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# The *Kalanke* Ruling: Gender Equality in the European Labor Market

*Ann Donahue\**

## INTRODUCTION TO DISCRIMINATION

Meet Ruth. She is a twenty-three year-old graduate of a university in Bonn, Germany. She just obtained her degree in civil engineering and is returning to her hometown in Bremen, Germany, to look for a job. She hopes to get a position with the city and to excel in her field. Yet interviews have proved fruitless for Ruth. While she shares the same qualifications as others her age, she is being passed over for her male colleagues. Even more astonishing is the fact that Ruth has no legal remedy.

Although Ruth is a fictional character, her story is typical of many women's experiences in the European job market. Ruth represents women who have been and will be denied career opportunities due to gender discrimination. During the past century, the introduction of women into the labor market has forced legislatures to implement and employers to adjust to laws regarding gender equality and positive action. While such laws have changed the dynamics of the employer-employee relationship, they have failed to provide women with unconditional equality in the workplace.

During the past few decades, gender equality has arisen as a topic of concern in the United States and abroad.<sup>1</sup> Recently, legislatures worldwide recognized and addressed gender equality by passing laws prohibiting discrimination.<sup>2</sup> The European Community encouraged such laws in Member

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\* Juris Doctorate Candidate, Northwestern University School of Law, 1998. I would like to thank Professor Martha Fineman, Columbia University, Professor Laura Lin, Northwestern University, Ray Sinnapan, Allison Wing-Takahashi, Brad Aaron, Patrick Shaw, and Michelle Ochs for their comments. I would also like to thank Darlene Donahue, Paul Donahue, and William Donahue for their support.

<sup>1</sup> See Josephine Shaw, *Recent Developments in the Field of Labour Market Equality: Sex Discrimination Law in the Federal Republic of Germany*, 13 COMP. LAB. L.J. 18 (1991).

<sup>2</sup> Jill Andrews, *National and International Sources of Women's Right to Equal Employment Opportunities: Equality in Law Versus Equality in Fact*, 14 NW. J. INT'L L. & BUS. 413, 413 n.2 (1994).

States,<sup>3</sup> and many Members complied by passing equal opportunity laws.<sup>4</sup> This note examines one such law.

The state of Bremen in Germany created a positive action law for women in under-represented areas of the state employment market.<sup>5</sup> The law provides for the promotion of equally qualified women when under-represented in an area of employment. Yet, the European Court of Justice (ECJ) determined that the law exceeded the bounds of the Council Directive 76/207, Article 2(4), and thus was inconsistent with the anti-discrimination laws of the European Union.<sup>6</sup> The issue addressed by the Court and this note involves balancing non-discrimination against positive action. Specifically, the question addressed here is whether a law which promotes a person of one gender over a person of another gender when all other qualifications are equal constitutes unlawful discrimination.<sup>7</sup>

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<sup>3</sup> See Council Recommendations 84/635, 1984 O.J. (L331) 34, which suggests Member States "adopt a positive action policy designed to eliminate existing inequalities affecting women...eliminate or counteract the prejudicial effects on women in employment...from existing attitudes...encourage the participation of women in...occupations...where they are at present under-represented."; see also Andrews, *supra* note 2, at 414.

<sup>4</sup> Andrews, *supra* note 2, at 414.

<sup>5</sup> Case C-450/93, *Kalanke v. Freie Hansestadt Bremen*, 1995 E.C.R. I-3069, I-3072, [1996] 1 C.M.L.R. 175, 191 (1995) [hereinafter *Kalanke*].

<sup>6</sup> *Kalanke*, 1995 E.C.R. at I-3078, [1996] 1 C.M.L.R. at 194.

<sup>7</sup> Before delving into the decision and the reasoning behind the ruling, an explanation of the European Union is required. In 1957, negotiations among France, West Germany, Italy, Belgium, the Netherlands and Luxembourg resulted in the Treaty of Rome. Andrews, *supra* note 2. See also Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11 [hereinafter Treaty of Rome]. The Treaty of Rome established the European Economic Community. Rebecca Means, *Kalanke v. Freie Hansestadt Bremen: The Significance of the Kalanke Decision on Future Positive Action Programs in the European Union*, 30 VAND.J.TRANSLAT'L L. 1087, 1091 (1997). In signing this Treaty, these countries established a free trade area. *Id.* Ireland, Denmark, and the United Kingdom joined in 1973. *Id.* Greece became a member in 1979, with Spain and Portugal following suit in 1986. *Id.* Recently, Austria, Sweden and Finland joined thereby bringing membership in the European Union to 15 members. Regine Wosnitza, *Court Ruling Casts Doubt on Fate of Europe's Affirmative Action Programs*, DALLAS MORNING NEWS, Dec. 9, 1995, at 42A and Means, *supra*, at 1093.

In 1992, an amendment to the Treaty of Rome was signed resulting in a document more widely known as the Maastricht Treaty. Means, at 1093, and The Treaty on the European Union, August 31, 1992, 35 O.J. (C 224) [hereinafter Maastricht Treaty]. Besides renaming the European Economic Community the European Union, the Treaty set up timelines for the creation of a common currency. *Id.*, at 5, Art. B, and Means, *supra*, at 1093. The Treaty did not overrule or supercede the Treaty of Rome, but acted to supplement the provisions. Maastricht Treaty, at 5, Art. A., and Means, *supra*, at 1094.

The Treaty of Rome established four institutions: the Commission, the Council of Ministers, the European Parliament and the European Court of Justice (ECJ). Andrews, *supra* note 2, at 421. Each institution performs a specific task in running the European Community. The Commission proposes and enforces legislation. *Id.* The Council of Ministers "composed of members from the...[European] C[ommunity] States," implements EC law. *Id.* at 421-22. The European Parliament "reviews proposed legislation and acts as a public forum," and the ECJ "is the EC Supreme Court," *Id.* at 422, made up of fifteen members,

Part I of this note describes the facts that lead up to the ruling in *Kalanke v. Freie Hansestadt Bremen* and critiques the decision of the ECJ. Since the Court's reasoning lacks depth and precedence, Part II examines the opinion of the Advocate General to explain the possible reasoning behind the decision. Part III scrutinizes the degree of cohesiveness between the *Kalanke* ruling and subsequent decisions by the ECJ. Part IV follows the reactions of the European market to *Kalanke*. Part V examines proposals to minimize the effects of the decision. Finally, the note proposes statutory language designed to remedy the situation created by *Kalanke*.<sup>8</sup>

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one from each state. Fred Barbash, *Little-Known Court Voids Laws of Europe's Nations; Two Recent Rulings Bar Favoring Women*, WASH. POST, Oct. 25, 1995, at A25. The ECJ differs from American Supreme Courts in that its rulings are not binding. Yet, the practical effects are that the decisions are usually followed by Member States as correct interpretations of EU law. See Means, *supra*, at 1108. Any amendments to the Treaty "require unanimous support from all 15 European Union members." Wosnitza, *supra*.

The Treaty of Rome, with its amendments, constitutes the body of law for what is now the European Union, which consists of 15 European nations. (The Treaty has been amended twice. Once in 1992, with the Maastricht Treaty and once in 1997, with the Treaty of Amsterdam. The four institutions survived the amendments.) The Member States are responsible for adopting laws consistent with the treaties of the European Union. The European Parliament reviews the proposed legislation and provides a public forum. The Council of Ministers votes on and sometimes carries out the laws. Under a principle known as subsidiarity, the Member States implement the new laws when possible. If a Member State is unable to implement the law for any reason, the Council will become involved in implementing the law. When a change needs to be made or a law needs to be added, the Commission proposes the legislation. Then all of the Member States must agree to the proposal before it can be added to the Treaty. Once it is added, the Council of Ministers implements the law and the Commission enforces the law. Any questions regarding the Treaty or regarding whether a Member State's law is in conflict with the Treaty or its Directives are reviewed and decided upon by the ECJ.

<sup>8</sup>This paper makes several presumptions of which the reader should be aware. In general, the author supports positive/affirmative action. More specifically, the author first presumes equality in the workplace between men and women, both actual and numerical, is a worthwhile goal. Second, the author presumes that, in general, when a qualified woman is passed over for a job, the passing is likely to be an act of prejudice or discrimination. (Why else would the man get the job, all things being equal?) Third, the author presumes that positive action helps promote equality in the workplace and combats discrimination.

Scholars share the presumptions of the author. A professor of economics at the University of Illinois wrote in a book review,

Disparities in earnings and occupations by race and sex have long been documented and are not in dispute. Nor does anyone question that discrimination did at one time play a part in causing these disparities, for there is no denying that long after slavery was abolished, minorities faced legally sanctioned barriers against equal access to education and training, and long after women attained the right to vote, they too were excluded by schools and labor unions, and married women were even precluded from holding certain types of jobs.

Marianne A. Ferber, *In Defense of Affirmative Action*, 50 INDUS. & LAB. REL. REV. 516, n.3 (Apr. 1997) (reviewing BARBARA R. BERGMAN, *IN THE DEFENSE OF AFFIRMATIVE ACTION* (1996)).

Furthermore, a United Nations report stated, "discriminatory practices are based on embedded social mechanisms or explicit public policies on the gender division of labour, political contests, education, households and access to credit." . . . *But Severe Poverty Afflicts a*

## I. THE *KALANKE* RULING

On October 17, 1995, the European Court of Justice ruled that a positive action law, which provided for the promotion of equally qualified women when under-represented in an area of employment,<sup>9</sup> violated the laws prohibiting gender discrimination in the European Union.<sup>10</sup> The suit began with two individuals, Heike Glissman<sup>11</sup> and Eckhard Kalanke.<sup>12</sup> Ms. Glissman began working as a horticultural employee for the Parks Department of Bremen in 1975.<sup>13</sup> In 1983, Ms. Glissman obtained her diploma in landscape gardening.<sup>14</sup> While Ms. Glissman was hired two years after Eckhard Kalanke, they were both in the same pay bracket.<sup>15</sup>

Mr. Kalanke was hired in 1973 and acted as the assistant to the Section Manager.<sup>16</sup> He also held a diploma in horticulture and landscape gardening.<sup>17</sup> After years of work, the position for Section Manager became available.<sup>18</sup> Both Ms. Glissman and Mr. Kalanke applied for the position. The

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*Quarter of the World; 1997 Report on the World Social Situation*, 34 UN CHRON. 33, n.1 (Mar. 22, 1997).

<sup>9</sup> The Law on Equal Treatment of Men and Women in the Public Service of the Land of Bremen provides in part:

(1) In the case of an appointment (including establishment as a civil servant or judge) which is not made for training purposes, women who have the same qualifications as men applying for the same post are to be given priority in sectors where they are under-represented.

(2) In the case of an assignment to a position in a higher pay, remuneration and salary bracket, women who have the same qualifications as men applying for the same post are to be given priority if they are under-represented. This also applies in the case of assignment to a different official post and promotion.

(3) . . .

(4) Qualifications are to be evaluated exclusively in accordance with the requirements of the occupation, post to be filled or career bracket. Specific experience and capabilities, such as those acquired as a result of family, work, social commitment or unpaid activity, are part of qualifications within the meaning of subparagraphs (1) and (2) if they are of use in performing the duties of the position in question.

(5) There is under-representation if women do not make up at least half of the staff in the individual pay, remuneration and salary brackets in the relevant personnel group within a department. This also applies to the function levels provided for in the organization chart.

*Kalanke v. Freie Hansestadt Bremen*, Opinion of the Advocate General, 1995 E.C.R. I-3053, I-3054-55, [1996] 1 C.M.L.R. 177, 178-79 [hereinafter *Kalanke AG*].

<sup>10</sup> *Kalanke*, 1995 E.C.R. at I-3078, [1996] 1 C.M.L.R. at 194.

<sup>11</sup> *Business and the Law: Decision on Sex Discrimination-European Court*, FIN. TIMES, Nov. 7, 1995, at 30 [hereinafter *Business and the Law*]; see also *Kalanke*, 1995 E.C.R. at I-3073, [1996] 1 C.M.L.R. at 191.

<sup>12</sup> *European Court Rejects Using Quotas to Hire and Promote Women*, L.A. TIMES, Home Edition, Oct. 18, 1995, at A16 [hereinafter *ECJ Rejects Quotas*]; see also *Kalanke*, 1995 E.C.R. at I-3073, [1996] 1 C.M.L.R. at 191.

<sup>13</sup> See *Kalanke*, 1995 E.C.R. at I-3073, [1996] 1 C.M.L.R. at 191.

<sup>14</sup> See *id.*

<sup>15</sup> See *id.*

<sup>16</sup> See *id.*

<sup>17</sup> See *id.*

<sup>18</sup> See *id.*

Parks Department promoted Ms. Glissman to the position of Section Manager.<sup>19</sup>

Mr. Kalanke challenged the decision to promote Ms. Glissman in arbitration.<sup>20</sup> The arbitration "resulted in a recommendation in favor" of the promotion of Mr. Kalanke.<sup>21</sup> The staff of the department, however, claimed that the arbitration had failed and "appealed to the Conciliation Board."<sup>22</sup> The decision of the Conciliation Board found, despite the differences in seniority, that the two candidates were equally qualified; thus, priority went to Ms. Glissman under the *Landesgleichstellungsgesetz* (Bremen Law on Equal Treatment for Men and Women in Public Service) ("Bremen law").<sup>23</sup>

Mr. Kalanke appealed to the Labor Court that his qualifications surpassed those of Ms. Glissman.<sup>24</sup> Both the Labor Court and the Regional Labor Court dismissed Mr. Kalanke's claims.<sup>25</sup>

Mr. Kalanke continued to appeal the promotion. The German Federal Labor Court found that the Conciliation Board correctly applied the Bremen law on equal treatment and correctly promoted Ms. Glissman.<sup>26</sup> The Court said that the system in Bremen did not consist of strict quotas, but of quotas dependent on the abilities of the candidates.<sup>27</sup> Women enjoyed "no priority unless the candidates of both sexes" were equally qualified.<sup>28</sup> Furthermore, the court found that if priority was "given in principle to women," appropriate cases resulted in exceptions.<sup>29</sup> The exceptions permitted under the Bremen law were important because they allowed men to be promoted over equally-qualified women in underrepresented professions. Thus, a system of strict quotas did not exist. Yet, because the Federal Labor Court sought to apply Article 2(4) of Directive 76/207 EEC to the Bremen law, the court stayed the proceeding for a ECJ ruling on the scope of Article 2(4).<sup>30</sup>

The European Court of Justice disagreed with the opinion of the Federal Labor Court that the Bremen law allowed for exceptions in appropriate cases.<sup>31</sup> In a terse opinion,<sup>32</sup> the ECJ said that a national rule that "automatically" gave priority to women constituted sex discrimination.<sup>33</sup>

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<sup>19</sup> *See id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* The Conciliation Board is the first step in the process after arbitration fails. The decision of the Conciliation Board is binding on the employer. *Id.*

<sup>24</sup> *Kalanke*, 1995 E.C.R. at I-3073, [1996] 1 C.M.L.R. at 191-92.

<sup>25</sup> *Kalanke*, 1995 E.C.R. at I-3074, [1996] 1 C.M.L.R. at 192.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Kalanke*, 1995 E.C.R. at I-3075-76, [1996] 1 C.M.L.R. at 192-93. See *Equal Opportunities*, *infra* note 36, and Council Directive 76/207, 1976 O.J. (L 39) 40, for a full view of the text of Article 2(4).

<sup>31</sup> *See Kalanke*, 1995 E.C.R. at I-3077, [1996] 1 C.M.L.R. at 193.

The opinion of the ECJ began with the question of the scope of Article 2, sections 1 and 4 of the Directive.<sup>34</sup> Section 1 outlaws discrimination on the basis of sex, “either directly or indirectly.”<sup>35</sup> Section 4 “provides that the Directive ‘shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women’s opportunities.’”<sup>36</sup> The German Federal Labor Court asked the ECJ to consider the Bremen law under the scope of Article 2, section 4.<sup>37</sup> The ECJ found that national rules guaranteeing women “absolute and unconditional priority” go beyond “promoting equal opportunities” and overstep the boundaries of Article 2(4).<sup>38</sup> The ECJ interpreted Article 2(4) strictly, stating that a Member cannot substitute the result of equality for equality of opportunity.<sup>39</sup>

While the ECJ prohibited the Bremen law under the Directive, the Court acknowledged that one means of combating prejudice against women entails promoting women to senior posts within the workplace.<sup>40</sup> The ECJ also recognized figures that show women constitute a low percentage in high career brackets.<sup>41</sup> These findings could be the reason for the narrow ruling of the court — only outlawing those laws giving “automatic” priority to women.<sup>42</sup>

Yet, the ruling by the Court, in relying on the automatic nature of the Bremen law,<sup>43</sup> only alluded to substituting the result of equality for equality of opportunity as a possible reason for finding the Bremen law outside the scope of the exception found in Article 2(4). While Peter Duffy, a legal commentator for the *Solicitor’s Journal*, asserted that the decision of the ECJ “flows logically from the wording, structure and object of the Equal Treatment Directive,”<sup>44</sup> the ECJ’s decision lacks the reasoning crucial for other courts to be able to apply the ruling. The ECJ outlawed absolute and

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<sup>32</sup> Sarah Moore, *Nothing Positive from the Court of Justice*, 21 EUR. L. REV. 156, 158 (1996).

<sup>33</sup> *Kalanke*, 1995 E.C.R. at I-3077, [1996] 1 C.M.L.R. at 193.

<sup>34</sup> *Kalanke*, 1995 E.C.R. at I-3075-77, [1996] 1 C.M.L.R. at 192-93.

<sup>35</sup> *Kalanke*, 1995 E.C.R. at I-3076, [1996] 1 C.M.L.R. at 193.

<sup>36</sup> *Kalanke*, 1995 E.C.R. at I-3077, [1996] 1 C.M.L.R. at 193. Article 2(4) states: “This Directive shall be without prejudice to measures to promote equal opportunity for men and women in particular by removing existing inequalities which affect women’s opportunities in the areas referred to in Article 1, (1).” Council Directive 76/207, *supra* note 30, and *Equal Opportunities: Commission Defines Scope of Positive Action*, EUR. INTELLIGENCE, Apr. 16, 1996, §114 [hereinafter *Equal Opportunities*].

<sup>37</sup> See *Kalanke*, 1995 E.C.R. at I-3075-76, [1996] 1 C.M.L.R. at 192-93.

<sup>38</sup> See *Kalanke*, 1995 E.C.R. at I-3078, [1996] 1 C.M.L.R. at 194.

<sup>39</sup> *Id.*

<sup>40</sup> See *Kalanke*, 1995 E.C.R. at I-3076, [1996] 1 C.M.L.R. at 193.

<sup>41</sup> See *id.*

<sup>42</sup> See *Kalanke*, 1995 E.C.R. at I-3079, [1996] 1 C.M.L.R. at 195.

<sup>43</sup> See *id.*

<sup>44</sup> Peter Duffy, *European Briefing*, 139 SOLIC. J. 1095 (1995).

unconditional priority as exceeding Article 2(4) in the Directive. The ECJ further stated that the Bremen system incorrectly substituted the result of equality of opportunity instead of providing equal opportunity, but left unanswered the question of the scope of its ruling and how it should be applied in future cases.

Sarah Moore, a barrister and a legal secretary at the Court of First Instance, pointed to many arguments that could be made to reach the opposite result. She examined the argument that the Bremen law was not absolute and unconditional; the argument that Article 2(4) helped create the general framework of the Article — not an exception — thus giving rise to a looser standard of interpretation than strict interpretation; and the argument that quota systems constitute one way to reach the objectives of Article 2(4).<sup>45</sup> Ms. Moore found the decision “tenable,” if confusing.<sup>46</sup> Moore’s conclusion lacks foundation in the same way that Duffy’s opinion that the ruling “flows logically” from the Article<sup>47</sup> lacks merit.

“Absolute priority” fails as a basis on which to overrule the Bremen law on equal treatment. The law as established gave women priority when under-represented in a certain grade of employment.<sup>48</sup> The dictionary defines priority as “precedence, especially established by order of importance or urgency. An established right to precedence.”<sup>49</sup> The definition of precedence is “the act, state, or right of preceding” or coming before in time, order or rank.<sup>50</sup> Based on these definitions, being given priority means being given the right to come before another in order or rank. It does not mean the automatic promotion of an individual. The ECJ went too far in using the term “unconditional priority,” because priority is a term of ranking. Priority is in no way an absolute term, much as Ms. Moore pointed out in her article.<sup>51</sup> Barbara R. Bergmann, an author of a book on affirmative action, drew a distinction between quotas and goals: “Goals are intended to reduce rather than to perpetuate privilege, to open up jobs previously reserved for white men to others, but only to the extent that they have the necessary qualifications.”<sup>52</sup> Thus, the distinction this author draws between quotas and goals lies within a requirement of necessary qualifications. If qualifications are necessary, no quota system exists. Furthermore, the German Federal Court said that allowances were made for individual circumstances in cases regarding equally qualified candidates separated by sex.<sup>53</sup> Thus, the ECJ interpreted the Bremen law incorrectly in asserting

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<sup>45</sup> See Moore, *supra* note 32, at 158-60.

<sup>46</sup> *Id.* at 161.

<sup>47</sup> Duffy, *supra* note 44, at 1095.

<sup>48</sup> *Kalanke*, 1995 E.C.R. at I-3072-73, [1996] 1 C.M.L.R. at 191.

<sup>49</sup> THE AMERICAN HERITAGE DICTIONARY 985 (2d ed. 1982).

<sup>50</sup> *Id.* at 974.

<sup>51</sup> See Moore, *supra* note 32, at 159.

<sup>52</sup> Ferber, *supra* note 8.

<sup>53</sup> See *Kalanke*, 1995 E.C.R. at I-3074, [1996] 1 C.M.L.R. at 192.



that the law gave automatic priority to women in such a way that the law over-stepped the boundaries of Article 2 (4).

## II. MR. TESAURO'S OPINION: POSSIBLE RATIONALE BEHIND THE DECISION

The Advocate General, Mr. Tesauero, wrote an opinion to the ECJ regarding *Kalanke*,<sup>54</sup> and the Court appeared to adopt at least the conclusion of Tesauero's opinion. The Tesauero opinion may serve to illuminate the behind-the-scenes reasoning of the Court. Mr. Tesauero started by examining parts of the Directive, identifying an inherent tension between, on the one hand, Article 1(1), which establishes the principle of equal treatment in employment, and Article 2(1), which prohibits discrimination on the basis of gender, and, on the other hand, Article 2(4) which allows "the Member States to adopt" and/or maintain "measures to promote equal" treatment "by removing existing inequalities."<sup>55</sup> In Council Recommendation 84/635/EEC of December 13, 1984, the Council interpreted Article 2(4) as a "promotion of positive action for women" to counteract "the prejudicial effects on women" arising "from social attitudes, behavior and structures."<sup>56</sup> Examination of the Bremen law revealed that the law allowed priority for equally-qualified but under-represented women.<sup>57</sup> As used in the Bremen law on equal treatment, under-represented denotes a situation in which the percentage of women is less than half of "the individual pay, remuneration and salary brackets."<sup>58</sup> The Advocate General posed the issue as: "Must each individual's right not to be discriminated against on the grounds of sex" — which the court held is "a fundamental right"— yield "to the rights of the disadvantaged group," in order "to compensate for the discrimination suffered by that group in the past?"<sup>59</sup>

Mr. Tesauero attempted to answer this question by discussing how positive action developed to eliminate existing obstacles affecting disad-

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<sup>54</sup> *Kalanke* AG, 1995 E.C.R. at I-3053, [1996] 1 C.M.L.R. at 177. The Advocate General serves as an advisor to the ECJ and issues opinions on legal questions before the court. The opinion is not binding but is often used as a secondary source or as a source of reasoning.

<sup>55</sup> *Id.*

<sup>56</sup> *Kalanke* AG, 1995 E.C.R. at I-3054, [1996] 1 C.M.L.R. at 177-78. Recommendation 84/635 states that "existing legal provisions on equal treatment, which are designed to afford rights to individuals, are inadequate for the elimination of all existing inequalities unless parallel action is taken by governments, both sides of industry and other bodies concerned, to counteract the prejudicial effects on women in employment which arise from social attitudes, behavior and structures." Council Recommendation 84/635, 1984 O.J. (L 331) 34, or *supra* note 3, and *Court Rules Against Discrimination in Favour of Women*, MONTHLY REP. ON EUR., Oct. 27, 1995, § 133 [hereinafter MONTHLY REP.]

A recommendation is a statement issued by the Council of Ministers. The Council is responsible for implementing EU laws. Thus, a Council recommendation defines the scope of the law according to the Council and how they intend to fulfill the law.

<sup>57</sup> See *Kalanke* AG, 1995 E.C.R. at I-3054-55, [1996] 1 C.M.L.R. at 178-79.

<sup>58</sup> *Kalanke* AG, 1995 E.C.R. at I-3055, [1996] 1 C.M.L.R. at 179.

<sup>59</sup> *Kalanke* AG, 1995 E.C.R. at I-3057, [1996] 1 C.M.L.R. at 180-81.

vantaged groups.<sup>60</sup> In Tesauro's view, three forms of positive action existed.<sup>61</sup> The first form removes the "condition of disadvantage" through "vocational guidance and training."<sup>62</sup> The second form designs actions "to foster balance between family and career responsibilities and a better distribution" between the sexes.<sup>63</sup> The third form focuses on compensation for past inequality — preferential treatment through quotas and goals.<sup>64</sup> According to Mr. Tesauro, quotas fit the third category, but equal opportunities should put people at equal starting points.<sup>65</sup> The equal qualifications of Ms. Glissman and Mr. Kalanke constitute proof that the two candidates had equal starting points.<sup>66</sup> Thus, the Bremen law merely creates "fair job distribution," beyond the scope of Article 2(4).<sup>67</sup>

Ignoring the spirit of the Directive and Recommendation 84/635 which explains the law,<sup>68</sup> the Advocate General argued that the scope of Article 2(4), under which actions discriminatory in appearance are allowed when intended to eliminate instances of inequality, encompassed only those programs which create structures for child care and which organize working hours.<sup>69</sup> The Advocate General argued that these measures reduce inequalities.<sup>70</sup> While admitting Article 2(4) left Member States the discretion to determine which social measures to adopt, the Advocate General said this enabled "Member States to adopt measures designed to eliminate the unfavorable consequences for women of their biological condition."<sup>71</sup> By granting such things as maternity leave, one established substantive equality.<sup>72</sup> The Advocate General believed that the derogation in Article 2(4) stopped short of numerical objectives and positive actions.<sup>73</sup>

Ms. Moore, in analyzing the decision of the ECJ, also looked to the opinion of the Advocate General.<sup>74</sup> Ms. Moore focused on the desire of the Advocate General to create equal starting points through career training programs, "working hours and child care structures."<sup>75</sup> She claimed this ra-

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<sup>60</sup> See *Kalanke* AG, 1995 E.C.R. at I-3057, [1996] 1 C.M.L.R. at 181.

<sup>61</sup> See *Kalanke* AG, 1995 E.C.R. at I-3058-59, [1996] 1 C.M.L.R. at 181-82.

<sup>62</sup> *Kalanke* AG, 1995 E.C.R. at I-3058, [1996] 1 C.M.L.R. at 181.

<sup>63</sup> *Id.*

<sup>64</sup> See *Kalanke* AG, 1995 E.C.R. at I-3058, [1996] 1 C.M.L.R. at 182.

<sup>65</sup> See *Kalanke* AG, 1995 E.C.R. at I-3059-60, [1996] 1 C.M.L.R. at 182-83.

<sup>66</sup> See *Kalanke* AG, 1995 E.C.R. at I-3060, [1996] 1 C.M.L.R. at 183-84.

<sup>67</sup> *Kalanke* AG, 1995 E.C.R. at I-3060, [1996] 1 C.M.L.R. at 184.

<sup>68</sup> Article 2 of the Directive and Recommendation 84/635 allow for measures that appear discriminatory but are created to eradicate discrimination. Council Directive 76/207, *supra* note 30, and Council Recommendation 84/635, *supra* note 3.

<sup>69</sup> *Kalanke* AG, 1995 E.C.R. at I-3061, I-3063, [1996] 1 C.M.L.R. at 184-85, 186.

<sup>70</sup> See *Kalanke* AG, 1995 E.C.R. at I-3061, [1996] 1 C.M.L.R. at 184.

<sup>71</sup> *Kalanke* AG, 1995 E.C.R. at I-3062, [1996] 1 C.M.L.R. at 186.

<sup>72</sup> See *id.*

<sup>73</sup> See *Kalanke* AG, 1995 E.C.R. at I-3063, [1996] 1 C.M.L.R. at 186-87.

<sup>74</sup> Moore, *supra* note 32, at 157.

<sup>75</sup> *Id.*

tionale was consistent with the decision and the Advocate General's rationale in *Commission v. France*,<sup>76</sup> "in which the court confirmed that the scope of Article 2(4) is limited to those measures which are discriminatory in appearance only and designed, in practice, to secure substantive equality through the elimination of obstacles which prevent women from pursuing the same results as men on equal terms."<sup>77</sup> While *Commission v. France* discussed the scope of Article 2(4) of Council Directive 76/207, the decision did not limit the measures to those discriminatory in appearance and designed to "eliminate obstacles which prevent women from pursuing the same results as men on equal terms."<sup>78</sup> This is only General Tesauro's interpretation.<sup>79</sup> Rather, the ECJ defined the scope of Article 2(4) as an exception to equal treatment "specifically and exclusively designed to allow measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life."<sup>80</sup>

In *Commission v. France*, at issue were collective bargaining agreements which allowed for women "the extension of maternity leave; the shortening of working hours, for example for women over 59 years of age; the advancement of the retirement age; the obtaining of leave when a child is ill" and other such measures.<sup>81</sup> The court felt such measures worked against the equal treatment directive in Article 2(1) that "there shall be no discrimination whatsoever on the grounds of sex."<sup>82</sup> Furthermore, the court found the measures outside the scope of the exceptions in Article 2(3) and Article 2(4).<sup>83</sup> Article 2(3) did not pertain because that Article refers to maternity and pregnancy whereas the collective bargaining agreements pertained in part to old age and parenting—"categories to which both men and women may equally belong."<sup>84</sup> Article 2(4) did not pertain because special rights preserved for women in collective agreements were not aimed at reducing or eliminating actual inequalities.<sup>85</sup> While *Commission v. France* did discuss the scope of Article 2(4), it did not discuss the scope of this article as it pertains to job promotions and opportunities. Thus, this case adds little to the analysis of the courts reasoning in *Kalanke*.

Scrutinizing the arguments of the Advocate General and the way Moore depicts the decision in *Commission v. France*, the arguments for

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<sup>76</sup> *Id.* at 159.

<sup>77</sup> *Id.* at 157.

<sup>78</sup> Case 312/86, *Commission v. France*, 1988 E.C.R. I-6315, I-6332, [1989] 1 C.M.L.R. 408, 420 (1988).

<sup>79</sup> See *Kalanke* AG, E.C.R. at I-3061, [1996] 1 C.M.L.R. at 184.

<sup>80</sup> *France*, E.C.R. at I-6336, [1989] 1 C.M.L.R. at 418.

<sup>81</sup> *France*, E.C.R. at I-6336, [1989] 1 C.M.L.R. at 418.

<sup>82</sup> See *France*, E.C.R. at I-6336, [1989] 1 C.M.L.R. at 418.

<sup>83</sup> See *France*, E.C.R. at I-6336, [1989] 1 C.M.L.R. at 418-19.

<sup>84</sup> See *France*, E.C.R. at I-6336, [1989] 1 C.M.L.R. at 418.

<sup>85</sup> See *France*, E.C.R. at I-6336, [1989] 1 C.M.L.R. at 418.

overruling the Bremen law on equal treatment disappear once again. A strict interpretation of the language of Article 2(4), in combination with the clarification of Recommendation 84/635/EEC, allows positive action measures such as the law of Bremen.<sup>86</sup> Article 2(4) allows discriminatory practices if the practices eliminate obstacles to equality for women.<sup>87</sup> Recommendation 84/635/EEC interprets Article 2(4) as the promotion of positive action for women to counteract the prejudicial effect on women arising from "social attitudes, behavior and structures."<sup>88</sup> The largest obstacle to the advancement of women, or to any minority advancement, is prejudice. One way to combat the prejudice against promoting women is to mandate promotions under circumstances such as those in *Kalanke*. While not every society agrees with such measures, Germany was not outside the scope of European Union law when it decided to promulgate legislation to promote women. The patriarchal approach of Mr. Tesauro toward these statutes ignores the real prejudice that exists in the labor market for women. Notwithstanding these arguments, the opinion of the ECJ, supported by reasoning in the opinion of the Advocate General, is the law for the fifteen states that make up the European Union.

### III. THE FAILURE OF IMMEDIATELY SUBSEQUENT RULINGS TO HELP CLARIFY THE DECISION

Subsequent decisions do little to clarify the position of the ECJ on positive action. The Court ruled that measures that grant women automatic or "absolute and unconditional" priority over men or that substitute the end result of equality for equality of opportunity are against the equal treatment directive of Article 2(1).<sup>89</sup> Yet, the Court gave no direction as to what measures are acceptable under Article 2(4), and cases decided after *Kalanke* lack further instruction. The cases even contradict each other.

During the same week the *Kalanke* ruling came down, the ECJ struck down a British government scheme that allowed women over the age of sixty free prescriptions, by allowing an extension of the free prescriptions to both sexes.<sup>90</sup> Men originally were ineligible for free prescriptions until they reached the age of sixty-five.<sup>91</sup> "The differential saved the government" \$45 million a year.<sup>92</sup> The British government believed that since the legal age in Britain for gaining retirement benefits made a distinction between men and women, extending the distinction to prescriptions was permissi-

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<sup>86</sup> See *Kalanke* AG, 1995 E.C.R. at I-3053-54, [1996] 1 C.M.L.R. at 177-78.

<sup>87</sup> See *Kalanke* AG, 1995 E.C.R. at I-3053, [1996] 1 C.M.L.R. at 177.

<sup>88</sup> See *Kalanke* AG, 1995 E.C.R. at I-3054, [1996] 1 C.M.L.R. at 177-78.

<sup>89</sup> *Kalanke*, 1995 E.C.R. at I-3078, [1996] 1 C.M.L.R. at 194.

<sup>90</sup> See Case C-137/94, *The Queen v. Secretary of State for Health, ex parte Cyril Richardson*, 1995 E.C.R. I-3407, I-3431 and I-3436, [1995] 3 C.M.L.R. 376, 393 and 396 (1995).

<sup>91</sup> *Richardson*, 1995 E.C.R. at I-3430, [1995] 3 C.M.L.R. at 392.

<sup>92</sup> Barbash, *supra* note 7, at A25.

ble.<sup>93</sup> The ECJ ruled that the program violated European Union sex discrimination laws.<sup>94</sup> The court found that the discrimination was not essential to the financial equilibrium of the social security regime; and, furthermore, this discrimination "is not objectively necessary to ensure coherence between the retirement pension system" and the prescription system.<sup>95</sup>

The Court further reasoned that "since women can retire after the legal age of sixty and men before the legal age of sixty-five, without any effect on the exemption of women over sixty from paying for medicines, there is no link between the criteria for retirement and those for free medicines. Consequently, the exemption on retirement age could not be extended to the provision of free medicines and equipment."<sup>96</sup>

The Court framed the issue as whether a man must retire at sixty-five and whether a woman must retire at the age of sixty. Since the retirement ages are not mandatory, the Court posited, the age at which one may start receiving free medicine should not be fixed. However, because retirement benefits are only received at these ages, some women workers will take advantage of retiring at sixty and most men will work until they are sixty-five so as to not lose pension benefits. Thus, the real issue becomes whether women who have retired should pay for medicine until age sixty-five or whether men who have not retired should receive free medicine for five years. The court could legitimately argue that this policy is discriminatory; but then the entire retirement benefit plan in England would be discriminatory.

While the *Richardson* decision is consistent with *Kalanke* in that sex discrimination is illegal under automatic conditions, a subsequent decision by the ECJ results in the opposite conclusion than that in *Kalanke*, allowing sex discrimination if the prejudicial treatment serves a public purpose. In December 1995, not two months after *Kalanke*, the ECJ ruled that national provisions may preclude part-time workers in minor employment, meaning less than 15 hours a week, from statutory old-age insurance if the legislation achieves a social policy aim separate from discrimination, even if considerably more women are affected.<sup>97</sup> The plaintiff, a German national, worked less than fifteen hours a week and earned one-seventh "of the average monthly salary of persons insured under the statutory old-age insurance scheme."<sup>98</sup> She worked and paid compulsory insurance until her children

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<sup>93</sup> See *Richardson*, 1995 E.C.R. at I-3430-31, [1995] 3 C.M.L.R. at 392-93.

<sup>94</sup> See *Richardson*, 1995 E.C.R. at I-3429 and I-3433, [1995] 3 C.M.L.R. at 393-94.

<sup>95</sup> See *Richardson*, 1995 E.C.R. at I-3431-32, [1995] 3 C.M.L.R. at 393.

<sup>96</sup> *EU Court Rules Against Discrimination in Favour of Women*, EUR. SOC. POL'Y, Nov. 16, 1995, at 57 [hereinafter *Against Discrimination*]. See also *Richardson*, 1995 E.C.R. at I-3432-33, [1995] 3 C.M.L.R. at 393.

<sup>97</sup> Case C-317/93, *Nolte v. Landesversicherungsanstalt Hannover*, 1995 E.C.R. I-4625, I-4661-62.

<sup>98</sup> *Nolte*, 1995 E.C.R. at I-4653.

were born, and then she worked part-time in minor employment as a cleaner.<sup>99</sup> In 1988, she became ill and later applied "for retirement and an invalidity pension;" however, her application was rejected because she had not paid into the fund for thirty-six months during the last sixty months.<sup>100</sup>

The Sozialgericht Hannover, the body to which Mrs. Nolte appealed the decision, argued that this plan amounted to indirect discrimination against women, since women compose the majority of part-time workers in minor employment.<sup>101</sup> Germany countered with a statement about the need for minor employment and its inability to supply the workers for the work force without denying them compulsory insurance.<sup>102</sup> The ECJ held that "social policy is a matter for the Member States" and upheld the exclusion of the plaintiff from the pension.<sup>103</sup>

Just a few months after *Richardson*, the ECJ ruled that "[M]ember [S]tates may not enact legislation which denies compensation for part-time workers participating in work committees and training programs outside of normal working hours, where the majority" of the "part-time workers are women."<sup>104</sup> In this particular case, a part-time female employee attended a five-day training course.<sup>105</sup> While all full-time employees in attendance were paid for a full week, she was only paid for her contractual work week of four days.<sup>106</sup> Meaning, she worked an extra, uncompensated day while her full-time colleagues worked their regular schedules.<sup>107</sup> Unequal treatment, as defined by the ECJ, included paying full-time employees higher salaries than part-time employees for the same number of hours worked.<sup>108</sup> The Court reasoned that where a difference in treatment between full and part-time workers exists and where a majority of part-time workers are women, the application of the laws amounted to indirect sex discrimination in the matter of pay.<sup>109</sup> Yet, the ECJ still reaffirmed its commitment to allowing the social policy issues of a Member State to govern if the Member State's national courts found the policy issues and law to have a purpose unrelated to the gender discrimination.<sup>110</sup>

The ECJ seemed to have implemented a policy of not allowing any type of sex discrimination unless promulgated under the guise of a Member

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<sup>99</sup> *Nolte*, 1995 E.C.R. at I-4653.

<sup>100</sup> *Nolte*, 1995 E.C.R. at I-4653-54.

<sup>101</sup> *Nolte*, 1995 E.C.R. at I-4654 and I-4658.

<sup>102</sup> *Nolte*, 1995 E.C.R. at I-4659-60.

<sup>103</sup> *Nolte*, 1995 E.C.R. at I-4660-62.

<sup>104</sup> *Court Says Part-Timers Must Get Fair Compensation*, REUTER EUR. COMMUNITY REP., Feb. 6, 1996 [hereinafter *Part-Timers*]. Case C-457/93, *Kuratorium für Dialyse und Nierentransplantation e. V v. Lewark*, 1996 E.C.R. I-243, I-271-72.

<sup>105</sup> *Lewark*, 1996 E.C.R. at I-262.

<sup>106</sup> *Lewark*, 1996 E.C.R. at I-263 and I-272.

<sup>107</sup> *Id.*

<sup>108</sup> *Lewark*, 1996 E.C.R. at I-267.

<sup>109</sup> *Lewark*, 1996 E.C.R. at I-271-72.

<sup>110</sup> *Lewark*, 1996 E.C.R. at 269.

State's social policy. The Court left a trail of irreconcilable precedents based on ideas of gender equality and of social policy concerns being left to the States. The Court only succeeded in allowing equal or worse treatment for women in each case, while leaving the scope of Article 2(4) unclear.

The Advocate General tried to clarify his reasoning in the *Kalanke* matter in a case regarding gender reassignment. In *P. v. S. and Cornwall County Council*, P., a manager at an educational facility then operated by the Cornwall County Council, requested and appeared to obtain the support of his supervisor S. before undergoing a gender reassignment operation.<sup>111</sup> In the summer of 1992, while P. underwent the first operation, S. and the board of governors of the educational establishment where P. worked, chose to dismiss P. in three months, effective December 31, 1992.<sup>112</sup> When P. offered to fulfill the rest of his duties at work dressed as a woman, the governors told P. to work from home.<sup>113</sup> P. underwent the final operation on December 23, 1992, before the dismissal took effect, and brought suit the following March.<sup>114</sup>

The Industrial Tribunal started and the ECJ was advised to start from the point that P. was dismissed solely for the sex-change operation.<sup>115</sup> The issue before the court was "can a transsexual, if he or she is dismissed because he or she is a transsexual, in particular when he or she undergoes gender reassignment, successfully rely on [Directive 76/207]?"<sup>116</sup> The ECJ ruled that the transsexual may rely on the directive, even though there is nothing specific in European Union law or the national laws to justify such reliance.<sup>117</sup>

The Advocate General argued that because "P. would not have been dismissed" if she "remained a man," the case involved discrimination on the grounds of sex.<sup>118</sup> The prohibition against discrimination on the grounds of sex was seen as part of the principle of equality, which mandated "no account to be taken of discriminatory factors," such as sex.<sup>119</sup> The Advocate General argued that individuals must be treated alike and sex must not influence the treatment of workers.<sup>120</sup> Mr. Tesauro clarified that the *Kalanke* ruling showed that the exceptions only permit those programs

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<sup>111</sup> Case C-13/94, *P. v. S. & Cornwall County Council*, Opinion of the Advocate General, 1996 E.C.R. I-2145, I-2146, [1996] 2 C.M.L.R. 247, 250 (1996) [hereinafter *P. v. S. AG*].

<sup>112</sup> *P. v. S. AG*, 1996 E.C.R. at I-2147, [1996] 2 C.M.L.R. at 250.

<sup>113</sup> *P. v. S. AG*, 1996 E.C.R. at I-2147, [1996] 2 C.M.L.R. at 250-51.

<sup>114</sup> *P. v. S. AG*, 1996 E.C.R. at I-2147, [1996] 2 C.M.L.R. at 251.

<sup>115</sup> *Id.*

<sup>116</sup> *P. v. S. AG*, 1996 E.C.R. at I-2145, [1996] 2 C.M.L.R. at 249.

<sup>117</sup> Case C-13/94, *P. v. S. & Cornwall County Council*, 1996 E.C.R. I-2159, I-2165, [1996] 2 C.M.L.R. 261, 263 (1996) [hereinafter *P. v. S.*].

<sup>118</sup> *P. v. S. AG*, 1996 E.C.R. at I-2154, [1996] 2 C.M.L.R. at 257.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

that, because they "aim at attaining substantive equality," ensure actual equality<sup>121</sup> rather than merely numerical equality.

Mr. Tesauro then drew an analogy between the inequality suffered by women and that suffered by transsexuals.<sup>122</sup> He argued that discrimination against women is not "due to their physical characteristics," but to their role in society and the images society has of them.<sup>123</sup> Just as it would be hard to argue that P. lost the job because his abilities to perform the job had changed, job discrimination is not against the physical abilities of women.<sup>124</sup> Rather, according to Mr. Tesauro, society shared a negative image of both women in the workplace and of transsexuals.<sup>125</sup> Thus, transsexuals needed a minimum of protection under the sex discrimination laws.<sup>126</sup> Mr. Tesauro's final proposal to the ECJ was that "Articles 2(1) and 5(1) of the Council Directive" should "be interpreted as precluding the dismissal of a transsexual on account of a change of sex."<sup>127</sup>

Mr. Tesauro, and ultimately the ECJ, reached the correct conclusion in *P. v. S. and Cornwall County Council*. The defendants in that case dismissed P. based on sex. Because Council Directive 76/207 outlaws discrimination on the grounds of sex or gender, the directive was held to apply. Yet, the Advocate General's analogy between this case and the situation of women within the scope of the *Kalanke* decision is confusing. The *Kalanke* ruling focused on the scope of Article 2(4). Article 2(4) did not apply to the *P. v. S.* case. Yet, Mr. Tesauro made an analogy to express his opinion that the sex of a person should be irrelevant with regard to the rules regulating job discrimination. He wanted gender never to be a consideration in an employment decision.

While this premise may be tenable in a gender-neutral world, it does not work in the real world. If equal treatment laws exist only on the books, equality in fact cannot be realized.<sup>128</sup> Over the past twenty years in Europe, the station of women has not improved.<sup>129</sup> Since the 1970s, when anti-discrimination legislation was first enacted, few significant improvements have transpired for working women.<sup>130</sup> By the 1980s, on average, women constituted 38.2 % of the labor force of the European Community.<sup>131</sup> Yet,

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<sup>121</sup> *P. v. S.* AG, 1996 E.C.R. at I-2154, [1996] 2 C.M.L.R. at 257-58.

<sup>122</sup> *P. v. S.* AG, 1996 E.C.R. at I-2154-55, [1996] 2 C.M.L.R. at 258.

<sup>123</sup> *P. v. S.* AG, 1996 E.C.R. at I-2155, [1996] 2 C.M.L.R. at 258.

<sup>124</sup> *P. v. S.* AG, 1996 E.C.R. at I-2154-55, [1996] 2 C.M.L.R. at 258.

<sup>125</sup> *P. v. S.* AG, 1996 E.C.R. at I-2155, [1996] 2 C.M.L.R. at 258.

<sup>126</sup> *Id.*

<sup>127</sup> *P. v. S.* AG, 1996 E.C.R. at I-2158, [1996] 2 C.M.L.R. at 260-61.

<sup>128</sup> John Gibeaut, *Same Words, Different Meanings: Affirmative Action Debate is Rife with Views on How to Achieve Equality*, 83 A.B.A.J. 106 (Apr. 1997) (addressing racial discrimination).

<sup>129</sup> 1997 O.J. (C 30) 5; *Communication on the Kalanke Ruling*, EUR. INDUS. REL. REV., 29, n.269, June 1996.

<sup>130</sup> Shaw, *supra* note 1, at 18.

<sup>131</sup> *Id.*



the difference in wages between men and women decreased slightly more than three percent between 1975 and 1985, and remained "between 25 and 35 percent in most Member States."<sup>132</sup> While more women entered the market, they frequently entered "low pay, low status and minimal social protection" positions.<sup>133</sup> The unemployment rates of women, as compared to men, were and are higher, with "rates in 1988 at around 13 percent" for women compared with about eight percent for men.<sup>134</sup> This lack of improvement led to the enactment of positive actions laws because European governments thought that prohibitions against gender discrimination were not enough to achieve actual equality.<sup>135</sup> Yet, the ECJ struck down this form of improvement.<sup>136</sup>

The *Kalanke* ruling outlawed automatic positive action measures which substitute the result of equality instead of providing equal opportunities. Advocate General Tesauro voiced the idea of a society of equal starting points and genderless hiring practices. Subsequent decisions have failed to explain how *Kalanke* should be reconciled with other gender-related problems in the European Union. The instability of the present state of gender relations and legislation in the EU have some Europeans wondering what the long-range effects of the *Kalanke* decision will be and asking what steps can be taken to undo the *Kalanke* ruling.

#### IV. REACTIONS TO THE *KALANKE* RULING BY THE EUROPEAN COMMUNITY

As if the *Kalanke* ruling opened the floodgates, the European women's movement suffered other setbacks as well. The day after the *Kalanke* ruling, at its annual conference, the Christian Democratic Union (CDU), the dominant political party in Germany, opposed proposed measures "to reserve one third of all party posts and candidate slots for women."<sup>137</sup> The proposal fell five votes short of passing.<sup>138</sup>

Along similar lines, after the *Kalanke* decision, Tory chairperson of Great Britain, Brian Mawhinney, declared the ruling the "'final nail in the coffin' for women-only shortlists" for promotion to election candidates within the Labour party.<sup>139</sup> He felt compelled to eliminate the plan to promote women because of the *Kalanke* decision.<sup>140</sup>

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Communication on the Kalanke Ruling, supra* note 129.

<sup>136</sup> *Kalanke*, 1995 E.C.R. at I-3079, [1996] 1 C.M.L.R. at 195.

<sup>137</sup> *Women's Quota Move by Kohl Fails*, IRISH TIMES, Oct. 19, 1995, at 9 [hereinafter *Kohl Fails*].

<sup>138</sup> *Id.*

<sup>139</sup> John Deans, *Blow for Labour on Jobs for the Girls*, DAILY MAIL, Oct. 18, 1995, at 5 [hereinafter *Girls*].

<sup>140</sup> *Id.* All women shortlists have not disappeared despite Mawhinney's prediction. While the lists "were stopped in January, 1996, when an industrial tribunal ruled that they

Reactions to the *Kalanke* ruling have crossed the spectrum of ideological standards. The Confederation of British Industry (CBI) said: "Today's ruling confirms the CBI's view that positive discrimination is unlawful. The CBI believes there is only one acceptable form of discrimination, and that is on ability."<sup>141</sup> One paper claimed that the British government, which opposes job quotas, displayed "quiet official smiles."<sup>142</sup>

The discrimination laws of the United Kingdom prohibit positive action measures.<sup>143</sup> "Preferential treatment of members of one sex (or racial group) constitutes unlawful direct discrimination contrary to the Sex Discrimination Act 1975" and the "Race Relations Act 1976."<sup>144</sup> The provisions in these acts allow special treatment in certain circumstances, but the treatment is "limited to single-sex training or encouragement to counteract the effects of past discrimination in particular work where, in the previous twelve months, there were no persons, or a comparatively small number of persons, of the sex doing that work."<sup>145</sup> These measures do not extend to recruitment or promotion.<sup>146</sup>

Even some private individuals affected by the decision approved of the ruling. Helga Kowalski, forty-eight, a worker in the European market, felt sorry for women who obtained their jobs through quota systems.<sup>147</sup> "I believe in the principle of the right person for the right job regardless whether it's a man or a woman."<sup>148</sup> Ms. Kowalski, however, favored measures addressing child care and the "assistance of husbands at home" that "help women pursue their careers."<sup>149</sup>

At the other end of the spectrum, women's groups are reeling from the decision<sup>150</sup> and feel that the ruling was an affront to the advancement of women.<sup>151</sup> "In Germany, politicians reacted angrily," calling for "their government to raise the issue at next year's intergovernmental confer-

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breached the Sex Discrimination Act," half of the women who obtained seats in the House of Commons during the Labour Party's landslide victory in May 1997, were chosen from such lists. Kirsty Milne, *Labour's Quota Women are on a Mission to Modernise*, 126 NEW STATESMAN 16, n.4334 (May 16, 1997). While a former press secretary, now MP for Leicester West, Patricia Hewitt, feels the policy of shortlists has been vindicated, others still search for alternative means of opening the selection process to women. *Id.*

<sup>141</sup>Peter Benesh, *European Court Bans Affirmative Action for Gender*, PITTSBURGH POST-GAZETTE, Oct. 18, 1995, at A12.

<sup>142</sup>*In the Courts* (2), ECONOMIST, Oct. 21, 1995, at 53.

<sup>143</sup>Sex Discrimination Act, 1975, Part I, §§ 1(1) and 2(1), and Part II, §§ 6(1) and 6(2) (Eng.) *Equal Treatment Directive Outlaws Positive Discrimination*, IRS EMPLOYMENT REV., Jan. 1996, at 599 [hereinafter *Equal Treatment*].

<sup>144</sup>*Id.*

<sup>145</sup>*Id.*

<sup>146</sup>*Id.*

<sup>147</sup>Wosnitza, *supra* note 7.

<sup>148</sup>*Id.*

<sup>149</sup>*Id.*

<sup>150</sup>*Kohl Fails*, *supra* note 137.

<sup>151</sup>Equal Opportunities, *supra* note 36.

ence.”<sup>152</sup> The decision “was denounced as ‘cynicism’ by high-ranking female politicians in Germany,” and they warned that the movement towards “equality in the workplace could be slowed as a result” of the decision.<sup>153</sup>

Chancellor Helmut Kohl of the German CDU, disappointed by the *Kalanke* decision and the CDU’s failure to reserve a third of all party posts for women, “promised to reintroduce the proposal” regarding party posts at the meeting again next year.<sup>154</sup> Rita Suessmuth, head of the women’s caucus of the CDU, urged women to continue fighting for better representation in the party.<sup>155</sup>

The Women’s Affairs Ministers from eight of the sixteen German states — “some of which have their own laws giving female public employees preferential treatment — issued a statement asking the German government to lobby for a change in European policy.”<sup>156</sup> Christine Wischer, Bremen’s senator for women, said the ruling calls “into question German acceptance of European institutions.”<sup>157</sup>

Some members of the German public felt positive action was justified.<sup>158</sup> Julius Baer, thirty-one, an unemployed toolmaker felt quotas are necessary,<sup>159</sup> and said: “Attitudes stick too fast and, therefore, some women do not have a chance despite being well-suited for a job.”<sup>160</sup> Steffi Welscher, a twenty-six year-old nurse, was outraged “that a man went to court as soon as a woman was given priority.”<sup>161</sup>

Elsewhere, “[w]omen’s rights advocates condemned the ruling as a step backward” and said they will “fight to amend the European” treaty.<sup>162</sup> In England, Clare Short, the spokesperson for the Labour Party on Women’s Affairs, countered Brian Mawhinney and said: “The [*Kalanke*] ruling does not affect Labour’s policy of selecting women candidates in half our winnable seats. Obviously, party selections are not covered by employment law.”<sup>163</sup>

Pauline Green, leader of the British Socialist Group, said, “the judges are out of touch with reality for working women in Europe.”<sup>164</sup> Lissy Gro-

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<sup>152</sup> Robert Rice, *Women Job Quotas ‘Unlawful’: European Court Ruling Raises Doubts About Affirmative Action*, FIN. TIMES, Oct. 18, 1995, at 20.

<sup>153</sup> Wosnitza, *supra* note 7.

<sup>154</sup> Kohl Fails, *supra* note 137.

<sup>155</sup> *Id.*

<sup>156</sup> *European Union Court Ruling Limits Job Preference for Women*, N.Y. TIMES, Oct. 18, 1995, at A11 [hereinafter *Limits Jobs for Women*].

<sup>157</sup> *Id.*; Rice, *supra* note 152.

<sup>158</sup> See Wosnitza, *supra* note 7.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Limits Jobs for Women*, *supra* note 156.

<sup>163</sup> *Girls*, *supra* note 139; see also *supra* note 146 and accompanying text.

<sup>164</sup> *In the Courts (2)*, *supra* note 142, at 53.

ener, spokesperson for the Social Democratic Women in the European Parliament, quipped, "The verdict shows that there is a considerable gap in equal rights on the European level. I think a tendency is visible here," that, regarding affirmative action, "the icy wind is again blowing from the front."<sup>165</sup>

Some feel the ruling will have a limited effect.<sup>166</sup> An expert for the European Union did not feel the decision would substantially impact the Member States because few other governments of the European Union members "imposed such a strict quota system as the one considered by the court."<sup>167</sup> The expert said "the ruling as worded did not cover voluntary efforts in the private sector."<sup>168</sup>

Similarly, Claudia Nolte, "German [M]inister for [F]amily and [W]omen's [A]ffairs, cautioned that the ruling only applied to quotas."<sup>169</sup> She stated that the ruling did not "affect federal legislation that requires government agencies and state-owned entities to draw up plans to encourage employment of women."<sup>170</sup>

Yet, others feel that the decision may have a wide-ranging impact.<sup>171</sup> The International Labor Organization (ILO) representatives were split as to the effects of this ruling on state laws. According to the ILO, "most European Union [S]tates have affirmative action programs."<sup>172</sup> Italy has over "50 programs in the corporate sector and the Netherlands [has] several [programs] in government service."<sup>173</sup> These programs could be affected. Yet, "the ILO urged governments not to overreact" because the ruling did not outlaw affirmative action per se — just laws that go too far in setting numerical, absolute objectives.<sup>174</sup> Barbara Nolan, the spokesperson for Employment Commissioner Pdraig Flynn, agreed the ruling would "have a significant impact across Europe, particularly in countries like Austria, Denmark, Sweden, Finland, Italy and the Netherlands that mandate various types of positive discrimination."<sup>175</sup>

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<sup>165</sup>Wosnitza, *supra* note 7.

<sup>166</sup>See Laura Molinari, *The Effect of the Kalanke Decision on the European Union: A Decision with Teeth, but Little Bite*, 71 ST. JOHN'S L. REV. 591, 591 n.3 (1997).

<sup>167</sup>*Limits Jobs for Women*, *supra* note 156.

<sup>168</sup>*Id.*

<sup>169</sup>Tom Buerkle, *Europe's Court Strikes Down Hiring Quotas for Women*, INT'L HERALD TRIB., Oct. 18, 1995.

<sup>170</sup>*Id.*

<sup>171</sup>Rice, *supra* note 152, at 20.

<sup>172</sup>*Id.*

<sup>173</sup>*Id.*

<sup>174</sup>*Id.*

<sup>175</sup>Buerkle, *supra* note 169.

## V. EVALUATION OF SUGGESTIONS OFFERED TO REMEDY THE SITUATION

The question proponents of positive action now face is what can be done to rectify or minimize the effects of the *Kalanke* decision. The Commission of the EU suggested amending Article 2(4) to describe the types of positive action allowed in the aftermath of the decision.<sup>176</sup> Padraig Flynn, the Social Affairs Commissioner, immediately explained that “he wanted to find a way to nullify the impact of the recent European Court of Justice ruling.”<sup>177</sup> He further stated, “We have to return to the situation that existed (before) the Court judgment insofar as support for positive action is concerned.”<sup>178</sup> The *Kalanke* opinion raised difficult questions for the Commission, and Flynn pledged he would be “actively examining” the opinion in order to discern ways in which the directive could be amended.<sup>179</sup>

The Commission issued a report to the European Parliament and the Council regarding the *Kalanke* ruling on March 27, 1996.<sup>180</sup> The report acknowledged the controversy and uncertainty caused by the *Kalanke* ruling and stated that it is of “paramount importance together with the fight against unemployment” to “reaffirm the need to use . . . ‘positive action’ measures to promote equal opportunities for women and men” by “removing existing factors of inequality that affect women’s opportunities” in employment.<sup>181</sup>

The Commission then recognized three types of positive action.<sup>182</sup> First, positive action involves intervening to remedy disadvantageous situations “at the level of professional orientation and vocational training.”<sup>183</sup> The second type focuses on attaining “balance between family and work responsibilities and more efficient distribution” between the two sexes — giving priority to “measures concerning the organization of working time, the development of child-care infrastructure and the reintegration of workers in the labor market after a career break.”<sup>184</sup> The third form aims “to make up for past discrimination” when “preferential treatment is prescribed in favor of certain categories of persons” and “may take the form of quota systems or targets.”<sup>185</sup> Then the Commission drew a distinction between

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<sup>176</sup> See *Communication on the Kalanke Ruling*, *supra* note 129, at 32.

<sup>177</sup> *Flynn Wants to Nullify Court Decision on Women*, REUTER EUR. COMMUNITY REP., Oct. 31, 1995 [hereinafter *Flynn to Nullify*].

<sup>178</sup> *Id.*

<sup>179</sup> Patrick Smyth, *EU Court Rules Out Positive Action for Women in Jobs*, IRISH TIMES, Oct. 18, 1995, at 3.

<sup>180</sup> 1997 O.J. (C 30) 5 *Communication on the Kalanke Ruling*, *supra* note 129.

<sup>181</sup> *Id.*

<sup>182</sup> The three types of positive action recognized by the Commission are the same three forms of positive action articulated by the Advocate General. See *supra* notes 60-67 and accompanying text for a discussion of the three forms.

<sup>183</sup> *Communication on the Kalanke Ruling*, *supra* note 129.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

rigid quotas — where only numbers are considered, and flexible quotas — where preferential treatment is granted only once qualifications are deemed equal and individual circumstances are considered.<sup>186</sup> Thus, the Commission posed two questions: “Is this a provision limited to safeguarding positive actions in favor of women at work only as regard measures such as special assistance for vocations training, leave for family reasons, etc., or does it also allow positive discrimination in the field of recruitment/promotion by giving preference to women under certain conditions?”<sup>187</sup> And, “should a distinction be made between positive actions which take account of considerations of necessity/proportionality and those which do not?”<sup>188</sup>

After quoting some international human rights law that support positive action measures to obtain equality, the Commission concluded that the ECJ “only condemned the automatic quota system of the Land of Bremen.”<sup>189</sup> The Commission “therefore takes the view that quota systems which fall short of the degree of rigidity and automaticity provided for by the Bremen law have not been touched by the Court’s judgment and are, in consequence, to be regarded as lawful.”<sup>190</sup>

Finally, the Commission suggested that Article 2(4) be amended to “specifically permit the kinds of positive action which remain untouched by *Kalanke*.”<sup>191</sup> The following language was proposed, with an entirely new second sentence:

This Directive shall be without prejudice to measures to promote equal opportunity for men and women in particular by removing existing inequalities which affect the opportunities of the under-represented sex in the areas referred to in Article 1, section 1. Possible measures shall include the giving of preference, as regard access to employment or promotion, to a member of the under-represented sex, provided that such measures do not preclude the assessment of the particular circumstances of an individual case.<sup>192</sup>

The Commission clarified that such an amendment “would make it clear that positive action measures short of rigid quotas are permitted by Community law” and reflects the “legal position which results from the judgment of the Court.”<sup>193</sup>

Not everyone shared the Commission’s view of the proposed amendment to Article 2(4). The Union of Industrial and Employers’ Confederations of Europe (UNICE) felt that the ECJ was clear in the *Kalanke*

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<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Equal Opportunities*, *supra* note 36.

<sup>193</sup> *Id.*

ruling.<sup>194</sup> UNICE saw the ruling as limiting positive action to providing “better opportunities for women” and saw the proposed amendment as creating more questions instead of clarifying the ruling.<sup>195</sup> The UNICE viewed the decision of the court as being straightforward — it prohibited the automatic promotion of women and thought that the proposed amendment would leave the terms for employers ambiguous, allowing positive action if individual circumstances were assessed. UNICE proposed that flexible quotas be replaced with “more precise ‘numerical objectives’” if such an amendment was implemented.<sup>196</sup>

The amendment proposed by the Commission could be difficult to enact because of the need for the Member States’ unanimous support.<sup>197</sup> The amended proposal also omits the requirement that the candidates have “equal qualifications,” because this would cause some Member States “to backtrack on their own programs.”<sup>198</sup> “Karen Banks, an aide to European Social Affairs Commissioner Pádraig Flynn, said she was optimistic the EU states, including Britain,” would endorse the proposal since the text did not require members to do anything, but allowed them to act if they so choose.<sup>199</sup> The EU would not impose positive action on Member States.<sup>200</sup>

The Ministry of Social Affairs and Health also did not share the Commission’s view on amending Article 2(4). The Ministry published a brochure entitled “Act on Equality Between Women and Men” which proposed a different approach.<sup>201</sup> The Act:

- \* prevents direct and indirect discrimination based on gender;
- \* improves the status of women particularly in working life;
- \* gives those discriminated [against] in working life a right to claim compensation;
- \* obliges the authorities to change such circumstances that prevent the achievement of equality;
- \* requires that men and women shall be provided equal opportunities for educational and occupational advancement;
- \* demands [a]n even distribution of male and female members in state and municipal bodies.<sup>202</sup>

The Act prohibits an employer from terminating a pregnant employee, or one on maternity, paternity, parental or care leave.<sup>203</sup> The Act also pro-

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<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> Suzanne Perry, *EU Proposal Blesses Flexible Job Quotas for Women*, REUTERS WORLD SERVICE, Mar. 27, 1996, available in LEXIS, World library, Renwld File.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Employment Conditions: Special Categories of Employees: Employment of Women: Equal Opportunities for Men and Women*, COMMISSION OF THE EUR. COMMUNITIES, June 11, 1996 [hereinafter *Employment Conditions*].

<sup>202</sup> *Id.*

hibits sex discrimination including the attempt to "recruit an applicant who is not as qualified as another rival candidate of the opposite sex."<sup>204</sup>

The Ministry's proposal faces the same obstacles as the Commission's proposed amendment. The EU Member States must unanimously approve the Act.<sup>205</sup> In addition, the Ministry's proposed Act requires "equal qualifications," a standard some member States' laws do not meet.<sup>206</sup>

Yet, amendments to the EC Treaty occurred in the aftermath of the *Kalanke* decision. These amendments attempt to clarify the Community position on gender discrimination. An addition to Article 3 of the Treaty, known as the Treaty of Amsterdam, reads: the "Community shall aim to eliminate inequalities and to promote equality between men and women."<sup>207</sup> The new wording of Article 119.4 now reads:

With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any member state from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.<sup>208</sup>

The author of an article regarding these amendments, Celia Hampton, contends that these two additions allow for preferences in favor of equally qualified women when women are under-represented in a position.<sup>209</sup> Yet, the author also realizes that these measures "do not affect the underlying ruling" in *Kalanke*.<sup>210</sup> The amendments made to the Treaty, while suggesting the European Union recognizes and supports the elimination of gender discrimination, do not clarify the types of positive action Member States may pursue. The amendment to Article 119.4 merely allows for vocational classes and compensation, not promotions.

The German state of North Rhine-Westphalia dealt with the *Kalanke* ruling by distinguishing the North Rhine-Westphalian law from the law of Bremen.<sup>211</sup> The positive action law in North Rhine-Westphalia remained in effect despite the *Kalanke* ruling against it.<sup>212</sup> On December 19, 1995, "a state superior administrative court" rejected "a petition from a woman who

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<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> Perry, *supra* note 197.

<sup>206</sup> *Id.* at 38.

<sup>207</sup> Treaty of Amsterdam Amending the Treaty on the European Union, the Treaties Establishing the European Communities and Certain Related Acts, 1997 O.J. (C 340) 25, [hereinafter Treaty of Amsterdam].

<sup>208</sup> *Id.*

<sup>209</sup> Celia Hampton, *Equal Treatment and Employment*, BUS. L. EUR., July 1, 1997.

<sup>210</sup> *Id.*

<sup>211</sup> *North Rhine-Westphalia Affirmative Action Law to Remain In Effect Despite Court Ruling*, WK. IN GERMANY, Jan. 5, 1996, available in LEXIS, Europe Library, WKGerm File. [hereinafter *North Rhine-Westphalia*].

<sup>212</sup> *Id.*



had been passed over for a promotion” for a male colleague.<sup>213</sup> The Administrative Court invoked *Kalanke*; however, Minister of Women, Ilse Ridder-Melcher, announced that the affirmative action law will stay in effect because the Administrative Court had no jurisdiction over laws “passed by the state parliament.”<sup>214</sup> Only the Federal Constitutional Court had such authority.<sup>215</sup> Ms. Ridder-Melcher further distinguished the law of North Rhine-Westphalia from that of Bremen because of the provision in the former, mandating each case “to be reviewed individually to assure that the man” under review, is “not put under ‘unfair hardship’” by not receiving the promotion.<sup>216</sup>

The ECJ agreed with Ms. Ridder-Melcher’s characterization of the North Rhine-Westphalian law. In the case of *Marschall v. Land of Nordrhein-Westfalen*, the Court revisited the issue of positive action in Germany.<sup>217</sup> The case began when a German school teacher, Helmutt Marschall, applied for a promotion and was allegedly told by the school board that they “intended to appoint a female candidate.”<sup>218</sup> The German court stayed the proceedings and referred a question to the ECJ regarding the validity of the statute under EU law.<sup>219</sup>

In his recommendation to the Court, Advocate General Jacobs, like former Advocate General Tesouro, distinguished between the result of equality and actual equal opportunities.<sup>220</sup> Jacobs stated that “there is no equal opportunity for men and women in an individual case if, where all else is equal, one is appointed or promoted in preference to the other solely by virtue of his or her sex.”<sup>221</sup>

The ECJ, however, once again focused on whether the preference was absolute, upholding the law because it allows for an objective assessment in favor of men competing with women for positions.<sup>222</sup> The law reads that where “there are fewer women than men in the particular higher grade post in the career bracket, women are to be given priority for promotion in the event of equal suitability, competence and professional performance, unless reasons specific to an individual [male] candidate tilt the balance in his fa-

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<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> Leyla Linton, *EU Court Upholds Hiring Preferences*, NAT’L L.J., Nov. 24, 1997, at A14, available in LEXIS, Genfed Library, NTLAWJ File. Case C-409/95, *Marschall v. Land Nordrhein-Westfalen*, 1997 E.C.R. I-6363, I-6385-86, [1998] 1 C.M.L.R. 547, 565-66 (1997).

<sup>218</sup> *Marschall*, 1997 E.C.R. I-6387, [1998] 1 C.M.L.R. at 566-67.

<sup>219</sup> *Marschall*, 1997 E.C.R. I-6388, [1998] 1 C.M.L.R. at 567.

<sup>220</sup> *Marschall*, 1997 E.C.R. I-6374, [1998] 1 C.M.L.R. at 557.

<sup>221</sup> *Marschall*, 1997 E.C.R. I-6374-75, [1998] 1 C.M.L.R. at 558.

<sup>222</sup> *Marschall*, 1997 E.C.R. I-6392-93, [1998] 1 C.M.L.R. at 569-70.

vor.”<sup>223</sup> The Court found that this “savings clause”<sup>224</sup> distinguished this statute from the Bremen law.<sup>225</sup>

Other German states followed suit and prevented the destruction of their positive action laws by adopting flexible quota systems.<sup>226</sup> The highest labor court in Germany, however, outlawed the law of Bremen because it violated European Union law.<sup>227</sup> In light of the *Kalanke* ruling, the decision to hire Mr. Kalanke would have to be reviewed, but he would not automatically get the job.<sup>228</sup> Due to the flexible nature of quota systems in other German states, *Kalanke* is the only hiring decision up for review.

## VI. CONCLUSION AND PROPOSAL

In proposing the amendment to Article 2(4) of Council Directive 76/207, the Commission had the correct idea, but the idea stopped short of any substantive changes to rectify the *Kalanke* decision.<sup>229</sup> Similarly, the Ministry came close to changing the result of *Kalanke*, but went too far in requiring equal qualifications. Only one thing need be done to counteract the effects of *Kalanke*. While the EC treaty leaves room for positive action measures to be adopted, the right to positive action must be written into the Directive in order to counteract *Kalanke*.

Mr. Tesauo was correct in arguing that women deserve equal starting points.<sup>230</sup> While countries should continue to provide equal training and education to women, this is not enough. Prejudice exists in societies to such an extent that equal qualifications will not necessarily result in the promotion of women.<sup>231</sup> Societal attitudes keep women from attaining the same goals as their male colleagues, as evidenced by relevant statistics.<sup>232</sup>

The problem with *Kalanke* is that it creates rather than remedies discrimination. According to statistics, “woman-friendly legislation and affirmative action programs in the past decades” have not resulted “in a

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<sup>223</sup> *Marschall*, 1997 E.C.R. I-6386, [1998] 1 C.M.L.R. at 566.

<sup>224</sup> The savings clause is the portion of the law that states, “unless reasons specific to an individual candidate tilt the balance in his favour.”

<sup>225</sup> *Marschall*, 1997 E.C.R. I-6391-92, [1998] 1 C.M.L.R. at 569-71.

<sup>226</sup> *Bremen's Affirmative Action Program Violates EU Law, Court Says*, WK. IN GERMANY, Mar. 15, 1996 [hereinafter *Bremen's Law*].

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> The Social Affairs Ministers of the Council rejected the Commission's amendment to Directive 76/207 on April 17, 1997. The Council felt the Commission's proposal anticipated subsequent ECJ decisions and thus was premature. *Positive Discrimination*, BUS. L. EUR., Apr. 30, 1997.

<sup>230</sup> See *supra* text accompanying notes 65-67.

<sup>231</sup> See *supra* text accompanying notes 128-35 (showing equal treatment laws do not substantially improve the situation of women in the European labor market). See also *infra* text accompanying notes 233-36 (discussing women in the European labor market).

<sup>232</sup> See *infra* text accompanying notes 233-36.

gender balance on the European job market.”<sup>233</sup> “Although receiving the same training, women still earn 25 percent less and their unemployment rate exceeds that of men by about three percent.”<sup>234</sup> “While making up 51.2 percent of the European population,” females “form a 27.6 [percent] minority” in the Parliament.<sup>235</sup> Before the Scandinavian countries entered the EU in January 1995, “Britain was the only country” where the “unemployment rate [for women] fell below that of men” — mainly because of “widespread part-time employment.”<sup>236</sup>

By allowing employers to make employment decisions on a case-by-case basis, the ECJ is returning employment practices to their pre-1975 status. A case can be made for any employee that denial of a promotion caused “unfair hardship.”<sup>237</sup> Effectively, European employers would never have to promote women into higher earning brackets and positions of power. The employer could always argue that a man needed the money to support his family, children, or aging parents. This decision perpetuates the system that was already in place. It is “a step backward,”<sup>238</sup> to quote European women’s groups.

The European Commission proposed adding a sentence to Article 2(4) explaining the right to give preference to the under-represented sex as long as an assessment of the circumstances of the case are taken into account.<sup>239</sup> This proposed amendment, which asks for preference after an assessment of each individual case, does nothing but reconfirm *Kalanke*. The Commission argued that it is trying to limit the interpretation of *Kalanke*. Yet, *Kalanke* is ambiguous and allows employers to refuse promotions to women. The *Kalanke* ruling is what is damaging, and the amendment merely codifies it.

The Council of Ministers agreed with this observation. The Social Affairs Council decided to “hold off on amending” Article 2(4).<sup>240</sup> In considering the amendment, the Ministers argued that the “legislation was unnecessary since the court ruling spoke for itself . . . .”<sup>241</sup> The Council waited for another ECJ ruling to clarify *Kalanke*<sup>242</sup> and “for the outcome of

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<sup>233</sup> Wosnitza, *supra* note 7.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> Specifically, the argument is that loss of pay incident to being passed over for a job may be construed as a hardship.

<sup>238</sup> See *supra* text accompanying note 162.

<sup>239</sup> See *supra* text accompanying note 192.

<sup>240</sup> *Council to Hold Off on Kalanke Job-Preference Rules*, REUTER EUR. COMMISSION REP., Dec. 2, 1996.

<sup>241</sup> *Id.*

<sup>242</sup> See *supra* text accompanying notes 217-25.

discussions" on these issues "at the inter-governmental conference on EU treaty reforms."<sup>243</sup>

The Commission should instead amend the Directive to undo the ruling. The Commission should start with Article 2(1) and add a sentence explaining that Article 2(4) is exempted from this provision. Then Article 2(4) should be supplemented with a provision, so that it reads:

This Directive shall be without prejudice to measures to promote equal opportunity for men and women in particular by removing existing inequalities which affect the opportunities of the under-represented sex in the areas referred to in Article 1, section 1. Existing inequalities include prejudice towards hiring and promoting members of the under-represented sex. Member States may create measures to combat this prejudice by giving priority to persons of the under-represented sex. Priority does not mean absolute promotion within the confines of this Article. Preference may be given to such candidates if the Member State so decides. However, Member States may interpret priority as absolute promotion unless the promotion would cause 'undue hardship' on the other candidates. The burden of proving undue hardship employs a higher standard than proving the financial loss resulting from not obtaining the promotion.

The first sentence of this proposal contains the actual language of Article 2(4). The second sentence defines the scope of the provision. The third sentence grants Member States that wish to enact positive action laws the legal authority to do so. The fourth sentence is crucial in that it explains that priority is not a strict quota system. Thus, the fourth sentence allows for laws such as the one challenged in *Kalanke*. The fifth sentence reiterates that priority is merely a preference system. The sixth sentence protects the over-represented gender class in cases where the promotion of the under-represented candidate would be unfair to the over-represented candidate. Yet, sentence seven limits that protection by creating a higher standard of proof than the financial loss from not being promoted.

Many groups expressed doubt about the possibility that such a provision would be passed by the Parliament, especially given the requirement of unanimous support for an amendment to the Directive.<sup>244</sup> This doubt lacks foundation. Many Member States, including Great Britain, were members of the EC when these measures were adopted.<sup>245</sup> Once these recommendations passed, no members withdrew because of them.

The only perceived aggressive dissenter to positive action is Great Britain.<sup>246</sup> Yet, Great Britain is unlikely to withdraw from the Community over such an issue. The economic benefits it gains from the European Union far outweigh the effect of any such provision. Would Great Britain really sacrifice a free trade zone over such a law? Furthermore, the provi-

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<sup>243</sup> *Id.*

<sup>244</sup> See Perry, *supra* note 197, at 38.

<sup>245</sup> See *supra* text within note 7, paragraph 1, regarding when Member States joined the Community.

<sup>246</sup> See *supra* text accompanying notes 197-200, at 38.

sions are not mandatory and would not necessarily affect Great Britain — their meritocracy would be just as legitimate as Germany's 'positive action' programs. A good advocate could win this point on the public forum floor.

In Europe, the dynamics of the labor market create a stage for writing positive action into EU law. Laws for positive action already exist in many of the Member States. Increased political pressure on government representatives, such as was exhibited in Germany,<sup>247</sup> will force the representatives to act.

The Commission even has its own policy on the issue. The Commission identified "the need to take an active part in promoting awareness of equal opportunities and changing attitudes within the EU on the roles and abilities of men and women."<sup>248</sup> Since 1982, the Commission has implemented three programs with various aims toward equality.<sup>249</sup> The 1991-95 action program aimed "to improve the position of women in the labour market and the status of women in society, with particular emphasis on their access to the decision-making process."<sup>250</sup> The Commission has extensively researched gender inequality and supported conferences, workshops, and training projects on the subject.<sup>251</sup> Yet, the *Kalanke* ruling effectively made the Commission's program "for promoting women among its 19,000 [member] staff" illegal.<sup>252</sup>

With the amount of support for positive action on a public policy level, it is not in the best interest of any Member State to stand in the way of such an amendment to the Directive. Previous legislation regarding equality for women has been passed, and analogous laws currently exist in a number of Member States. There is no valid reason why such an amendment would not succeed. The European Commission must work toward the goal of writing positive action into the Directive in order to deflate the effects of *Kalanke*.

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<sup>247</sup> See *supra* text accompanying note 155, at 30.

<sup>248</sup> *Commission Overview of EU Action on Equal Opportunities, Commission Press Release Memo 95/27: Equal Opportunities Between Women and Men*, REUTER EUR. COMMISSION REP., Mar. 7, 1995.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> Frances Gibb & Charles Bremner, *Euro Court Outlaws 'Jobs for Women' Programmes*, TIMES, Home News, Oct. 18, 1995.

