bannerman in obtaining the May 1972 position.

The other male hired for a limited term position was Cleothis Simmons. He was hired in February, 1972, from a certification on which [**12] he ranked ahead of Bannerman, having received a higher interview score. The only claim possible respecting Simmons concerns the process by which applicants were ranked. Simmons was again appointed to a limited term position in January, 1973, at which time Bannerman held a full-time position with DYA.

B. Hiring From the 1973 Open List

In order to provide opportunities for new applicants, SPB prepared new open lists in 1973, superseding the 1971 lists. Bannerman took the 1973 written test for Parole Agent I but did not pass it and thus did not proceed to the oral interview phase of the selection process. She therefore has no claim except to the extent it may be based on the written examination. McGowen took and passed the 1973 written test and received a score of 98 from the QAP, placing her in the fourth rank on the 1973 open list. As stated above, beginning in 1972, SPB prepared certification lists according to the rule of three ranks, rather than three persons. If the veterans' preference point system had not been in effect, McGowen would have been in the second rather than the fourth rank. She claims that the veterans' preference and the promotional preference operated [**13] in a sex-discriminatory fashion to prevent her from being hired. Thus, it is necessary to examine the impact of those practices upon the hiring which took place from the 1973 open list.

Four men were hired from that list, two of them for full-time permanent positions (Watkins and Campagna). Watkins received a promotional preference. Without it

he would have been ranked sixth, behind McGowen who was in the fourth rank. But even if Watkins had not received the preference and been left in the sixth rank, there were three ranks ahead of Bannerman from which in the normal course the appointment would have been made under the rule of three ranks. However, the man in the first rank (St. Cyr) received veterans' preference points; without them, he would have ranked seventh, behind McGowen. The validity of Watkins' employment, therefore, turns not on the promotional preference but on the veterans' preference which caused McGowen to be excluded from the first three ranks. The other man hired (Campagna) ranked ahead of McGowen without the benefit of any preference.

Two men were hired for limited term appointments (St. Cyr and Taylor). St. Cyr, as stated above, ranked ahead of McGowen [**14] by virtue of veterans' preference points. Taylor was tied with McGowen in the fourth rank and received no preference. The record shows that Taylor had prior experience as a Parole Agent I on a temporary basis which warranted his employment ahead of McGowen.

III. The Validity of the Evaluation Procedure

Plaintiffs charge that the use of written and oral tests to qualify applicants for Parole Agent I results in sex-based discrimination. [*1278] Title VII forbids the use of employment tests which are discriminatory in effect. Once the complaining party has made out a prima facie case of discrimination by showing that the particular tests select candidates in a sex pattern significantly different from that of the pool of applicants, the burden shifts to the employer to show that a given requirement has a manifest relationship to the employment in question. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975). The threshold question, then, is whether plaintiffs have sustained their burden of showing that the written test and the oral QAP process result in a significantly lower percentage of women eligible for the position of Parole [**15] Agent I.

McGowen and Bannerman cannot complain that as to them the 1971 written test had a discriminatory effect. Both passed the test and, overall, a higher percentage of women taking the test passed than men. The test is given on a pass-fail basis so scores have no significance. In 1973, Bannerman failed the written test, but it is impossible to conclude that the failure was the result of sex bias in the examination, inasmuch as once again a higher percentage of women than men passed the test.

Both plaintiffs claim that the 1971 oral interview process had a discriminatory effect, alleging that, although a higher percentage of women passed the inter-

view than men, their scores and resulting rankings were so low as to give them little chance of being hired. Although the provisions of Title VII did not become applicable to public employers until March 24, 1972, the rankings derived from the 1971 oral interview panels were used to make hiring decisions until 1973. Thus, any sex discrimination arising from the 1971 oral interview is subject to the prohibitions of Title VII since the "relevant aspects of the decisionmaking process had undergone little change" after March 24, 1972. [**16] *Hazelwood School Dist. v. United States*, 433 U.S. 229, 433 U.S. 299, 97 S. Ct. 2736, 2742 n. 15, 53 L. Ed. 2d 768 (1977); see also, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S. Ct. 555, 564, 50 L. Ed. 2d 450 (1977).

Plaintiffs presented expert testimony to support the charge that the interview process had a discriminatory impact on women applicants. The expert testified, first, that women generally obtained significantly lower scores than men, which is explained in part by the fact that the benefit of veterans' preference points generally went to men and improved their ranking. The validity of the veterans' preference is discussed in the following section.

Plaintiffs' expert further testified that women on the San Francisco Bay Area open lists obtained significantly lower scores than men even when veterans' preference points were eliminated. At the same time, however, he found that women on the Los Angeles list received higher scores than men and that no significant sex-based differences appeared on other lists.

The statistics are based on a sampling which reflects not only the scores given by the particular QAPs that interviewed [**17] in the area covered by the list but also scores of candidates who transferred to the list from other areas. Thus, the sample used is not an accurate reflection of the ratings produced by the San Francisco or any other particular QAP panel. Moreover, the results distilled by plaintiffs' expert do not demonstrate the presence of any inherent sex bias in the process.

This conclusion is reinforced by the findings of defendants' expert to the effect that, in connection with the 1971 interviews: (1) there was no statistically significant difference between the pass rates of males and females interviewed by the QAPs; (2) there was no statistically significant difference in scoring by male and female panel members; (3) there was no correlation between the sex of the panel members and the total scores assigned by a particular panel; (4) there was a high degree of correlation of the scores given an applicant by the different panel members; (5) there was no statistically significant difference between scores received by males and scores received by females from a panel; (6) there was no correlation between the sex of the applicant and whether an

applicant [*1279] ranked above or below [**18] the median score; and (7) there was no correlation between sex and obtaining a passing grade on the interview.

The Court concludes that plaintiffs have failed to establish that the interview process is discriminatory. The process itself is facially neutral. Both men and women are on the interview panels. The questions asked and criteria applied by the panel were validated by an independent study conducted by SPB in 1975, which produced the critical requirements for the Parole Agent I position. The result of the interviews, which may favor women in one case and men in another, do not establish either the existence of a discriminatory effect or a pre-textual arrangement.

The Court therefore finds that the 1971 oral interview process did not result in discrimination against plaintiffs on the basis of sex. Nor can plaintiffs complain of the 1973 QAP interviews. Bannerman was not eligible for the oral interview, not having passed the written test. McGowen, who would have placed in the second rank if the award of veterans' preference points had not moved her to the fourth rank, cannot contend that the 1973 interview process was sex-biased or had the effect of discriminating against [**19] her on the basis of sex, in view of the high ranking she in fact achieved.

In addition to the Title VII attack on the written and oral tests, plaintiffs claim that the process used to select candidates for Parole Agent I position unconstitutionally discriminates against women in violation of 42 U.S.C. § 1983. The process used to select candidates is neutral on its face. The only aspect of the process which classified applicants on the basis of sex -- the use of male-only and female-only certifications -- did not have an adverse impact upon these plaintiffs, as shown above, and was discontinued in 1972. The analysis to be applied to facially neutral, job-related tests was set forth in *Washington v. Davis*, 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976), where the Court held that the discriminatory impact of a facially non-discriminatory employment test used by the District of Columbia Police Department did not establish a constitutional violation in the absence of evidence of a discriminatory intent. From the record here, the Court is unable to discern any evidence of discriminatory intent in the Parole Agent I testing procedures. Indeed, the QAPs were admonished not [**20] to discriminate on the basis of sex in their judgment of applicants. *Washington v. Davis* counsels trial courts to regard the totality of the relevant facts, including the disproportionate impact of the law or practice on one race, or sex, in judging whether an invidious discriminatory purpose can be inferred from a facially neutral practice. Considering all of the evidence here, no such purpose can be inferred.

IV. *The Veterans' Point Preference*

As may be seen from the facts found above, the award of veterans' preference points adversely affected the ranking of both Bannerman and McGowen in 1971, and that of McGowen in 1973. Pursuant to *California Government Code § 18973*, a veteran, as defined in that section, or the widow or widower of a veteran, is allowed a credit of 10 points to the passing score he attains in an entrance examination for a civil service position. Veterans' points may be used not to attain the veteran candidate. The veterans' preference statute is neutral on its face in that it applies equally to male and female veterans. Nevertheless, the Court may take judicial notice of the [**21] fact that, in practical effect, the benefits of the veterans' preference are available more frequently to male applicants, since males have served in the armed forces in disproportionately greater numbers than females. This is reflected in the conclusion which plaintiffs' expert drew from his study of the results of the open list in both 1971 and 1973 that when veterans' points were counted, the differences between the scores of men and women were statistically significant.

Plaintiffs are precluded from attacking the veterans' preference under Title VII since Section 712, 42 U.S.C. § 2000e-11, provides that Title VII shall not be construed to repeal or modify federal, state, or local laws creating special rights or preferences [*1280] for veterans. They do attack the preference under *Section 1983*, however, relying on *Anthony v. Massachusetts*, 415 F. Supp. 485 (D.Mass., 1976) (three-judge court), appeal docketed *sub nom.*, *Massachusetts v. Feeney*, 45 U.S.L.W. 3163 (U.S. Aug. 23, 1976, No. 76-265).² In *Anthony*, the majority sustained plaintiff's attack on the Massachusetts statute which gave veterans an absolute preference over other applicants, holding that it [**22] discriminated against women in violation of the *equal protection clause of the 14th Amendment*. The court made clear at the outset that it found the Massachusetts statute to have been enacted not for the purpose of eliminating women from civil service positions but for the legitimate purposes of encouraging military service and easing the transition from military to civilian life. Relying upon the disproportionate impact on women civil service applicants, however, the court analyzed the discriminatory effect upon women in light of Supreme Court opinions which require a convincing factual rationale for sex-based classifications, and found that the Massachusetts preference could not survive that scrutiny. See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636, 95 S. Ct. 1225, 43 L. Ed. 2d 514 (1975), cited by the court in *Anthony*.

2 The Supreme Court has since certified to the Supreme Judicial Court of Massachusetts the question whether the state attorney general could bring the appeal without the consent of the state officials who were the named defendants. 429 U.S. 66, 97 S. Ct. 345, 50 L. Ed. 2d 224 (1976). *Anthony v. Massachusetts* is analyzed in Note, *Veterans' Public Employment Preference as Sex Discrimination*, 90 Harv.L.Rev. 805 (1977).

[**23] Thus, the *Anthony* case rested its holding entirely upon the reasoning that a state statute which is discriminatory in its impact upon women may violate *Section 1983* even though the law is neutral on its face and enacted without discriminatory intent. This approach was rejected in *Washington v. Davis*, 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976), decided shortly after *Anthony*, wherein the Court made legislative intent the crucial factor in discrimination cases. Plaintiffs in *Washington* were black District of Columbia police officers and applicants for that position who challenged on equal protection grounds the literacy test for police officers. At trial, plaintiffs proved that black officers and applicants failed the test in proportionally greater numbers than did white applicants, but the District Court held that the disproportionate impact alone did not warrant a finding that the test was discriminatory. The Supreme Court, reversing the Circuit Court and affirming the District Court, held that discriminatory impact standing alone is insufficient to invalidate a law or practice without proof that the law or practice was designed so to discriminate. Moreover, [**24] the Court held that discriminatory impact alone did not prove an intent to discriminate where the law or practice is neutral on its face.³

3 *Washington v. Davis*, *supra*, requires a showing of intent to determine whether a statute neutral on its face may be found to discriminate on the basis of *race*. The Court did not address in that case the question of sex discrimination. Given the fact that race classifications are subject to strict scrutiny and must be justified on the basis of a compelling state interest, while sex classifications are examined under a less searching standard, the showing of intent would have to be at least as substantial as *Washington v. Davis*, *supra*, requires for a race case. In *Branch v. Du Bois*, 418 F. Supp. 1128 (N.D.Ill., 1976) (three-judge court) the Illinois veterans' preference law was upheld against challenge by women on a finding that there was no intent to discriminate, applying the *Davis* case.

The record in this case reveals no evidence of any intent to [**25] discriminate underlying the California

veterans' preference system. As other courts have stated, veterans' preference statutes have as their purpose the rewarding of veterans who have served their country and, recognizing that military experience may enhance a candidate's qualifications, the easing of their re-entry into the civilian job market. See, *Feinerman v. Jones*, 356 F. Supp. 252 (M.D.Pa.1973) (three-judge court) (Pennsylvania statute awarding 10 point bonus upheld against equal protection challenge by women applicants); *Branch v. Du Bois*, 418 F. Supp. 1128 (N.D.Ill.1976) (three-judge court). Indeed, as stated above, the *Anthony* court recognized [*1281] the valid, non-discriminatory purposes of the Massachusetts veterans' preference law. The crucial difference between the facts of that case, and those presented here, is that the Massachusetts system awarded an absolute preference to any veteran passing the entrance examination, no matter how low his score might be in comparison with other applicants. The opinion of Judge Tauro, writing for the *Anthony* court, strongly emphasized the absolute nature of the preference, as did the concurring opinion of [**26] Circuit Judge Campbell, 415 F. Supp. at 501. Both opinions suggest that a less than absolute preference might pass constitutional muster. Thus, even if intent to discriminate could be inferred from the type of preference given by Massachusetts, such a result would not follow here where the preference is limited to 10 points added to a passing score. Absent a finding of legislative intent to discriminate, plaintiffs' claim with respect to the veterans' preference system must fail under *Washington v. Davis*, *supra*.

V. Promotional Preference and Male-Only Certification

Under the practices of SPB, any DYA employee eligible for promotion to Parole Agent I was placed ahead of all other candidates on the certification list, regardless

of score. As the foregoing analysis shows, under the circumstances of this case, that preference did not have an adverse effect on either plaintiff. It is not necessary, therefore, to pass on its lawfulness. Similarly, the use of male-only certifications, until they were discontinued in 1972, had no impact on plaintiffs here inasmuch as they failed to result in the hiring of men with lower scores than plaintiffs.

VI. Bannerman's Other Claims

[**27] In addition to her claims based upon the discriminatory impact of the hiring process, Bannerman alleges that she was discriminated against on the basis of her sex during her employment as Parole Agent I. She claims that her male supervisors gave her negative performance evaluations, that she was followed by her supervisors, that her office was bugged, and that she was prevented from taking the examination for Parole Agent III. Bannerman's testimony with respect to each of these claims was contradicted by her supervisors, who testified that they never evaluated her performance on the basis of sex nor harassed her in the manner she alleges. Bannerman filed a charge relating to these claims with the EEOC. The Commission investigated and found no evidence of discrimination. The Court finds that the evidence presented by defendants is more credible than that of Bannerman, and accordingly concludes that plaintiff has not sustained her burden of proof on these issues.

The foregoing constitutes the Court's findings of fact and conclusions of law.

For the reasons stated above, the Court finds and concludes that judgment should be entered in favor of defendants on all claims of both plaintiffs, [**28] and that each party shall bear its own costs.

IT IS SO ORDERED.