LABOR:
FEMALE LABOR: Section 292.170, RSMo, which requires seating for women at work is partially in conflict with Title 42 U.S.C. Sec. 2000e and 29 C.F.R. Sec. 1604.2(b)(4) and in such areas of conflict the state law must give way to the federal requirements. Therefore, an employer must provide seats for all employees or prove that business necessity precludes such seats and not provide them for any employees.

OPINION NO. 287

December 21, 1973

Mr. Edwin Pruitt, Jr., Chairman
Missouri Commission on Human Rights
314 East High Street
Jefferson City, Missouri 65101

Dear Mr. Pruitt:

You have asked for an official opinion as to whether Section 292.170, RSMo, has been superseded by Title 29 C.F.R. Sec. 1604.2 (b)(4) and 42 U.S.C. Sec. 2000e-2. You have further referred me to the cases of Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) and Public Utilities Commission of California v. United States, 355 U.S. 534 (1958).

Section 292.170, RSMo, provides:

> "In every manufacturing, mechanical, mercantile and other establishment in this state wherein girls or women are employed there shall be provided and conveniently located seats sufficient to comfortably seat such girls or women, and during such times as such girls or women are not necessarily required by their duties to be upon their feet, they shall be allowed to occupy the seats provided."

42 U.S.C. Sec. 2000e-2(a) provides:

> "(a) Employers. It shall be an unlawful employment practice for an employer--
>
> (1) 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

(2) 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 as an employee, because of such individual's race, color, religion, sex, or national origin."

42 U.S.C. Sec. 2000e-12(a) provides:

"(a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this title [42 USCS §§ 2000e-2000e-17]. Regulations issued under this section shall be in conformity with the standards and limitations of the Administrative Procedure Act."

29 C.F.R. Sec. 1604.2(b)(4) provides:

"(4) As to other kinds of sex-oriented State employment laws, such as those requiring special rest and meal periods or physical facilities for women, provision of these benefits to one sex only will be a violation of title VII. An employer will be deemed to have engaged in an unlawful employment practice if:

(i) It refuses to hire or otherwise adversely affects the employment opportunities of female applicants or employees in order to avoid the provision of such benefits; or

(ii) It does not provide the same benefits for male employees. If the employer can prove that business necessity precludes providing these benefits to both men and women, then the State law is in conflict with and superseded by tile [sic] VII as to this employer. In this situation, the employer shall not provide such benefits to members of either sex."

The cases of Gibbons v. Ogden, supra, and Public Utilities Commission of California v. United States, supra, are illustrious members of a large family of cases holding that, in areas where the Congress is constitutionally able to pass laws, its laws will have supremacy over state laws on the same subject. There is no doubt that the provisions of 42 U.S.C. Sec. 2000e-2 fall into such an area and therefore 42 U.S.C. Sec. 2000e-2 supersedes any state laws dealing with the issue of employment discrimination.

42 U.S.C. Sec. 2000e-12(a) gives the Equal Employment Opportunity Commission authority to issue, amend or rescind regulations to further the purposes of the act. These regulations are published in the Code of Federal Regulations under the Federal Register Act and Executive Order No. 9930, Fed. 4, 1948, 13 F.R. 519. The Code of Federal Regulations has the force and effect of law, Sheridan-Wyoming Coal Co. v. Krug, 172 F.2d 282 (D.C. Cir. 1949) reversed on other grounds, 338 U.S. 621, 70 S.Ct. 392, 94 L.Ed. 393 (1950) and must be judicially noticed as prima facie evidence of the regulations included, Wei v. Robinson, 246 F.2d 739 (8th Cir. 1957) cert. denied, 355 U.S. 879, 78 S.Ct. 144, 2 L.Ed.2d 109 (1957).

29 C.F.R. Sec. 1604.2(b)(4) set out above deals with guidelines on discrimination because of sex, the same issue dealt with by Section 292.170, and, therefore, supersedes as much as Section 292.170 as is in conflict with the federal guidelines. In this instance, the employer must provides seats for both women and men unless he is able to prove that business necessity precludes providing seats for both sexes, in which case he shall not provide them for either sex.

CONCLUSION

It is the opinion of this office that Section 292.170, RSMo, which requires seating facilities for women at work is partially in conflict with Title 42 U.S.C. Sec. 2000e and 29 C.F.R. Sec. 1604.2(b)(4) and in such areas of conflict the state law must give way to the federal requirements. Therefore, an employer must provide seats for all employees or prove that business necessity precludes such seats and not provide them for any employees.

The foregoing opinion, which I hereby approve, was prepared by my assistant Anne E. Forry.

Yours very truly,

John C. Danforth

JOHN C. DANFORTH
Attorney General