

# THE POTENTIAL IMPACT OF CEDAW RATIFICATION ON U.S. EMPLOYMENT DISCRIMINATION LAW: LESSONS FROM CANADA

Jessica Riggin\*

## I. INTRODUCTION

At first glance, the struggle for women's rights may seem to be a thing of the past. For one, women have begun to occupy extremely prominent positions in government. Hillary Clinton, the close runner-up for Democratic Presidential nominee, is now Secretary of State.<sup>1</sup> Sarah Palin was the 2008 Republican Vice Presidential candidate and is rumored to be a future Presidential contender.<sup>2</sup> Nancy Pelosi is frequently in the news, due to her position as House Minority Leader and former Speaker of the House,<sup>3</sup> and Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan comprise a powerful female voice on the Supreme Court.<sup>4</sup> Women are

---

\* A.B. Boston College (2008); J.D. Columbia Law School (expected 2011). The author would like to thank Lenora Lapidus for introducing her to the topic, Elizabeth Emens for her generous guidance, and Achraf Farraj, Juan Carlos Ibarra, and the staff of the *Columbia Human Rights Law Review* for their diligence in editing this Note.

1. Secretary of State Hillary Rodham Clinton, <http://www.state.gov/secretary> (last visited Mar. 7, 2010).

2. See, e.g., Paul Bedard, *Sarah Palin vs. President Barack Obama in 2012?*, Washington Whispers Blog, U.S. News & World Report (Oct. 8, 2008), <http://www.usnews.com/news/blogs/washington-whispers/2008/10/08/sarah-palin-vs-president-barack-obama-in-2012>; *Sarah Palin.com: In support of Sarah Palin 2012*, Sarah Palin.com, <http://www.sarah-palin.com/> (last visited Feb. 7, 2011).

3. Representative Nancy Pelosi, Representing the 8<sup>th</sup> District of California, <http://www.house.gov/pelosi/> (last visited Mar. 7, 2010).

4. *Members of the Supreme Court of the United States*, Supreme Court of the United States, <http://www.supremecourt.gov/about/members.aspx> (last visited Jan. 22, 2011).

now the CEOs of major corporations,<sup>5</sup> and their representation in the workforce has swelled in the past century.

Why, then, is the United States one of seven countries and the only industrialized nation that has failed to ratify the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW” or the “Convention”)? Given the seemingly progressive state of affairs in the United States, one would likely expect the U.S. to be a leader in gender equity, both in terms of its domestic law and its international human rights obligations. This, however, is unfortunately not the case. CEDAW, billed as the “women’s rights treaty,” has remained pending in the United States Senate Foreign Relations Committee for over twenty-five years, while nearly every other country in the world has ratified it. CEDAW is now, though, beginning to reemerge in public discourse under the Obama administration, as President Obama and a number of top administration officials have been vocal CEDAW supporters.<sup>6</sup> As such, it is vital for both supporters and detractors of CEDAW to hypothesize and analyze the likely effects of U.S. ratification.

CEDAW is designed to cover all aspects of women’s rights, so its provisions span a broad spectrum of topical areas. This Note focuses on the potential effects of CEDAW ratification on four discrete areas of U.S. employment discrimination law, a topic yet to receive much attention in the CEDAW literature. Recent scholarship on CEDAW has discussed the benefits and drawbacks of U.S. ratification generally,<sup>7</sup> or as compared to other approaches

---

5. For examples of major companies with female CEOs, see *Our Leadership*, PepsiCo, <http://www.pepsico.com/Company/Leadership.html> (last visited Jan. 22, 2011); *Management Team*, Kraft Foods, <http://www.kraftfoods.com/company/About/profile/index.aspx> (last visited Jan. 22, 2011); *Meet the Executives*, DuPont, [http://www2.dupont.com/Our\\_Company/en\\_US/executives/index.html](http://www2.dupont.com/Our_Company/en_US/executives/index.html) (last visited Jan. 22, 2011).

6. Susan E. Rice, Ambassador, U.S. Permanent Representative to the United Nations, Statement on the 30th Anniversary of the Convention on the Elimination of All Discrimination against Women (CEDAW) (December 18, 2009), available at <http://usun.state.gov/briefing/statements/2009/133840.htm> (“The Obama Administration strongly supports this landmark treaty, and is committed to United States ratification.”).

7. See, e.g., Ann M. Piccard, *U.S. Ratification of CEDAW: From Bad to Worse?* 28(1) *Law and Ineq.* 119 (2010), available at <http://ssrn.com/abstract=1483768> (exploring the possibility that U.S. ratification of CEDAW may be ineffective, or even potentially harmful); Harold Hongju Koh, *Why America Should Ratify the Women’s Rights Treaty (CEDAW)*, 34 *Case W. Res. J. Int’l L.* 263 (2002) (explaining how CEDAW ratification would affirm the US commitment to gender equality and address common misconceptions about the treaty);

attempting to achieve gender equality.<sup>8</sup> Numerous articles have analyzed CEDAW's specific impact on certain countries throughout the world,<sup>9</sup> while others focus on its application to specific, hot-button issues.<sup>10</sup> Others still have examined CEDAW itself from a theoretical framework.<sup>11</sup> None, however, have focused exclusively on CEDAW's

---

Barbara Boxer, *CEDAW Ensuring the Rights of Women in Afghanistan and Beyond* (2002), American Bar Association, <http://www.abanet.org/irr/hr/summer02/boxer.html> (advocating for the U.S. ratification of CEDAW to signal to the world the strength of the U.S. commitment to women's rights).

8. See, e.g., Adrien K. Wing & Samuel P. Nielson, *An Agenda for the Obama Administration on Gender Equality: Lessons from Abroad*, 107 Mich. L. Rev. First Impressions 124 (2009) (citing the difficult political battle that would inevitably result from ratification efforts, the concern that RUDs would strip the treaty of all force, and the non-self-executing nature of the treaty).

9. See, e.g., Jennifer T. Sudduth, *CEDAW's Flaws: A Critical Analysis of Why CEDAW is Failing to Protect a Women's Right to Education in Pakistan*, 38 J.L. & Educ. 563 (2009) (asserting that fundamentalist religious traditions, poor governance, and a lack of domestic and international enforcement are at the root of CEDAW's failure to protect women's right to education in Pakistan); Lisa R. Pruitt, *Migration, Development, and the Promise of CEDAW for Rural Women*, 30 Mich. J. Int'l L. 707 (2009) (considering how China, Ghana, India, and the Republic of South Africa have implemented Article 14 of CEDAW, which sets forth particular rights for rural women); Angela M. Banks, *CEDAW, Compliance, and Custom: Human Rights Enforcement in Sub-Saharan Africa*, 32 Fordham Int'l L.J. 781 (2009) (critiquing the CEDAW Committee's compliance discourse framework, in terms of its effects on domestic implementation in Sub-Saharan Africa); Michele Brandt, *The Tension Between Women's Rights and Religious Rights: Reservations to CEDAW by Egypt, Bangladesh, and Tunisia*, 12 J.L. & Religion 105 (1996) (discussing religious based reservations to CEDAW and recommending solutions to maintain the effectiveness of CEDAW in light of these reservations).

10. See, e.g., Carlota Bustelo, *Reproductive Health and CEDAW*, 44 Am. U. L. Rev. 114, 148–50 (1995) (briefly explaining CEDAW's provisions relating to reproductive rights); Jennifer S. Hainsfurther, *A Rights-Based Approach: Using CEDAW to Protect the Human Rights of Migrant Workers*, 24 Am. U. Int'l L. Rev. 843 (2009) (discussing how CEDAW can be used to advocate for the rights of both legal and undocumented migrant workers); Ravi Mahalingam, *Women's Rights and the "War on Terror": Why the United States Should View the Ratification of CEDAW as an Important Step in the Conflict with Militant Islamic Fundamentalism*, 34 Cal. W. Int'l L.J. 171 (explaining how women's rights intersect with the war on terror, in order to emphasize the importance of CEDAW ratification by the United States); Jennifer Riddle, Note, *Making CEDAW Universal: A Critique of CEDAW's Reservation Regime Under Article 28 and the Effectiveness of the Reporting Process*, 34 Geo. Wash. Int'l L. Rev. 605 (2002) (reviewing the reservations to CEDAW and advocating for an alternative to CEDAW's ineffective system of handling crippling reservations).

11. See, e.g., Brad R. Roth, *The CEDAW as a Collective Approach to Women's Rights*, 24 Mich. J. Int'l L. 187, 189 (2002) (asserting that CEDAW, as a document

Article 11 employment discrimination provisions as they would be applied to the United States. As such, this paper intends to fill a gap in the literature and explore the nuances of a relatively overlooked issue. This topic has not been unaddressed for lack of importance; while this Note does not discuss the role of work in daily American life, it remains evident that the ability to obtain and sustain continued employment free from discrimination on the basis of sex is of the utmost importance.

In order to inform the analysis of CEDAW's effects on employment law in the United States, this Note examines how CEDAW ratification has influenced women's employment rights in Canada. Canada was chosen because it closely resembles the United States socially, economically, politically, and legally, and has a similarly long history of women's employment rights. As such, Canada is one of the most useful case studies to inform predictions as to the effects of CEDAW in the United States.<sup>12</sup> A more detailed

---

advocating for "positive liberty," presents a collectivist challenge to the liberal-individualist approach); Alda Facio & Martha I. Morgan, *Equity or Equality for Women? Understanding CEDAW's Equality Principles*, 60 Ala. L. Rev. 1133, 1134 (2009) (discussing the difference between "equality" and "equity" and advocating for the CEDAW Committee's use of "equality").

12. The fact that a number of other studies in a variety of fields have engaged in comparative analyses of the United States and Canada suggests that doing so with CEDAW will be beneficial and informative. *See generally* David Card, Thomas Lemieux & W. Craig Riddell, *Unionization and Wage Inequality: A Comparative Study of the U.S., the U.K., and Canada* (Nat'l Bureau of Econ. Research Working Paper No. 9473, 2003) (using these three countries because the "institutional arrangements governing unionization and collective bargaining are relatively similar"); Michele Mekel & Samuel E.D. Shortt, *A Comparative Study of Canadian and U.S. Academic-linked Health Policy Centers*, NLM Gateway (2005), available at <http://gateway.nlm.nih.gov/MeetingAbstracts/ma?f=103623410.html> (abstract of meeting discussing structural models and operational success strategies of university-linked health policy centers in Canada and the United States); Bidisha Biswas, *We Are Good Citizens: Post-9/11 Diaspora Mobilization in USA and Canada* (2007), available at [http://www.allacademic.com/meta/p180662\\_index.html](http://www.allacademic.com/meta/p180662_index.html) (examining the post-9/11 security environment and immigration communities in the United States and Canada); S. A. Krajewski et al., *Access to Emergency Surgical Care—A Comparative Study on Canadian and American Healthcare Systems*, 115 J. of Surgical Research 235 (2009) (examining whether the difference in universal health care on substantially similar populations results in a difference in access to emergency surgical care).

analysis of the similarities and differences between the United States and Canada is undertaken in Part IV(A), *infra*.<sup>13</sup>

CEDAW ratification has the potential to improve gender equality in the workplace without imposing an undue burden upon States Parties. First and foremost, positive results can directly flow from the legal obligations created by the document itself. Additionally, the Committee on the Elimination of Discrimination against Women, the treaty body charged with helping States Parties implement the Convention (the “Committee” or “CEDAW Committee”), provides feedback to each country. This expert feedback also has the potential to generate further positive progress through the interaction between the Committee and the country. For example, in Canada, CEDAW has spurred research into lesser explored areas of employment law, such as the role of unpaid domestic work in pay equity statistics. Canada responded to the CEDAW Committee’s request for additional information and then utilized those conclusions to achieve positive policy outcomes in such areas as parental leave. The CEDAW Committee’s reports also spark constructive dialogue about issues of employment discrimination, which helps interested NGOs push for further change.<sup>14</sup>

Not all CEDAW Committee concerns translate into action, however, and its influence seems to stop at budget allocation decisions. For example, Canada has persistently refused to expand the scope of its federal equal opportunity in employment laws and its enforcement mechanisms, which are both severely limited by a lack of funding.<sup>15</sup> Despite their practical limitations, however, the CEDAW Committee’s recommendations do seem to have initiated reforms resulting in improved gender equality in the workplace. Thus, the United States would likely be able to similarly benefit from the CEDAW Committee’s recommendations, as well as from the enhanced legal support for gender equality.

Part II of this Note provides background information on CEDAW and the CEDAW Committee, as well as an explanation of the history of CEDAW in the United States. Since CEDAW has a

---

13. Although it is tempting to examine the effects of CEDAW in developing countries, where even now, women have been relegated to second class status, such case studies have less comparative value in an inquiry into the effects of CEDAW in the United States, in which there is an established legal framework for gender equity.

14. See *infra* Part IV.C.2.

15. See *infra* Part IV.B.2.

long history of consideration by the United States, this Part explains why the treaty is relevant now and discusses likely obstacles to ratification. Part III sets forth CEDAW's employment discrimination provisions by examining the text itself, as well as its *Travaux Préparatoire* (Preparatory Notes), which detail the major compromises and discussions in the drafting of these provisions. Part IV first provides an introduction to the Canadian legal system and the country's history with gender equality measures, noting relevant comparisons to the United States. It then details Canada's current employment discrimination laws before evaluating its efforts to comply with CEDAW. Part V follows a similar format, describing United States employment discrimination laws and the current state of gender equity in the United States workplace. It then analyzes lessons from Canada, in order to predict the likely effects of CEDAW ratification on U.S. employment discrimination law.

## II. THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

CEDAW was adopted by the United Nations in 1979 to create a comprehensive international standard for the protection and promotion of women's rights.<sup>16</sup> CEDAW, often described as an "international bill of rights for women," defines discrimination against women and creates a domestic framework to end such abuses.<sup>17</sup> The Convention was the culmination of a number of prior women's rights instruments adopted by the United Nations, including the Convention on the Political Rights of Women in 1952, the Convention on the Consent to Marriage in 1957, and the non-binding Declaration on the Elimination of Discrimination against

---

16. Amnesty Int'l, A Fact Sheet on CEDAW: Treaty for the Rights of Women (2005), available at [http://www.amnestyusa.org/women/pdf/CEDAW\\_fact\\_sheet.pdf](http://www.amnestyusa.org/women/pdf/CEDAW_fact_sheet.pdf).

17. Discrimination is defined as "... any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field." United Nations, Div. for the Advancement of Women, Dep't of Econ. and Soc. Affairs: Convention on the Elimination of All Forms of Discrimination against Women, <http://www.un.org/womenwatch/daw/cedaw/> (last visited Feb. 7, 2011).

Women, which laid the groundwork for CEDAW.<sup>18</sup> 186 countries have currently ratified CEDAW; the holdouts are Iran, Nauru, Palau, Tonga, Somalia, Sudan, and the United States.<sup>19</sup>

The Convention calls for parties to eliminate all discrimination against women, in such areas as healthcare, education, employment, domestic relations, law, and political participation.<sup>20</sup> Countries that have ratified or acceded to CEDAW are legally obligated to implement its provisions domestically, as well as to report on compliance at least every four years.<sup>21</sup> These reports are meant to include areas of progress, as well as any difficulties with implementation.<sup>22</sup>

The Committee on the Elimination of Discrimination against Women was established in 1982 under Article 17 of the Convention in order to review such reports and provide specific recommendations to each country.<sup>23</sup> After receiving country reports from States Parties, the Committee enters into open dialogue with the reporting country and publishes recommendations and conclusions based on its findings.<sup>24</sup>

The Committee is made up of twenty-three independent experts elected by parties to the Convention by secret ballot.<sup>25</sup> In

18. Luisa Blanchfield, Cong. Research Serv., Order Code RL33652, The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW): Congressional Issues CRS-2 (2008), available at <http://fpc.state.gov/documents/organization/112471.pdf> [hereinafter CRS, CEDAW Congressional Issues].

19. U.N. Treaty Collection, States Parties of the Convention on the Elimination of All Forms of Discrimination against Women 1, available at <http://treaties.un.org/doc/Publication/MTDGS/Volume%20I/Chapter%20IV/IV-8.en.pdf> (last visited Nov. 18, 2010).

20. Luisa Blanchfield et al., Cong. Research Serv., Order Code RL34438, International Violence against Women: U.S. Response and Policy Issues CRS-35 (2008), available at <http://fpc.state.gov/documents/organization/103698.pdf>.

21. Convention on the Elimination of All Forms of Discrimination against Women arts. 18, 24, Dec. 18, 1979, 1249 U.N.T.S. 13, 16, 18 (entered into force Sept. 3, 1981), available at [http://treaties.un.org/doc/Treaties/1981/09/19810903%2005-18%20AM/Ch\\_IV\\_8p.pdf](http://treaties.un.org/doc/Treaties/1981/09/19810903%2005-18%20AM/Ch_IV_8p.pdf) [hereinafter CEDAW].

22. CRS, CEDAW Congressional Issues, *supra* note 18, at CRS-3.

23. *Id.*

24. *Id.* For a full list of CEDAW Committee recommendations, see *Committee on the Elimination of Discrimination against Women—General Recommendations*, Office of the High Comm'r for Human Rights, <http://www2.ohchr.org/english/bodies/cedaw/comments.htm> (last visited Nov. 29, 2010).

25. CRS, CEDAW Congressional Issues, *supra* note 18, at CRS-3.

order to be eligible for service, candidates must “have high moral standing and competence” and “represent different forms of civilization as well as principal legal systems.”<sup>26</sup> Each party to CEDAW may nominate one expert, who will serve a four-year term if elected.<sup>27</sup> The Committee meets twice a year and reports annually on its activities to the U.N. General Assembly.<sup>28</sup> In order to be as well informed as possible, the Committee and its working groups also invite non-governmental organizations to provide country-specific information.<sup>29</sup> In fact, NGOs do regularly attend and make presentations at Committee meetings.<sup>30</sup>

On October 6, 1999, the U.N. General Assembly adopted an Optional Protocol to strengthen the Convention.<sup>31</sup> The Protocol contains a “communications procedure” that allows groups or individuals to report complaints to the CEDAW Committee.<sup>32</sup> It also allows the Committee to explore potential abuses of women’s rights

---

26. *Id.*

27. *Id.*

28. *Id.*

29. See *Information Note Prepared by OHCHR for NGO Participation*, Office of the High Comm’r for Human Rights, [http://www2.ohchr.org/english/bodies/cedaw/docs/NGO\\_Participation.final.pdf](http://www2.ohchr.org/english/bodies/cedaw/docs/NGO_Participation.final.pdf) (last visited Nov. 29, 2010) (describing how reports from non-governmental organizations help to keep the Committee well-informed and how the organizations can submit reports to the Committee); see also Comm. on the Elimination of Discrimination against Women, Statement at the 45th Session of the Committee on the Elimination of Discrimination against Women on the Committee’s Relationship with Non-governmental Organizations, available at <http://www2.ohchr.org/english/bodies/cedaw/docs/statements/NGO.pdf> (last visited Sept. 25, 2010) (emphasizing the importance of NGOs in ensuring States Parties implement the Convention as required).

30. For an example of an NGO statement, see Hama Jamiyaa, Statement at the 45th Session of the Committee on the Elimination of Discrimination against Women: Maldives NGO Statement to the CEDAW Committee, available at <http://www.iwraw-ap.org/resources/pdf/Maldives%20oral%20statement.pdf> (last visited Sept. 25, 2010) (evaluating the Maldives’ government on its implementation of the Convention according to fourteen Maldives NGOs and community-based organizations).

31. Optional Protocol to the Convention on the Elimination of Discrimination against Women, *opened for signature* Dec. 10, 1999, 2131 U.N.T.S. 83, available at <http://www2.ohchr.org/english/law/cedaw-one-about.htm>. There are 99 parties to the Optional Protocol. For a full list of countries, see *States Parties of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, U.N. Treaty Collection, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8b&chapter=4&lang=.en.pdf](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8b&chapter=4&lang=.en.pdf) (last visited Nov. 29, 2010).

32. *Id.*



in countries that have adopted the Protocol through an “inquiry procedure.”<sup>33</sup> Although this inquiry procedure is confidential and depends on the cooperation of the State Party,<sup>34</sup> it can produce public reports and heighten the potential for reform.<sup>35</sup> Nevertheless, despite the Optional Protocol and the Convention’s use of mandatory language, CEDAW is enforced by the same informal mechanisms as many other treaties—political will and international pressure.<sup>36</sup>

#### A. CEDAW History in the United States

Although the United States has failed to ratify CEDAW thus far, the treaty has a long history of consideration and has been pending in the Senate Foreign Relations Committee for over twenty-five years. The ratification process began when President Jimmy Carter signed the treaty on July 17, 1980 and submitted it to the Senate Foreign Relations Committee in November 1980.<sup>37</sup> Treaties, however, have the potential to languish in the committee for years. CEDAW is an extreme example—the Foreign Relations Committee did not vote on the treaty until 1994, when it recommended full Senate approval after being urged to do so by various state

---

33. United Nations Div. for the Advancement of Women Dep’t of Econ. and Soc. Affairs, *Optional Protocol to CEDAW Communication Procedure: Inquiry Procedure*, <http://un.org/womenwatch/daw/cedaw/protocol/communication.htm> (last visited Feb. 7, 2011).

34. Office of the United Nations High Comm’r for Human Rights, *Human Rights Bodies—Complaints Procedure*, <http://www2.ohchr.org/english/bodies/petitions/index.htm> (last visited Feb. 7, 2011).

35. See, e.g., Comm. on the Elimination of Discrimination against Women, *Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under Article 8 of the Optional Protocol to the Convention, and Reply from the Government of Mexico* 92, U.N. Doc. CEDAW/C/2005/OP.8/MEXICO (Jan. 27, 2005), available at <http://www.un.org/womenwatch/daw/cedaw/cedaw32/CEDAW-C-2005-OP.8-MEXICO-E.pdf> (illustrating how the Committee’s report regarding CEDAW violations in Mexico resulted in the Mexican government addressing the claims and promising to implement the Committee’s recommendations).

36. As the United Nations lacks a standing army or alternative method of forcibly ensuring enforcement with the mandatory language of treaties like CEDAW, it can only rely on Committee reports to generate international political pressure to instigate change.

37. Am. Ass’n of Univ. Women, *CEDAW in the United States*, [http://www.aauw.org/About/international\\_corner/upload/CEDAWin-the-US.pdf](http://www.aauw.org/About/international_corner/upload/CEDAWin-the-US.pdf) (last visited Feb. 7, 2011) [hereinafter CEDAW in the United States].

legislatures, sixty-eight senators, and President Clinton.<sup>38</sup> Yet, when Senator Jesse Helms became the committee chairman in 1995, he led a hold on the treaty and refused to permit hearings on it, thus preventing a full vote by the Senate.<sup>39</sup> According to Helms, the treaty was “negotiated by radical feminists with the intent of enshrining their radical anti-family agenda into international law.”<sup>40</sup> Despite the fact that the United States pledged in 1995 to ratify CEDAW by 2000 at the United Nations Fourth World Conference on Women in Beijing,<sup>41</sup> Helms’ efforts paid off and the treaty remained dormant.

In subsequent years, a number of states, counties, and cities began to pass resolutions in support of CEDAW ratification.<sup>42</sup> The city of San Francisco voted to adopt the treaty and has since incorporated its provisions into such areas as hiring practices

---

38. *Id.* See Working Group on Ratification of the U.N. Convention on the Elimination of All Forms of Discrimination against Women, Human Rights For All (2001), available at [http://endabuse.org/userfiles/file/Maternal\\_Health/cedaw.pdf](http://endabuse.org/userfiles/file/Maternal_Health/cedaw.pdf) (last visited Nov. 29, 2010) [hereinafter Human Rights for All]. For more information on the 1994 congressional hearings, see S. Rep. No. 103-38 (1994). (Comm. on For. Relations Rep.).

39. David Crary, *Bitter Divisions Resurface over Global Women’s Right Treaty that U.S. Has Never Ratified*, Associated Press, June 20, 2002; see also Marjorie Cohn, *Obama: Bring the U.S. into the 21<sup>st</sup> Century on Gender Equality*, AlterNet (Dec. 22, 2008), <http://www.alternet.org/reproductivejustice/114802/> (noting that Committee Chairman Helms continued to hold CEDAW hostage in spite of President Clinton’s support by keeping it from a vote in the Senate).

40. Christina Hoff Sommers, *The UN Women’s Treaty: The Case Against Ratification* (American Enterprise Institute Working Paper No. 2010-01, 2010), available at <http://www.aei.org/docLib/20100323-CEDAW-Sommers.pdf>.

41. Human Rights for All, *supra* note 38.

42. Legislatures in 11 states and territories have endorsed U.S. ratification: California, Hawaii, Illinois, Iowa, Guam, Maine, Massachusetts, New Hampshire, New York, Rhode Island and Vermont. The Connecticut and Wisconsin Senates and the House of Representatives in North Carolina, Florida, South Dakota and West Virginia also have endorsed U.S. ratification. Nineteen counties have endorsed U.S. ratification: Alachua Co., FL, Cook Co., IL, Cuyahoga Co., OH, Dade Co., FL, Dane Co., WI, Fayette/Lexington Co., KY, Jefferson County Fiscal Court, KY, Los Angeles Co., CA, Marin Co., CA, Milwaukee Co., WI, Monterrey Co., CA, San Francisco Co., CA, San Mateo Co., CA, Santa Barbara Co., CA, Santa Clara Co., CA, Santa Cruz Co., CA, Sonoma Co., CA, Spokane Co., WA and Ventura Co., CA. Human Rights for All, *supra* note 38, at 9. In total, 96 cities, counties, and states have passed resolutions urging the ratification of CEDAW. Peggy Simpson, *Chances Improve for Ratification of CEDAW*, The Women’s Media Center, <http://womensmediacenter.com/blog/2009/03/chances-improve-for-ratification-of-cedaw-by-peggy-simpson/> (last visited Mar. 20, 2009).

and juvenile rehabilitation.<sup>43</sup> Over 200 organizations representing millions of people support U.S. ratification of CEDAW, including the AARP (formerly known as the American Association of Retired Persons), Amnesty International, the American Bar Association, and the American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”).<sup>44</sup> Yet, in spite of this widespread support, the ratification process remained stalled for a number of years.

The story picks up again in 2002, when a letter from the Bush administration to the Senate Foreign Relations Committee stated that CEDAW is “generally desirable and should be ratified.”<sup>45</sup> This comment sparked energetic backlash from conservative organizations, which denounced the treaty as a “dangerous, anti-family document” and a “thinly veiled cover for demanding abortion and decriminalizing prostitution.”<sup>46</sup> Six months after the Bush administration’s initially supportive letter, then-Secretary of State Colin Powell wrote to the Senate Foreign Relations committee, stating that, while the administration still supports CEDAW’s “general goal of eradicating invidious discrimination across the globe,” it now believes that the Justice Department should review the document due to its “vagueness” and “complexity.”<sup>47</sup> In particular, the Administration cited its concern with “controversial interpretations” of certain CEDAW Committee recommendations.<sup>48</sup> The reasons for this policy shift were not explicitly stated, but it seems likely that this change in the administration’s position was prompted by the conservative backlash that immediately ensued after the administration initially expressed support for the treaty.

---

43. Gretchen Sidhu, *San Francisco Plunges Ahead in Adopting a CEDAW Treaty of its Own*, Chi. Trib., Aug. 2, 1998, at 8; see also Linda Tarr-Whelan, *Why the U.S. needs more women in government*, S.F. Chron., Dec. 18, 2009, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/12/17/EDKV1B5HPH.DTL> (noting the “significant, encouraging” results that flowed from San Francisco’s adoption of CEDAW); Cohn, *supra* note 39.

44. For a complete list of organizations supporting CEDAW ratification, see Human Rights for All, *supra* note 38, at 44–46.

45. Karen DeYoung, *Senate Panel to Defy Bush, Vote on Women’s Treaty*, Wash. Post, July 18, 2002, at A21.

46. *Id.*

47. *Id.*

48. CRS, CEDAW Congressional Issues, *supra* note 18, at CRS-5. For a discussion of the common misconceptions about CEDAW’s more controversial provisions, see United Nations Association for the United States of America, *Myths and Realities about CEDAW*, <http://www.unausa.org/Page.aspx?pid=935> (last visited Feb. 7, 2011).

Despite this presidential hesitation, in an “almost unheard-of challenge to presidential prerogative,” then-Senate Foreign Relations Committee chair Joseph Biden scheduled a committee vote on CEDAW.<sup>49</sup> The committee heard testimony both in support of and against ratification from such diverse sources as non-governmental organizations, academics, and relevant agencies.<sup>50</sup> With a bipartisan vote of 12-7, the Foreign Relations Committee again voted to recommend ratification of CEDAW, subject to four reservations, five understandings, and two declarations.<sup>51</sup> This time, however, an overcrowded fall Senate schedule prevented consideration by the full Senate, and the 107th Congress adjourned before the Senate could vote on the Convention.<sup>52</sup> In 2007, the Bush administration sent a letter to the Senate Foreign Relations Committee stating that it did not support Senate action on the treaty.<sup>53</sup> Again, the rationale behind the Bush Administration’s policy shift was not openly explained, but for some reason, CEDAW was simply not to be passed while George W. Bush was in office.

#### B. Why Now?

Despite this historic inability to generate enough political movement to ratify CEDAW, the treaty has once again reemerged in national discussion under the Obama administration. Prominent members of the current administration and legislature support the ratification of CEDAW, suggesting that action may be imminent. President Obama,<sup>54</sup> Vice President Biden,<sup>55</sup> Secretary of State Hillary

---

49. DeYoung, *supra* note 45.

50. CRS, CEDAW Congressional Issues, *supra* note 18, at CRS-5.

51. S. Exec. Rep. No. 107-9 (2002) at 4. The approval included the nine reservations, understandings, and declarations (RUDs) recommended by the Clinton Administration, plus two additional understandings. One understanding stated that “nothing in this Convention shall be construed to reflect or create any right to abortion and in no case should abortion be promoted as a method of family planning.” *Id.* at 12. The other stated that the “CEDAW Committee has no authority to compel parties to follow its recommendations.” *Id.* at 9–10.

52. CEDAW in the United States, *supra* note 37.

53. CRS, CEDAW Congressional Issues, *supra* note 18, at CRS-6.

54. Press Release, Robert Wood, Deputy Dep’t Spokesman, U.S. Dep’t of State, Thirtieth Anniversary of the United Nations Adoption of CEDAW (Dec. 18, 2009), *available at* <http://www.state.gov/r/pa/prs/ps/2009/dec/133893.htm> (“President Obama’s Administration views CEDAW as a powerful tool for making gender equality a reality. We are committed to U.S. ratification of the Convention . . . .”); *Senator Obama on the Issues*, National Organization for

Clinton,<sup>56</sup> and Legal Counsel for the State Department Harold Koh<sup>57</sup> have all backed CEDAW.<sup>58</sup>

In addition to support from prominent members of the administration, a number of key senators are staunch supporters of CEDAW. Barbara Boxer, chairwoman of the Senate Foreign Relations Committee's Subcommittee on International Operations and Organizations, Human Rights, Democracy and Global Women's Issues,<sup>59</sup> "plans a concerted effort to seek ratification."<sup>60</sup> According to Senator Boxer, "We've waited long enough. All these years later, there's no excuse for not ratifying this critical convention to shine a light on women's rights around the world. It's a shame that the U.S. stands with countries such as Iran, Sudan and Somalia in failing to ratify the treaty."<sup>61</sup> Due to this strong support, the treaty is expected to be approved and referred to the full Senate Foreign Relations Committee, chaired by John Kerry, who purports to be "extremely supportive of stronger international frameworks for promoting global equality and women's empowerment."<sup>62</sup> Senator Boxer has stated that she hopes to begin with a "clean" version of CEDAW, absent the previously proposed reservations, understandings, and declarations ("RUDs"),<sup>63</sup> although her aides say that it is "almost certain" some

---

Women Political Action Committee, <http://www.nowpacs.org/2008/obama/issues.html> (last visited Nov. 16, 2010).

55. Joseph R. Biden Jr. & Barbara Boxer, Op-Ed., *Senate Needs to Ratify the Treaty for the Rights of Women*, S. F. Chron., June 13, 2002, at A-29.

56. See U.S. Dep't of State, Press Release, *supra* note 54.

57. During 2002 Senate Foreign Relations Committee hearings on CEDAW ratification, Koh stated that "America cannot be a world leader in guaranteeing progress for women's human rights, whether in Afghanistan, here in the United States, or around the world, unless it is also a party to the global women's treaty." Koh further stated that there is "nothing in the substantive provisions of this treaty that even arguably jeopardizes our national interests," noting that its provisions are "entirely consistent" with domestic law. DeYoung, *supra* note 45.

58. Simpson, *supra* note 42.

59. Boxer co-authored an op-ed with then-Senate Foreign Relations Committee chair Biden supporting CEDAW ratification. See Biden & Boxer, *supra* footnote 55.

60. David Crary, *Discord Likely over Ratifying Women's Rights Pact*, Seattle Times, Mar. 7, 2009, [http://seattletimes.nwsourc.com/html/nationworld/2008825819\\_apwomensrightstreaty.html](http://seattletimes.nwsourc.com/html/nationworld/2008825819_apwomensrightstreaty.html) (last visited Nov. 21, 2010).

61. *Id.*

62. *Id.*

63. Reservations, understandings, and declarations (RUDs) are provisions added to a ratified treaty to modify the terms of a country's obligation. Reservations are the most significant, as they materially change the treaty obligation of the reserving party without changing the text of the treaty itself,

RUDs will be added.<sup>64</sup> As of March 2009, the subcommittee was awaiting word from the Obama administration on the desirability of the RUDs.<sup>65</sup>

Although only the Senate is required to ratify the treaty, widespread support across other areas of government suggests that action on CEDAW is likely. On January 9, 2009, the House of Representatives submitted a resolution asserting that “the full realization of the rights of women is vital to the development and well-being of people of all nations; and the Senate should, therefore, give its advice and consent to the ratification of the Convention on the Elimination of All Forms of Discrimination Against [sic] Women.”<sup>66</sup> This resolution sends a strong signal that the U.S. Government has the necessary political will to consider ratification of CEDAW a priority. Further, on December 18, 2009, the State Department issued a press release stating that “President Obama’s Administration views CEDAW as a powerful tool for making gender equality a reality” and that the State Department is “committed to U.S. ratification of the Convention and look[s] forward to joining the countries that have adopted it as a central part of their efforts to ensure that human rights are enjoyed fully and equally by all people.”<sup>67</sup> Currently, CEDAW is under interagency review with the Department of Justice, and Secretary Clinton is expected to recommend it for consideration by the Senate Foreign Relations Committee in the near future.<sup>68</sup>

---

through such means as exemptions from certain treaty provisions. Understandings are interpretative statements meant to clarify the meaning of the text; for example, the United States might have a declaration in the Convention Against Torture that notes that the death penalty is not prohibited. Declarations are related statements of policy that do not necessarily change the treaty provisions. For example, a treaty might have a provision that mentions, but does not require extradition, and the United States may declare that as a policy, American citizens cannot be extradited. As RUDs can significantly shift a party’s obligations under a treaty, considering the impact of potential RUDs is vitally important to understanding the future impact of a treaty. Particular potential RUDs will be discussed later, but it is important to consider that the presence, or the lack, of RUDs will entirely shift both the support for the treaty, as well as U.S. obligations as a State Party.

64. Crary, *supra* note 60; Simpson, *supra* note 42.

65. Crary, *supra* note 60.

66. H.R. Res. 22, 111th Cong. (2009).

67. See U.S. Dep’t of State Press Release, *supra* note 54.

68. Human Rights Watch, United States Ratification of International Human Rights Treaties (2009), available at <http://www.hrw.org/en/news/2009/07/>

U.S. advocates for CEDAW note that under the Obama administration there is an increased desire to promote a positive American image abroad, as well as stronger domestic support for international human rights law, as evidenced by the fact that a number of municipalities have independently expressed support for CEDAW.<sup>69</sup> Additionally, certain ambassadors have noted for some time that the failure to ratify CEDAW impairs international relations, as well as U.S. efforts to promote gender equality abroad.<sup>70</sup>

### C. Obstacles to Ratification

To be ratified in the United States, CEDAW, like any treaty, must be signed by the President and receive the support of two-thirds of the Senate.<sup>71</sup> Since former President Jimmy Carter signed CEDAW in 1979, Senate ratification is the only remaining step required. To be ratified by the Senate, CEDAW must first be approved by the Senate Foreign Relations Committee's Subcommittee on International Operations and Organizations, Human Rights, Democracy and Global Women's Issues. Following subcommittee approval, the Convention must be then approved by a majority of the Foreign Relations Committee before being subject to a full Senate vote.

The ratification of CEDAW is a highly politicized issue in the United States; as such, ratification will likely not be free from controversy. As has been the case in past decades, conservative groups and senators are expected to oppose CEDAW ratification. Some conservative groups argue that CEDAW will create additional rights, such as legalized prostitution<sup>72</sup> and unrestricted rights to

---

24/united-states-ratification-international-human-rights-treaties#\_Convention\_on\_the%20(July%2024,%202009%20report.

69. Simpson, *supra* note 42; see also Linda Tarr-Whelan, *Time for U.S. Senate to Act on U.N. Women's Treaty*, *Toward Freedom* (Dec. 22, 2009), <http://towardfreedom.com/home/content/view/1798/1/> (former deputy assistant to President Jimmy Carter for women's concerns urges ratification of CEDAW).

70. Nora O'Connell & Ritu Sharma, *Treaty for the Rights of Women Deserves Full U.S. Support*, 10 No. 2 Hum. Rts. Brief 22 (2003), <http://www.wcl.american.edu/hrbrief/10/2women.cfm>; see also *Frequently Asked Questions*, CEDAW 2010, <http://www.cedaw2010.org/index.php/about-cedaw/faq> (outlining the positive implications of ratification of CEDAW for the United States, including at the international level).

71. See U.S. Const. art. II, § 2; O'Connell & Sharma, *supra* note 70.

72. The treaty does not require the legalization of prostitution, although the CEDAW Committee has recommended decriminalization in some countries, to ensure that women who have been the victims of sexual slavery and trafficking

abortion.<sup>73</sup> Some religious groups echo those concerns, and cite additional fears, such as CEDAW obligating the United States to adopt a gender quota system for holders of political office.<sup>74</sup> Others assert that the ratification of CEDAW will provide legitimacy for countries such as Saudi Arabia, where CEDAW was ratified but women are still prohibited from voting and driving.<sup>75</sup> According to Wendy Wright of Concerned Women for America, “The treaty is worse than useless. It gives legitimacy to regimes that are committing some of the worst abuses against women.”<sup>76</sup>

Because women’s rights is a topic typically thought of as a major tenet of the liberal agenda, it is perhaps surprising that there is the potential for liberal opposition to CEDAW ratification. Some liberals are concerned, however, that attaching certain RUDs will deprive the treaty of all force.<sup>77</sup> Because Republican votes will be necessary for ratification, it is possible, or perhaps even likely, that CEDAW supporters will make some concessions in the form of RUDs in order to win over hesitant Republican senators.<sup>78</sup> But, this attempt at compromise could result in the corresponding loss of liberal support. As Kim Gandy, President of the National Organization for Women, stated,

It would be an important signal to the world that we adopt this critical convention without limitations that exempt the U.S. from coverage and responsibility for the treatment of women. It sends a kind of “ugly American” signal that we expect to hold other

---

will not be deterred from seeking assistance from state authorities. Crary, *supra* note 60.

73. *Id.*

74. Susan Yoshihara, Int’l Orgs. Research Grp., Briefing Paper No. 3, CEDAW Reality Check 4 (2007).

75. *See id.* (noting that is little evidence that CEDAW has done much to improve women’s rights around the world and that violence against women is still severe and pervasive).

76. Crary, *supra* note 60.

77. *Id.*

78. *See, e.g.,* Betsy Reed, *A ‘Clean’ CEDAW*, *The Nation*, Mar. 12, 2009, available at [http://www.thenation.com/blogs/notion/416892/a\\_clean\\_cedaw](http://www.thenation.com/blogs/notion/416892/a_clean_cedaw) (asking whether “the Obama administration, and Senate Democrats, [will] bow to pressure from anti-abortion Republicans and include such [RUDs] in this year’s version, in a bid to ensure passage,” and noting that despite Senator Boxer’s desire to begin with a clean version of the treaty, “pressure will quickly mount to muck it up”).



countries to a standard that we're not willing to accept for ourselves.<sup>79</sup>

As another women's rights group put it, "The argument you'll hear is that it's better for the U.S. to at least be in the game, even with a weaker CEDAW. I don't buy that argument . . . What you're compromising on is so integral that you really would be selling the principles of what you're trying to [accomplish]."<sup>80</sup> Proponents of CEDAW will walk a thin line in trying to appeal to conservatives without depriving the treaty of all force.

One other obstacle to ratification is the existence of limited political capital. There are a number of worthwhile treaties pending,<sup>81</sup> and pushing for ratification of CEDAW may lead to the delay of another. Those who value U.S. ratification of international human rights treaties must decide whether CEDAW is worth their limited time and resources, or whether another treaty like the Convention on the Rights of the Child should be prioritized instead.

### III. CEDAW AND EMPLOYMENT LAW

CEDAW, sometimes referred to as the "women's treaty,"<sup>82</sup> encompasses much more than employment law. This Note, however, limits its discussion to the employment discrimination protections set forth in Article 11 of CEDAW. Before examining employment discrimination law in Canada and the United States, it is necessary to examine exactly what changes CEDAW seeks to promote. Most generally, Article 11 of CEDAW addresses women's rights in the employment context by requiring parties to "take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights . . ."<sup>83</sup> This part discusses the four<sup>84</sup> major

---

79. Crary, *supra* note 60 (internal quotation marks omitted).

80. *Id.*

81. See Human Rights Watch, *supra* note 68, at 1 (noting other pending treaties include the Convention on the Rights of the Child, the Convention against Enforced Disappearance, the Mine Ban Treaty, the Convention on Cluster Munitions, the Convention on the Rights of Persons with Disabilities and the Optional Protocol to the Convention on Torture).

82. Amnesty International, *From Suffrage to CEDAW: Celebrate Women's Equality Day!*, Human Rights Now: Amnesty International USA Web Log (Aug. 27, 2010, 4:41 PM), <http://blog.amnestyusa.org>.

83. CEDAW art. 11(1), *supra* note 21, at 9–10.

84. There is arguably a fifth employment discrimination provision: affordable childcare. While Article 11 protects the "right to free choice of

employment discrimination provisions of CEDAW Article 11, which cover equal opportunity in employment, pay equity, marital and pregnancy protections, and sexual harassment.<sup>85</sup> These subtopics will first be explored in theoretical depth and then will be scrutinized in terms of how they exist within Canada and the United States.

In addition to analyzing the language of each provision, this part also endeavors to discuss each provision's *Travaux Préparatoires*,<sup>86</sup> which are notes from years of preparatory discussions and negotiations.<sup>87</sup> These notes are intended to provide

---

profession and employment," it is clear that there are certain preconditions that must be satisfied to allow women such free choice. The Article addresses the availability of childcare as one of these preconditions, requiring states to "encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities." *Id.* art. 11(1)(c), 11(2)(c). The relationship between childcare and the ability to work is important and should be noted, but, as childcare is beyond the ambit of what are considered "employment" protections in the United States, it will not be addressed at length in this Note.

85. Article 11 also provides protection of such rights as "the right to work as an inalienable right of all human beings," "the right to free choice of profession and employment," "the right to social security," and the "right to protection of health and to safety in working conditions." *Id.* art. 11(1)(a), 11(1)(c), 11(1)(e), 11(1)(f). While these are important workplace rights, they deal more with generally applicable employment law and less with employment discrimination. They will not be considered in detail in this Note, which instead focuses on those provisions applicable to equal opportunities in employment. The provisions discussed at length in this Note include language such as "the same employment opportunities" and "the right to equal remuneration." *Id.* art. 11(1)(b), 11(1)(d) (emphasis added). Because it is vital that both men and women enjoy certain rights in the workplace, this Note focuses on provisions that aim to ensure there is no differential treatment based on gender.

86. For a discussion of *Travaux Préparatoires* and their use, see Jonathan Pratter, *À la Recherche des Travaux Préparatoires: An Approach to Researching the Drafting History of International Agreements*, *GlobaLex* (December 2005), [http://www.nyulawglobal.org/globalex/Travaux\\_Preparatoires.htm](http://www.nyulawglobal.org/globalex/Travaux_Preparatoires.htm).

87. The reader will note that essentially all information regarding the *travaux préparatoires* for CEDAW is drawn from *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women*, and not to the original text itself. Lars Adam Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women 132–133* (Martinus Nijhoff Publishers, 1993) [hereinafter Rehof, *Guide*]. The reasons for this are twofold. First, as Pratter mentions in his article, the *travaux préparatoires* are typically published in chronological order and thus do not correlate well with the final text of the treaty, making guides an "invaluable research resource." Pratter, *supra* note 86, pt. B. Secondly, as Rehof notes in the

insight into the goals of each provision by analyzing the drafting process and noting what language was discarded in favor of that which was ultimately adopted.

#### A. Equal Opportunity in Employment

Article 11(1)(b) guarantees women the “right to the same employment opportunities, including the application of the same criteria for selection in matters of employment.”<sup>88</sup> The impetus for this subsection seems to have come from the efforts of the United States and Belgium, which pushed for an emphasis on concrete legislation to ensure equal employment opportunities and to prevent job discrimination.<sup>89</sup> Mexico opposed the addition, believing that equal employment opportunities were adequately covered by the introductory paragraph requiring states to take all appropriate measures to eliminate discrimination.<sup>90</sup> India voiced additional opposition, arguing that this special attention paid to the question of equal opportunity would result in a form of reverse discrimination.<sup>91</sup> Despite such objections, the proposals by the United States and Belgium were codified.<sup>92</sup>

One suggestion by the USSR and several other countries was to include in Article 11(1)(b) “the right to receive, when necessary, free training in a new occupation or profession and to resume work of a similar standard after an unavoidable absence.”<sup>93</sup> The fact that this was ultimately not adopted suggests that, perhaps, this would be an excessive burden on States Parties. As such, it appears that employees who have no choice but to leave work are not guaranteed the right to return in a similar position as when they left, or to be assisted with acquiring skills for a new position.

---

Preface to the *Guide*, the United Nations archives on the negotiating process were lost in transit between New York and Vienna, resulting in the absence of a complete collection of the relevant documents in both locations. Rehof, *Guide to the Travaux Préparatoires* at vii. As Rehof has “spen[t] much time and effort trying to collect relevant documentation from many corners of the world,” the *Guide* appears to be the most complete and accurate source of the *travaux préparatoires* available. *Id.*

88. CEDAW art. 11(1)(b), *supra* note 21, at 9.

89. Rehof, *Guide*, *supra* note 87, at 132–33.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 125, 132.

## B. Pay Equity

Article 11(1)(d) provides the “right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work.”<sup>94</sup> In a later recommendation, the CEDAW Committee expanded upon the means to implement this protection, suggesting that states “consider the study, development and adoption of job evaluation systems based on gender-neutral criteria that would facilitate the comparison of the value of those jobs of a different nature, in which women presently predominate, with those jobs in which men presently predominate.”<sup>95</sup>

There is a distinct difference between *equal pay for identical work* and *equal pay for work of equal value*. The former simply means that people performing identical or substantially similar jobs in a workplace must be paid the same salary.<sup>96</sup> The latter, also known as the comparable worth doctrine, is more complex and far more controversial. The comparable worth doctrine asserts that women are disproportionately likely to end up in lower-paying employment fields due to historic patterns of discrimination and subordination. To remedy this inequity in the status quo, jobs that have the same intrinsic value to society should be paid the same wages, regardless of whether the job responsibilities themselves are different.<sup>97</sup> Thus, it appears that Article 11 requires not just equal pay for substantially similar work, but also equal pay for work of equal value.

## C. Marital and Pregnancy Protections

CEDAW’s Article 11(2) aims to “prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work.”<sup>98</sup> Article 11(2)(a) directs States Parties “[t]o prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination

---

94. CEDAW art. 11(1)(d), *supra* note 21, at 9.

95. Comm. on the Elimination of Discrimination against Women, *Report of the Committee on the Elimination of Discrimination against Women*, 76, U.N. Doc. A/44/38 (Feb. 13, 1990).

96. Mark A. Rothstein & Lance Liebman, *Employment Law: Cases and Materials* 469 (Foundation Press, 2007).

97. *Id.* at 469–91.

98. CEDAW art. 11(2), *supra* note 21, at 10.

on the basis of marital status.”<sup>99</sup> The United States and India proposed different language prohibiting dismissal “merely based on marriage or maternity of a woman.”<sup>100</sup> The United States also argued that the paragraph should be divided into two parts, one dealing with marital status and the other with pregnancy.<sup>101</sup> Other countries, however, felt that the paragraph should be more affirmative, requiring States Parties “[t]o make unlawful the dismissal of women who are on leave on account of marriage, pregnancy or maternity leave.”<sup>102</sup> El Salvador wanted the prohibition on discrimination against women due to marriage or maternity deleted, but this suggestion was not adopted.<sup>103</sup> These countries ultimately agreed to support France’s proposal of the current language.<sup>104</sup>

Similarly controversial were discussions relating to Article 11(2)(b), which requires States Parties “[t]o introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances.”<sup>105</sup> One source of disagreement was over the source of funds for the proposed leave. France proposed an amendment to include that “the costs of such protection would be borne by social security or other public funds or by means of collective arrangements.”<sup>106</sup> The United States, however, opposed this amendment, as it could be interpreted to prevent employers from paying out of private funds.<sup>107</sup> Japan and the United Kingdom also opposed an original wording that required the periods of leave to be treated as equivalent to periods of work actually performed.<sup>108</sup> As a result of this opposition, parties compromised on the current, vague text, which makes no reference to the source of funding for this protection or how the benefits would be calculated.

Another point of disagreement over subsection (2)(b) related to how compensation for paid leave would be addressed.<sup>109</sup> Hungary and the USSR strongly favored requiring employers to grant paid

---

99. *Id.* Further, CEDAW requires parties to “provide special protection to women during pregnancy in types of work proven to be harmful to them.” *Id.* art. 11(2)(d).

100. Rehof, Guide, *supra* note 87, at 138.

101. *Id.* at 139.

102. *Id.* at 138.

103. Rehof, Guide, *supra* note 87, at 138.

104. *Id.*

105. CEDAW art. 11(2), *supra* note 21, at 10.

106. Rehof, *supra* note 87, at 139.

107. *Id.*

108. *Id.* at 140.

109. *Id.* at 139.

leave. France agreed, noting that the Convention should “lead mankind forward” by “draw[ing] attention to the need for specific changes in legislation and behavior.”<sup>110</sup> India, Indonesia, and the United States disagreed, noting that not all countries were able to require employers to provide paid leave or had the public funding to cover the costs.<sup>111</sup> Japan took the position that allowing leave without payment would be adequate.<sup>112</sup> These discussions led to the final adoption of the wording “to introduce maternity leave with pay or with comparable social benefits,”<sup>113</sup> ultimately leaving the debate over mandatory versus voluntary paid leave unresolved.

#### D. Sexual Harassment

Although Article 11 does not explicitly address the issue of sexual harassment, the CEDAW Committee has subsequently expanded its scope. According to the Committee, Article 11 covers sexual harassment because “[e]quality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace.”<sup>114</sup> The Committee considers harassment discriminatory “when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.”<sup>115</sup> Since the Committee is the international body charged with issuing authoritative interpretations and overseeing the implementation of CEDAW’s provisions, this interpretation carries binding force for all parties to the treaty. Because it was issued after the adoption of the Convention, States Parties did not have the same opportunity to debate and seek compromise. So, instead of simply codifying the preexisting state of women’s legal

---

110. *Id.*

111. *Id.*

112. *Id.* at 140.

113. CEDAW art. 11(2), *supra* note 21, at 10.

114. Comm. on the Elimination of Discrimination against Women, *General Recommendation 19*, art. 11, ¶ 17–18, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (May 27, 2008) (defining sexual harassment as “such unwelcome sexually determined behavior as physical contact and advances, sexually colored remarks, showing pornography and sexual demand, whether by words or actions”).

115. *Id.*

rights, this interpretation initially shaped the global perspective on sexual harassment.<sup>116</sup>

#### IV. CEDAW IN CANADA

This part provides an in-depth analysis of Canada's compliance with CEDAW employment discrimination provisions. First, this part provides background information about Canada's political and legal systems, experience with women's rights, and history with CEDAW in order to demonstrate its usefulness as the integral case study for a comparison to the United States. Part IV is further divided into four subsections, one for each area of employment discrimination law protected by CEDAW: equal opportunity in employment, pay equity, marital and pregnancy provisions, and sexual harassment. Each subsection presents current statistics and relevant Canadian law and analyzes the extent to which Canada complies with CEDAW, describing both areas of progress and concern from a variety of perspectives. The analysis will draw heavily on CEDAW Committee reports and the ensuing dialogue between Canada and the Committee. This discussion will lay the groundwork to later draw conclusions from the ways in which Canada's ratification of CEDAW has (and has not) resulted in changes to Canadian employment discrimination law.

##### A. An Introduction to Canada: Politics, Law, and Women's Rights

Canada and the United States have much in common. Canada has "developed in parallel with the US" and has a 99% literacy rate for both males and females.<sup>117</sup> Canada's economy "resembles the US in its market-oriented economic system, pattern of production, and affluent living standards."<sup>118</sup> Its legal system is also based on the English common law. Like the United States, Canada's political system embodies the characteristics of representative democracy and federalism; however, it differs from the United States in that it incorporates a constitutional monarchy and a

---

116. For example, Bangladesh and India both relied heavily on the CEDAW interpretation of sexual harassment in developing their domestic sexual harassment law. *CEDAW Success Stories*, U.N. Development Fund for Women, [http://www.unifem.org/cedaw30/success\\_stories/](http://www.unifem.org/cedaw30/success_stories/) (last visited Nov. 21, 2010).

117. *Canada*, CIA World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/geos/ca.html>, (last updated Nov. 9, 2010).

118. *Id.*

parliamentary system based on the British model.<sup>119</sup> The Canadian courts operate independently from legislative bodies and governments, and their independence is protected by the Constitution Act, 1867 and the Canadian Charter of Rights and Freedoms.<sup>120</sup> The courts' primary human rights responsibility is to redress human rights violations by interpreting the Canadian Charter of Rights and Freedoms and other human rights codes and legislation.<sup>121</sup>

Most relevant to the present issue is that Canada's federalist system, similar to that of the United States, confers legislative and executive powers to both the federal and provincial governments, each of which are sovereign in their respective spheres.<sup>122</sup> One interesting feature of, and also a potential difficulty created by, Canada's federalist system is the scope of the delegation of power between the federal system and the provinces, particularly in terms of implementing international treaties.<sup>123</sup> The federal government of Canada has the authority to enter into international treaties, but if the subject matter of the treaty does not fall exclusively in federal jurisdiction, the consent of the provinces is required.<sup>124</sup> Human rights law is an area of shared jurisdiction, so the federal government is required to consult the provincial governments during all stages of ratification.<sup>125</sup>

While the Canadian Charter of Rights and Freedoms provides an "important unifying influence" among jurisdictions<sup>126</sup> and the Supreme Court of Canada has stipulated that human rights protections should have consistent meanings across jurisdictions,<sup>127</sup>

---

119. United Nations Int'l Human Rights Instruments, *Core Document Forming Part of the Reports of States Parties: Canada*, 12 January 1998, ¶¶ 45–46, U.N. Doc. HRI/CORE/1/Add.91 (Jan. 12, 1998) [hereinafter U.N. Core Document, Canada].

120. *Id.* ¶ 83.

121. *Id.* ¶ 92.

122. CIA World Factbook, *supra* note 117.

123. In the United States, CEDAW is also subject to the interplay between federal and state power. Some American states have expressed support for CEDAW. *See supra* note 42. However, due to constitutional design, American states have less direct control over the ratification of treaties than their Canadian counterparts. *See supra* note 71 and accompanying text.

124. U.N. Core Document, Canada, *supra* note 119, ¶ 62.

125. Comm. on the Elimination of Discrimination against Women, *Summary Record of the 603rd Meeting*, ¶ 56, CEDAW/C/SR.603 (Feb. 7, 2003).

126. *Id.*

127. U.N. Core Document, Canada, *supra* note 119, ¶ 140(a), (b).



this shared responsibility poses some difficulties for treaty implementation.<sup>128</sup> For example, one CEDAW Committee representative sought more information on “whether the federal government had any means of compelling the provincial governments to implement the Convention.”<sup>129</sup> This comment was echoed in a later meeting by another CEDAW Committee member, who sought “clarification as to the areas in which the federal Government had enforcement power and those in which it did not.”<sup>130</sup> Another member “stressed that in a dualist system, it was important that all provincial and federal acts be in conformity with international human rights instruments, including the Convention,” noting that Canada’s ratification of the Optional Protocol made it even more important to ensure that “some nationwide system existed for monitoring compliance on the part of all relevant authorities.”<sup>131</sup> These issues were not fully addressed by any Canadian representative, thus leaving open important questions of federal enforcement power and provincial independence.<sup>132</sup>

The history of women’s rights in Canada took place on a relatively similar timeline as its American counterpart. The women’s suffrage movement began in the 1870s, but it did not truly take force until the turn of the 20th century.<sup>133</sup> The Wartime Elections Act of 1917 allowed Canadian women over the age of twenty-one to vote if they were the wife, widow, mother, sister, or daughter of someone serving overseas.<sup>134</sup> Although this was designed as a temporary measure, the Women’s Franchise Act of 1918 took effect soon after

---

128. *Id.* ¶ 140.

129. Comm. on the Elimination of Discrimination against Women, *Summary Record of the 330th Meeting*, ¶ 28, CEDAW/C/SR.330 (Mar. 27, 1998).

130. CEDAW Comm., *Summary Record of the 603rd Meeting*, *supra* note 125, ¶ 21.

131. *Id.* ¶ 44.

132. It should be noted that the provinces are free to, and have, implemented their own employment legislation, which may provide even greater employee protections, but the specifics of such legislation are beyond the scope of this Note. *See, e.g.*, Gov’t of Canada, *Fifth Periodic Report of Canada*, ¶¶ 395–991, U.N. Doc. CEDAW/C/CAN/5 (Apr. 9, 2002) (laying out the measures enacted by the governments of the provinces that are relevant to CEDAW provisions) [hereinafter *Canada, Fifth Periodic Report*].

133. *See generally Oldtimers: McClung’s “Mock Parliament”* (Canadian Broadcasting Corporation television broadcast Dec. 9, 1974) available at [http://archives.cbc.ca/version\\_print.asp?page=1&IDLan=1&IDClip=9553&IDDossier=1450&IDCat=327&IDCatPa=260](http://archives.cbc.ca/version_print.asp?page=1&IDLan=1&IDClip=9553&IDDossier=1450&IDCat=327&IDCatPa=260) (remarking on social activist Nellie McClung’s “mock parliament” speech).

134. *Id.*

and allowed women to vote in federal elections, so long as they met the property ownership and racial requirements that were applied to men in provincial elections.<sup>135</sup> Finally, the Dominion Elections Act of 1920 gave women the same federal voting rights as men, also doing away with a number of general restrictions, including property ownership requirements.<sup>136</sup> During the same year, the Nineteenth Amendment to the United States Constitution was enacted, giving women the right to vote.<sup>137</sup> In 1929, the Judicial Committee of the British Privy Council decided that the word “persons” in section 24 of the British North America Act (Canada’s de facto Constitution at that time) includes both males and females.<sup>138</sup> This historic decision made women eligible to become members of the Senate of Canada.<sup>139</sup>

The Canadian Government’s support for gender equality “is based on a belief that equal rights for women are an essential component of progress on human rights and democratic development, and sustainable development will only be achieved if women are able to participate as equal decision makers in, and beneficiaries of, that development.”<sup>140</sup> In Canada’s introduction to its Fifth Periodic Report to the CEDAW Committee, it noted that women’s role in society was remarkably transformed in the shift from the nineteenth to the twentieth century, particularly through their integration into the labor force.<sup>141</sup> In the United States, too, the twentieth century brought “steadily expanding access to nonagricultural and nonindustrial occupations,” despite the fact that labor unions did not show an interest in organizing female workers until the late twentieth century.<sup>142</sup> Oftentimes, however, “certain needs were still unmet” and “certain goals had still not been attained” when gender intersected

---

135. *Id.*

136. *Id.*

137. U.S. Const. amend. XIX, § 1; see also E. Susan Barber, *One Hundred Years toward Suffrage: An Overview*, Nat’l Am. Woman Suffrage Ass’n Collection, <http://lcweb2.loc.gov/ammem/naw/nawstime.html> (last visited Nov. 6, 2010) (providing a timeline of events important to women’s suffrage in the United States).

138. Monique Benoit, *Are Women Persons? The “Persons” Case*, Library and Archives Canada, <http://www.collectionscanada.gc.ca/publications/archivist-magazine/015002-2100-e.html> (last modified Jan. 21, 2006).

139. *Id.*

140. Canada, Fifth Periodic Report, *supra* note 132, ¶ 9.

141. CEDAW Comm., *Summary Record of the 603rd Meeting*, *supra* note 125, ¶ 2.

142. Jeanne Boydston, *Women in the Labor Force*, in *The Oxford Companion to United States History* 834, 834–35 (Paul S. Boyer ed., 2001), available at [http://www.anb.org/cush\\_wlabor.html](http://www.anb.org/cush_wlabor.html).

with such other vulnerable characteristics as race, disability, sexual orientation, and family status.<sup>143</sup> As one CEDAW Committee representative noted, “[a]t the international level, the Canadian Government was renowned as one of the leading lights in the field of gender equality, but domestically a number of challenges still remained.”<sup>144</sup> This astute comment applies both to Canada and the United States; although these countries are held up as examples of gender equality, this important progress does not negate the need for continued self-reflection and further development.

Canada was among the first countries to sign and ratify CEDAW, doing so on December 10, 1981.<sup>145</sup> Canada acceded to the Optional Protocol to CEDAW in October 2002.<sup>146</sup> The following analysis of Canada’s efforts to comply with CEDAW is based heavily on its reports submitted to the CEDAW Committee and the Committee’s concluding observations on such reports. It should be noted that these documents, while useful, cannot paint a perfect picture. First, there is a large disparity in institutional capacity between the twenty-three member Committee and the 186 States Parties which it monitors. For example, Canada’s most recent report totals 186 pages, while the Committee’s observations number only eleven pages.<sup>147</sup> Despite their brevity, the Committee reports contain a great deal of information useful in determining a State’s compliance with CEDAW Article 11. Another problem concerns overly optimistic reporting. As one CEDAW Committee member candidly stated, she was “concerned at the reporting State’s tendency to document only the positive developments in the area of the advancement of women and reiterated the importance of presenting a balanced account of the challenges faced by Canada and the methods

---

143. CEDAW Committee, *Summary Record of the 603rd Meeting*, *supra* note 125, ¶ 2.

144. *Id.* ¶ 18.

145. *See* Status of the CEDAW, *supra* note 19.

146. Comm. on the Elimination of Discrimination against Women, *Concluding Observations on the Fifth Periodic Report of Canada*, ¶ 339, U.N. Doc. A/58/38 (Mar. 20, 2003) [hereinafter *Concluding Observations on Canada’s Fifth Periodic Report*].

147. Gov’t of Canada, *Combined Sixth and Seventh Reports of Canada*, U.N. Doc. CEDAW/C/CAN/7 (Aug. 17, 2007) [hereinafter *Canada, Combined Sixth and Seventh Periodic Reports*]; Comm. on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Sixth and Seventh Periodic Reports of Canada*, U.N. Doc. CEDAW/C/CAN/CO/7 (Nov. 7, 2008) [hereinafter *Concluding Observations on Canada’s Combined Sixth and Seventh Periodic Reports*].

employed to overcome them.”<sup>148</sup> To balance the perspective of Canada’s reports to the Committee, Canada’s self-reports must also be considered with CEDAW Committee recommendations and reports by critical NGOs still pushing for further change.

Before delving into Canada’s specific compliance with Article 11, it should first be noted that Canada guarantees equal protection of the laws to all. In the Third and Fourth Periodic Reports to the Committee, it was “emphasized that Canada had taken decisive steps to provide women with an effective legal framework against discrimination,”<sup>149</sup> most notably through the Canadian Charter of Rights and Freedoms,<sup>150</sup> which is the country’s legal basis for gender equality. The Charter provides protection against intentional discrimination, as well as systematic discrimination that results in a disparate impact<sup>151</sup> on women.<sup>152</sup> Under the Charter, individuals and groups may challenge legislation and practices of the federal or provincial governments—not private actors—and a special program provides financial support for those seeking to utilize the equality protections of the Charter.<sup>153</sup>

The Canadian Human Rights Commission, a quasi-judicial body established by the government of Canada, is also charged with both preventing discrimination and providing dispute resolution, when there is alleged discrimination by a federally regulated employer.<sup>154</sup> If such mediation is unsuccessful, the commission will either dismiss the complaint or refer it to a human rights tribunal or board of inquiry, which holds a public hearing at no cost to the

---

148. CEDAW Committee, *Summary Record of the 603rd Meeting*, *supra* note 125, ¶ 15.

149. Comm. on the Elimination of Discrimination against Women, *Concluding Observations on the Third and Fourth Periodic Reports of Canada*, ¶ 310, U.N. Doc. A/52/38/Rev.1 (Jan. 31, 1997) [hereinafter *Concluding Observations on Canada’s Third and Fourth Periodic Reports*].

150. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, art. 15(1), *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.) (“Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”).

151. *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143 (Can.).

152. *Concluding Observations on Canada’s Third and Fourth Periodic Reports*, *supra* note 149, ¶ 310.

153. *Id.*

154. *Overview*, Canadian Human Rights Commission, <http://www.chrc-cddp.ca/about/default-en.asp>; U.N. Core Document, Canada, *supra* note 119, ¶ 104.

plaintiff.<sup>155</sup> The tribunal or board then makes an order, which is subject to judicial enforcement.<sup>156</sup> Lastly, each province in Canada has also enacted anti-discrimination legislation that applies to the public and private sectors and prohibits discrimination on a number of grounds, including sex, and in many cases, pregnancy or marital status.<sup>157</sup>

## B. Equal Opportunity in Employment

The participation of women in the paid work force in Canada has significantly increased to 47% in 2004, up from 37% in 1976.<sup>158</sup> Additionally, the number of women employed in managerial positions has risen from 30% in 1987 to 37% in 2004.<sup>159</sup> Yet, despite the fact that women now make up over half of professionals in diagnostic and treatment positions in medicine and in business and financial positions, two-thirds of employed women still work in traditionally female fields, such as teaching, nursing, administrative positions, and sales occupations.<sup>160</sup> In 1992, however, 72% of women were employed in traditionally female occupations, so the numbers seem to be moving in a positive direction.<sup>161</sup>

### 1. Legislation and Case Law

During the 1970s and 1980s, despite the fact that human rights statutes prohibited systemic discrimination, there was an increasing awareness that entrenched systems and practices in the workplace would not be changed without more proactive steps by the government.<sup>162</sup> At first, the Canadian government instituted solely voluntary programs in the federal sector, but these did not result in

---

155. U.N. Core Document, *supra* note 119, ¶ 104.

156. *Id.* ¶ 105.

157. Gov't of Canada, *Third Periodic Report of Canada*, CEDAW/C/CAN/3 (Sep. 25, 1992) [hereinafter *Canada, Third Periodic Report*].

158. Canada, Combined Sixth and Seventh Periodic Reports, *supra* note 147, ¶ 153.

159. *Id.* ¶ 16.

160. *Id.*

161. Canada's Third Report, *supra* note 157, ¶ 76.

162. *Employment Equity Act Review: A Report on the Standing Committee on the Human Resources Development and the Status of Persons with Disabilities*, Labour Program, Department of Human Resources and Skills Development § 2 (Dec. 2001), <http://www.hrsdc.gc.ca/eng/lp/lo/lsw/we/review/report/main.shtml> [hereinafter *Employment Equity Act Review*].

any drastic changes to the white, male-dominated workforce.<sup>163</sup> In 1983, the government established the Royal Commission on Equality in Employment, designed to “explore the most efficient, effective, and equitable means of promoting equality in employment for four groups: women, native people, disabled persons, and visible minorities.”<sup>164</sup> This “employment equity” initiative was designed to be distinguished from American affirmative action programs, which “had been associated with quotas.”<sup>165</sup>

The Commission’s reports led to the passage of the Employment Equity Act in 1986, the purpose of which is

to achieve equality in the workplace so that no person shall be denied employment opportunities or benefits for reasons unrelated to ability and, in fulfillment of that goal, to correct the conditions of disadvantage in employment experienced by women, aboriginal peoples, persons with disabilities and members of visible minorities by giving effect to the principle that employment equity means more than treating persons the same way but also requires special measures and the accommodation of differences.<sup>166</sup>

The Act requires employers to identify and eliminate employment barriers against women and to institute positive policies, such as allowing for reasonable accommodation, in order to ensure that women achieve a degree of representation in each occupational group in the employer’s workforce reflective of their representation in the Canadian workforce.<sup>167</sup> Employers must identify equity issues in their workplace by using self-identification practices to compare their internal information to labor market data,<sup>168</sup> review their practices and policies to remove employment barriers, and consult with unions and employee representatives in

---

163. *Id.*

164. *Id.*

165. *Id.*

166. Employment Equity Act, S.C. 1995, c. 44, § 2, available at <http://laws.justice.gc.ca/PDF/Statute/E/E-5.401.pdf>.

167. *Id.* § 5. This obligation, however, does not require an employer to implement any measures that would cause undue hardship, to hire those lacking essential qualifications for the job, to take any action that conflicts with the Public Service Employment Act, or to create new positions in its workforce. *Id.* § 6.

168. Employment Equity Act Review, *supra* note 162, § 4.2.

preparing an employment equity plan.<sup>169</sup> The plan must be designed to establish policies for the removal of identified barriers to employment and set short and long-term numerical goals (although section 33(e) of the Act specifically prohibits quotas).<sup>170</sup>

A revision to the Employment Equity Act came into effect on October 24, 1996. The revised Act extended coverage to include all federally regulated private sector employers and certain public sector employers, excluding those who have less than 100 employees.<sup>171</sup> The Act also filled the previous void of enforcement mechanisms by empowering the Canadian Human Rights Commission to conduct on-site compliance reviews and Employment Equity Review Tribunals to provide for final enforcement.<sup>172</sup> To ensure continued improvement, the Act requires a parliamentary committee to assess its effectiveness and impact every five years.<sup>173</sup>

As will be discussed, in Part IV.B.2, the Employment Equity Act has some serious limitations in terms of its scope and ability to provide redress. As such, it is important to note that employees can also bring claims of employment discrimination under federal or provincial human rights legislation. In *British Columbia (Public Service Employees Relations Committee) v. British Columbia Government Service Employees' Union (BCGSEU)*,<sup>174</sup> the Supreme Court of Canada established a standardized test for employment discrimination actions brought under human rights legislation. The employee first has the burden of showing a prima facie case of discrimination.<sup>175</sup> To avoid liability, the employer must then prove that the employment decision was adopted for a purpose rationally connected to the performance of the job, was made in good faith, and was reasonably necessary for the accomplishment of a legitimate work-related purpose.<sup>176</sup> To demonstrate reasonable necessity, the

---

169. Pub. Service Comm'n of Can., Consultation Document: Preparing for the Review of the Employment Equity Act 3 (Feb. 2007).

170. Employment Equity Act Review, *supra* note 162, § 4.2.

171. *Id.* § 4.

172. *Id.* § 2.

173. *Id.*

174. [1999] 3 S.C.R. 3 (Can.) (holding that a standard set for aerobic fitness for firefighters was discrimination on the basis of sex).

175. The prima facie case may vary in its exact language among the provincial human rights statutes. For one example, see the standard for the Quebec Charter of Human Rights and Freedoms, as explained in *Comm'n scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525, 538–40 (Can.).

176. *British Columbia v. BGCSEU* [1999] 3 S.C.R. 3, 5 (Can.) (where plaintiff employee was fired for failing to meet the newly imposed aerobic requirements for

employer must show that it would be “impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship on the employer.”<sup>177</sup> This recently expanded framework provides a clearer route to remedying claims of employment discrimination for those not covered by the Employment Equity Act.

## 2. CEDAW Analysis: Progress and Concerns

This subsection recounts the interactions between Canada and the CEDAW Committee in their ongoing dialogue regarding equal opportunity in employment in Canada. This information is primarily drawn from Canada’s reports to the Committee and the Committee’s concluding remarks on those reports. As such, their dialogue permits an analysis of how the CEDAW Committee’s observations and recommendations affected the Canadian employment opportunity regime.

While the Employment Equity Act was an important step in establishing equitable employment practices, after its passage some concerns still remained. In a 1996 meeting of the CEDAW Committee, one representative requested a full analysis of the impact of federal employment equity legislation on the private sector (as the Act only applies to the federally regulated private sector) and was concerned that the 1995 amendments to the Act actually made it more difficult to bring complaints of systematic discrimination before the courts.<sup>178</sup> Similarly, in 1997, the CEDAW Committee was “concerned that despite the steps taken to implement the Federal Employment Equity Act in the public sector, it was still too limited to have a real impact on women’s economic position and suffered from weak enforcement.”<sup>179</sup>

Canada later responded to this concern, stating that the revised Employment Equity Act gave the Canadian Human Rights Commission the authority to conduct audits and verify compliance

---

her job as forest firefighter, after previously being employed as such for three years).

177. *Id.*

178. CEDAW Committee, *Summary Record of the 330th Meeting*, *supra* note 129, at ¶ 32.

179. Concluding Observations on Canada’s Third and Fourth Periodic Reports, *supra* note 149, ¶ 332.



with employment equity provisions.<sup>180</sup> Since October 1997, the Commission audited or initiated audits of 50% of employers, and by March 2002, the number of employers in compliance jumped from eight to seventy-eight.<sup>181</sup> While these increases in compliance are positive, a CEDAW committee member questioned whether the failure to audit all employers was a “consequence of reluctance on the [employers’] part or of budget constraints.”<sup>182</sup>

In 2003, the Committee again expressed concern over the Employment Equity Act. One representative noted that the Act would not cover the over 40% of women working in non-standard, part-time, or precarious jobs, as the Act only applies to employers with over one hundred employees.<sup>183</sup> In response, a Canadian representative noted that the Employment Equity Act applied to employers regulated by the federal government (mostly banking, transportation, and communications industries), comprising nearly five hundred employers with approximately two million employees; the exemptions for smaller employers are due to the heavy burden of the Act’s intensive reporting requirements.<sup>184</sup> Ultimately, however, the Employment Equity Act covers only 10% of the Canadian workforce.<sup>185</sup>

Other concerns with the Act include dissatisfaction with accommodations intended to provide access to employment, as it is difficult to hold individual managers liable for failing to comply with the Act’s requirements.<sup>186</sup> Even willing employers were unsure of how to implement the Act’s provisions and so requested additional materials and guidance from the Canadian Human Rights Commission.<sup>187</sup> A CEDAW Committee member also questioned whether any employment protections existed for agricultural workers, workers in the informal sector, and domestic help.<sup>188</sup> In response, a Canadian representative noted that, although these

---

180. Gov’t of Canada, Addendum to Canada’s Fifth Report to the CEDAW Committee, ¶ 77, U.N. Doc. CEDAW/C/CAN/5/Add.1 (Dec. 30, 2002) [hereinafter Canada, Addendum to its Fifth Periodic Report].

181. *Id.*

182. Comm. on the Elimination of Discrimination against Women, *Summary Record of the 604th Meeting*, ¶ 27, U.N. Doc. CEDAW/C/SR.604 (Feb. 10, 2003).

183. *Id.* ¶ 36.

184. *Id.* ¶ 59.

185. Employment Equity Act Review, *supra* note 162, §4.1.

186. *Id.* § 7.4.

187. *Id.*

188. CEDAW Comm., Summary Record of the 604th Meeting, *supra* note 182, ¶ 36.

workers would not be covered under the Employment Equity Act, they are still protected by anti-discrimination legislation at both federal and provincial levels.<sup>189</sup>

While some significant progress has been made, it appears that the Employment Equity Act's power is limited due to from ineffective monitoring and enforcement provisions that provide little to no incentive for employers to take employment equity policy seriously.<sup>190</sup> Additionally, even for those it covers, the Employment Equity Act is not complaint-driven, but rather focuses on proactive employer initiatives.<sup>191</sup>

Women alleging discrimination by government employers, whether protected under the Act or not, have two options. They may choose to bring an action under other human rights legislation to a Human Rights Committee or they may choose to institute a court action under the Canadian Charter of Rights and Freedoms; both instruments provide protection against direct and adverse-effect discrimination.<sup>192</sup> Yet, despite the fact that federal human rights legislation permits the Canadian Human Rights Commission to initiate discrimination claims, in practice, the Human Rights Commission rarely initiates such claims, as adequate resources have not been allocated for this purpose.<sup>193</sup> As a result, some believe that the Employment Equity Act should be amended to create a private right of action so that the threat of litigation may be used to incentivize employer compliance.<sup>194</sup>

As of yet, there are no sanctions for failure to remedy workplace discrimination when an employer has an equity plan and can provide a plausible reason for slow or nonexistent progress.<sup>195</sup> There are also no sanctions for failing to remove job barriers; fines may only be imposed for failure to file required reports or for false reporting.<sup>196</sup> Employers may undergo three audits, each of which can take from nine to eleven months, before the Commission may ask the

---

189. *Id.* ¶ 62.

190. Carol Agocs, *Canada's employment equity legislation and policy, 1987-2000: The gap between policy and practice*, 23 *Int'l J. Manpower* 256, 273 (2002).

191. *Id.* at 259.

192. CEDAW Comm., Summary Record of the 604<sup>th</sup> Meeting, *supra* note 182, ¶ 62.

193. Agocs, *supra* note 190, at 259.

194. Employment Equity Act Review, *supra* note 162, § 7.14.

195. Agocs, *supra* note 190, at 269.

196. *Id.* at 271.

Employment Equity Tribunal to issue an order, which may be registered with a federal court.<sup>197</sup> Due to the extremely long timeframe of this process, employers may be able to avoid compliance with the Act for years.<sup>198</sup> Enforcement is also difficult, due to resource limitations. The audit program depends on ten auditors, who have the capacity to perform ten audits each per year; since most employers require multiple audits, there simply are not sufficient personnel to audit all employers in a timely manner.<sup>199</sup>

CEDAW does not explicitly require States Parties to impose sanctions on employers, so the absence of this enforcement technique is not a *per se* violation of CEDAW provisions. The fact that the Committee itself lacks an enforcement mechanism, however, suggests that without effective state enforcement, the treaty provisions will lack all force. As such, in order to assess the effectiveness of a State Party's implementation of CEDAW, it is necessary consider not only the presence of legislation but also the State Party's means of ensuring compliance.

### C. Pay Equity

As discussed earlier, Article 11 provides the "right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work."<sup>200</sup> This section first discusses the current state of pay equity in Canada and then examines pay equity legislation and case law. Following that, it analyzes Canada's compliance with CEDAW's pay equity provisions, including both equal pay for the same jobs, as well as equal pay for work of equal value.

Statistics show that there is still a fairly significant wage gap between male and female workers in Canada. The 2006 census found that the wage gap between men and women fluctuated; women made 72–85% of male salaries, depending on age.<sup>201</sup> As shown by Figure 1,

---

197. *Id.* at 270–71.

198. *Id.* at 271.

199. *Id.* at 272.

200. CEDAW art. 11(1)(d), *supra* note 21.

201. Standing Comm. on the Status of Women, *An Analysis of the Effects of the Public Sector Equitable Compensation Act 2 (2009)*, available at [http://www2.parl.gc.ca/content/hoc/Committee/402/FEWO/Reports/RP4007440/402\\_FEWO\\_Rpt07/402\\_FEWO\\_Rpt07-e.pdf](http://www2.parl.gc.ca/content/hoc/Committee/402/FEWO/Reports/RP4007440/402_FEWO_Rpt07/402_FEWO_Rpt07-e.pdf).

**Figure 1: Accounting for Male-Female Differences in Hourly Earnings in the Canadian Labor Force**<sup>202</sup>

Factor	Fraction of Gap Explained by
Experience	11%
Field of Study	4%
Job Tenure	2%
Part-Time Status	2%
Union Status	1%
Firm Size	1%
Industry	15%
Occupation	7%
Job Responsibilities	6%
Marital Status	1%
Age of Youngest Child	1%
TOTAL EXPLAINED	51%
TOTAL UNEXPLAINED	49%

Statistics Canada reported that roughly half of the hourly wage gap can be attributed to explainable differences in labor force participation, indicating that most of the wage gap is due to pay inequity.

There also remains a significant gender disparity in part-time workers: 27% of the total female workforce worked part-time in 2004, as compared to 11% among employed men.<sup>203</sup> These numbers have actually increased over time, but as they have risen from 25% of women and 8% of men, this may be an indicator of increasing part-time jobs across the board, not of gender disparity. Additionally, in 2006, 28% of part-time female employees did not want full-time work and 27% were attending school.<sup>204</sup> Twenty-two percent of female part-time workers, however, could not find full-time employment.<sup>205</sup> There is a significant gendered dimension to part-time work, since 19% of female workers only work part-time because of child and family

---

202. *Id.* at 3.

203. Canada, Combined Sixth and Seventh Periodic Reports, *supra* note 147, ¶ 17.

204. Gov't of Canada, Responses of Canada to the list of Issues and Questions with Regard to the Consideration of Canada's Sixth and Seventh Reports on the Convention on the Elimination of All Forms of Discrimination Against Women, 40, CEDAW/C/CAN/Q/7/Add.1 (Sep. 9, 2008) [hereinafter Canada, Responses].

205. *Id.*

responsibilities, while that is true for only 2% of male part-time workers.<sup>206</sup> Because the wage gap still exists, it is important to analyze Canada's compliance efforts along with CEDAW's pay equity provisions.

### 1. Legislation and Case Law

The Government of Canada's obligation to promote pay equity is derived from Part III of the Canada Labour Code, the Public Sector Equitable Compensation Act ("PSECA"), and the Canadian Human Rights Act ("CHRA").<sup>207</sup> Sections 182 and 249 of Part III of the Canada Labour Code empower Labour Program inspectors to examine all records of federally regulated employers for evidence of pay discrimination based on gender.<sup>208</sup> If an inspector has "reasonable grounds" to believe that an employer is not complying with pay equity requirements, the inspector may report infractions to the Canadian Human Rights Commission.<sup>209</sup>

The Public Sector Equitable Compensation Act came into force on June 1, 2009 and applies to the Treasury Board of Canada in its capacity as employer of departments and agencies in Schedule 1 of the act, separate agencies listed in Schedule V, the Royal Canadian Mounted Police, and the Canadian Forces.<sup>210</sup> The PSECA establishes a more proactive and transparent system, requiring employers and unions to work together to ensure equitable compensation through collective bargaining and further requiring employers of non-union employees to establish equitable compensation plans.<sup>211</sup> The value of work, under the PSECA, is assessed on "skill, effort, responsibility, and working conditions, along with consideration of qualifications and market factors."<sup>212</sup> All federal public sector employees may file complaints with the Public Service Labour Relations Board.<sup>213</sup> Due to

---

206. *Id.*

207. *Id.* at 38.

208. *Id.*

209. *Id.*

210. The Public Sector Equitable Compensation Act, S.C. 2009 (Can.).

211. *Id.* See also *Fact Sheet—The Public Sector Equitable Compensation Act*, Treasury Bd. of Can. Secretariat (Feb. 6, 2009), <http://www.tbs-sct.gc.ca/media/nr-cp/2009/0206b-eng.asp#fstt> (reporting that "employers are required to proactively ensure wages are equitable, either through equitable compensation plans for non-unionized employees or with bargaining agents through the collective bargaining wage-setting process for unionized employees").

212. *Id.*

213. *Id.*

the PSECA's recent adoption, the CEDAW Committee has yet to analyze its effects. As a result, it is necessary to rely on accounts from both the PSECA's supporters and detractors to determine its role in Canada's efforts to comply with CEDAW.

The President of the Treasury Board has stated that this legislation is evidence that the government "respects the principle of equal pay for work of equal value."<sup>214</sup> According to his statement, the previous complaint-based pay equity system was time-consuming and costly, sometimes requiring women to wait over fifteen years for resolution of their claim.<sup>215</sup> This rationale for the adoption of the PSECA illustrates the government's desire to make clear its commitment to pay equity, suggesting that CEDAW has played a significant role in making pay equity a priority.

Detractors of the PSECA, on the other hand, paint a much different picture of its impact on pay equity in Canada. While there is widespread agreement that the complaint-based model was ineffective, the vast majority of witnesses who reported to the Standing Committee on the Status of Women, a permanent committee in the House of Commons, were critical of the new legislation.<sup>216</sup>

The first major criticism is that pay equity is a human rights issue and not a collective bargaining scheme. Critics express concern that pay equity is no longer being framed as a right, consistent with Canada's international human rights obligations under CEDAW.<sup>217</sup> This criticism, in particular, makes clear the significant role that CEDAW plays in inciting dialogue and promoting awareness of women's rights. Additionally, some critics have noted that the new legislation significantly increases the threshold for defining a "female predominant group," thereby making it more difficult to bring pay equity claims. The Canadian Human Rights Act previously used

---

214. Press Release, Treasury Bd. of Can. Secretariat, Statement by the President of the Treasury Board Welcoming the Public Sector Equitable Compensation Act (Feb. 2, 2006), available at <http://www.tbs-sct.gc.ca/media/nr-cp/2009/0206b-eng.asp>.

215. *Id.*

216. Analysis of the Effects of PSECA, *supra* note 201, at 4.

217. *Id.* See Mariel Angus, *Public Sector Equitable Compensation Act Threatens Pay Equity Rights of Women* (2009), available at <http://www.cpj.ca/en/blog/2009-02-06/mariel/public-sector-equitable-compensation-act-threatens-pay-equity-rights-women> (arguing that the PSECA offers women only narrow legal options and that pay equity should be addressed as a right).

different thresholds for workplaces of different sizes (70% for occupational groups with fewer than 100 members; 60% for occupational groups with between 100 and 500 members; and 55% for groups with over 500 members), while the PSECA sets the threshold at 70%, regardless of occupation group size.<sup>218</sup> Lastly, others are concerned that the PSECA now requires employees to file pay equity complaints without the assistance of their union or a specialized commission like the Canadian Human Rights Commission.<sup>219</sup> Based on these concerns, the Standing Committee on the Status of Women recommends that the government repeal the PSECA and replace it with a more effective and comprehensive federal pay equity law.<sup>220</sup>

The Canadian Human Rights Act governs all federally regulated employers not covered by the PSECA for the purposes of pay equity issues.<sup>221</sup> Section 11 of the CHRA states that “it is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value.”<sup>222</sup> Case law has illuminated what is required for two employees to be considered to work in the same “establishment” under the pay equity provisions of the CHRA. In *Canada (Human Rights Commission) v. Canadian Airlines International Ltd.*, the Supreme Court of Canada held that the Canadian Human Rights Commission must compare the salaries and working conditions of Air Canada’s mostly female flight attendants to those of the airline’s mostly male pilots and mechanics.<sup>223</sup> The Court found that although they are governed by separate collective agreements, the flight attendants and pilots are part of the same “establishment” for the purpose of pay equity claims because they are subject to a “common personnel and wage policy.”<sup>224</sup> The Court decided *Reid v. Vancouver*

---

218. Analysis of the Effects of PSECA, *supra* note 201, at 6.

219. *Id.*

220. *Id.* at 8.

221. Analysis of the Effects of the PSECA, *supra* note 201, at 1.

222. Canadian Human Rights Act, R.S.C. 1985, c. H-6. For guidance on the pay equity provisions of section 11 of the CHRA and their application, see Canadian Human Rights Commission, The Equal Wages Guidelines (1986), available at [http://www.chrc-ccdp.ca/publications/tfa\\_appendix4-eng.aspx](http://www.chrc-ccdp.ca/publications/tfa_appendix4-eng.aspx).

223. [2006] 1 S.C.R. 3 (Can.).

224. See also *P.S.A.C. v. Canada Post Corporation* (No. 6), [2005] C.H.R.T. 39 (holding that Canada Post had violated the Canadian Human Rights Act by paying the employees in the female-dominated Clerical and Regulatory Group less than employees in the male-dominated Postal Operations Group for work of equal value).

*Police Board*<sup>225</sup> the opposite way, holding that a 40% wage discrepancy between the mostly male fire dispatchers and the mostly female police dispatchers did not discriminate against the female dispatchers, as the female employees were Police Board Employees while the male dispatchers were City of Vancouver employees.

The effectiveness of the CHRA in promoting pay equity is limited because employers can point to differences among their employees' performance appraisals, demotion, and training assignments to dispute that their work is of equal value.<sup>226</sup> Furthermore, the CHRA establishes a reactive system of enforcement. The Canadian Human Rights Commission relies on complaints and investigations in order to settle, dismiss, or refer a complaint to a tribunal; it does not have the authority to investigate and bring cases on its own.<sup>227</sup>

As the above information makes clear, pay equity is a serious goal of the Canadian government, yet it has been addressed by scattered legislation, resulting in some confusion over the designated implementation strategy. The government recognized this problem in September 2006, when it renewed its efforts to create a proactive pay equity program in three phases.<sup>228</sup> First, through education and promotion, the Labour Program will provide compliance advice and guidance to federally regulated employers.<sup>229</sup> Second, during the mediation phase workplace parties will be allowed to request specialized mediation assistance in negotiating pay equity solutions in unionized workplaces.<sup>230</sup> The third, and final, phase involves compliance monitoring, whereby staff will visit workplaces to collect information and review wage records.<sup>231</sup> If inspectors discover non-compliance or complaints of discriminatory wage practices, they will refer those cases to the Canadian Human Rights Commission.<sup>232</sup> Further, the Continuing Committee of Officials on Human Rights (the "CCOHR") acts as a forum in which federal, provincial, and territorial governments may discuss and share information on issues such as pay equity with a "view to enhancing implementation of

---

225. [2005] B.C.J. No. 1832 (Can.).

226. Canada, Fifth Periodic Report, *supra* note 132, ¶ 281.

227. *Id.* ¶ 282.

228. For Canada's responses to specific concerns, see Canada, Responses, *supra* note 204, at 38.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* at 38.



Canada's international human rights obligations."<sup>233</sup> The CCOHR meets twice a year and has monthly conference calls with CEDAW and other international human rights treaties on the standing agenda.<sup>234</sup> These improvements will hopefully serve to supplement the authority and effectiveness of existing pay equity legislation.

## 2. CEDAW Analysis: Progress and Concerns

This subpart describes the ongoing dialogue between Canada and the CEDAW Committee in regard to pay equity and demonstrates that CEDAW and the Committee's recommendations have had an impact on pay equity legislation in Canada. As the description of Canada's pay equity laws and procedures may have suggested, Canada appears to sincerely desire pay equity while simultaneously recognizing that the piecemeal approaches it has used in the past have not been successful in eradicating the problem. As such, pay equity is a very interesting topic in terms of Canada's willingness to address the problem and the CEDAW Committee's advisory role in doing so. Canada took the vital first step of admitting that there was a problem with pay equity.<sup>235</sup> In its Fourth Periodic Report to the Committee, the Canadian Government noted that, although its complaint procedure under the Canadian Human Rights Commission has had some positive results,<sup>236</sup> the process remained "slow" and "confrontational," with limited effectiveness.<sup>237</sup> Accordingly, the Commission recommended that the system be amended to require employers to take initiative in eliminating sex-

---

233. *Id.*

234. *Continuing Committee of Officials on Human Rights*, Canadian Heritage (Nov. 23, 2010), <http://www.pch.gc.ca/pgm/pdp-hrp/canada/cmtt-eng.cfm>.

235. Interestingly, this first step is not as simple as it seems. Much of the opposition to CEDAW seems based on the argument that the United States, unlike the other signatories, has no need for the CEDAW provisions because there is no problem with women's rights. As later statistics will show, this is far from the case. Thus, as many psychologists and therapists have found when helping patients deal with physical and psychological problems, perhaps the most important step for the United States is to objectively analyze the state of gender equity in the workplace and recognize that we are still a long way from true equality.

236. In the years up to 1994, the Commission resolved approximately 110 complaints, awarding total compensation payments in the range of 100 million Canadian dollars. Gov't of Canada, *Fourth Periodic Report of Canada*, ¶ 125, U.N. Doc. CEDAW/C/CAN/4 (Oct. 1, 1996) [hereinafter *Canada, Fourth Periodic Report*].

237. *Id.*

based pay inequity.<sup>238</sup> In the early 1990s, there was a major review of pay equity compliance, and the government introduced a pay equity audit process to verify self-reporting by covered employers.

Perhaps not surprisingly, the Committee's Remarks on Canada's Third and Fourth Periodic Reports noted that "improvements were needed with regard to women's earnings and to deal with persistent occupational segregation."<sup>239</sup> The Committee further noted that "[i]nformation on the valuation and qualification of women's unpaid work, including domestic work, should be provided in future reports" and that Canada should develop methodologies to assess progress in closing the pay gap and in ensuring equal pay for equal work.<sup>240</sup>

In a seemingly direct response to the Committee's requests, the Canadian government later reported that, on average, women spend five more full-time weeks a year doing unpaid work than men, noting that families and society could not function without reaping the benefits of this unpaid work.<sup>241</sup> Recognizing that there is a direct link between hours spent on unpaid work and decreased time for paid work, the Canadian government took a number of measures to raise awareness on the issue of unpaid work as a pay equity issue.<sup>242</sup> For example, the 1996 census, for the first time, included questions on unpaid household work. Funding was provided to NGOs to study and promote the issue of unpaid work, and the government sponsored an international symposium on gender equality indicators in March 1998.<sup>243</sup>

The Committee's next set of recommendations, published in 2003, commended the government's efforts to implement the principle of equal pay for work of equal value, but remained concerned that, due to their unpaid household tasks, a large percentage of women have "part-time jobs, marginal jobs, and self-employment arrangements," which do not always have adequate social benefits.<sup>244</sup> Further, the Committee expressed concern that the auditing process to ensure the implementation of equal pay for equal

---

238. *Id.*

239. Concluding Observations on Canada's Third and Fourth Periodic Reports, *supra* note 149, ¶ 311.

240. *Id.*

241. Canada, Fifth Periodic Report, *supra* note 132, ¶ 267.

242. *Id.* ¶ 357.

243. *Id.* ¶ 268.

244. Concluding Observations on Canada's Fifth Periodic Report, *supra* note 132, ¶¶ 373, 375.

work was too slow, resulting in lack of compliance in some provincial governments.<sup>245</sup> In response to these concerns, in February 2008, the government established an Ad Hoc Committee to examine the issue of work-life and is currently funding related research.<sup>246</sup>

Pay equity provides a prime example of the desirable benefits that may flow from Committee recommendations to States Parties. Canada enacted a number of various provisions indicating that pay equity was a serious goal of the government, and yet, those programs consistently fell short of their desired effects. So, in its report to the Committee, Canada candidly explained this shortcoming and, in doing so, allowed the Committee to respond with positive and productive recommendations that have now resulted in Canada's new three-part initiative discussed earlier. Although it is too early to tell whether the new pay equity initiatives will have more success in bringing about pay equity in the Canadian workplace, the process of arriving at those initiatives is the most important product to understand for the purpose of analyzing CEDAW's effect on the United States.

#### D. Marital and Pregnancy Protections

CEDAW requires States Parties to "prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status [and] [t]o introduce maternity leave with pay or with comparable social benefits without loss of former employment, senior

---

245. *Id.* ¶ 375. This point brings up the related issue of the distribution of power and responsibility between the federal government and the provinces. In these remarks, the Committee affirmed that it was "cognizant of the complex federal and constitutional structures in the State Party," but "it underline[d] . . . that the federal Government is responsible for ensuring the implementation of the Convention and providing leadership to the provincial and territorial governments in that context." *Id.* ¶ 11. Essentially, the Committee is concerned that the federal government lacks an effective mechanism to ensure the compliance of the provinces, and thus suggests that the government accelerate its efforts in creating an effective partnership. *Id.* ¶ 376.

246. CAALL, *Work-Life Balance*, [http://www.caall-acalo.org/about\\_projects\\_worklifebalance\\_eng.shtml](http://www.caall-acalo.org/about_projects_worklifebalance_eng.shtml). The Committee exists under the umbrella of the Canadian Association of Administrators of Labour Legislation (CAALL) and is responsible for reviewing the literature on work-life balance, particularly in terms of its cost-benefit analysis to employers. *Id.* For the committee's conclusions, see Donna S. Lero et al., *Cost-Benefit Review of Work-Life Balance Practices—2009* (2009), available at <http://www.caall-acalo.org/docs/Cost-Benefit%20Review.pdf>.

or social allowances.<sup>247</sup> Further, CEDAW requires parties to “provide special protection to women during pregnancy in types of work proved to be harmful to them.”<sup>248</sup> This section discusses, in turn, the protections, benefits, and accommodations provided by Canadian law and analyzes whether these provisions comply with CEDAW.

### 1. Protections

In *Brooks v. Canada Safeway Ltd.*, the Supreme Court of Canada held that it was sex discrimination for a group insurance plan to deny pregnant women any leave benefits but offer benefits for an accident or sickness.<sup>249</sup> Thus, discrimination on the basis of pregnancy became a form of discrimination on the basis of sex.

### 2. Benefits

In 1987, there were four maternity-related absences for every 100 women aged 15–49 who were paid workers.<sup>250</sup> Paid maternity leave became more prevalent during the 1980s, from 77% of maternity leaves compensated in 1980 to 92% in 1987.<sup>251</sup> Parental benefits were extended to fathers in the 1988 *Schachter v. The Queen* decision, where a federal court held that unemployment insurance should be available to natural fathers who stayed home with newborn children, as well as to natural mothers and adoptive parents.<sup>252</sup>

In 2000, the Canadian government extended parental benefits from ten weeks to thirty-five weeks, dropped a two-week waiting period for paternal leave, and allowed parents to work while receiving benefits, thereby allowing parents to transition back to the workplace if they so desired.<sup>253</sup> Canada’s goal was to adapt maternity and parental benefits to “make it easier for fathers to take a larger share in child-rearing so that, over the course of a lifetime, women

---

247. CEDAW art. 11(2)(a), (b), *supra* note 21.

248. *Id.* art. 11(2)(d).

249. *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 (Can.). This case was decided on the basis of the Manitoba Human Rights Act, but the reasoning applies to other provincial statutes prohibiting discrimination on the basis of sex, as well as the Canadian Charter of Rights and Freedoms.

250. Canada, Third Periodic Report, *supra* note 157, ¶ 99.

251. *Id.* For a detailed explanation of maternity and parental benefits available after the 1990 plan revisions, see *id.* ¶ 14.

252. [1988] 3 F.C. 515 (Can.).

253. Canada, Addendum to its Fifth Periodic Report, *supra* note 180, ¶ 95.

would not find themselves in the situation now affecting older women” who were finding it difficult to survive when, due to separation, divorce, or death, they had no income or pension.<sup>254</sup> As a result of these extensions, the number of Canadians utilizing parental benefits increased by 24.3% in 2001, and, as intended, the number of male claimants increased by almost 80%.<sup>255</sup>

The revisions to parental leave policy extending benefits to men are not surprising; in the *Travaux Préparatoires*, Canada emphasized that the Convention does not request special privileges for women, but aims for equality.<sup>256</sup> In the same vein, Canada felt that reference should be made to “parents” and not only “mothers” in laws relating to working women.<sup>257</sup>

Although the extension of parental leave benefits is positive progress, one CEDAW Committee member nevertheless noted that “women’s disproportionate burden as caregivers and their high level of unpaid work continued to hinder their full participation in the economy.”<sup>258</sup> Societal shifts in care-giving, however, may only need time to take hold, as the CEDAW Committee noted in its most recent concluding observations to Canada that it was pleased at the increased possibilities for parental leave for fathers in Quebec.<sup>259</sup> It therefore appears that Canada’s expansion of parental leave benefits has allowed families desiring a non-traditional familial care-giving structure to take advantage of that preference, to the satisfaction of the CEDAW Committee.

### 3. Accommodations

Due to the amendment of the Canada Labour Code and the Public Service Staff Relations Act, the Canada Labour Code now requires “employers under federal jurisdiction to make reasonable attempts to modify a job or arrange reassignment for pregnant employees when their health needs so require.”<sup>260</sup> If accommodation

---

254. Summary Record of the 604th Meeting, *supra* note 182, ¶ 7.

255. Summary Record of the 603rd Meeting, *supra* note 125, ¶ 8.

256. Rehof, *supra* note 87, at 128.

257. *Id.*

258. Summary record of the 603rd meeting, *supra* note 125, ¶ 49.

259. Concluding Observations on Canada’s Combined Sixth and Seventh Periodic Reports, *supra* note 147, ¶ 6.

260. Canada, Fourth Periodic Report, *supra* note 236, ¶ 137.

is not possible, pregnant employees may be able to collect unemployment insurance rather than limited maternity benefits.<sup>261</sup>

The Supreme Court of Canada has expanded the applicability of reasonable accommodation, applying it to unions and collective agreements, emphasizing that it requires genuine, non-negligible effort, and noting that accommodations may necessitate minor inconvenience to other employees.<sup>262</sup> Lower courts have followed the Supreme Court's lead. For example, in *Emrick Plastics v. Ontario*, a court held that the refusal to transfer a pregnant spray painter to a location free from fumes violated the duty of reasonable accommodation.<sup>263</sup> Similarly, in *Brown v. Department of National Revenue*, a Canadian Human Rights Tribunal held there was a failure to accommodate when an employer refused to allow an employee to work day shifts, which she requested due to pregnancy complications and childcare needs.<sup>264</sup>

Pregnancy accommodations have yet to be mentioned in the CEDAW Committee's report, indicating that Canada's own initiatives have been sufficient to protect the rights of pregnant women. This omission is important to note because it shows that the Committee does not intend to reshape States Parties domestic priorities or reform programs that are shown to be non-discriminatory and successful. Rather, the Committee focuses its energies on those areas on which States Parties require assistance and guidance, as demonstrated by objective data and the country's own admissions of insufficiency.

#### E. Sexual Harassment

As noted earlier, although Article 11 does not explicitly mention sexual harassment, the CEDAW Committee has subsequently interpreted the provision to include a prohibition on sexual harassment. According to the Committee, "[e]quality in

---

261. *Id.*

262. *Central Okanagan School District No. 23 v. Renaud* [1992] 2 S.C.R. 970 (Can.) (holding that an employer was under a duty to accommodate to the point of undue hardship); *Commission Scolaire Regionale de Chambly v. Bergevin* [1994] 2 S.C.R. 525 (Can.) (finding that a school should adjust its working hours to accommodate employees' religious beliefs).

263. *Emrick Plastics v. Ontario* (1992), 90 D.L.R. 4th 476 (Ont. Div. Ct.).

264. *Brown v. Department of National Revenue (Customs and Excise)* (1993), T.D. 7/93 (Human Rights Tribunal), available at [http://www.chrt-tcdp.gc.ca/aspinc/search/vhtml-eng.asp?doid=178&lg=\\_e&isruling=0](http://www.chrt-tcdp.gc.ca/aspinc/search/vhtml-eng.asp?doid=178&lg=_e&isruling=0).

employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace.”<sup>265</sup> But, while the Committee clearly recognizes sexual harassment as a serious and pressing issue facing women around the world, because it is not explicitly protected in Article 11, States Parties do not report on it and so the Committee does not make relevant recommendations. Consequently, it is very difficult to determine CEDAW compliance in the area of sexual harassment, although standards from other areas of employment discrimination law may be applied to inform the analysis.

A 1993 survey found that 23% of Canadian women experienced sexual harassment in the workplace.<sup>266</sup> Another study found that only 8% of women report sexual harassment, making it very difficult to accurately grasp the extent of the problem.<sup>267</sup> One commentator suggested that conflicting characterizations of the prevalence of sexual harassment stem from the fact that “incidents that may be classified as harassment vary both in the minds of people and in the policies developed by businesses, corporations, and governments.”<sup>268</sup> Unfortunately, it also does not appear that more recent statistics are available, preventing an effective judgment of legislative and judicial efforts designed to prevent and address sexual harassment.

The Canadian courts led the way on the prohibition of sexual harassment, providing a path for Parliament to eventually follow. In *Janzen v. Platy Enterprises Ltd.*, the Supreme Court of Canada followed the same logic of the CEDAW Committee and held that the Manitoba Human Rights Act’s prohibition on sex discrimination operates as a prohibition on sexual harassment.<sup>269</sup> In *Robichaud v. the Queen*, the Supreme Court of Canada interpreted the Canadian Human Rights Act and held that it imposes something similar to

---

265. CEDAW Comm., General Recommendation 19, *supra* note 114, art. 11, 17–18 (defining sexual harassment as “such unwelcome sexually determined behavior as physical contact and advances, sexually colored remarks, showing pornography and sexual demand, whether by words or actions”).

266. Holly Johnson, *Work Related Sexual Harassment*, 6 Perspectives on Labour and Income 1, 2 (1994), available at <http://www.statcan.gc.ca/studies-etudes/75-001/archive/e-pdf/1561-eng.pdf>.

267. *Sexual Assault Statistics*, Sexual Assault Centre, <http://sacha.ca/home.php?sec=17&sub=43> (last visited January 19, 2011).

268. Johnson, *supra* note 266, at 1.

269. *Janzen v. Platy Enter.*, [1989] 1 S.C.R. 1252 (Can.) (“Sexual harassment is a form of sex discrimination.”).

vicarious liability on employers for the sexual harassment practiced by their employees.<sup>270</sup> While it is, of course, possible that these courts independently reached the conclusion that sexual harassment is encompassed by the prohibition on sex discrimination, it also seems possible that the CEDAW Committee analysis helped to embolden litigants and paved the way for courts and legislators to read existing sex discrimination prohibitions to bar sexual harassment.

In 1992, Canada informed the Committee that the Canada Labour Standards Regulations were in the process of being amended to include a sexual harassment policy.<sup>271</sup> The Regulations now provide that “[e]very employee is entitled to employment free of sexual harassment” and define sexual harassment as

any conduct, comment, gesture or contact of a sexual nature that is likely to cause offence or humiliation to any employee; or that might, on reasonable grounds, be perceived by that employee as placing a condition of a sexual nature on employment or on any opportunity for training or promotion.<sup>272</sup>

Under the regulations, employers are required to make “every reasonable effort” to prevent sexual harassment and to issue a policy statement on sexual harassment.<sup>273</sup> In the policy statement, employers must explain internal procedures for reporting sexual harassment, advise employees that the employer will take appropriate disciplinary action against any person responsible for sexual harassment, and inform employees as to their rights of redress under the Canadian Human Rights Act.<sup>274</sup>

While this amendment was the most significant progress in the realm of sexual harassment, the government continued to take steps to inform and educate employers and employees alike. Government officials tasked with administering unemployment insurance were given educational materials on sexual harassment to enhance implementation of this policy.<sup>275</sup> And, in 2001, the Canadian

---

270. *Robichaud v. Canada*, [1987] 2 S.C.R. 84 (Can.).

271. Canada, Third Periodic Report, *supra* note 157, ¶ 200.

272. Canada Labour Code, R.S.C. 1985, c. L-2, pt. III, div. XV.1, 247.1-2, available at [http://laws.justice.gc.ca/eng/L-2/page-3.html#anchorbo-ga:l\\_III-gb:l\\_XV\\_1](http://laws.justice.gc.ca/eng/L-2/page-3.html#anchorbo-ga:l_III-gb:l_XV_1) (internal subdivisions omitted).

273. *Id.* at 247.3-247.4.

274. *Id.* at 247.4.

275. Canada, Fourth Periodic Report, *supra* note 236, ¶¶ 118-19.



Human Rights Commission also created and distributed an anti-harassment guide for employers.<sup>276</sup>

Further, Canada's Fourth Periodic Report to the CEDAW Committee states that an unemployment policy entered into force, under which those who claim sexual harassment as the reason for quitting are given a presumption of justification.<sup>277</sup> The report goes on to state that the Commission "resolved, through mediation and conciliation, a range of complaints dealing with pregnancy-related discrimination, sexual harassment, and sex-discrimination in the workplace."<sup>278</sup>

While it is positive that these issues are being dealt with by competent authorities, this statement provides no quantification as to how severe these issues of sexual harassment are and to what extent the Commission was successful in reforming the behaviors of offending employers. Part of this issue might be reporting difficulties. Furthermore, sexual harassment suffers from a lack of information, in terms of understanding the scope of the problems, the effectiveness of legislative and judicial solutions, and Canada's potential compliance with CEDAW provisions. The first step to solving all of these problems is to create and implement an effective reporting mechanism for sexual harassment complaints; only then can this issue be fully understood and addressed.

#### F. Reservations, Understandings, and Declarations

When Canada ratified CEDAW, it did so with only one statement of understanding, which stated, in relevant part, that the Canadian government had "addressed the concept of equal pay . . . by legislation which requires the establishment of rates of remuneration without discrimination on the basis of sex."<sup>279</sup> This understanding was included in order to generate provincial consent to ratification.<sup>280</sup> While some provinces had already passed pay equity legislation by

---

276. Canada, Addendum to its Fifth Periodic Report, *supra* note 180, ¶ 84.

277. Canada, Fourth Periodic Report, *supra* note 236, ¶ 117.

278. Canada, Addendum to its Fifth Periodic Report, *supra* note 180, ¶ 84.

279. CEDAW, *supra* note 21.

280. Lee Waldorf & Susan Bazelli, *The First CEDAW Impact Study Country Papers: Canada 37* (2000) (The First CEDAW Impact Study was designed by the International Advisory Committee as a pilot study in ten countries to "gather qualitative and quantitative data from the 'grassroots' in order to develop better measures of the implementation of human rights guarantees from the perspective of women's rights advocates").

the time CEDAW was ratified, others had no plans to do so; the reservation was designed to appeal to such provinces. In 1986, however, Canada took a stand against the use of inappropriate RUDs to international human rights conventions and thus was concerned that having its own statement of understanding would undermine its position. So, after discussing with the provinces, on May 28, 1992, the government of Canada notified the Secretary General of its withdrawal of its previous statement of understanding to Article 11(1)(d) to the Convention.<sup>281</sup> As will be discussed in greater detail later, the inclusion of RUDs can have a very significant effect on the implementation of a treaty, so it is important to understand how CEDAW's impact on Canada stems from the full force of the treaty, unhampered by any RUDs.

Since its ratification of CEDAW in 1981, Canada has clearly made strides toward greater gender equality. Whether CEDAW caused these changes is difficult to determine, as there have been a variety of concurrent initiatives and obligations that could have feasibly provided incentives to revise and expand employment discrimination law. However, as one of the frontrunner documents for women's rights, CEDAW certainly had a role in instigating and informing the social changes and provocative discussion that took place in Canada. Canada's interactions with the CEDAW Committee (and, in some cases, the lack thereof) also provide valuable insight into the Committee's potential relationship with the United States. These lessons will be explored in greater detail in the next section.

## V. THE UNITED STATES AND CEDAW

If CEDAW is ever to be ratified, there must be an honest discussion of the likely changes, if any, that would accompany ratification. This part, like the previous part on Canada, discusses the current state of the law regarding the four major areas of CEDAW employment discrimination protection: equal opportunity in employment, pay equity, marital and pregnancy protections, and sexual harassment. As a non-party to CEDAW, the U.S. does not have the benefit of the CEDAW Committee's analysis of its progress in the aforementioned fields. So, while it is possible to make inferences by comparing U.S. statistics and policy to CEDAW requirements, it is useful to analogize to Canada to better explore whether the United States would be considered in compliance with

---

281. United Nations Treaty Collection, *supra* note 19, at 51 n.12.

CEDAW provisions and what changes to employment discrimination law, if any, would likely be required following ratification.

#### A. Equal Opportunity in Employment

The number of working women in the United States has risen from 5.1 million in 1900 to 18.4 million in 1950<sup>282</sup> to 68.4 million in 2007,<sup>283</sup> with the number expected to reach 76 million by 2014.<sup>284</sup> This means that in 2007 almost 57% of women over the age of sixteen worked,<sup>285</sup> accounting for 46.5% of the labor force.<sup>286</sup> Labor force participation has increased most dramatically among married women.<sup>287</sup> Although the United States is a world leader in terms of female achievement, there is still progress to be made. The Equal Employment Opportunity Commission (“EEOC”) is still litigating and settling enormous lawsuits based on “glass ceiling” discrimination, in which women are discriminated against in the terms and conditions of their employment and denied equal opportunities for advancement.<sup>288</sup> Perhaps as the female population more regularly sees women in visible positions of power, as discussed in Part I, *supra*, they will be made aware of the possibilities for advancement and thus will be primed to recognize and fight back against glass ceiling discrimination.

---

282. Dep’t for Prof’l Emps., AFL-CIO, Fact Sheet 2006 1 (2006), *available at* <http://www.pay-equity.org/PDFs/ProfWomen.pdf>.

283. U.S. Bureau of Labor Statistics, U.S. Dep’t of Labor, Employment and Earnings 28 (2007), *available at* <http://www.bls.gov/opub/ee/empearn200712.pdf> [hereinafter U.S. Dep’t of Labor, Employment and Earnings].

284. Mitra Toossi, *Labor Force Projections to 2014: Retiring Boomers*, 128 Monthly Labor Review Online 25, 26 (2005), <http://www.bls.gov/opub/mlr/2005/11/art3full.pdf>.

285. U.S. Dep’t of Labor, Employment and Earnings, *supra* note 283, at 17.

286. *Id.* at 28.

287. U.S. Bureau of Labor Statistics, U.S. Dep’t of Labor, Women in the Labor Force: A Databook 63 (2005), *available at* <http://www.bls.gov/cps/wlf-databook-2005.pdf>.

288. See Press Release, EEOC, Outback Steakhouse To Pay \$19 Million For Sex Bias Against Women in ‘Glass Ceiling’ Suit by EEOC (Dec. 29, 2009) *available at* <http://www.eeoc.gov/eeoc/newsroom/release/12-29-09a.cfm>; EEOC, Title VII of the Civil Rights Act of 1985 Charges FY 1997–2009, *available at* <http://www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm>; *EEOC Litigation Statistics: FY 1997 through FY 2010*, U.S. Equal Opportunity Empt’t Comm’n, *available at* <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm> (last visited January 20, 2011).

The occupational distribution of male and female workers also differs, as women are scarcely found in the construction, production, and transportation sectors but are concentrated in administrative support jobs.<sup>289</sup> Sixty-eight percent of female professionals work in education or health care, compared to 29% of men.<sup>290</sup> In 2005, 92% of registered nurses, 82% of all elementary and middle school teachers, and 98% of all preschool and kindergarten teachers were women. In comparison, only 13.2% of all civil engineers, 7.1% of electrical and electronics engineers, and 5.1% of all aircraft pilots and flight engineers were female.<sup>291</sup> There has, however, been some progress in specific professions. For example, women made up 48% of pharmacists and 37% of chemists in 2007.<sup>292</sup> It is possible that these figures are more a product of socialization than of discrimination, but in any case, it is illuminating to consider how males and females may be raised differently to expect and pursue only certain types of careers.

#### 1. Equal Opportunity Employment: Current Legislation and Case Law

The United States' major legislation protecting equal opportunity in employment is Title VII of the Civil Rights Act of 1964 ("Title VII"), which outlaws discrimination in employment based on race, color, religion, sex, and national origin. Under Section 703(a), it is unlawful for an employer to

fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin; or to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status

---

289. See U.S. Bureau of Labor Statistics, U.S. Dep't of Labor, Report 1017, *Highlight of Women's Earnings in 2008* 2 (2009), available at <http://www.bls.gov/cps/cpswom2008.pdf> [hereinafter *Highlight of Women's Earnings in 2008*].

290. *Id.* at 2.

291. U.S. Dep't of Labor, Employment and Earnings, *supra* note 283, at 29.

292. *Id.*

as an employee, because of such individual's race, color, religion, sex, or national origin.<sup>293</sup>

There are, however, four exceptions to this prohibition on discrimination. Otherwise unlawful discrimination is permitted where sex is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of the business,<sup>294</sup> where there is a bona fide seniority or merit system or the employer measures earnings by the quantity or quality of production, where the employer acts on the results of a professional ability test that "is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin," or where differences in pay based upon sex are authorized by the Equal Pay Act of 1963.<sup>295</sup> According to EEOC guidelines, though, certain situations do not warrant a BFOQ defense: (1) the refusal to hire a woman based on assumption of employment characteristics of women in general; (2) the refusal to hire based on sex stereotypes; (3) the refusal to hire based on preferences of coworkers, clients, customers, or the employer; and (4) the fact that the employer may have to provide separate facilities.<sup>296</sup>

There are two types of discrimination protected under Title VII: disparate treatment and disparate impact. Disparate treatment actions are those in which the plaintiff alleges that she was treated differently on account of her status as a member of a protected class, namely her sex.<sup>297</sup> In these cases, the court uses a burden shifting framework, in which the plaintiff must first prove a prima facie case of discrimination. The Civil Rights Act of 1991 codified the Supreme Court's ruling in *Price Waterhouse v. Hopkins*<sup>298</sup> that a plaintiff may establish an unlawful employment practice when sex was one of the motivating factors for the employment decision, even if there were other motivating factors as well.<sup>299</sup> Once the plaintiff proves a prima

---

293. 42 U.S.C. § 2000e-2(a) (2006).

294. There is a two-step test to determine if sex is a BFOQ for a job in question. First, does the particular job under consideration require that the worker be of one sex only? Then, if so, is that requirement reasonably necessary to the essence of the employer's business? Typically, sex or sex appeal itself must be the dominant service provided, unlike, for example, an airline, where its primary function is the safe transportation of passengers. See *Wilson v. Southwest Airlines*, 517 F.Supp. 292, 302 (N.D. Tex. 1981).

295. 42 U.S.C. § 2000e-2(h).

296. Rothstein & Liebman, *supra* note 96, at 278-79.

297. *Id.* at 226.

298. 490 U.S. 228 (1989).

299. 42 U.S.C. § 2000e-2(m).

facie case, the employer has the burden of showing a legitimate, nondiscriminatory reason<sup>300</sup> for its decision—or, in the case of mixed motive, that it would have made the same employment decision regardless of the impermissible factor.<sup>301</sup> The plaintiff finally has the opportunity to show that the employer’s proffered reason is pretextual, but the ultimate burden of proof lies with the plaintiff.<sup>302</sup>

Title VII also enables disparate impact claims, which are those in which an employment practice has a disproportionately negative impact on a protected class of people.<sup>303</sup> If an employment standard is found to have a differential impact, it may only stand if found to be a “business necessity”<sup>304</sup> in that it has a manifest relationship to the employment in question.<sup>305</sup> Employees must attempt to show which employment practices caused the disparate impact, but if the practices are impossible to separate, courts must analyze them as one practice. The burden of showing business necessity in disparate impact cases lies with the employer.<sup>306</sup>

In 1972, the Equal Employment Opportunity Act was extended to apply Title VII protections to state and local government employees.<sup>307</sup> Claimants may also assert an action under Sections 1981, 1983,<sup>308</sup> and 1985 of the Civil Rights Act of 1868 if they are not covered by Title VII or miss the short statute of limitations of Title VII. Typically, though, Title VII is the preferred statutory basis for the suit because it has more extensive coverage and the Equal Employment Opportunity Commission can help claimants file their complaints.

---

300. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803 (1973) (holding that the employer’s proffered reason of the respondent’s participation in unlawful conduct against it as the cause for his rejection was sufficient to discharge the petitioner’s burden).

301. *Price Waterhouse*, 490 U.S. at 244–45.

302. *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

303. Rothstein & Liebman, *supra* note 96, at 256.

304. In regard to disparate impact claims, the 1991 Act overturned several Supreme Court cases, including *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989), to return to a “business necessity” standard.

305. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); Civil Rights Act of 1991, Pub. L. 102-66, 105 Stat. 1071.

306. Rothstein & Liebman, *supra* note 96, at 278.

307. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261 (1972).

308. *See Back v. Hastings on Hudson Union Free School Dist.*, 365 F.3d 107 (2d Cir. 2004) (holding that a § 1983 sex discrimination claim can be based on a “gender + parenthood” standard, so plaintiff has a legitimate claim if her treatment changed from pre- to post-baby).

## 2. Equal Opportunity in Employment: Lessons From Canada

The main weaknesses of Canada's equal opportunity in employment program seem to be coverage and enforcement. The Employment Equity Act only covers 10% of Canada's workforce, thus leaving the vast majority of employees without any legal protection. Additionally, although the 1996 revisions to the Act gave the Canadian Human Rights Commission increased power to audit employers, the drawn-out enforcement process and lack of sanctions suggest that employers have little to no extrinsic incentive to comply with the Act's provisions. The Employment Equity Act is also not a complaint-initiated framework, so any person who wishes to bring a sex discrimination suit is forced to use Canada's human rights legislation, which does not have adequately funded forums to handle such complaints.

Canada has, however, implemented concrete changes to its legislation based on these concerns of the CEDAW Committee. For example, although the provisions are still less than satisfactory, the 1996 revisions to the Employment Equity Act were a distinct improvement and represented positive progress. Sometimes, though, Canada's responses to the CEDAW Committee's concerns have been limited to a Canadian representative explaining, from the perspective of an advocate, how the Committee's concerns have already been addressed. For example, when the Committee continued to criticize the limited coverage of the Employment Equity Act, a Canadian representative noted that all employees are covered by federal and provincial anti-discrimination legislation and that over two million workers are covered by the Employment Equity Act, while citing the reasons that the act could not apply to smaller employers. So, while Canada seems to feel obligated to respond to the Committee's concerns, it may sometimes act from a defensive perspective, and not from the perspective of a partner seeking positive change.

There are other limits to Canada's cooperation with the CEDAW Committee. The Canadian representative did not, for example, note the difficulties in bringing a claim under the national or provincial legislation or explain that the Employment Equity Act only covers 10% of the Canadian workforce. This lack of coverage and enforcement is mostly due to the lack of resources to implement a proactive forum for litigation or to increase monitoring efforts. Although the Committee has noted these problems for a number of years, its criticisms do not appear to have made a budgetary impact

on Canada's equal employment efforts. So, at the very least, the Committee serves a valuable purpose in instigating dialogue regarding the need for progress and pointing to areas requiring improvement; these changes could potentially lead to revisions in legislation, although they are unlikely to control budget decisions.

Because Title VII applies to all private employers and provides the basis for litigation against private employers and state and local governments, the United States has already made significant strides in avoiding the Canada's issues of coverage and enforcement when dealing with equal opportunity in employment. Further, the Equal Employment Opportunity Commission is available to assist employees in filing lawsuits, both in terms of legal expertise and funding, which provides even greater incentive for employers to comply with the terms of Title VII.<sup>309</sup> As such, the United States has already made great strides towards compliance with the equal opportunity in employment mandate of CEDAW Article 11.

Compliance with CEDAW provisions, as defined by the CEDAW Committee, is not an on-off switch. Rather, the Committee analyzes the current state of affairs, applauds progress, and points out areas for improvement. So, the question is not whether the United States already complies with CEDAW provisions but how it can further improve its already impressive provisions guaranteeing equal opportunity in employment. Although the United States can point to areas in which its equal opportunity in employment provisions are successful (and even more successful than those of other States Parties to the Convention), there is still room for improvement, both in terms of the opportunity for the United States to reaffirm its commitment to equality in the workplace and by continuing to break through glass ceiling barriers.

Ratification of CEDAW would affirm the existing right of women to equal opportunities and pay, while providing employers additional incentives to assess their own compliance efforts. The Canadian experience is informative with respect to the role employers can play; since there is no effective enforcement

---

309. The EEOC, however, is not without its critics. See e.g. Reed Abelson, *The E.E.O.C. is Short of Will and Cash*, Race Matters (July 1, 2001), <http://www.racematters.org/eeoclackswill&cash.htm> (noting that critics maintain that the effectiveness of the EEOC is hampered by bureaucracy, lack of political will and a passive approach to identifying the worst cases of discrimination from the tens of thousands of complaints it receives each year).



mechanism in the Canadian system, it focuses heavily on employer initiatives to identify and resolve existing barriers to employment. Although the United States courts are already an effective outlet for litigation against offending employers, ratification of CEDAW would provide additional motivation for employers to engage in self-identification techniques. Ideally, such internal mechanisms can be used to recognize and remedy any existing inequity before enforcement becomes necessary, thus saving employer and government resources. Further, as was the case in Canada, the CEDAW Committee can serve as an effective sounding board to identify areas in need of progress, and its comments may form the basis of revisions to existing law. What the CEDAW Committee will not do, as demonstrated by the Canadian experience, is require the United States to spend beyond its means to achieve perfect equality of opportunity in the workplace. Rather, ratification of CEDAW would reaffirm the United States' strong commitment to gender equity in the workplace.

#### B. Pay Equity

Even though American women have made great strides in terms of their employment opportunities, they are not yet paid equally. In 2008, U.S. women who were full-time wage and salary workers earned a median weekly amount of \$638, about 80% of the male \$798 median.<sup>310</sup> When comparing median annual earnings, the wage gap is even more pronounced, as women earn just 77.1% as much as men.<sup>311</sup> Even in occupations where women considerably outnumber men, the wage gap persists. For example, female elementary and middle school teachers earned over 10% less than similarly employed men, despite comprising 81.7% of the field, and female registered nurses earned 8% less than their male colleagues, despite the fact that 91.6% of nurses are women.<sup>312</sup> Additionally, female physicians and surgeons earn 39% less than males in the field, female university professors earn 21% less than male

---

310. Highlight of Women's Earnings in 2008, *supra* note 289, at 1.

311. U.S. Bureau of Labor Statistics, U.S. Dep't of Labor, Report 987, Highlight of Women's Earnings in 2004 28 (2005), available at <http://www.bls.gov/cps/cpswom2004.pdf> [hereinafter Highlight of Women's Earnings in 2004]; Inst. for Women's Policy Research, The Gender Wage The Gender Wage Gap: 2009 1 (2010), available at <http://www.iwpr.org/pdf/C350.pdf>.

312. U.S. Bureau of Labor Statistics, U.S. Dep't of Labor, Employment and Earnings, Annual Averages, Table 39, Median Weekly Earnings of Full-time Wage and Salary Workers by Detailed Occupation and Sex (2006).

professors, and female lawyers earn 22% less than male lawyers.<sup>313</sup> Of the nineteen countries in the Organisation for Economic Co-operation and Development (“OECD”), the United States’ gender earning gap is the third largest, behind only Austria and Switzerland.<sup>314</sup>

Due to the earnings gap, the families of working women lose an average of \$9,575 each year.<sup>315</sup> Over a lifetime, the wage gap results in a loss of wages of \$700,000 for a high school graduate, \$1.2 million for a college graduate, and \$2 million for a professional school graduate.<sup>316</sup> Since women are paid less while working, they also receive smaller pensions and Social Security checks when they retire; the average Social Security benefit was over 23% less for women than men in 2003.<sup>317</sup>

The staggering effects of the wage gap, as well as its persistence over time, suggest that current legislation and attempted solutions are ineffective. The numbers don’t lie; women simply make less than men. As the numbers for Canada showed in Part IV, *supra*, there is a portion of the wage gap that is unexplained by any theory other than gender discrimination. As such, the United States, as well as Canada, needs a different approach if there is to be any chance of achieving pay equity.

### 1. Pay Equity: Current Legislation and Case Law

The Equal Pay Act of 1963 (the “EPA”) was passed as an amendment to the Fair Labor Standards Act to prohibit sex-based wage discrimination.<sup>318</sup> This Act contains a prohibition on unequal wages for

313. *Id.*

314. Org. for Econ. Co-operation and Dev., OECD Employment Outlook 2002, Chapter 2: Women at Work: Who Are They and How Are They Faring? 97 (2002), available at <http://www.oecd.org/dataoecd/28/58/18960381.pdf>.

315. AFL-CIO, Department for Professional Employees, Professional Women: Vital Statistics 4 (2010), available at [http://dpeaflcio.org/pdf/DPE-fs\\_2010\\_Professional\\_Women.pdf](http://dpeaflcio.org/pdf/DPE-fs_2010_Professional_Women.pdf).

316. *The Wage Gap Over Time: In Real Dollars, Women See a Continuing Gap*, Nat’l Comm. on Pay Equity, available at <http://www.pay-equity.org/info-time.html>.

317. AFL-CIO, Department for Professional Employees, Professional Women–Vital Statistics 3 (2006), available at <http://www.pay-equity.org/PDFs/ProfWomen.pdf>.

318. Equal Pay Act of 1963, 29 U.S.C. § 206(d). Additionally, recent legislation has adapted the statute of limitations for pay equity claims. The Lily

equal work on jobs the performance of which requires equal skill, effort, and responsibility and which are performed under similar working conditions, except where such payment is made pursuant to i) a seniority system, ii) a merit system, iii) a system which measures earnings by quantity or quality of production, or iv) a differential based on any other factor other than sex, provided that an employer cannot reduce wages to comply.<sup>319</sup>

The EPA, however, does not play a significant role in equal pay legislation because it is extremely difficult to determine when two jobs are “equal,” making it fairly easy for employers to avoid liability and disincentivizing women from bringing claims under the EPA.<sup>320</sup>

The effectiveness of the EPA is also limited because it does not prohibit female-dominated professions from being paid less than male-dominated professions. In *AFSCME v. Washington*, the Ninth Circuit rejected AFSCME’s claim that Washington violated Title VII with its refusal to correct wage disparity by implementing a comparable worth program.<sup>321</sup> In rejecting the disparate treatment claim, the court noted that the state’s mere awareness of statistics indicating pay disparities between male and female-dominated fields was not sufficient to impute an intent to discriminate.<sup>322</sup> The court also rejected the disparate impact claim, thus allowing employers to utilize a market rate defense that allows them to base pay on market

---

Ledbetter Fair Pay Act of 2009 was passed to overturn the Supreme Court’s decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007) (holding that a claim of pay discrimination must be filed within 180 days of the pay-setting decision) and reinstated the EEOC’s original position that each discriminatory paycheck is a separate act of discrimination, regardless of when the discrimination began. Thus, under the Act, an individual subject to discrimination in compensation may file a charge within 180 days of when the discriminatory compensation decision is made, when the individual becomes subject to a discriminatory compensation decision, or when the individual’s compensation is affected by the application of a discriminatory pay decision, including each time the individual receives compensation that is based on such discriminatory compensation decision. Lily Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5, 5–6 (2009).

319. Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1).

320. Sara L. Zeigler, *Litigating Equality: The Limits of the Equal Pay Act*, 26 Rev. Pub. Personnel Admin. 199, 207–08 (2006).

321. 770 F.2d 1401, 1408 (9th Cir. 1985).

322. *Id.* at 1406–07.

factors for different fields and positions.<sup>323</sup> So, neither disparate treatment nor disparate impact actions are available means of pursuing a comparable worth action.<sup>324</sup> The 1991 Amendment did not overturn this decision, so market rates will always preclude a differential impact challenge to address comparable worth.<sup>325</sup>

The Paycheck Fairness Act was a failed attempt to amend the EPA to remove the “any other factor other than sex” exception, and instead require only bona fide factors.<sup>326</sup> The findings to the proposed Paycheck Fairness Act noted that “the Equal Pay Act has not worked as originally intended” and “modifications to the law are necessary to ensure that the Act provides effective protection to those subject to pay discrimination on the basis of sex.”<sup>327</sup> As such, the Paycheck Fairness Act was designed to ensure that women receive equal pay for work of equal value, thus extending the limited protection of the Equal Pay Act. The fact that it was deemed necessary, and yet still not passed, suggests that there is significant room for improvement in U.S. pay equity provisions.

## 2. Pay Equity: Lessons From Canada

When the United States last considered the ratification of CEDAW, it did so within the confines of certain RUDs. In the pay equity context, one particular reservation is specifically applicable:

U.S. law provides strong protections against gender discrimination in the area of remuneration, including the right to equal pay for equal work in jobs that are substantially similar. However, the United States does not accept any obligation under this Convention to enact legislation establishing the doctrine of

---

323. *Id.* (“We find nothing in the language of Title VII or its legislative history to indicate Congress intended to abrogate fundamental principles such as the laws of supply and demand or to prevent employers from competing in the labor market”); Nancy E. Dowd, *The Metamorphosis of Comparable Worth*, 20 *Suffolk. U. L. Rev.* 833, 848–49 (1986).

324. *Id.*

325. William J. Scheibal, *Title VII and Comparable Worth: A Post-AFSCME Review*, 25 *Am. Bus. L. J.* 265, 280 (1987) (“Courts have consistently refused to hold an employer liable for setting wages based on prevailing market rates. Every comparable worth opinion that has addressed the issue has upheld an employer’s right to use market rates in setting wages.”).

326. H.R. 1338, 110th Cong. (2008).

327. *Id.*

comparable worth as that term is understood in U.S. practice.<sup>328</sup>

While it is unclear whether renewed ratification efforts would include the previous RUDs,<sup>329</sup> this reservation, if included, would limit remedial pay equity efforts to jobs that require “equal skill, effort, and responsibility, and which are performed under similar working conditions.”<sup>330</sup> U.S. courts have yet to recognize the doctrine of comparable worth,<sup>331</sup> so this reservation would prevent changes to existing precedent, although at the expense of remedying the existing pay inequity between female-dominated and male-dominated fields of employment. As a result, much of the effect of CEDAW’s pay equity provisions is dependent upon whether the United States keeps this reservation in force. If this reservation is not included when the United States ratifies CEDAW, then CEDAW’s pay equity provisions would seem to require courts and the legislature to reconsider their current reluctance to support notions of comparable worth.

Regardless of whether the United States chooses to utilize a reservation negating its responsibility to institute comparable worth, it would still be obligated to institute additional measures to ensure equal pay for substantially similar jobs.<sup>332</sup> The wage gap has persisted over decades, even as women’s representation in the workforce has significantly increased. Therefore, the United States should consider implementing additional awareness programs, perhaps modeled on Canada’s three step process of education, mediation, and compliance.<sup>333</sup> Ideally, these awareness programs would assist employers in developing constructive ways of closing the wage gap, while incentivizing Congress to develop more effective equal pay legislation.

The United States could also follow Canada’s lead in recognizing and accounting for the impact of women’s unpaid work in the household as a factor influencing pay equity in the workplace. Canada appears to be leading the way in terms of addressing the disproportionate burden of household work on women’s capacity to

---

328. S. Exec. Rep. No. 103-38, at 37 (1994).

329. See *supra* notes 63–64 and accompanying text.

330. 29 U.S.C. § 206(D).

331. See *AFSCME v. Washington*, 770 F.2d at 1408 (holding that the state of Washington’s refusal to implement a comparable worth program to correct wage disparity was not a violation of Title VII).

332. CEDAW Article 11(1)(d) sets forth the “right to equal remuneration.” See CEDAW, *supra* note 21.

333. See *supra* Part IV.

earn full-time wages. The United States has not, as of yet, accounted for women's tendency to exert more household hours; ratifying CEDAW would provide support for relevant research, in an attempt to find creative ways to remedy the persistent wage gap.

In a more general sense, Canada's experience with the CEDAW Committee demonstrates the effectiveness of Committee requests for information. For example, the Committee requested additional research on women's unpaid work, and Canada promptly responded by measuring the gender differential in unpaid work, analyzing how unpaid work contributes to society, including questions on unpaid work in the census, and providing research funds to NGOs to delve deeper into related issues.<sup>334</sup> Then, again in 2003, the Committee remained concerned about women's disproportionate tendency to engage in unpaid household work and about the ineffectiveness of the auditing process. In response, Canada established an Ad Hoc Committee to examine the issue of unpaid work.<sup>335</sup> So, while Canada's persistent lack of resources to fully rectify equal opportunity in employment issues suggests that the CEDAW Committee lacks enforcement mechanisms strong enough to shift budget priorities, Canada's consistent responses to the Committee's requests for pay equity information suggest that it can be persuasive in directing the progress of future and additional research.

This is an important lesson for the United States, since the Committee seems not to demand inflexible mandates, particularly in regard to such a difficult issue as comparable worth, but it simply asks that countries fully examine the issue to ensure there is a broad awareness of the implications of their policy decisions. Consequently, the United States should not be concerned that the CEDAW Committee, upon reservation-free ratification, will demand a complete overhaul of previous equal pay legislation. Rather, it is more likely, based on Canada's example, that the Committee will request further information examining the status of equitable pay in the United States, as well as the practical implications of various policy choices. While CEDAW clearly mandates "equal pay for work of equal value," there are a variety of ways to implement this provision; further research will be necessary before settling on a final plan of action for the United States.

---

334. *Id.*

335. *Id.*

### C. Marital and Pregnancy Protections

Despite the progressive state of American society, discrimination on the basis of pregnancy is far from over. The EEOC litigates and settles pregnancy discrimination suits on a fairly frequent basis.<sup>336</sup> In fact, pregnancy discrimination complaints have increased from 3,977 in 1997 to 6,196 in 2009.<sup>337</sup> These statistics may indicate not only an increased incidence of discriminatory actions but also employees' increased awareness of their rights.

In regard to *paid* leave, 33% of civilian workers are not provided with any paid sick leave.<sup>338</sup> In New York, more than seven in ten low-income workers without paid sick leave reported going to work sick because they feared losing their job or losing pay. Additionally, 17% of such workers reported that their employer threatened to fire, suspend, write up, or penalize them for taking time off to recover from an illness or to care for a sick child, as compared to only 9% of workers with paid sick leave.<sup>339</sup> These statistics suggest that there seem to be a variety of reasons holding both women and men back from taking needed time off—pregnancy, sickness, or their children.

#### 1. Marital and Pregnancy Protections: Current Legislation and Case Law

In 1978, the Pregnancy Discrimination Act (“PDA”) expanded the definition of sex discrimination to include discrimination “on the

---

336. See Press Release, EEOC, Kohler Company Pays \$175,500 to Settle EEOC Pregnancy Discrimination Lawsuit (Nov. 25, 2009), *available at* <http://www.eeoc.gov/eeoc/newsroom/release/11-25-09.cfm>; Press Release, EEOC, Utah Japanese Restaurant To Pay \$30,000 To Settle EEOC Pregnancy Discrimination Suit (Nov. 16, 2009), *available at* <http://www.eeoc.gov/eeoc/newsroom/release/11-16-09.cfm>; Press Release, EEOC, Lawyers Glen Retirement Living Center to Pay Damages to Settle EEOC Pregnancy Bias Suit (Oct. 28, 2009), *available at* <http://www.eeoc.gov/eeoc/newsroom/release/10-28-09.cfm>.

337. See *Pregnancy Discrimination Charges: EEOC & FEPA's Combined: FY 1997–FY 2009*, U.S. Equal Emp't Opportunity Comm., <http://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy.cfm> (last visited Dec. 1, 2010).

338. U.S. Bureau of Labor Statistics, U.S. Dep't of Labor, Employee Benefits in the United States—March 2010 15 (2009), *available at* <http://www.bls.gov/news.release/pdf/ebs2.pdf>.

339. Jeremy Reiss et al., Community Service Society, Sick in the City: What the Lack of Paid Leave Means for Working New Yorkers 10 (2009), *available at* <http://www.cssny.org/userimages/downloads/Sick%20in%20the%20City%20report%20October%202009.pdf>.

basis of pregnancy, childbirth, or related medical conditions.”<sup>340</sup> Under this Act, “women affected by pregnancy, child-birth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.”<sup>341</sup> The PDA does, however, have its limitations. In *Lang v. Star Herald*, the plaintiff, experiencing complications with pregnancy, wanted indefinite leave with a guarantee that she would get her job back.<sup>342</sup> The Eighth Circuit found for her employer, noting that she was not treated any differently from non-pregnant employees and holding that the PDA does not confer specific rights for pregnancy, nor does it create a right to preferential treatment.<sup>343</sup>

The Family and Medical Leave Act of 1993 (“FMLA”) requires that employers provide twelve weeks of unpaid leave each year for such reasons as childbirth, the care of children or other family members, or medical leave.<sup>344</sup> During this leave, employers are required to continue to provide health benefits at the same level.<sup>345</sup> The Wage and Hour Division of the Labor Department has set forth guidelines on what constitutes a “serious health condition” and thus qualify for FMLA leave.<sup>346</sup>

The only federal law protecting employees on the basis of marital status is the Civil Service Reform Act of 1978, which protects federal employees and applicants from actions based on attributes or conduct that do not adversely affect employee performance, such as marital status.<sup>347</sup> The EEOC, however, does not enforce any law protecting private employees from discrimination based on marital status.<sup>348</sup> States may have their own laws protecting employees from marital status discrimination.<sup>349</sup>

---

340. Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978).

341. *Id.*

342. 107 F.3d 1308, 1310 (8th Cir. 1997).

343. *Id.* at 1312.

344. Family and Medical Leave Act (FMLA) of 1993 § 102, 29 U.S.C. § 2612 (2006); see Wage and Hour Division, U.S. Dep’t of Labor, Fact Sheet #28: The Family and Medical Leave Act of 1993 (Feb. 2010), available at <http://www.dol.gov/whd/reg/compliance/whdfs28.pdf>.

345. *Id.*

346. *Id.*

347. Civil Service Reform Act of 1978 § 101(a), 5 U.S.C. § 2302 (2006).

348. See *Federal Laws Prohibiting Job Discrimination Questions and Answers*, U.S. Equal Emp’t Opportunity Comm’n (Nov. 21, 2009), <http://www.eeoc.gov/facts/qanda.html>. The EEOC is only charged with the enforcement of certain statutes (Title VII, the EPA, the ADA, the ADEA, and



## 2. Marital and Pregnancy Protections: Lessons From Canada

Although the FMLA was an important step in the right direction, many workers do not have the financial flexibility to take unpaid leave days. As a result, they will work when they or their family members are pregnant or sick, contributing to rising health care costs and the spread of disease. The ratification of CEDAW, followed by dialogue with the CEDAW Committee, would promote the adoption of employer-paid sick leave policies and encourage the passage of the Healthy Families Act of 2009, which was referred to the House of Representatives Subcommittee on Workforce Protections on June 11, 2009.<sup>350</sup> This Act, if passed, would provide employees with one hour of paid sick leave for each period of thirty hours worked, up to a maximum of fifty-six hours per year.<sup>351</sup> The passage of this type of legislation, as well as the independent ratification of CEDAW, would discourage employers from penalizing workers for taking time off for pregnancy or illness and ensure that workers are not faced with the choice of risking their health or risking their job.

The Canadian experience illustrates how pregnancy protections may be slightly extended, such that employers cannot evade the minimal protections of the Pregnancy Discrimination Act. Under current U.S. law, employers are only required to provide pregnant women with the same protections as other employees.<sup>352</sup> Thus, if employers do not provide other employees with generous leave time or reasonable accommodations, employers will not be legally required to provide these benefits to pregnant women. Requiring employers to “reasonably accommodate” pregnant workers would help to ensure that employers deal with pregnant women equitably, to whatever extent possible, and do not simply use the supposed “inability to work” as a pretext to fire them. Thus,

---

GINA). Since marital status is not a protected classification under any of these statutes, it is not a basis for enforcement by the EEOC.

349. See, e.g., Alaska Stat. § 18.80.220 (2008); Md. Code Ann., State Gov’t § 20-602 (LexisNexis 2009); N.J. Stat. Ann. § 10:5-112. (West 2002 & Supp. 2010). For a chart of state protections of marital status, see *State Laws against Marital Status Discrimination*, Unmarried America, <http://www.unmarriedamerica.org/ms-statutes.htm> (last visited Nov. 11, 2010).

350. H.R. 2460, 111th Cong. (2009).

351. *Id.*

352. See *Lang v. Star Herald*, 107 F.3d 1308, 1312 (8th Cir. 1997).

ratification of CEDAW may help the United States truly meet the goal of eliminating discrimination based on pregnancy.

Canada's laws on pregnancy accommodation also provide another important lesson: the Committee will not fix what isn't broken. Canada clearly demonstrated that it had successfully tackled the problem of reasonable accommodation during pregnancy, and the Committee's silence should be taken as implicit agreement and approval. It is important to remember that the Committee's overarching goal is to promote effective and productive domestic mechanisms to eliminate various types of sex discrimination.<sup>353</sup> When a country has already succeeded in eradicating a specific issue, the Committee has no further role and can instead focus on other, more pressing issues. The example of reasonable accommodation during pregnancy should serve to quell the fears of some critics of CEDAW by assuring them that if and when the United States actually solves various aspects of workplace discrimination, the CEDAW Committee will not substitute its own judgment for a successful, United States-initiated solution.

Canada also provides an important model for demonstrating how research initiated by CEDAW Committee recommendations can translate into practical policy changes that align with overarching national goals. As previously discussed, the CEDAW Committee recommended additional research on women's unpaid work, particularly in the home.<sup>354</sup> Resulting from this research was the conclusion that women spend a disproportionate amount of time engaging in unpaid work in the home. Canada acted upon its findings and adjusted a related area of employment discrimination law: pregnancy discrimination. In order to provide the structural framework that would allow for a more equitable distribution of unpaid work in the home, Canada expanded upon the father leave provisions. This policy change did not go unnoticed by fathers; father leave has skyrocketed over the past few years in direct response to those expansions in policy. Such policy changes will likely have a ripple effect; for example, when fathers have the ability to stay home, mothers enjoy the additional benefit of being able to go back to

---

353. *Committee on the Elimination of Discrimination against Women*, United Nations, Div. for the Advancement of Women, Dep't of Econ. and Soc. Affairs, <http://www.un.org/womenwatch/daw/cedaw/committee.htm> (last visited Dec. 6, 2010).

354. *See supra* Part IV.C.2.

work.<sup>355</sup> This illustrates the idea that focusing on legislation and policies solely affecting women may not always be the most effective means of combating gender discrimination; rather, as was the case in Canada, it may involve extending equitable rights to all. This creative solution to pay equity issues came as the result of the CEDAW Committee process: identifying a problem, requesting additional information, and noting how that information may lead to effective policy changes.

#### D. Sexual Harassment

In a study of over one thousand Boston-area workers, 26% of women reported having experienced at least one type of sexual harassment.<sup>356</sup> In the fiscal year 2008, the Equal Employment Opportunity Commission resolved 11,731 sexual harassment charges, recovering \$47.4 million in monetary benefits for charging parties and other aggrieved individuals.<sup>357</sup> The federal government lost \$327 million from 1992–1994 due to sexual harassment, based on increased job turnover, increased use of sick leave, and losses in

---

355. For a more skeptical view, see Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions about Where, Why, and How the Burden of Care for Children Should be Shifted*, 76 Chi.-Kent L. Rev. 1753 (2001) (noting increased employer responsibility for children may have unintended distributional consequences favoring men with wives and children over untraditional women).

356. Nancy Krieger et al., *Social Hazards on the Job: Workplace Abuse, Sexual Harassment, and Racial Discrimination—A Study of Black, Latino, and White Low-Income Women and Men Workers in the United States*, 36 Int'l J. of Health Servs. 51, 63 (2006).

357. U.S. Equal Emp't Opportunity Comm'n, Sexual Harassment (Mar. 11, 2009), available at [http://archive.eeoc.gov/types/sexual\\_harassment.html](http://archive.eeoc.gov/types/sexual_harassment.html); see also Press Release, EEOC, Monterey Gourmet Foods Sued for Sexual Harassment and Retaliation (Jan. 13, 2010), <http://www.eeoc.gov/eeoc/newsroom/release/1-13-10a.cfm> (explaining that Monterey Gourmet Foods was charged by the EEOC for allowing its supervisor to sexually harass employees and then terminate them for reporting the harassment); Press Release, EEOC, Ralph Schomp Automotive Agrees to Pay \$1.5 Million to Settle EEOC Sex and Age Bias Lawsuit (Jan. 7, 2010), <http://www.eeoc.gov/eeoc/newsroom/release/1-7-10.cfm> (explaining that Ralph Schomp Automotive agreed to settle with the EEOC for a charge on grounds of subjecting five female employees to sex discrimination); Press Release, EEOC, West Texas Cap Maker Settles EEOC Sexual Harassment Suit (Jan. 11, 2010), <http://www.eeoc.gov/eeoc/newsroom/release/1-11-10.cfm> (stating that Crowell agreed to settle with the EEOC for a charge of subjecting its female employee to a sexually hostile work environment). For a listing of all press releases, visit <http://www.eeoc.gov/eeoc/newsroom/release/index.cfm>.

productivity.<sup>358</sup> The unfortunate fact remains, however, that these startling numbers comprise only a small fraction of the true rates of sexual harassment. Studies suggest that only 1–7% of victims file formal complaints,<sup>359</sup> indicating that current awareness and enforcement mechanisms are severely lacking.

### 1. Sexual Harassment: Current Legislation and Case Law

Two forms of sexual harassment are prohibited under Title VII: *quid pro quo*, which is when agreement to engage in sexual activity is made a condition of employment, and hostile work environment, which is when statements or conduct of a sexual nature create an environment of intimidation, insult, or ridicule.<sup>360</sup> In hostile work environment cases, there may be a tangible employment action involved, which is an official act of the enterprise, such as denial of a raise.<sup>361</sup> If that is the case, the employer is strictly liable because the supervisor is bringing the official power of the enterprise to bear on subordinates.<sup>362</sup> If, however, there is no tangible employment action, the employer may, in specified contexts, use an affirmative defense to show that it installed a readily accessible and effective policy for reporting and resolving claims of sexual harassment *and* that the plaintiff unreasonably failed to avail herself of that employer-provided preventative or remedial apparatus.<sup>363</sup>

To establish a hostile work environment claim, the plaintiff must show that the harassing behavior is “sufficiently severe or pervasive enough to alter the conditions of employment.”<sup>364</sup> No single

---

358. U.S. Merit Systems Protection Board, *Sexual Harassment in the Federal Workforce: Trends, Progress, and Continuing Challenges* 26 (1995). *See also* Robert H. Faley, et al., *Estimating the Organizational Costs of Sexual Harassment: The Case of the U.S. Army*, 13 *J. of Bus. & Psychol.* 461, 461 (1999) (noting the variety of costs of sexual harassment, in addition to litigation and associated settlements).

359. D.A. Charney & R.C. Russell, *An overview of sexual harassment*, 151 *Am. J. Psychiatry* 10, 10 (1994).

360. Rothstein & Liebman, *supra* note 96, at 594.

361. *Id.* at 602.

362. *See* *Pennsylvania State Police v. Suders*, 542 U.S. 129, 137 (2004) (holding that an employee may establish “constructive discharge” when the resignation was a fitting response to the hostile work environment and an employer may have an affirmative defense unless the employee quit in response to the employer’s adverse employment action).

363. *Id.* at 134.

364. *Id.* at 133 (citing *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)).

factor is required, but a reasonable person must find the totality of the circumstances hostile or abusive; it cannot just be slightly offensive.<sup>365</sup> So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious.<sup>366</sup> The plaintiff's claim is not automatically defeated if she quits, but if she wishes to obtain back-pay and not just compensatory damages for the emotional harm suffered at work, she must establish that her quitting was actually a constructive discharge.<sup>367</sup> To prove constructive discharge, the plaintiff must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response.<sup>368</sup>

## 2. Sexual Harassment: Lessons From Canada

Canadian sexual harassment law is very similar to that of the United States,<sup>369</sup> and sexual harassment remains a significant—and very much closeted—issue in both countries. And, as was the case with unpaid and domestic work, sexual harassment is acknowledged as a widespread phenomenon, but there have been very few studies gauging its prevalence and form. In order to effectively formulate solutions to the issue of sexual harassment, it must first be understood. Like their Canadian counterparts, U.S. policymakers would likely benefit from more information to understand the nature and scope of the problem. Like it did in Canada, the ratification of CEDAW would likely result in information requests from the CEDAW Committee. As was the case for Canadian equal employment opportunity efforts, increased attention to the problem would likely serve to increase the public's awareness of the prevalence of sexual harassment and help to identify areas for further improvement. Additionally, if the United States government ratifies CEDAW, thus signaling the seriousness with which it views sexual harassment, it will provide additional incentives for employers to address potential issues in their workplace and thus avoid liability.

---

365. *Id.* at 147.

366. *Harris v. Forklift Systems Inc.*, 510 U.S.17, 20 (1993).

367. *Suders*, 542 U.S. at 141.

368. *Id.* at 147.

369. The main difference between the sexual harassment laws is that Canada requires employers to institute a sexual harassment policy, while U.S. jurisprudence simply provides significant incentives for doing so. This difference likely has no practical effect on compliance with statutory prohibitions.

## VI. CONCLUSION

The United States has, of its own initiative, made great strides in enacting effective employment discrimination legislation. From Title VII to the FMLA to the PDA, the U.S. has clearly taken seriously its commitment to women's rights. Why, then, has it not ratified CEDAW? Would ratification be unduly burdensome? Would it result in unintended consequences? Most of the opposition appears centered on areas other than employment law; for example, critics are concerned with the impact of CEDAW on abortion and with signing the same women's rights document as countries that continue to perpetuate severe gender inequality. Of the employment discrimination provisions, comparable worth is likely the most controversial. This is not without reason, as CEDAW's provision requiring equal pay for work of equal value would likely be the most major substantive change to United States law required by CEDAW, assuming the previously existing reservation is not included.

If the United States ratifies CEDAW, it will only serve to strengthen the preexisting U.S. commitment to gender equity. Canada's relationship with the CEDAW Committee shows that ratification of CEDAW is not something to be feared. For Canada, the CEDAW Committee's primary role seems to be one of guidance and analysis. The Committee, after reading Canada's reports, notes areas of concern and recommends topics for additional research and attention. Although it does advocate for itself at times, Canada generally seems to respond very positively to such criticisms, using the Committee's feedback as an opportunity to further understand complex policy issues and effectively shape new legislation. And when Canada has succeeded on a given issue—like parental leave or reasonable accommodation during pregnancy—the Committee approvingly notes the success and moves on to other issues.

While the United States clearly has the capacity to pass gender equity legislation, current statistics show that some gaps in coverage remain. Ratification of CEDAW would provide additional incentive and political capital to fill these gaps with more comprehensive legislation. While the United States could independently recognize and remedy the flaws in its employment discrimination legislation, the CEDAW Committee may be more objective in identifying the most pressing areas of concern, as it is not clouded by domestic political influence. Legislators and advocates pressing for greater equality in the workplace will find support in CEDAW and its Committee, which will tailor its recommendations to

the specific circumstances of the United States employment context. Although direct cause and effect is difficult to measure with such broad outcomes as legislation, CEDAW has appeared to play a significant role in shaping Canadian employment legislation. The United States could similarly benefit from the expertise of the CEDAW Committee and from the legal support of the Convention itself.

Canada has, however, demonstrated that CEDAW's impact on the domestic implementation of gender equity laws varies from resulting in legislative revisions, to directing further research, or to no change at all. Much of this variation depends upon the extent to which CEDAW is utilized by NGOs and other groups advocating for greater gender equity. As explained earlier, CEDAW contains no formal enforcement mechanism.<sup>370</sup> This does not mean that States Parties to CEDAW can indefinitely avoid following through on its mandates. Instead, it means that the responsibility for holding a state party to its CEDAW obligations may fall on interested NGOs and other watchdog groups, as well as the general public. As such, much of the effect of CEDAW will lie in the hands of such U.S. groups, who have the potential to utilize the courts and remind the legislature of their CEDAW-derived responsibilities. So, U.S. ratification of CEDAW has the *potential* to further affirm the U.S. commitment to gender equity and reform existing legislation to remedy existing inequity, though ratification is just the first of many steps.

---

370. See *supra* notes 30–35 and accompanying text.