IN THE

COMMONWEALTH COURT

OF PENNSYLVANIA

PENNSYLVANIA HUMAN RELATIONS COMMISSION,

Appellee

vs.

PITTSBURGH PRESS COMPANY, A CORPORATION,

Appellant

No. 1275

C.D. 1976

BRIEF FOR APPELLEE

Appeal From the Order of the Pennsylvania Human Relations Commission at Docket No. E-8528

Elisabeth S. Shuster,
Assistant General Counsel

Sanford Kahn, General Counsel
Attorneys for Appellee

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES: PAGE

STATUTES:

COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

I. DO SECTIONS 5(e) AND 5(g) OF THE PENNSYLVANIA HUMAN RELATIONS ACT VIOLATE THE RIGHTS OF FREEDOM OF THE PRESS AND FREE SPEECH GUARANTEED BY THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION?

A. Are "situation-wanted" advertisements a form of commercial speech which does not fall under the protection of the First Amendment?

B. Do the prohibitions of Sections 5(e) and 5(g) constitute an unconstitutional prior restraint of the First Amendment freedoms of the press and speech?

II. DOES THE PITTSBURGH PRESS AID AND ABET AN UNLAWFUL DISCRIMINATORY PRACTICE IN VIOLATION OF SECTION 5(e) OF THE PENNSYLVANIA HUMAN RELATIONS ACT BY PUBLISHING "SITUATION-WANTED" ADVERTISEMENTS WHICH CONTAIN INFORMATION THAT AN INDIVIDUAL SEEKING EMPLOYMENT IS PROHIBITED FROM PUBLISHING BY SECTION 5(g)?

III. DOES SECTION 5(g) OF THE PENNSYLVANIA HUMAN RELATIONS ACT FURTHER THE POLICIES OF THE PENNSYLVANIA HUMAN RELATIONS ACT WITHOUT VIOLATING THE FIRST OR FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION?

A. Does Section 5(g) further the policies of the Pennsylvania Human Relations Act?

B. Does Section 5(g) exclude political campaign advertisements and therefore is not subject to the challenge of being unconstitutionally overbroad?

C. Does Section 5(g) violate the substantive due process guarantee of the Fourteenth Amendment of the United States Constitution?

TABLE OF CITATIONS

(Continued)

REQUEST FOR MODIFICATION OF FINAL ORDER

The Commission requests that the Court modify the Commission's Final Order to eliminate the exemption provided in Conclusion of Law No. 6.

COUNTER-HISTORY OF THE CASE

This is an appeal from an Order of the Appellee, Pennsylvania Human Relations Commission (the Commission) ordering Appellant Pittsburgh Press (the Press) to immediately cease and desist from publishing "situation-wanted" advertisements, the contents of which are prohibited by Section 5(g) of the Pennsylvania Human Relations Act (the Act) (R. 76a). Only that part of any "situation-wanted" advertisement which is prohibited by Section 5(g) is subject to this Order; the Commission did not order the Press the cease and desist from publishing all "situation-wanted" ads. The complaint arose from a Commission-initiated complaint charging that the Press "maintains a pattern and practice of aiding and abetting the doing of an unlawful and discriminatory act, prohibited by Section 5g of the Pennsylvania Human Relations Act that the Respondent [the Press] prints in its "Situation-Wanted" column advertisements which specify or express the race and/or sex of the individual placing the advertisement" (R. 2a). After an investigation by Commission staff probable cause to credit the allegation was found, an attempt at conciliation was made and failed, a public hearing was held and briefs by both parties were submitted. Upon the recommendation of the Hearing Panel, the full Commission issued the Final Order which is now being appealed by the Press.

The Press prints a "Situation-Wanted" column composed of advertisements for employment which individuals have paid the Press to publish (Stipulation (i), R. 10a). The Press prints the advertisements as

the individuals submit them (Stipulation (h), R. 10a), even if the ads contain language which is expressly prohibited by Section 5(g) of the Pennsylvania Human Relations Act. Large numbers of the ads inserted into the record as examples of the "Situation-Wanted" ads published by the Press contain prohibited information about the individual which is designed to appeal to the prejudices of prospective employers (Exhibits A-1-A-27, R. 27a-53a).

SUMMARY OF ARGUMENT

The "situation-wanted" advertisements published by the Pittsburgh Press frequently contain information prohibited by §5(g) of the Pennsylvania Human Relations Act. By appealing to the prejudices of prospective employers these ads encourage unlawful discrimination. These ads are prime examples of purely commercial speech and as such are not entitled to protection under the First Amendment, especially as they propose and make possible actions which in and of themselves are illegal. No unconstitutional prior restraint of First Amendment freedoms is involved since "situation-wanted" ads are not protected speech and they do not involve speech which disseminates ideas.

Pittsburgh Press violates §5(e) of the Pennsylvania Human Relations Act by publishing the unlawful "situation-wanted" ads. Publication of the ads alone is enough to constitute the aiding or abetting of an unlawful discriminatory act; no further action by the Press is necessary.

By prohibiting an individual from publishing facts about him or herself which are designed to appeal to the prejudices of prospective employers, §5(g) furthers the purpose of the Pennsylvania Human Relations Act to eliminate discrimination in employment. As political candidates cannot be considered to be seeking employment in the accepted use of the term, §5(g) is not unconstitutionally overbroad.

Section 5(g) is rationally related to the Commonwealth's substantial interest in eliminating discrimination. It therefore does not violate the substantive due process guarantees of the Fourteenth Amendment.

ARGUMENT

I. SECTIONS 5(e) and 5(g) OF THE PENNSYLVANIA HUMAN RELATIONS ACT DO NOT VIOLATE THE RIGHTS OF FREEDOM OF THE PRESS AND FREE SPEECH GUARANTEED BY THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

A. "SITUATION-WANTED" ADVERTISEMENTS ARE A FORM OF COMMERCIAL SPEECH WHICH DOES NOT FALL UNDER THE PROTECTION OF THE FIRST AMENDMENT.

Section 5(e) of the Pennsylvania Human Relations Act provides that it is an unlawful discriminatory practice:

> "For any person, whether or not an employer, employment agency, labor organization or employe, to aid, abet, incite, compel, or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, or to obstruct or prevent any person from complying with the provisions of this act or any order issued thereunder, or to attempt, directly or indirectly, to commit any act declared by this section to be unlawful discriminatory practice."

Section 5(g) of the Pennsylvania Human Relations Act provides that it is an unlawful discriminatory practice:

> "For any individual seeking employment to publish or cause to be published any advertisement which specifies or in any manner expresses his race, color, religious creed, ancestry, age, sex or national origin, or in any manner expresses a limitation or preference as to the race, color, religious creed, ancestry, age, sex or national origin of any prospective employer."

The right of a newspaper to print and distribute the free-flow of information and ideas to the public is protected by the First Amendment of the United States Constitution. The First Amendment does not, however, protect all forms of speech. In Valentine v. Chrestensen, 316 U.S. 52 (1942) the United States Supreme Court established the principle that the constitutional restraints of governmental regulations of free speech 'imposes no such restraints on government as respects purely commercial advertising." 316 U.S. at 54. The "situation-wanted" ads which

individuals pay to have printed in the Pittsburgh Press constitute a classic example of "purely commercial advertising".

In Chrestensen, a New York City ordinance which prohibited the distribution of advertising material on the street was found to be a valid government regulation and did not violate the advertiser's constitutional right of "freedom of speech" and "freedom of the press". The speech in question was a hand bill advertising the exhibiting of a submarine to which had been added on the reverse side a protest against an action of a New York City official. The Court determined that the protest was merely a subterfuge to avoid the provisions of the ordinance and that the handbill was purely commercial speech and not entitled to constitutional protection.

Subsequent Supreme Court decisions have modified Chrestensen and have held that merely because speech is contained in a paid advertisement, or is of a commercial nature, it is not automatically rendered purely commercial and stripped of all constitutional protection. However, in all of these cases, the Supreme Court has been careful to point out that the speech has involved issues of general public interest, New York Times v. Sullivan, 376 U.S. 254 (1964), Bigelow v. Virginia, 421 U.S. 809 (1975); potential destruction of the opportunity or forums of speech by the regulation imposed, Murdock v. Pennsylvania, 319 U.S. 105 (1943), Grosjean v. American Press Co., 297 U.S. 233 (1936); or a potential smothering of the communication of ideas, Smith v. California, 361 U.S. 147 (1959), Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952), Thomas v. Collins, 323 U.S. 516 (1945). The Court has taken care to specify that the protection afforded commercial speech is not

provided if the transactions proposed in the forbidden advertisements are themselves illegal in any way. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., _____ U.S. _____ , 98 S. Ct. 1817 (1976).

In New York Times v. Sullivan, 376 U.S. 254 (1964), the Times published an "editorial" advertisement which cited grievances, protested claimed abuses and sought financial support for the civil rights movement. The Court did not reverse Chrestensen, rather it based its decision on the difference between the content of advertisement:

> "The publication here was not a 'commercial' advertisement in the sense in which the word was used in Chrestensen. It communicated information, expressed opinion, recited grievance, protested claimed abuses and sought financial support on behalf of a movement whose existence and objective are matters of the highest public interest and concern." 376 U.S. at 266 (emphasis added).

In Bigelow v. Virginia, 421 U.S. 809 (1975), a Virginia newspaper published an advertisement of a New York agency which announced that the agency would arrange for a New York abortion, the practice being legal in New York. Virginia had a statute making it a misdemeanor to by sale or circulation of any publication to encourage or prompt the processing of an abortion. The Court found that the abortion adverment came within the First Amendment protection of freedom of the press and freedom of speech because it "contained factual material of clear 'public interest' ". 421 U.S. at 822. Again the Court based its decision on the kind and content of advertising presented by the case, rather than reverse Chrestensen. The "situation-wanted" ads involved in the present case certainly do not contain "matters" of the highest public interest and concern" or even of "clear public interest."

Appellant cites Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. ____ U.S. ____ 96 S. Ct. 1817 (1976) for its indication of the trend away from the commercial speech doctrine. (Appellant's brief 11-12). But even Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., which provided First Amendment protection to advertisements of drug prices, despite the State's attempt to prohibit such advertisements as a measure to guarantee and protect the professionalism of pharmacists, did not state that all commercial speech fell under the protection of the First Amendment. The Court stated that "[W]e of course do not hold that [commercial speech] can never be regulated in any way. Some forms of commercial speech regulation are surely permissible." 96 S. Ct. at 1830.

Obviously, the case closest to the present case and the one which is dispositive of the issue of whether classified advertisements of employment constitute pure commercial speech is Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973) (Press).

In Press the type of advertisement involved, "help-wanted" was the complement of the type presented here, "situation-wanted". The context is identical, both cases deal with ads involving a proposition of possible employment. Pittsburgh Press was printing "help-wanted" ads in sex designated columns, the designation being either at the direction of the employer placing the ad, or if no direction was given, where Pittsburgh Press determined it belonged. The Court found that

the advertisements for employment were not of such public import as to be entitled to constitutional protection, stating:

> "In the crucial respects, the advertisements in the present record resemble the Chrestensen rather than the Sullivan advertisements. None express a position on whether, as a matter of social policy, certain positions ought to be filled by members of one or the other sex, nor does any of them criticize the ordinance or the Commission's enforcement practices. Each is no more than a proposal of possible employment. The advertisements are thus classic examples of commercial speech." 413 U.S. at 385.

The distinction between the advertisements found in the instant case, Press and Chrestensen, which are not protected, and those found in Sullivan, which are protected, was reiterated in Bigelow v. Virginia, 421 U.S. 809 (1975). As was stated above, the Court followed the Sullivan rationale and found that the abortion advertisement was not merely a solicitation for a commercial transaction, but rather, contained matters and information of public interest and concern and for this reason the advertisement was afforded constitutional protection. The Court stated:

> "The legitimacy of appellant's First Amendment claim in the present case is demonstrated by the important differences between the advertisement presently at issue and those involved in Chrestensen and in Pittsburgh Press. The advertisement published in appellant's newspaper did more than simply propose a commercial transaction. It contained factual material of clear 'public interest'". 421 U.S. at 821-822.

Even with the broadening of the protection of the First Amendment to many areas of commercial speech, the "situation-wanted" ads in this case would not be covered. The Supreme Court has a clearly-established trend of refusing to extend First Amendment protection to commercial speech which involves an illegal commercial activity. In the Press

the Supreme Court stated:

> "Whatever the merits of [abrogating the distinction between commercial and other speech] may be in other contexts, it is impersuasive in this case. Discrimination in employment is not only commercial activity, it is illegal commercial activity under the Ordinance. We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes." 413 U.S. at 388 (emphasis in original).

The Court further found:

> "Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." 413 U.S. at 389.

More recently, the Supreme Court has upheld the distinction between commercial speech which involves legal activity and commercial speech which involves illegal activity. In Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., the Supreme Court differentiated between a case where the commercial activity being advertised was legal and cases where it is illegal:

> "Also, there is no claim that the transactions proposed in the forbidden advertisements are themselves illegal in any way. Cf. Pittsburgh Press v. Pittsburgh Human Relations Commission, supra; [further cites ommitted]".

The "situation-wanted" ads which contain information prohibited by Section 5(g) of the Pennsylvania Human Relations Act constitute a commercial activity which is itself illegal. Such activity is a form of commercial speech which is not protected by the First Amendment.

B. THE PROHIBITIONS OF SECTIONS 5(e) AND 5(g) DO NOT CONSTITUTE AN UNCONSTITUTIONAL PRIOR RESTRAINT OF THE FIRST AMENDMENT FREEDOMS OF THE PRESS AND SPEECH

Section 5(g) of the Pennsylvania Human Relations Act prohibits an individual who is seeking employment from publishing an advertisement "which specifies or in any manner expresses" the individual's race, color, religious creed, ancestry, age, sex or national origin or which "in any manner expresses a limitation of preference" as to a prospective employer, vis-a-vis any of these categories. Section 5(e) of the Act prohibits aiding and abetting employment discrimination. Together these sections prohibit the use of certain language in "situation-wanted" ads. Because of the nature and content of the "situation-wanted" ads, Sections 5(e) and 5(g) do not constitute an unconstitutional prior restraint of the First Amendment of the freedom of the press and speech.

As was pointed out above, "situation-wanted" ads are the complements of "help-wanted" ads. Their nature is the same and the effects of placing anti-discrimination restraints on both "help-wanted" and "situation-wanted" ads are the same. In Press, the Supreme Court held that a prohibition of sex-designated "help-wanted" ads did not violate Pittsburgh Press's First Amendment rights and that the prohibition did not constitute an unconstitutional prior restraint of speech. The Court stated:

> "The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment.

> The present order does not endanger arguably protected speech. Because the order is based on a continuing course of repetitive conduct, this is not a case in which the Court is asked speculate as to the effects of the publication." 413 U.S. at 390.

The "situation-wanted" ads of the present case are as much a "continuing course of repetitive"conduct as were the "help-wanted" ads. All that a "help-wanted" ad which has no unlawful discriminatory language addresses itself to is making known to a prospective employe the existence of a job. Some ads have more details some less. All that a "situation-wanted" which has no unlawful discriminatory language addresses itself to is making known to prospective employers that the individual desires a certain kind of job. Again, some ads have more details, some less. In no way do either ads address "matters of the highest public interest and concern" or of "clear public interest". The direction and purpose of "situation-wanted" ads, like that of "help-wanted" ads will not change in the future. "Situation-wanted" ads do not present new ideas or even discussion of old ones so that each one could be said to have a different effect on the public. Therefore, the Court is not being asked to "speculate as to the effects of publication." Free speech and freedom of the press are not endangered. The cases where the Supreme Court has found an unconstitutional prior restraint are all cases where the dissemination of ideas was endangered. In Smith vs. California, 361 U.S. 147 (1959), a bookseller was prosecuted under a statute which imposed criminal liability for mere possession of an obscene book in his store, even though he had no knowledge of the book's contents. In its rationale for the decision,

the Court expressed its concern that such a statute could result in booksellers restricting the books in their shop to those that they had actually read. It was the danger of restricting the public's access to reading matter that served as the basis for the Court's decision.

In Bigelow vs. Virginia, supra, the Court struck down a statute which prohibited the sale or circulation of any publication to encourage or prompt the processing of an abortion. There, the Court found that the advertisement "conveyed information of potential interest and value to a diverse audience...". 421 U.S. at 822. It was the restriction of information which was of importance to the public that made the Virginia statute an unconstitutional prior restraint.

"Situation-wanted" ads do not involve a dissemination of ideas. The "special vice" of a prior restraint is not present. Therefore, "situation-wanted" ads should not follow the line of cases exemplified by Smith and Bigelow, but rather the precedent of Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations.

Appellant argues that the scope of Sections 5(e) and 5(g) is too broad and that the "situation-wanted" ads will be too difficult to screen, that this difficulty will result in excess caution and that the screening would be too expensive (Appellant's brief, pp 15-18.) Both sections clearly spell out the unlawful references. Appellant argues that even something as basis as an individual's name, address or telephone number could result in sex or national origin, for example, being indicated. The Commission does not contend that the

individual placing the ad should be prohibited from inserting information that an employer would need to contact the individual. But what the Commission is contending is that extraneous information such as "LADY - Desires Day Work" (Exhibit A-2, R. 28a) or "YOUNG MAN - Can Do Many Types of Work" (Exhibit A-4, R. 30a), which is designated to appeal to the prejudices of prospective employers, be prohibited. Assuming arguendo, the Press would take the most rigid position and prohibit the use of names, addresses or telephone numbers for fear that they would contain such information as would violate the Act and the Final Order, the result would only be a minor restriction which could by no means begin to be an unconstitutional restraint of speech. In the ads submitted into the record less than five percent gave any name, either first or last. Many of the ads gave a post office box number rather than an address or telephone number. Thus even if the Court were to require the strictest interpretation of Section 5(e), Section 5(g) and the Final Order, there would be no unconstitutional prior restraint of the freedoms of the press or speech.

It is argued that if the Press accidentally publishes an ad which contains language which it thought neutral and which was later determined to be in violation of the Pennsylvania Human Relations Act or the Final Order that the Press would be immediately subject to contempt charges for violating the Commission's Final Order. It is implied that the contempt citation would be automatic and without any review of the situation. Therefore, the Press's fear of the citation would act as a prior restraint and thus constitute censorship. A reading of Section 10

of the Act[1] should immediately dispel any concern about the use of a contempt citation acting as a prior restraint. The Commission does not have the power to issue a contempt citation; it would have to seek the imposition of a contempt citation in Commonwealth Court or the Court of Common Pleas of the county within which the hearing was held. The opportunity that the Court provides in such cases for an examination of the issues will more than adequately protect the Press from the fear of the automatic imposition of contempt charges if it prints a seemingly-neutral ad which is later determined to be violative of the Act.

Appellant tries to distinguish the present case from Press by alleging that whereas in Press the deletion of sex-based headings cause no increase in expenditure, the present

---

[1] The relevant portions of Section 10 read as follows: "The complainant, the Attorney General or the Commission may secure enforcement of the order of the Commission or other appropriate relief by the Commonwealth Court, or by the court of common pleas of the county within which the hearing was held. When the Commission has heard and decided any complaint brought before it, enforcement of its order shall be initiated by the filing of a petition in such court, together with a transcript of the record of the hearing before the Commission, and issuance and service of a copy of said petition as in proceedings in equity. When enforcement of a Commission order is sought, the court may make and enter, upon the pleadings, testimony and proceedings set forth in such transcript, an order or decree enforcing, modifying and enforcing as so modified, or setting aside, in whole or in part, the order of the Commission, and the jurisdiction of the court shall not be limited by acts pertaining to equity jurisdiction of the court. An appeal may be taken as in other civil actions.

Any failure to obey an order of the court may be punished by said court as a contempt thereof." 43 P.S. §960.

case would "impede the paper's ability to publish by imposing a financial burden" resulting from a "significant and costly editorial supervision" (Appellant's brief, P. 18). There is nothing in the record to support this argument. In Wetzel v. Liberty Mutual Insurance Co., 9 E.P.D. ¶9942 (3d. Cir.1975), the insurance company tried to justify its policy of excluding pregnancy benefits from its employes' income protection plan in large part by alleging that its plan did not violate Title VII because of "the company's legitimate interest in maintaining the financial integrity of the plan". 9 E.P.D. ¶9942 at 6971. In response to this argument the Court stated:

> "Appellant has offered no statistical information from which we could conclude that the increased cost for pregnancy benefits would be 'devastating'. We do realize that there would be an increased premium. However, we are not convinced that [the] integrity of the plan would be jeopardized.
>
> Giving our deference to the EEOC Guidelines, we agree that cost is no defense under Title VII to this particular issue. 29 C.F.R. §1604.9(e)." 9 E.P.D. ¶9942 at 6971.

In Wetzel, the Court upheld the civil rights statute while recognizing that an increase in cost would result. In the present case, Appellant has submitted no evidence of any appreciable increase in cost, far less a "devastating" increase which would imperil the Press' ability to publish.

Section 5(e) and 5(g) do not create an unconstitutional prior restraint of Pittsburgh Press' First Amendment rights. The doctrine of prior restraint has been developed to protect the dissemination of ideas and matters of interest to the public.

"Situation-wanted" ads neither disseminate ideas nor matters of interest to the public, and there is no danger of the application of either Section 5(e) or Section 5(g) expanding so as to act as a prior restraint at some future date".

II. THE PITTSBURGH PRESS AIDES AND ABETS AN UNLAWFUL DISCRIMINATORY PRACTICE IN VIOLATION OF SECTION 5(e) OF THE PENNSYLVANIA HUMAN RELATIONS ACT BY PUBLISHING "SITUATION WANTED" ADVERTISEMENTS WHICH CONTAIN INFORMATION THAT AN INDIVIDUAL SEEKING EMPLOYMENT IS PROHIBITED FROM PUBLISHING BY SECTION 5(g).

Section 5(g) of the Pennsylvania Human Relations Act states that it is unlawful discriminatory practice "For an individual seeking employment to publish or cause to be published any advertisement which specifies or in any manner expresses his race, color..." (emphasis added). Section 5(e) of the Act states that it is an unlawful discriminatory practice for any person to aid or abet the doing of any act declared to be an unlawful discriminatory practice by Section 5 of the Act. Because it is unlawful for an individual to publish or cause to be published an advertisement specifying his or her race, color, et cetera, it is unlawful for any person to publish or cause to be published such an advertisement.

Appellant argues that it does not aid or abet a discriminatory act because the Press "only accepts and publishes the data as submitted by the individual advertiser" (Stipulation (h), R.10a) (emphasis added) and does not take any affirmative action to aid the advertisers. Section 5(e) prohibits the

aiding or abetting of publishing an advertisement with language which violates Section 5(g). The Act does not require any editing or editorial comment in addition to the act of publication. Publication of the ad, without more, is in and of itself aiding and abetting an individual to violate Section 5(g) of the Act and therefore constitutes a violation of Section 5(e). Pittsburgh Press has already stipulated that it does publish the prohibited ads.

The purpose of Section 5(g) is to prevent an individual from publishing information about him or herself which would appeal to a prospective employer's prejudices and permit the employer to hire an individual on the basis of an unlawful, discriminatory qualification. If the individual could not get the advertisement published there would be no discriminatory appeal to the employer and no discriminatory hiring arising from it. Section 5(g) is immeasurably strengthened if an individual cannot find anyone to publish an unlawful advertisement. To prohibit both the individual from placing the ad and the publisher from publishing it, attacks the problem from both ends and provides the most effective means of dealing with it.

The argument that the publisher has to engage in some sort of affirmative action as regards the ad, above and beyond the act of publishing it, not only seriously undermines Section 5(g), it results in an absurd interpretation of Sections 5(e) and (g) and Pennsylvania law directs that in interpreting the language

of a statute "the Legislature does not intend a result that is absurd, impossible of execution or unreasonable". 1 Pa. C.S.A. §1922(1).

The meaning of the word publish is clear. It does not mean to edit or to editorialize; it means to print. Pittsburgh Press has already stipulated that it publishes the "situation wanted" ads as it receives them (stipulation (h), R.10a). Pittsburgh Press has already admitted to a violation of Section 5(e) by aiding and abetting a violation of Section 5(g).

III. SECTION 5(g) OF THE PENNSYLVANIA HUMAN RELATIONS ACT FURTHERS THE POLICIES OF THE PENNSYLVANIA HUMAN RELATIONS ACT WITHOUT VIOLATING THE FIRST OR FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

A. SECTION 5(g) FURTHERS THE POLICIES OF THE PENNSYLVANIA HUMAN RELATIONS ACT.

One purpose of the Pennsylvania Human Relations Act is to eliminate discrimination in employment in Pennsylvania. In its "Findings and Declaration of Policy", the Act declares:

> "(b) It is hereby declared to be the public policy of this Commonwealth, to foster the employment of all individuals in accordance with their fullest capacities regardless of their race, color, religious creed, ancestry, handicap or disability, use of a guide dogs because of blindness of the user, age, sex or national origin, and to safeguard their right to obtain and hold employment without such discrimination, to assure equal opportunity to all individuals..." 43 P.S. §952(b).

Section 5(g) was intended to further this policy by preventing individuals from advertising their race, color, et cetera or from stipulating that they were looking for employers

of a particular race, color, et cetera, in order to prevent a person from gaining employment by appealing to a prospective employer's prejudices. A review of the legislative history of the Pennsylvania Human Relations Act clearly indicates the connection that the legislators thought existed between such advertisements and employment discrimination. The following comments of Mr. Readinger, Majority Leader of the House, clearly indicate the reason for the inclusion of Section 5(g):

> "You would have no right to profess it [a person's religion] for the purpose of seeking employment, because the very statement of your creed, your color, and so forth, is specifying a part of you which is the basis for this discrimination which we are trying to eliminate. If you are going to stop employers from discriminating because of race, color and creed, you have to stop the people seeking employment from saying I want employment because I am white, or because I am colored, or because I am a Jew, or a Catholic, or something else. <u>You do not stop it at one end, you stop it at both ends</u>.
>
> ***
>
> ...We are not telling anybody that he cannot profess to be a Christian, or that he is a Communist, or something of that kind; but when it comes to advertising for employment we are saying, 'you can't do it,' because as long as you do, <u>you are going to foster and spawn more discrimination on the part of certain people who are looking for an opportunity to discriminate against a certain religion person or a certain color of person and so forth</u>." Volume 1, House Legislative History, February 21, 1955, pp 442-3 (emphasis added).

By violating Section 5(e) of the Act and printing "situation wanted" ads which violate Section 5(g), Pittsburgh Press is aiding those "who are looking for an opportunity to discriminate".

In the Press, supra, the Supreme Court found that "[b]y implication at least, an advertiser whose [help] want[ed] ad appears in the "Jobs - Male - Interest" column is likely to discriminate against women in his hiring decision." 413 U.S. at 387-388. It follows from this logic that the employer who responds to a "situation-wanted" ad which indicates the race or sex of an individual or which indicates the race or sex of employer that the individual desires to work for, is likely to discriminate in his or her hiring decisions. The active enforcement of both state and federal civil rights laws in the area of employment has changed the manner in which employers discriminate. Employers wishing to discriminate have become far more subtle in their discriminatory actions. The blatant refusal to hire an individual because "we don't want any Blacks here" has, for the most part, given way to more sophisticated methods of discrimination, such as non-job related requirements which though neutral on their face, are discriminatory because they will eliminate a disproportionate number of persons in a protected classes.Cf. Griggs v. Duke Power Co., 401 U.S. 424 (1971). As the courts recognize the subtler forms of discrimination and deal with them, employers find even subtler ways to discriminate. If an individual is able to place an ad declaring his or her race or sex for example, the employer who wishes to discriminate will be given a ready-made and safe opportunity to do so.

Employers are becoming more and more sophisticated in their methods of discrimination. Allowing the publication of a "situation-wanted" ad which violates Section 5(g) will allow individuals to appeal to employers' prejudices and further unlawful discrimination in the Commonwealth. The Legislature recognized this obvious fact in 1955 when it included Section 5(g) in the Pennsylvania Human Relations Act.

B. SECTION 5(g) EXCLUDES POLITICAL CAMPAIGN ADVERTISEMENTS AND THEREFORE IS NOT SUBJECT TO THE CHALLENGE OF BEING UNCONSTITUTIONALLY OVERBROAD.

Appelant's argument that Section 5(g) is unconstitutionally overbroad is based entirely on his contention that political campaign advertisements fall within the scope of Section 5(g). Political campaign advertisements do not fall within the scope of Section 5(g) as the Commission found in its "Findings of Fact" and "Conclusions of Law": "The Commission has not alleged that advertisements placed by candidates for political office violate any provisions of the Act." (Finding of Fact 11, R.71a). "Advertisements placed by candidates for political offices are not affected by these Conclusions of Law." (Conclusion of Law 7, R.73a).

An elected official is not an employe in the sense of the word as used by the Pennsylvania Human Relations Act and such an official is not considered to be an employe in the

normal legal usage of the term. Black's Law Dictionary, Revised Fourth Edition, defines an employe as "One who works for an employer; a person working for a salary or wages, applied to anyone so working, but usually only to clerks, workmen, laborers, etc., and but rarely to the higher officers of a corporation or government or to domestic servants." A similar definition is to be found in Corpus Juris Secundum which states that "The term [employe] generally is not used to designate official employment, and although it is also used in referring to deputies and assistants of public officers, it rarely refers to the higher officers of a corporation or government." 30 C.J.S. Employee.

The interpretations of Title VII of the United States Civil Rights Act of 1964 are frequently used in interpreting the Pennsylvania Human Relations Act. Cf. General Electric Corporation v. Commonwealth of Pennsylvania, Pennsylvania Human Relations Commission, No. 185 March Term, 1975 (Pa. Supreme Court, October 20, 1976); Pennsylvania Human Relations Commission v. Chester Housing Authority, 458 Pa. 67, 327 A. 2d 335 (1974). In this case, we need go no further than the language of Title VII itself where the term employe is defined.

> "The term 'employe' means an individual employed by an employer, except that the term 'employe' shall not include any person elected to public office in any state or political sub-division of any state by the qualified voters thereof,..." 42 U.S.C. §2000e(s).

The Pennsylvania Human Relations Act and Title VII are basically parallel statutes. As both the definition of employe in

Section 4(c) of the Pennsylvania Human Relations Act and the legislative history of the Act are silent on this issue, great weight should be given Title VII's definition.

Elected officials do not meet the accepted tests for employees. "[T]he test to determine whether one person is another's employe is whether or not he is subject to the control of such other person." 30 C.J.S. Employe. "The control of the work reserved in the employer which makes the employe a mere servant is a control, not only of the result of the work, but also of the means and manner of the performance thereof." Healey v. Carey, Baxter and Kennedy, Inc., 144 Pa. Super. 500, 19A. 2d 852 (1941). Appellant's analogy of election to hiring requires that the voters be considered the employer, for it is only by their votes that a person can gain such an office. Therefore, in order for an elected official to be considered an employe under the Pennsylvania Human Relations Act, the voters would have to be able to control the official's actions. Control by the legislature or legal sanctions imposed by the courts cannot be cited as an employer's control over the officials, because neither the Legislature nor the courts "hired" the official. The people who elect the public official have no control over the result of the official's work, as innumerable disillusioned voters will testify as they see one campaign promise after another broken, let alone control over the means and manner of the performance of the work. The "employer" of the elected official is the electorate, not the Commonwealth.

The electorate is not an employer and the elected official is not an employe.

The Press argues that it has standing to challenge Section 5(g) for facial overbreadth because Section 5(g) involves a First Amendment freedom. As Appellant himself cites, "This expansion of the standing doctrine is justified by the 'transcendent value to all society of constitutionally-protected expression.'/ Gooding v. Wilson, [405 U.S. 518, 521 (1972)]." (Appellant's brief, P. 25). Argument 1 of this brief has already shown that "situation-wanted" ads are a form of commercial speech which cannot be classified as "constitutionally protected expression". The cases that Appellant cites in his argument all involve speech that is clearly protected by the First Amendment; e.g., Dombrowski v. Pfister, 380 U.S. 479 (1965) (challenge of Louisiana's Subversive Activities and Communist Control Law and Communist Propaganda Law by the Southern Conference Educational Fund, Inc., a civil rights group which actively educated Blacks in their rights and promoted civil rights which was being repeatedly harassed by the state under this statute); Grayned v. City of Rockford, 408 U.S. 104(1972) (limitations on the right to protest by picketing). Therefore, the Pittsburgh Press has no standing to challenge the overbreadth of Section 5(g).

C. SECTION 5(g) DOES NOT VIOLATE THE SUBSTANTIVE DUE PROCESS GUARANTEE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Section 5(g) provides a reasonable restriction which is rationally related to a legitimate state interest in its restriction of the publication of commercial speech which is not protected by the First Amendment. The Fourteenth Amendment restriction on a state's right to regulate the liberty of its citizens is applied through the use of two tests. If the interest restricted is not a fundamental one, the state need only show a "rational relationship" to a legitimate state interest. Williamson v. Lee Optical Co., 348 U.S. 483 (1955). If the interest is a fundamental one, the state must show a "compelling state interest". Roe v. Wade, 410 U.S. 113 (1973). It has already been shown that the speech involved in the present case is a form of commercial speech which is not protected by the First Amendment and therefore no fundamental right is involved. Therefore, the appropriate test to be applied is the "rational relationship" test. This test requires two factors to be present, a legitimate state interest and a rational relationship between that interest and the regulation imposed.

In the present case, the state interest involved is the elimination of discrimination. The Legislature spelled out the reasons for that interest and its extent in Section 2(a) of the Pennsylvania Human Relations Act:

> "The practice or policy of discrimination against individuals or groups by reason of their race, color, religious creed, ancestry, handicap or disability, use of guide dogs because of blindness of the user, age, sex or national origin is a matter of concern to the Commonwealth. Such discrimination foments domestic strife and unrest, threatens the rights and privileges of the inhabitants of the Commonwealth, and undermines the foundations of a free democratic state. The denial of equal employment, housing and public accommodation opportunities because of such discrimination, and the consequent failure to utilize the productive capacities of individuals to their fullest extent, deprives large segments of the population of the Commonwealth of earnings necessary to maintain decent standards of living, necessitates their resort to public relief and intensifies group conflicts, thereby resulting in grave injury to the public health and welfare, compels many individuals to live in dwellings which are substandard, unhealthful and overcrowded, resulting in racial segregation in public schools and other community facilities, juvenile delinquency and other evils, thereby threatening the peace, health, safety and general welfare of the Commonwealth and its inhabitants."

There is no doubt that the Commonwealth has a legitimate interest in eliminating discrimination within its borders.

Appellant argues that there is no rational relationship between a person's advertising his or her race or sex, for example, and employment discrimination. The relationship is as rational as that which was found by the Supreme Court to exist between "help-wanted" ads and employment discrimination. The logic which states that advertising for a man will result in a woman not being hired states that if you advertise your sex you are appealing to an employer who wishes to hire someone of that sex and the employer who answers the ad answers it so as to be able to hire someone of that sex. The Legislature

found there to be a very clear connection between the advertisements prohibited by Section 5(g) and employment discrimination when it passed the Pennsylvania Human Relations Act.

Even assuming arguendo that there are protected First Amendment rights involved along with non-fundamental rights, as was the case in United States v. O'Brien, 391 U.S. 367 (1968), §5(g) would meet the more stringent test. The test established by the Court in O'Brien was:

> "[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

There are four parts to the O'Brien test. The first requirement of this test is that the regulation be within the constitutional power of the Commonwealth. There is no challenge to the fact that the Commonwealth has the constitutional power to prohibit discrimination.

The second test is that the regulation must further "an important or substantial government interest." The "Findings" of the Pennsylvania Legislature that unlawful discrimination "foments domestic strife and unrest, threatens the rights and privileges of the inhabitants of the Commonwealth, and undermines the foundations of a free democratic state", Pennsylvania Human Relations Act, §2(a), clearly demonstrates an important and even substantial government interest in eliminating discrimination. What could be a more substantial reason in the United States than the eradicating of something which "undermines a free

democratic state"?

The third test is that the government interest be unrelated to the suppression of free expression. The purpose of the Pennsylvania Human Relations Act in general, in Section 5(g) in particular, is the elimination of discrimination in employment. It is merely incidental to its attempt to eliminate employment discrimination that a restriction is placed on "situation-wanted" ads, a form of commercial speech. The clear intent of the Act is to eliminate discrimination, not to provide a limitation on free speech or the freedom of the press.

The fourth and final test under O'Brien is that the restriction on the alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. Contrary to Appellant's contention in his "Statement of the Case", the Commission is not "ordering Appellant, Pittsburgh Press Company, to cease and desist from publishing its "situation-wanted" advertisements (Appellant's Brief, P. 3). The Commission's Final Order and Section 5(g) limit their attention to "situation-wanted" ads which would encourage unlawful discriminatory hiring practices. That much of a limitation is necessary to eliminate discrimination within the Commonwealth, and that much and no more is required by the Act and the Final Order.

Section 5(g) of the Pennsylvania Human Relations Act meets the rational relationship test and therefore does not violate the due process substantive guarantees of the Fourteenth Amendment. Even beyond that, it meets the more stringent test of the Supreme Court in United States v. O'Brien, supra.

REQUEST FOR MODIFICATION OF FINAL ORDER

The exemption contained in Conclusion of Law No. 6 of the Commission's Final Order was erroneously granted and should be stricken by this Court.

Conclusion of Law No. 6 reads:

> "6. Not all situation-wanted advertisements which specify or express in some manner the race, color, religious creed, ancestry, age, sex or national origin of an individual seeking employment are in violation of §5(g). Those advertisements clearly directed at or seeking employment from prospective employers who are not within the jurisdiction of the Act are not unlawful " (R. 72a) (example omitted).

In Pittsburgh Press Employment Advertising Discrimination Appeal, 4 Pa. Cmwlth. Ct. 448, 287 A.2d 161 (1972), the Pittsburgh Commission on Human Relations declared it unlawful for a newspaper to place "help-wanted" advertisements from employers under sex-segregated column headings.

Although affirming the Order of the Pittsburgh Commission generally, this Court held that the Order was too broad in that the Pittsburgh Commission did not have jurisdiction over certain employers, such as those who employed less than five persons, or a religious, fraternal, charitable or sectarian organization not supported in whole or part by governmental appropriations. Accordingly, this Court modified the Order of the Pittsburgh Commission so that it did not apply to advertisements placed by employers exempted from the prohibition of the Ordinance.

The United Supreme Court recognized the correctness of this Court's modification of the Order so as to narrow its scope and limit its terms to non-exempt job opportunities. Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, supra.

It was in an effort to comply with the instructions of this Court on narrowly drawing this kind of an Order that the Pennsylvania Human Relations Commission created the exemption contained in Conclusion of Law No. 6. The Commission in the consideration of this issue in the preparation of its brief on this appeal has concluded that it was incorrect in creating this exemption in that the terms of the provision of its law here in question, Section 5(g), clearly distinguish this case from the Pittsburgh Press Employment Advertising Discrimination Appeal, supra.

The Pittsburgh Press in the previous case was held to have violated the Pittsburgh Ordinance by aiding and abetting an "employer to publish or cause to be published any advertisement related to employment ... which indicates any discrimination because of race, color, religion, ancestry, national origin or place of birth or sex." Therefore, it was clearly correct to exempt employers who are exempt from the Ordinance. Section 5(g) of the Act, on the other hand, is not based on the Commission having jurisdiction over an employer. It unequivocally declares it to be unlawful for "any individual seeking employment to publish or cause to be published any advertisement which specifies or in any manner expresses his race, color, religious creed,

ancestry, age, sex or national origin or in any manner expresses any limitation or preference as to the race, color, religious creed, ancestry, age, sex or national origin of any prospective employer." There is no way to guarantee that ads directed at or seeking employment from prospective employers who are not within the jurisdiction of the Act will not be written in such general language that it will not be clearly limited to employers or positions not within the jurisdiction of the Act, or will not be directed at employers covered by the Act as well as employers not covered by the Act. Thus, it would appear that the Commission has no authority to in effect authorize certain individuals to continue to place advertisements prohibited under Section 5(g).

For this reason, the Commission respectfully requests this Court to modify the Commission's Final Order to eliminate the exemption provided in Conclusion of Law No. 6.

CONCLUSION

Neither Section 5(e) or Section 5(g) violate the First Amendment constitutional rights of freedom of the press or freedom of speech. "Situation-wanted" ads are a form of commercial speech which does not fall within the protection of the First Amendment. Restrictions on "situation-wanted" ads do not constitute an unconstitutional prior restraint of speech.

Pittsburgh Press has violated Section 5(e) of the Pennsylvania Human Relations Act by publishing "situation-wanted" ads which contain information prohibited by Section 5(g). Publication alone is sufficient to constitute aiding or abetting a violation of Section 5(g); further action by the Press, such as editing the ad placed with it is not necessary.

Section 5(g) furthers the policies of the Pennsylvania Human Relations Act by prohibiting an individual from appealing to the prejudices of prospective employers. It permits the Commission to stop employment discrimination at both ends. The section does not apply to political candidates as they are not seeking to be "employes" in the accepted sense of the term. There is no violation of the substantive due process guarantees of the Fourteenth Amendment because the elimination of discrimination is an important state interest and Section 5(g) is calculated to serve that interest.

The Commission respectfully requests that this Court modify the Commission's Final Order to eliminate the exemption provided in Conclusion of Law No. 6 as it would appear that the Commission has no authority to in effect authorize certain individuals to continue to place advertisements prohibited under Section 5(g).

Respectfully submitted:

Elisabeth S. Shuster

ELISABETH S. SHUSTER
Assistant General Counsel

SANFORD KAHN
General Counsel

Pennsylvania Human Relations Commission

IN THE

COMMONWEALTH COURT

OF PENNSYLVANIA

Pennsylvania Human Relations Commission,

Appellee

vs.

Pittsburgh Press Company, a Corporation,

Appellant.

No. 1275

C.D. 1976

BRIEF FOR THE APPELLANT

Appeal From the Order of the Pennsylvania Human Relations Commission at Docket No. E-8528

Robert H. Shoop, Jr.
THORP, REED & ARMSTRONG
2900 Grant Building
Pittsburgh, Pennsylvania 15219

Attorneys for Appellant,
Pittsburgh Press Company.

TABLE OF CONTENTS

TABLE OF CONTENTS

(continued)

TABLE OF CITATIONS

TABLE OF CITATIONS

(continued)

STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter pursuant to Section 403 of the Act of July 31, 1970 (P.L. 673, No. 223), known as the Appellate Court Jurisdiction Act of 1970 (17 P.S. § 211.403) which gives the Commonwealth Court exclusive jurisdiction of appeals from final orders of administrative agencies.

STATEMENT OF THE QUESTIONS PRESENTED

I. Is the Pittsburgh Press aiding and abetting an unlawful discriminatory practice by publishing situation wanted advertisements?

II. Do Sections 5(e) and 5(g) of the Pennsylvania Human Relations Act violate the First Amendment of the United States Constitution?

III. Does Section 5(g) of the Pennsylvania Human Relations Act violate the substantive due process guarantee of the Fourteenth Amendment of the United States Constitution?

IV. Is Section 5(g) of the Pennsylvania Human Relations Act unconstitutionally overbroad?

STATEMENT OF THE CASE

This is an appeal from an order of the Pennsylvania Human Relations Commission ordering Appellant Pittsburgh Press Company to cease and desist from publishing its "situation-wanted" advertisements (R. 76a). The dispute arose from a Human Relations Commission complaint charging the Press with maintaining "a pattern and practice of aiding and abetting the doing of an unlawful discriminatory act prohibited by Section 5(g) of the Pennsylvania Human Relations Act in that [the Press] prints in its situation-wanted column advertisements which specify or express the race and/or sex of the individuals placing the advertisement" (R. 2a). This publishing was held to be in violation of Section 5(e) of the Act (43 P.S. § 955(e)) which forbids the aiding or abetting of an unlawful discriminatory practice.

The Pittsburgh Press prints a "Situations Wanted" classification within its Classified Advertisement pages as a public service to the readers of the Greater Pittsburgh Metropolitan area (Stip. d, e; R. 9a). The "Situation Wanted" classification is a section in which persons seeking employment describe themselves and/or the type of job which they are seeking (Stip. f; R. 9a). The ads are a service to both prospective employers and employees. The Press accepts and publishes the information exactly as

submitted by the advertiser (Stip. h; R. 10a). It does not maintain sex-based headings or any other headings or make any change in the content of the ads. Similar ads appear in other newspapers within the Commission's jurisdiction (R. 60a-66a).

The Commission recognized that the Press takes no active part in the wording of the advertisements (R. 70a), but found offensive the advertiser's personal references. Examples of ads objected to by the Commission did not state discriminatory preferences, but rather identified the advertiser's sex, race, religion and age (R. 70a).

SUMMARY OF ARGUMENT

The Pittsburgh Press accepts and publishes the situation wanted ads as a public service exactly as they are submitted by the individual advertisers. The act of publication does not constitute aiding, abetting, inciting, compelling or coercing an unlawful discriminatory practice. The Press does not change the wording of the ads, nor does it maintain discriminatory column headings for placement of the ads.

Even though the situation wanted ads involve aspects of commercial speech, they are within the protection of the First Amendment. Under the recent trend of the United States Supreme Court, the ads would be entitled to constitutional protection even if considered to be purely commercial because of the public interest in the factual information conveyed. Interference with the Press' First Amendment freedom to publish by the broad and vague prohibition of the Pennsylvania Human Relations Act is an unconsitutional prior restraint of expression.

Section 5(g) of the Human Relations Act violates the substantive due process guarantee of the Fourteenth Amendment because it interferes with First Amendment freedoms without furtherance of a substantial government interest. Section 5(g) does not foster non-discriminatory employment which is the enunciated

purpose of the Human Relations Act.

Section 5(g) is also void for unconstitutional overbreadth. On its face, the section sweeps political advertising within its scope. Political expression is clearly protected by the First Amendment. Under the recognized constitutional doctrine of overbreadth, such a statute must be held void even though political advertising was not raised in the instant complaint. Standing is expanded in First Amendment cases because of the constitutional prominence of freedom of expression.

ARGUMENT

I. THE PITTSBURGH PRESS IS NOT AIDING AND ABETTING AN UNLAWFUL DISCRIMINATORY PRACTICE BY PUBLISHING SITUATION WANTED ADVERTISEMENTS.

Section 5(e) of the Pennsylvania Human Relations Act (43 P.S. § 955(e)) makes it an unlawful, discriminatory practice:

> For any person, whether or not an employer, employment agency, labor organization, or employee to aid, abet, incite, compel or coerce the doing of an act declared by this section to be an unlawful discriminatory practice...

The Pennsylvania Human Relations Commission has found the Pittsburgh Press to be in violation of the above section by publishing "Situation Wanted" advertisements which "specify or in some manner express" the race, color, religious creed, ancestry, age, sex or national origin of the advertisers in violation of Section 5(g) of the Act (43 P.S. § 955(g)).

The Pittsburgh Press accepts and publishes the situation wanted ads as a public service exactly as they are submitted by the individual advertisers, and without regard to their contents (Stip. h; R. 10a). The Press commits no act in furtherance of an unlawful purpose. In Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973), the newspaper was found guilty of aiding and abetting unlawful discrimination by virtue of its

active maintenance of separate help wanted ad columns designated "Jobs-Male Interest", "Jobs-Female Interest", and "Male-Female Help." The Press would permit the advertiser to select the column within which its ad would be inserted and if no selection was indicated, the Press would make special inquiry of the advertiser and then place the ad accordingly. In the present case, the Press takes no affirmative action to aid the advertisers. It does not maintain sex-based columns or publish headings. It makes no inquiries of the advertisers promoting or suggesting unlawful discrimination.

The Supreme Court, in holding against the Press in the help wanted ad case, stressed the active role of the Press in the discriminatory scheme.

> [T]he practice of placing want ads for non-exempt employment in sex-designated columns did indeed "aid" employers to indicate illegal sex preferences. The advertisements, as embroidered by their placement, signaled that the advertisers were likely to show an illegal sex preference in their hiring decisions. 413 U.S. at 389.

Similarly, this Court held in its opinion of the help wanted ad case, Pittsburgh Press Employment Advertising Discrimination Appeal, 4 Pa. Cmwlth. 448, 463, 287 A.2d 161, 169 (1972):

> What is of importance is that through the use of its arbitrarily selected

> column headings the Pittsburgh Press "aids" such employers to discriminate. When the Pittsburgh Press arbitrarily arranges and publishes such column headings it is aiding in sex discrimination.

It is clear that in the opinions of both this Court and the United States Supreme Court in the Pittsburgh Press case, supra, the presence of column headings and the exercise of independent judgment by the Press concerning ad placement were essential to the finding of aiding and abetting unlawful discrimination. Neither means of active participation is present in the instant case.

The Press, then, does not aid and abet a violation of Section 5(g) of the Act by mere publication of situation wanted ads as they are submitted by advertisers. Furthermore, it does not promote the identified evil aimed at by Section 5(g) and by the Act as a whole, viz, invidious employment discrimination. The publication of one's personal characteristics and qualifications does not enable or even encourage a prospective employer to discriminate in his hiring selection any more than does the preparation of a resume or a personal appearance at an interview. To hold that such a neutral practice as publication of these advertisements aids or abets the unlawful practice of employment discrimination is to mock the intended purpose of the Human Relations Act.

II. SECTIONS 5(e) AND 5(g) OF THE PENNSYLVANIA HUMAN RELATIONS ACT VIOLATE THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

A. "Situation Wanted" Ads Are Entitled to First Amendment Protection.

In Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) the Supreme Court first established the doctrine of commercial speech, holding that the Constitution which restrains governments from interfering with the freedom of speech "imposes no such restraint on government as respects purely commercial advertising." In that case, the Court sustained the application of an ordinance banning the distribution of handbills where a public interest message was appended to the handbill solely to evade the ordinance.

Speech has been held by the United States Supreme Court to be protected by the First Amendment, even though it was paid for, New York Times v. Sullivan, 376 U.S. 254 (1964), sold for a profit, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952), motivated by hope of financial gain, Thomas v. Collins, 323 U.S. 516 (1945), or involved sales or soliciations, Murdock v. Pennsylvania, 319 U.S. 105 (1943). Under these holdings, the fact that the Press' situation wanted ads are paid for by individuals seeking employment does not establish them as purely commercial and outside the protection of the First Amendment.

The Supreme Court has recently limited the commercial speech even further, clearly entitling the situation wanted ads here to First Amendment protection. In Bigelow v. Virginia, 421 U.S. 809 (1975) the Court held that a newspaper editor's First Amendment rights were unconstitutionally abridged by his conviction under a statute making it a misdemeanor to encourage or prompt the procuring of abortions through advertising. The Court referred to Valentine v. Chrestensen, supra, at 819-20:

> [T]he holding is distinctly a limited one: the ordinance was upheld as a reasonable regulation of the manner in which commercial advertising could be distributed. The fact that it had the effect of banning a particular handbill does not mean that Chrestensen is authority for the proposition that all statutes regulating commercial advertising are immune from constitutional challenge. The case obviously does not support any sweeping proposition that advertising is unprotected per se.

Even more recently, in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 96 S.Ct. 1817, 1824 (1976) the Supreme Court noted its trend away from the commercial speech doctrine.

> Since [1951] the Court has never denied protection on the ground that the speech in issue was "commercial speech." That simplistic approach, which by then had come under criticism or was regarded as of doubtful validity by members of the Court, [footnote omitted] was avoided in

> Pittsburgh Press Co. v. Pittsburgh Comm'n. on Human Relations [citation omitted]. [Court's emphasis.]
>
> Last Term, in Bigelow v. Virginia [citation omitted], the notion of unprotected "commercial speech" all but passed from the scene.

In Bigelow v. Virginia, supra, the Court found the crucial element entitling publications to Constitutional protection is not whether it is commercial, but whether it contains some degree of public interest. "The advertisement published in appellant's newspaper did more than simply propose a commercial transaction. It contained factual material of clear 'public interest'." 421 U.S. at 822. The parties have stipulated that the advertisements in the instant matter are published in the public interest (Stip. e; R. 9a). Moreover, the United States Supreme Court has recognized that the advertisements at issue are in the public interest, providing to our society the ability to continue the free flow of commercial information. See, Virginia State Board of Pharmacy v. Virginia Consumer Council, Inc., supra at 1827, where the Court held:

> Generalizing, society also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely "commercial", may be of general public interest. ... Our pharmacist for example could cast himself as a commentator on store-to-store disparities in

> drug prices... We see little point in requiring him to do so, and little difference if he does not.

The Court went on to hold that even advertising that appears tasteless and excessive is dissemination of commercial information which is indispensable to the free enterprise economy.

In Bigelow v. Virginia, supra at 821, the Court cited Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973) for the principle that commercial advertising enjoys a degree of First Amendment protection. In the Pittsburgh Press case the Court sustained an ordinance forbidding newspapers to carry help wanted ads in sex-designated columns. The Court upheld the ordinance against arguments that the exchange of information is as important in the commercial realm as in any other. The Court at 388, reserved judgment on this argument as it may apply in other contexts holding it unpersuasive in the want ads case since "discrimination in employment is not only commercial activity, it is illegal commercial activity under the Ordinance." [Court's emphasis.]

This illegality argument is not applicable in the present case of situation wanted ads. Sex-designated help wanted ads encourage employers to establish a sexual basis of employment discrimination. Situation wanted ads do not. Employers are prohibited from hiring in accordance with a preference based on racial

or sexual classifications. Potential employees are not limited in their selection of a position. The instant ads merely convey factual information concerning the identity of the advertisers.

In the Pittsburgh Press case, supra, neither the section of the ordinance prohibiting sexual discrimination nor that section prohibiting advertisements indicating sexual discrimination were challenged. The Press challenged only the section prohibiting the aiding of violation of the ordinance. Therefore, the illegality argument applied. In the present case, Appellant does challenge Section 5(g) of the Pennsylvania Human Relations Act as unconstitutionally overbroad and unduly interfering with First Amendment freedoms. To hold, therefore, that Appellant is in violation of the Act because its activities are illegal under the Act would be to rely on circular argument.

B. Interference With the Press' Publication of "Situation Wanted" Ads Is an Unconstitutional Prior Restraint of First Amendment Freedoms.

There is a heavy presumption against the constitutional validity of any prior restraint of expression. New York Times v. United States, 403 U.S. 713 (1971); Smith v. California, 361 U.S. 147 (1959); Grosjean v. American Press Co., Inc., 297 U.S. 233 (1936); Near v. Minnesota, 283 U.S. 691 (1931). The blanket prohibitions imposed by Section 5(g) of the Pennsylvania

Human Relations Act, (43 P.S. § 955(g)) require the Press to make judgments concerning advertisements before there has been an adequate determination that the speech involved is, in fact, unprotected. This clearly constitutes a prior restraint on the Press' freedom to publish and is therefore unconstitutional.

Section 5(g) outlaws publication of any indication of race, color, religious creed, ancestry, age, sex, or national origin. Accordingly, the Press would be in violation of the Act if it printed such facts as: an advertiser's name, since this may indicate sex, religion, ancestry or national origin; an advertiser's alma mater, since this may indicate religion or sex; an advertiser's picture; date of birth; date of graduation; or even the advertiser's address since this may indicate race or national origin. The wide scope of the prohibition thus renders it extremely difficult, if not impossible, for the Press to screen potential ads. Moreover, if the Press errs in the inclusion of a seemingly neutral characteristic, it is subject to contempt charges for violation of the Human Relation Commission's order. Under the holding of Near v. Minnesota, supra at 713, "This is of the essence of censorship."

In Smith v. California, supra, the Court again dealt with the problems of imposing censorship on the free press by requiring it to conform to a vague standard. In that case a bookstore

owner was convicted under a California statute outlawing the possession of obscene books with no requirement of scienter. The Court held at 151:

> And this Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser. [Court's emphasis.]

The Smith Court went on to reason that the bookseller's burden would become the public's burden as the public's access to information would be limited by the bookseller's self-censorship compelled by fear of conviction.

The Supreme Court extended its position against prior restraints of First Amendment freedoms in the commercial speech context in Bigelow v. Virginia, 421 U.S. 809, 828 (1975):

> The strength of appellant's interest was augmented by the fact that the statute was applied against him as publisher and editor of a newspaper, not against the advertiser or a referral agency or a practitioner. The prosecution thus incurred more serious First Amendment overtones.

"[T]he special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination

that it is unprotected by the First Amendment,...." Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, supra, at 390. In the case of situation wanted ads, there is more involved than the repetitive conduct of placement of ads and printing of column headings. The content of the ads is sought to be controlled. Conformity with the Commission's order will require significant editorial judgment on the part of the Press as to whether a particular ad includes unlawful reference to race, color, religious creed, ancestry, age, sex or national origin. As hereinabove mentioned, reference to these factors may be subtle, such as in identification of an advertiser's alma mater, and there is considerable danger of restraint of protected expression.

The present case is also one in which, unlike the help wanted ads case, the court is asked to "speculate as to the effect of the publication." In the Pittsburgh Press case, supra at 387-88, the Court held, "By implication at least, an advertiser whose want ad appears in the 'Jobs-Male Interest' column is likely to discriminate against women in his hiring decisions." There is no such implication to be drawn in the present case. Mere publication of one's own personal characteristics and qualifications is not an instrument of employment discrimination. The connection is too remote to even be labelled speculative.

A further distinction may be made between the present case and the Supreme Court's holding in Pittsburgh Press, supra, where no prior restraint was found. In that case the regulation did not impede the paper's ability to publish by imposing a financial burden. No editorial judgment was required. The paper was only ordered to eliminate its sex-based headings. In the present case, significant and costly editorial supervision will be required of the Press. Such an imposition by the government of financial burden upon the press is as much a prior restraint as was the state license tax which was held unconstitutional in Grosjean v. American Press Co., Inc., 297 U.S. 233 (1936). The Court held at 250, "A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."

In the present case, the Pennsylvania Human Relations Commission does seek to fetter the Pittsburgh Press' freedom to publish. Conformance with Section 5(g) of the Act would require the Press to make extensive editorial judgments concerning the content of its situation wanted ads before their publication and before there has been an adequate determination that the content is unprotected speech. This is the essence of unconstitutional prior restraint of expression. This is the essence of censorship.

III. SECTION 5(g) OF THE PENNSYLVANIA HUMAN RELATIONS ACT VIOLATES THE SUBSTANTIVE DUE PROCESS GUARANTEE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Section 5(g) of the Pennsylvania Human Relations Act (43 P.S. § 955(g)) provides that it shall be an unlawful discriminatory practice:

> For any individual seeking employment to publish or cause to be published any advertisement which specifies or in any manner expresses his race, color, religious creed, ancestry, age, sex or national origin, or in any manner expresses a limitation or preference as to the race, color, religious creed, ancestry, age, sex or national origin of any prospective employer.

The Section is violative of the substantive due process guarantee of the Fourteenth Amendment in that it restricts the freedom of the Pittsburgh Press and its advertisers without serving a legitimate governmental interest. The Fourteenth Amendment restricts the power of the states to regulate the liberty of their citizens. When the liberty in jeopardy is a fundamental one, the state must show a compelling state interest to justify its regulation. Roe v. Wade, 410 U.S. 113 (1973), Dunn v. Blumstein, 405 U.S. 330 (1972). Rational relation to a legitimate state interest is required to justify regulation of commercial activity. Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

When First Amendment rights are involved, as in the present case, fundamental freedoms are often intertwined with non-fundamental activities such as the non-speech draft card burning in United States v. O'Brien, 391 U.S. 367 (1968). Nonetheless, the First Amendment aspects of the activity entitle it to due process protection. The O'Brien Court held at 377:

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Even though there are commercial aspects to the situation wanted ads, they must be tested under the O'Brien standard since First Amendment freedoms are involved. As heretofore set forth, the advertisements are within the protection of the First Amendment under the recent decisions of Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 96 S.Ct. 1817 (1976), Bigelow v. Virginia, 421 U.S. 809 (1975) and Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973).

Section 5(g) fails the O'Brien test. It does not further a substantial government interest. The purpose of the Pennsylvania

Human Relations Act is "to foster the employment of all individuals in accordance with their fullest capacities, regardless of their race, color, religious creed, ancestry, age, sex or national origin, and to safeguard their right to obtain and hold employment without such discrimination." 43 P.S. § 952(b). This is a valid and praiseworthy government concern but is not served by Section 5(g) and its ban on individual advertising of situations wanted. The ads here are merely publications of immutable personal characteristics. If prohibitions of these ads is in furtherance of the Human Relations Act goals, then so would be the mailing of employment resumes or even the signature on a letter of application. Surely the Commission would not prevent such activities although the job applicant would be publicizing age, sex, religion, race or national origin.

Moreover, the action of the legislature in prohibiting advertisements which may indicate a person's age, sex, religion, race or national origin may be contravening its own expressed legislative intent. The Commission has issued regulations requiring contractors who are receiving public funds or contributions from the Commonwealth to establish an affirmative action program to eliminate and correct any deficiencies in the hiring or promoting of minority groups or women. 16 Pa. Code, Ch. 49.51 et. seq. In furtherance of this policy the Commission, as well as federal agencies, encourage advertisements in publications having a

demonstrable female and minority readership. Another method frequently used to further this policy is to review the "Situation Wanted" advertisements to determine if females and minorities are available for employment and to determine the types of employment they are seeking.

Further, the Commission has not established by its exhibits any connection between the publication of situation wanted ads and employment discrimination. For the total period covered by the Commission's exhibits, approximately 19% of the sex-indicative words considered objectionable by the Commission referred to the male sex while approximately 14% referred to the female sex. The similarity of the figures indicates that neither group considers itself at a disadvantage to mention sex. When it is considered that there is no way to determine the actual percentage of males and females placing the ads, it becomes even more difficult to draw the conclusion that sex-indicative words in want ads lead to job discrimination.

In Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra, the Supreme Court struck down Virginia's ban on prescription drug advertising even though the ban could arguably serve the state interest of maintaining professionalism among state-licensed pharmacists. The challenge

there as here was based on the First Amendment. The Pittsburgh Press also bases its challenge on the First Amendment and the reasoning of Virginia State Board is applicable. The Court noted that the advertising ban did not directly affect the professional standards involved. The only possible effect would be through "the reactions it is assumed people will have..." 96 S.Ct. at 1829. Similarly, in the present case, the Commission makes the substantial assumption that discrimination will result from reactions to the situation wanted ads. First Amendment freedoms should not be curtailed on the basis of such an attenuated relationship to government interest. The Court concluded in Virginia State Board, supra at 1829:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests only if they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. ... It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.

The government interest in equality of employment opportunity underlying the Pennsylvania Human Relations Act is in no way achieved or even advanced by Section 5(g). Reference to

personal characteristics by potential employees in situation wanted ads do not promote the establishment of discriminating classifications by employers. The absence of these personal references will not prevent an employer from continuing unlawful discrimination. Since Section 5(g) restricts the exercise of First Amendment freedoms while bearing no rational relationship to the elimination of employment discrimination it is unconstitutional as violative of the substantive due process guarantee of the Fourteenth Amendment.

IV. SECTION 5(g) OF THE PENNSYLVANIA HUMAN RELATIONS ACT IS UNCONSTITUTIONALLY OVERBROAD.

Section 5(g) of the Pennsylvania Human Relations Act is void for overbreadth because it sweeps within its scope political campaign advertisements which are undoubtedly protected by the First Amendment. The Section makes it an unlawful discriminatory practice:

> For any individual seeking employment to publish or cause to be published any advertisement which specifies or in any manner expresses his race, color, religious creed, ancestry, age or national origin....

The Commission, in its Order, made only a brief reference to the political candidate question, holding "Advertisements placed by candidates for political offices are not affected by these

Conclusions of Law" (R. 73a). On the contrary, political candidates do fall within the provisions of Section 5(g) and their activities would be limited by any order interpreting that section. There is nothing in Section 5(g), or in the definitions of Section 4 (43 P.S. § 954) to exclude political candidates. "Individual" is not defined in the Act and a standard interpretation would certainly include political candidates. Employers are defined, at Section 4(b) as including "the Commonwealth or any political subdivision or board, department, commission or school district thereof." Again, political employment is apparently contemplated by the Act.

The Press is not limited in its argument to the allegations of the Complaint which refer only to situation wanted ads. The Supreme Court has expressly eliminated such limitations in challenges for facial overbreadth concerning First Amendment freedoms. When the freedom of expression is jeopardized by an overbroad statute, the Court grants standing to a challenge even though the present case may not involve punishment of a protected activity as to this challenger. Gooding v. Wilson, 405 U.S. 518, 521 (1972), Grayned v. City of Rockford, 408 U.S. 104, 114 (1972), Dombrowski v. Pfister, 380 U.S. 479, 486 (1965). This expansion of the standing doctrine is justified by "the transcendent value to all society of constitutionally protected expression." Gooding v. Wilson, supra at 521. The Pittsburgh Press, then, has standing under the

clearly enunciated policy of the Supreme Court to challenge Section 5(g) as it may be applied to political advertisements even though none was mentioned in the Commission's Complaint and even though the Press itself would not be a political candidate.

Once standing is recognized, there is little question that the Press must prevail on the merits of its overbreadth challenge. Campaign advertisements are clearly protected expression under the First Amendment. Buckley v. Valeo, 96 S.Ct. 612 (1976). Political freedom was the cornerstone of the First Amendment from its inception. The commercial nature of campaign advertising does not remove it from Constitutional protection. In Buckley, supra, the Court recognized the Constitutional prominance of political speech and concomitantly, campaign expenditures. The Court held, at 633:

> [T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a non-speech element or to reduce the exacting scrutiny required by the First Amendment.

In New York Times v. Sullivan, 376 U.S. 254 (1964) the Court also held that paid-for political advertising was entitled to the same First Amendment protection as any political expression. Section 5(g) also appears to apply to the use of posters, lapel pins and bumper stickers in its prohibition of "publications". These are

also First Amendment forums which are clearly entitled to Consittutional protection.

V. CONCLUSION.

While it may be said that the goal of the Pennsylvania Act is a laudable one, the action of the Commission in the instant case bears no rational relationship to the evil sought to be eliminated. Some of the greatest dangers to liberty lurk in the assiduous encroachment by men and women of zeal, often well meaning, but without understanding of the problems involved. The actions of the Commission here have encrouched not only in the editorial hand of the newspaper, but the freedom of the individual to express himself.

In the words of Alexander Meiklejohn "The First Amendment was not written primarily for the protection of those intellectual aristocrats who pursue knowledge solely for the fun of the game, whose search for truth expresses nothing more than a private intellectual curiosity or an equally private delight and pride in mental achievement. It was written to clear the way for thinking which serves the general welfare." To uphold the Commission's ruling is to abridge the freedom of our public citizenry

to discourse. The ruling of the Commission must be reversed and its complaint dismissed.

Respectfully submitted,

ROBERT H. SHOOP, JR.

THORP, REED & ARMSTRONG
2900 Grant Building
Pittsburgh, Pennsylvania 15219

(412) 288-7778

Attorneys for Appellant,
Pittsburgh Press Company.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1275 C.D. 1976

PENNSYLVANIA HUMAN RELATIONS COMMISSION,

Appellee,

v.

PITTSBURGH PRESS COMPANY, a corporation,

Appellant.

REPLY BRIEF OF APPELLANT

Appeal from the Decision and Order of the Pennsylvania Human Relations Commission at Commission Docket No. E-8528, July 27, 1976

Robert H. Shoop, Jr.
Jane A. Lewis
THORP, REED & ARMSTRONG
Attorneys for
Pittsburgh Press Company
2900 Grant Building
Pittsburgh, Pennsylvania 15219

(412) 288-7778

TABLE OF CONTENTS

TABLE OF CITATIONS

Other Authority

SECTIONS 5(e) AND 5(g) OF THE PENNSYLVANIA HUMAN RELATIONS ACT VIOLATE THE UNITED STATES CONSTITUTION.

A. Situation Wanted Ads are Constitutionally Protected Speech.

Situation wanted ads are individual expressions of the advertisers' personal characteristics and employment qualifications and are entitled to protection under the First Amendment. The fact that they are paid for does not remove their Constitutional protection. The Commission argues that the situation wanted ads at issue in the present case are not entitled to constitutional protection because they are strictly commercial speech (Appellee's Brief at pp. 6-9, 13). It certainly is questionable to categorize as strictly commercial speech an individual's endeavor to seek employment through the placing of an advertisement.

However, assuming arguendo that we may here be dealing with commercial speech the Commission disregards the most recent pronouncements of the United States Supreme Court and a stipulation of fact in the present case. The Supreme Court held that "the notion of unprotected 'commercial speech' [has] all but passed from the scene." Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 96 S.Ct. 1817 (1976). In that decision and in Bigelow v. Virginia, 421 U.S. 809 (1975), the Court held that public interest is the crucial element in the determination of whether speech is entitled to full constitutional

protection. The parties in the present case have stipulated to the public interest contained in the situation wanted ads.

> "[The Pittsburgh Press] prints, as a public service, on a daily and Sunday basis, within its Classified Advertisement pages, a 'Situation Wanted' classification." [Emphasis added] (Stip. e, R. 9a)

A finding of public interest in the present case is consistent with the recent holdings of the United States Supreme Court. In Virginia State Board of Pharmacy, supra at 1827, the Court recognized the public interest in the free flow of commercial information and granted constitutional protection to the advertisement of prescription drug prices. The Court held that it would not require the advertisers to justify the public interest in their ads by casting them as social commentaries.

Moreover, the Commission continues to speculate that the information in the advertisements is "designed to appeal to the prejudices of prospective employers..." (Appellee's Brief at p. 4). There was no proof offered to butress these unwarranted assumptions. Apparently, it took the Commission over twenty years to even reach these assumptions. It was assumptions and assumed reactions such as these that the Supreme Court in Virginia State Board, supra at 1829, felt could not override an individual's First Amendment rights. The Supreme Court would not prohibit the pharmacists' right to publicize prices merely to prevent a possible lowering of professional standards. Speculation was insufficient jusitifcation for interference with First Amendment rights.

The Commission argues that Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973) is dispositive on the commercial speech issue (Appellee's Brief at p. 9). That case dealt with help wanted ads placed by prospective employers, and even then the Court reserved judgment on the commercial speech question. 413 U.S. at 388. Here we have individuals seeking to be employed. They are not limited in their choice of employment. The publication by an individual of his or her own personal qualifications and characteristics does not promote unlawful discriminatory employment and no evidence has been presented to indicate it does.

B. The Restrictions Imposed by Sections 5(e) and 5(g) of the Pennsylvania Human Relations Act Constitute an Unconstitutional Prior Restraint of Expression.

The Commission argues that restrictions of Sections 5(e) and 5(g) of the Pennsylvania Human Relations Act do not constitute an unconstitutional prior restraint of expression (Appellee's Brief at pp. 12-17). The Commission again disregards Stipulation e (R. 9a) and bases its argument on the contention that situation wanted ads are not entitled to constitutional protection because they do not serve the public interest. Once the public interest of the ads is recognized as stipulated, it is beyond question that the restriction upon them is a prior restraint. Even without public interest, there is a prior restraint since publishers may hesitate to publish what is clearly protected expression out of a fear of penalty.

The Commission compares the present case with that in Pittsburgh Press, supra, where the Court found no prior restraint. This comparison is improper for two reasons. The Court in Pittsburgh Press never made a decision on the public interest issue because the ordinance was unchallenged and therefore the publications were illegal. Furthermore, in Pittsburgh Press, the Court found a practice of placing help wanted ads in sex-designated columns in a "continuing course of repetitive conduct." 413 U.S. at 390. The challenged conduct in the present case, publication of situation wanted ads which in "any manner expresses" the advertisers' race, color, religious creed, ancestry, age, sex or national origin is not repetitive or continuous as is the classifying of ads under sex-designated columns. To conform to the order in the help wanted ads case, the Press was only required to eliminate its column headings. Conformance in the present case requires a case-by-case scrutiny for personal references which may be as subtle as the mention of the advertiser's name.

The difficulty of editorial judgments in the present case would lead the Press to censorship of protected expression which is the essence of prior restraint. Near v. Minnesota, 283 U.S. 691 (1931). As quoted by the Commission (Appellee's Brief at p. 12) the Supreme Court held in Pittsburgh Press, supra at 390:

> "The special vice of a prior restraint is that communication will be suppressed,

> "either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment."

The Commission argues that there is no prior restraint in the present case because Sections 5(e) and 5(g) of the Act "clearly spell out the unlawful references" providing a standard for the Press and therefore, censorship will not result (Appellee's Brief at p. 14). Section 5(g) may not under any interpretation be classified as "clear." It provides that it is an unlawful discriminatory practice:

> "For any individual seeking employment to publish or cause to be published any advertisement which specifies or in any manner expresses his race, color, religious creed, ancestry, age, sex or national origin, or in any manner expresses a limitation or preference as to the race, color, religious creed, ancestry, age, sex or national origin of any prospective employer." [Emphasis added] 43 P.S. §955(g)

The Appellant has already suggested to the Court types of seemingly neutral characteristics such as name, address, alma mater, and date of graduation which may "in any manner" express race, age, sex or national origin (Appellant's Brief at p. 15). The Commission attempts to dismiss this argument by imposing its own qualification to interpret the Act to permit "information that an employer would need to contact the individual" (Appellee's Brief at p. 15). This qualification does not appear in the Act. Information necessary for contact by the employer such as name,

telephone number and address may, and on many occasions does, reflect sex, race or national origin.

The Commission refers to the complete elimination of offensive references from advertisements as "the most rigid position" even though such editing is clearly mandated by the Act (Appellee's Brief at p. 15). The Commission argues that the result of strict compliance with the Act "would only be a minor restriction which could by no means begin to be an unconstitutional restraint of speech" (Appellee's Brief at p. 15). Such a qualification of the First Amendment freedom of speech is constitutionally untenable. There is no such thing as a "minor restriction" of constitutional rights.

The Commission continues its equivocating with First Amendment freedoms by arguing that the Press would not censor its ads since there is no danger of immediate contempt proceedings for an unintentional violation of the Act, but rather, a hearing is provided replete with procedural due process. The self-imposed censorship which constitutes an unconstitutional prior restraint of expression is not affected by the justice of the contempt proceedings. So long as a fear of penalty chills free expression, there is a prior restraint, Smith v. California, 361 U.S. 147 (1959), Near v. Minnesota, supra.

The Commission also attempts to refute the prior restraint argument by contending that the costs imposed upon the Press for

editing the advertisements would be minimal and, therefore, would not chill First Amendment freedoms. Constitutional rights may not be qualified. The Commission cites Wetzel v. Liberty Mutual Insurance Co., 9 E.P.D. §9942 (3rd Cir. 1975) as authority for its contention that a minimal expense is not an infringement of constitutional rights. The Wetzel case did not involve a constitutional issue. In that case, the additional cost defense was rejected where an insurance company tried to justify its policy of excluding pregnancy benefits from its employees' income protection plan. The holding has no bearing in the present case where First Amendment freedoms are jeopardized. Moreover, the Circuit Court's holding in Wetzel is questionable after the United States Supreme Court's recent decision in General Electric Co. v. Gilbert, ___ U.S. ___ (1976). The Supreme Court has held that free expression may not be fettered by imposition of a financial burden. Grosjean v. American Press Co., Inc., 297 U.S. 233 (1936).

The claim of an unconstitutional prior restraint of expression in the present case is strengthened by the Commission's attempt to refute it. The Commission can only argue absence of restraint by modifying the wording of the Act. To justify its defense of the Act, the Commission inserted its own modification that advertisers may include references which are necessary to enable them to be contacted by prospective employers. This modification

emphasizes the absurdity of prohibiting language which refers "in any manner" to one's sex, race, age or national origin in seeking a job. The Commission recognizes by its very argument that such references are inevitable and serve the basic purpose of identifying the advertiser. Nonetheless, such references are clearly prohibited by the Act. The Commission's self-serving interpretation modifies the actual unconstitutional wording of the Act.

Prior restraint is also highlighted by the Commission's modification of fundamental Constitutional law. The Commission concedes the infringement of First Amendment liberties by contending that the infringement "would only be a minor restriction" (Appellee's Brief at p. 15). The Commission further concedes the threat of self-censorship by arguing that Press need not fear an unjust contempt charge for inadvertantly publishing offensive advertisements. The fear of penalty, whether or not fairly imposed, induces the self-censorship which restrains free speech. The Commission continues to disregard the stipulated facts that that "situations wanted" classification is published in the public interest and it is the dissemination of the information contained therein benefits every individual who through the mediums of the newspaper seeks to become an active member of our country's working force.

C. Sections 5(e) and 5(g) of the Pennsylvania Human Relations Act Violate the Substantive Due Process Guarantee of the Fourteenth Amendment Because the Restrictions are Broader than Necessary to Further a Legitimate Government Interest.

The Fourteenth Amendment to the United States Constitution requires that there be a compelling state interest before states may restrict the fundamental liberties of their citizens. Roe v. Wade, 410 U.S. 113 (1973). Even where First Amendment freedoms are mingled with non-fundamental activities, due process demands that any restriction must be no greater than is essential to the furtherance of an important or substantial government interest. United States v. O'Brien, 391 U.S. 367 (1968). Sections 5(e) and (g) of the Pennsylvania Human Relations Act do not pass this test.

The Commission contends that Sections 5(e) and 5(g) are justified by their relation to the elimination of employment discrimination. The Commission quotes from the legislative record to prove that this was the intent behind the adoption of Section 5(g) (Appellee's Brief at p. 21). The intent is a laudable one. However, the legislation cannot survive constitutional scrutiny since the restrictions imposed do not serve this interest directly and extend beyond it, restricting free speech.

Unlike help wanted ads, situation wanted ads are not direct tools in the establishment of discriminatory employment classifications. Help wanted ads are clear expressions of employer preference. Such preference is illegal when based on immutable

personal characteristics. Individuals are not restricted in their selection of employers. Since there is no government interest in controlling job selection, the free exercise of self-expression to that end may not be regulated.

Individuals placing situation wanted ads do so out of a bona fide desire to obtain employment. Often, they are unemployed and subsisting on government assistance. The government must not hamper their efforts to obtain employment by imposing such cryptic and burdensome regulations. Newspaper advertising is a simple and effective means of obtaining employment. It is probably the only effective means of contacting many employers of whom the individual advertiser has no knowledge. The regulation imposed by Section 5(g) renders advertising impractical and ineffective by making it difficult for prospective employers to evaluate and even to contact the advertisers. The information which may be contained in a newspaper advertisement concerning age, sex, race and national origin would certainly be included in other means of obtaining employment, for example, resumes, letters, agency referrals and personal interviews.

D. Section 5(g) of the Pennsylvania Human Relations Act is Unconstitutionally Overbroad Since it Interferes with Political Advertising.

The Commission contends that Section 5(g) of the Act is not overbroad because it does not affect political campaign advertisements. On the contrary, such advertisements are political situation

wanted ads and fall directly within the scope of the Act. In support of its argument, the Commission presents a series of definitions of "employee" from other sources which exclude political figures (Appellant's Brief at p. 24). The only definition which is pertinent in the present case is that included in the Pennsylvania Human Relations Act itself. That definition appears at §4(c) of the Act (43 P.S. §954(c)) and does not exclude political figures even though it consists of other exclusions:

> "(c) The term 'employee' does not include (1) any individual employed in agriculture or in the domestic service of any person, (2) any individual who, as part of his employment, resides in the personal residence of the employer, (3) any individual employed by said individual's parents, spouse or child."

In adopting this section, the Legislature was obviously aware that certain exclusions were appropriate from the definition of employee and would have excluded political persons if it had seen fit. Such was obviously not the legislative intent.

Furthermore, the critical definition in the present case is not that of "employee," but rather, of "individual" since this is the wording of the prohibition of Section 5(g). "Individuals" are prohibited from advertising their personal characteristics in seeking employment. "Individual" is not defined in the Act, but a general definition would certainly include political candidates. Substituting the Act's definition of "person" for "individual" still provides no exclusion for political candidates.

> "(a) The term 'person' includes one or more individuals, partnerships, associations, organizations, corporations, legal representatives, trustees in bankruptcy or receivers. It also includes, but is not limited to, any owner, lessor, assignor, builder, manager, broker, salesman, agent, employe, lending institution and the Commonwealth of Pennsylvania, and all political subdivisions, authorities, boards and commissions thereof." 43 P.S. §954(a)

"Individual" is the appropriate focus in an examination for overbreadth, not only because the Section is so worded but also because the advertisers are not employees at the time the advertisements are placed. They are potential employees, but as advertisers they are private individuals not controlled by any employment regulations. They do not fit in any accepted definitions of employee simply because they are not employed. For this reason, the Commission's proffered definitions are meaningless.

The Commission argues that it would be clear to any potential advertiser that the Act would not apply to political advertisements. This is simply not the case. Nowhere in the Act are political advertisements exempted. Those ads are placed by persons seeking employment and throughout include references to race, age, sex and other personal characteristics. Are not the same concerns that information contained in the advertisements is designed to appeal to prejudices equally applicable to individuals seeking political office?

Furthermore, in light of recent case law, a political advertiser would very likely expect to be regulated by the Human

Relations Act. In Davis v. Passman, ___ F.2d ___ (5th Cir. 1977) the court held that elected officials are very clearly subject to constitutional restraints in the area of civil rights, specifically sex discrimination in employment. Sovereign immunity was held not be insulate a United States Congressman from suit for discriminatory discharge of an employee. The immunity granted political speech was held only to extend to that speech "intimately cognate to the legislative process." Of course, political campaign advertisements are protected speech. Buckley v. Valeo, 96 S.Ct. 612 (1976). However, the limitations imposed by decisions such as Davis could well lead to self-censorship by political advertisers in Pennsylvania. Since there is a potential sanction under the clear language of the Pennsylvania Human Relations Act and since political office holders have been held liable for discriminatory practices, a political advertiser might well expect liability under the Pennsylvania Act. Such self-censorship is an unconstitutional chill of First Amendment freedoms.

Moreover, the Commission has unilaterally requested a modification of its own final order which in effect prevented its application to advertisements for employment outside the jurisdiction of the Commission (Appellee's Brief at pp. 31-33). These exemptions were provided in the original order and are for employers with less than five employees, and religious, fraternal, charitable and sectarian organizations which are not supported in whole or in part, by governmental appropriations (43 P.S. §954(b)).

It is unusual to say the least, for a party to attack its own order prior to a higher authority ruling on the issue. This request for a modification illustrates the obvious confusion which exists within the Commission when on the one hand it refused to apply the terms of the Act to other individuals seeking employment, i.e., political candidates. The Commission recognizes it has no authority to in effect authorize certain individuals to continue to place advertisements prohibited under Section 5(g) and yet attacks only those using the "situated wanted" columns ignoring all other forms of advertising.

CONCLUSION

This Court is here asked to speculate as to the effect of a publication by an individual of certain personal characteristics. We have reached that point that the dissenting Justices of the United States Supreme Court in the Pittsburgh Press case feared would come to pass. The Commission is seeking to prevent individuals seeking employment from publishing their personal characteristics. Next it may prevent individuals from writing letters to the editor of the paper which indicate their dissatisfaction with the Commission rulings. The motives exhibited here have lead in the past to the burning of books and even to the burning of witches. The Court must remember the history that precedes its decision in this case.

Respectfully submitted,

Robert H. Shoop, Jr.
Jane A. Lewis
THORP, REED & ARMSTRONG
2900 Grant Building
Pittsburgh, Pennsylvania 15219

Attorneys for Appellant.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

PENNSYLVANIA HUMAN RELATIONS COMMISSION, Complainant	)	
VS.	)	DOCKET NO. E-8528
PITTSBURGH PRESS COMPANY, A CORPORATION, Respondent	)	

BRIEF IN SUPPORT OF THE COMPLAINT

Gary L. Lancaster
Assistant General Counsel
Pennsylvania Human Relations Commission

Pennsylvania Human Relations Commission
Room 810, 4 Smithfield Street
Pittsburgh, Pennsylvania 15222

INDEX TO BRIEF

HISTORY OF THE CASE

The Pennsylvania Human Relations Commission's initiated Complaint alleges that the Respondent has aided the doing of an unlawful discriminatory act in violation of section 5(e) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744 as amended. The Respondent was duly served with copies of the Complaint but filed no answer. An investigation into the allegations of the Complaint was made by representatives of the Pennsylvania Human Relations Commission, and a determination was made that there was probable cause to credit the allegations therein. Thereupon, the Commission endeavored to eliminate the unlawful practices complained of by conciliation. This endeavor was unsuccessful, and on August 6, 1975, a Public Hearing was convened in Pittsburgh pursuant to section 9 of the Pennsylvania Human Relations Act.

SUMMARY OF ARGUMENT

I. The Respondent maintains a pattern and practice of aiding and abetting the doing of an unlawful discriminatory act, prohibited by section 5(g) of the Pennsylvania Human Relations Act, in that the Respondent prints in its "Situations Wanted" column advertisements which specify or express the race and/or sex of the individual placing the advertisement.

II. The fact that other newspapers carry "Situations Wanted" classifications which indicate the race and/or sex of the one placing the ad is not a defense for the Respondent.

ARGUMENT

I. The Respondent maintains a pattern and practice of aiding and abetting the doing of an unlawful discriminatory act, prohibited by Section 5(g) of the Pennsylvania Human Relations Act, in that the Respondent prints in its "Situations Wanted" column advertisements which specify or express the race and/or sex of the individual placing the advertisement.

The "Situations Wanted" column of the Pittsburgh Press is a section of the classified advertising pages in which persons seeking employment describe themselves and/or the type of job to which they are seeking. (Stipulation 1-f). It is uncontroverted that many of the advertisements found in the "Situations Wanted" column specify the race and/or sex of the prospective employee placing the advertisement:

> PAROLEE - WHITE, needs employment to be released. Licensed steam boiler & eng. Press Box L-784
>
> WHITE WOMAN - desires day work, office cleaning. 231-0208
>
> MAN - Desires full-time maintenance or janitorial work, not in restaurant or saloon. 828-9254. Exhibit A-1.[1]

---

[1]The three advertisements are intended as examples of the unlawful advertisements. A review of Exhibits A-1 through A-28 will reveal many instances of similar advertisements.

Each of the individuals who caused these advertisements to be published in the "Situations Wanted" column is in violation of section 5(g) of the Pennsylvania Human Relations Act. Section 5(g) provides that it shall be an unlawful discriminatory practice:

> (g) For any individual seeking employment to publish or cause to be published any advertisement which specifies or in any manner expresses his race, color, religious creed, ancestry, age, sex or national origin, or in any manner expresses a limitation or preference as to the race, color, religious creed, ancestry, age, sex, or national origin of any prospective employer.

As previously noted, the Complaint alleges that the Respondent is in violation of section 5(e) of the Act. Section 5(e) provides that it shall be an unlawful discriminatory practice:

> (e) For any person, whether or not an employer, employment agency, labor organization or employe, to aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, or to obstruct or prevent any person from complying with the provisions of this act or any order issued thereunder, or to attempt, directly or indirectly, to commit any act declared by this section to be unlawful discriminatory practice.

The Respondent has violated section 5(e) by using its facilities and equipment to print the unlawful advertisements (Stipulation 1-e) and by distributing those ads in the daily and Sunday editions of the newspaper. (Stipulation 1-d, 1-c).

The Respondent in oral argument has asserted that it has not

aided the doing of an unlawful act in that it only accepts and publishes the data as submitted by the individual advertiser. (T-13) (See Stipulation 1-h). This is a strained interpretation, for as previously noted, the Respondent accepts these unlawful advertisements, it uses its machines and facilities to print the unlawful advertisements, and it distributes the unlawful advertisements to the public. Clearly, this has aided the individual advertiser in the purest sense of the word.

It must be pointed out that the Respondent's policy with regard to the entire newspaper is not at issue. The Complaint is quite explicit in limiting the allegations to the "Situations Wanted" column. Thus, those advertisements found in Exhibits A-29 through A-33, consisting of political advertisements, should not be considered by the Commission in its deliberations. It would clearly be inadvisable for the Commission to decide questions beyond those raised by the Complaint, moreover, it is questionable whether the Commission even has the authority to take any action with regard to Respondent's policies which are not delineated in the allegations of the Complaint. See Pennsylvania Human Relations Commission vs. U. S. Steel Corp., Pa. 325 A.2d 910(1974). The Respondent, by alluding to these political advertisements, has merely attempted to draw the Commission away from the real issue. Moreover, assuming arguendo that the Commission could address itself to these political advertisements, they would have no

import on the issues involved, for a candidate for political office certainly is not "seeking employment" within the meaning of section 5(g) of the Pennsylvania Human Relations Act and thus, these advertisements are not illegal.

II. The fact that other newspapers carry "Situations Wanted" classifications which indicate the race and/or sex of the one placing the ad is not a defense for the Respondent.

The advertisements appearing in Exhibits B-1 through B-7 are examples of advertising found in "Situations Wanted" columns of other newspapers within the Commonwealth and surrounding states. The Commission certainly should be aware that the practice of printing these illegal advertisements is a wide-spread problem, nevertheless, even though other newspapers are openly violating the Pennsylvania Human Relations Act and have been for some time, this does not aid the Respondent's case.

> "We choose, however, to conclude that civil rights are not lost by historical default; that error compounded by error remains nonetheless error." Commonwealth v. Franklin, 172 Pa.Super. 152(1952)

Section 9 of the Pennsylvania Human Relations Act provides in pertinent part:

> If, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in or is engaging in any unlawful discriminatory practice as defined in this act, the Commission shall state its findings of fact, and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice...

Under this clear mandate from the Legislature, the Commission cannot accept and sustain the practices of the Respondent merely because

they are being practiced by others in the trade. An analogous situation would be presented were a person accused of robbing a bank defended himself on the basis that others have robbed banks as well and were not apprehended. Clearly, a criminal court would not countenance such a defense in the enforcement of the criminal statutes and neither should the Commission in upholding its mandate to enforce the provision of the Pennsylvania Human Relations Act.

CONCLUSION

The record compels a finding that the Respondent has aided individuals in printing and distributing advertisements in the "Situations Wanted" column of the Pittsburgh Press which indicate the race and/or sex of the one placing the advertisement. Such advertisements are expressly prohibited in section 5(g) of the Pennsylvania Human Relations Act, and the Respondent in aiding those individuals has violated section 5(e). The Pennsylvania Human Relations Commission in pursuing its mandate to enforce the provisions of the Pennsylvania Human Relations Act must find the Respondent in violation of the Pennsylvania Human Relations Act and order it to cease and desist its unlawful practices.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

PENNSYLVANIA HUMAN RELATIONS COMMISSION, Complainant	:	
vs.	:	DOCKET NO. E-8528
PITTSBURGH PRESS COMPANY, A CORPORATION, Respondent	:	

HISTORY OF THE CASE, FINDINGS OF FACT, CONCLUSIONS OF LAW, COMMISSION'S DECISION AND FINAL ORDER

HISTORY OF THE CASE

The Pennsylvania Human Relations Commission (hereinafter the "Commission") initiated a complaint on March 11, 1975 at Docket No. E-8528 charging that the Respondent Pittsburgh Press Company "maintains a pattern and practice of aiding and abetting the doing of an unlawful discriminatory act prohibited by Section 5(g) of the Pennsylvania Human Relations Act in that Respondent prints in its situation-wanted column advertisements which specify or express the race and/or sex of the individual placing the advertisement." The complaint charged that this conduct was in violation of Section 5(e) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §951 et seq, (the "Act"). Section 5(e) of the Act provides in its pertinent part:

> It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, or in the case of a fraternal corporation or association, unless based upon membership in such association or corporation or except

> where based upon applicable security regulations established by the United States of the Commonwealth of Pennsylvania ... for any person, whether or not an employer, employment agency, labor organization or employe, to aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice ...

Section 5(g) of the Act provides that is unlawful

> for any individual seeking employment to publish or cause to be published any advertisement which specifies or in any manner expresses his race, color, religious creed, ancestry, age, sex or national origin, or in any manner expresses a limitation or preference as to the race, color, religious creed, ancestry, age, sex or national origin of any prospective employer.

An investigation by the Commission staff determined that there was probable cause to credit the allegations of the complaint, whereupon the Commission endeavored to eliminate the unlawful pattern and practice complained of by conciliation. Conciliation having failed, the Commission convened a public hearing on August 6, 1975 pursuant to Section 9 of the Act. The Hearing Panel consisted of Commissioner Elizabeth M. Scott, Chairperson of the Panel, and Commissioners Robert Johnson Smith and John P. Wisniewski. Gary L. Lancaster, Esquire, Assistant General Counsel in the Pittsburgh Regional Office of the Commission, presented the case in support of the complaint.

Robert H. Shoop, Jr., Esquire, of Thorpe, Reed, and Armstrong, represented the Respondent. Elisabeth S. Shuster, Assistant General Counsel in the Harrisburg Headquarters Office of the Commission sat as Legal Advisor to the Hearing Panel.

Counsel for the parties entered into written stipulations which were entered into the record at the public hearing along with exhibits A1 through A33 and B1 through B7.

The Hearing Panel, upon consideration of oral argument and the record and the briefs submitted subsequent to the hearing by counsel for the parties,unaminously recommended that the full Commission find in favor of the Complainant.

FINDINGS OF FACT

1. The Complainant is the Pennsylvania Human Relations Commission, an administrative agency established by the Pennsylvania Human Relations Act and charged with effectuating the purposes of the Act, and empowered to initiate complaints charging violations of the Act.

2. The Respondent is the Pittsburgh Press Company, a corporation located at 34 Boulevard of the Allies, Pittsburgh, Pennsylvania.

3. The Respondent publishes a daily newspaper of general circulation called the Pittsburgh Press (hereinafter "the Press").

4. The Press accepts and publishes in its pages so-called "situation-wanted" advertisements from individuals seeking employment.

5. The Press accepts and publishes these advertisements in the language as submitted by these individuals and without regard to whether the content of the advertisement conforms with Section 5(g) of the Act.

6. Many of these advertisements specify or in some manner express the race, color, religious creed, ancestry, age, sex or national origin of the individual seeking employment.

7. Examples of the advertisements referred to in Finding of Fact No. 6 are:

a. College grad - Born again Christian with Bachelor's Degree and seven yrs. sales and marketing management experience seeking work with Christian business or organization. (Stipulated Exhibit "A-1").

b. White woman, desires day work, office cleaning. (A-1)

c. Parolee-White needs employment to be released. Licensed steam boiler and engineer. (A-1)

d. Salesman - Age 30, looking for career in Pittsburgh, start immediately, 15 years sales experience. (A-1)

e. What can I do for you? Recent college grad, good looking, twenty-five years old, B.S. in Business Administration, seeks entry level management position ...(A-8).

f. Man, mature, accounting, bookkeeping, office management, desires position in these or related fields. (A-23).

8. The Respondent engages in a pattern and practice of publishing "situation-wanted" advertisements from individuals seeking employment which specify or in some manner express the race, color, religious creed, ancestry, age, sex or national origin of the individual placing the advertisement.

9. This pattern and practice engaged in by the Respondent aids and abets the doing of the act declared to be an unlawful discriminatory practice by Section 5(g) of the Act.

10. This pattern and practice engaged in by the Respondent also aids and abets discrimination in hiring declared to be an unlawful discriminatory practice by Section 5(a) of the Act.

11. The Commission has not alleged that advertisements placed by candidates for political office violate any provisions of the Act.

CONCLUSIONS OF LAW

1. At all times herein mentioned the Commission had and still has jurisdiction over the Respondent and the subject matter of the complaint herein pursuant to the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended.

2. Subject to limitations described generally in Conclusions of Law No. 6, situation-wanted advertisements which specify or in any manner express the race, color, religious creed, ancestry, age, sex or national origin of the individual seeking employment are in violation of Section 5(g) of the Act.

3. Such advertisements are not protected by the First Amendment to the Constitution of the United States.

4. The conduct of the Respondent in engaging in a pattern and practice of publishing such situation-wanted ads is not protected by the First Amendment to the Constitution of the United States.

5. The Respondent's conduct in publishing situation-wanted advertisements the contents of which are in violation of Section 5(g) of the Act is in violation of Section 5(e) of the Act.

6. Not all situation-wanted advertisements which specify or express in some manner the race, color, religious creed, ancestry, age, sex or national origin of an individual seeking employment are in violation of Section 5(g). Those advertisements clearly directed at or seeking employment from prospective employers who are not within the jurisdiction of the Act are not unlawful.

> For example, an employer to be within the jurisdiction of the Act must employ four or more persons within the Commonwealth. An individual employed in agriculture or domestic service or who resides in the personal residence of the employer is not covered.

> On the other hand, an advertisement which specifies or otherwise expresses any of the prohibited information and which is written in such general language that it is not clearly limited to employers or positions not within jurisdiction of the Act, or is directed at employers covered by the Act as well as employers not covered, is unlawful.

7. Advertisements placed by candidates for political offices are not affected by these Conclusions of Law.

RECOMMENDATION OF HEARING COMMISSIONERS

AND NOW, this 27th day of June, 1976, upon consideration of the record of the public hearing and the arguments of Counsel and briefs submitted by the parties and the proposed History of the Case, Findings of Fact and Conclusions of Law, the Hearing Commissioners recommend to the Commission that an order be entered against the Pittsburgh Press Company finding that it has violated Section 5(e) of the Act and providing for appropriate relief.

ELIZABETH M. SCOTT
CHAIRPERSON

ROBERT JOHNSON SMITH

JOHN P. WISNIEWSKI

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

PENNSYLVANIA HUMAN RELATIONS COMMISSION, Complainant	:	
vs.	:	DOCKET NO. E-8528
PITTSBURGH PRESS COMPANY, A CORPORATION, Respondent	:	

COMMISSION'S DECISION

AND NOW, this 27th day of June, 1976, upon consideration of the record of the case, the briefs submitted by the parties, the History of the Case, Findings of Fact and Conclusions of Law and the Recommendation of Hearing Commissioners, the Pennsylvania Human Relations Commission finds and determines that the Respondent, Pittsburgh Press Company, has violated Section 5(e) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, in that it engages in a pattern and practice of accepting and publishing "situation-wanted" advertisements from individuals seeking employment which specify or in some manner express the race, color, religious creed, ancestry, age, sex or national origin of such individuals, thus aiding and abetting these individuals to violate Section 5(g) of the Act.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

ATTEST:

Elizabeth M. Scott
Secretary

By: Joseph X. Yaffe
Chairperson

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

PENNSYLVANIA HUMAN RELATIONS COMMISSION, Complainant	:	
vs.	:	DOCKET NO. E-8528
PITTSBURGH PRESS COMPANY, A CORPORATION, Respondent	:	

FINAL ORDER

AND NOW, this 27th day of June 1976, upon consideration of the foregoing History of the Case, Findings of Fact, Conclusions of Law and Recommendation of the Hearing Commissioners and pursuant to Section 9 of the Pennsylvania Human Relations Act, the Pennsylvania Human Relations Commission hereby

O R D E R S :

1. The Respondent shall case and desist from publishing "situation-wanted" advertisements the contents of which are prohibited by Section 5(g) of the Act.

2. The provisions of this order shall be effective immediately.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

ATTEST:

Elizabeth M. Scott
Secretary

By: Joseph X. Yaffe
Joseph X. Yaffe
Chairperson

The Supreme Court of Pennsylvania
Western District

SALLY MRVOS
PROTHONOTARY
IRMA T. GARDNER
DEPUTY PROTHONOTARY

801 CITY-COUNTY BUILDING
PITTSBURGH, PA.
15219

January 24, 1979

Robert S. Mirin, Esquire
Pa. Human Relations Commission
100 N. Cameron Street
Harrisburg, Pa. 17101

John E. Benjes, Esquire
301 Muench Street
Harrisburg, Pa. 17102

In Re: Pa. Human Relations Commission v. Pgh. Press Co.
No. 42 March Term, 1978

Dear Messrs. Mirin and Benjes:

Enclosed is a copy of the opinion filed today, together with the judgment order which was entered today.

Very truly yours,

Irma T. Gardner

DEPUTY PROTHONOTARY

Enclosures
cc: Robert H. Shoop, Jr., Esquire
Thorp, Reed and Armstrong
2900 Grant Building
Pittsburgh, Pa. 15219

Honorable James S. Bowman
for Hon. Harry A. Kramer
President Judge, Commonwealth Court
622 South Office Building
Harrisburg, Pa. 17120

SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA PENNSYLVANIA HUMAN RELATIONS COMMISSION, Appellant v. PITTSBURGH PRESS COMPANY	:	NO. 42 MARCH TERM, 1978

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the COMMONWEALTH COURT OF PENNSYLVANIA, be, and the same is hereby affirmed.

BY THE COURT:

Sally Mrvos

Sally Mrvos, Esquire
Prothonotary

Dated: January 24, 1979

[262]

IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA PENNSYLVANIA HUMAN RELATIONS COMMISSION,	:	No. 42 March Term, 1978
APPELLANT	:	Appeal from the Order of the Commonwealth Court of Pennsylvania at No. 1275 C. D. 1976 reversing the Order of the Pennsylvania Human Relations Commission at Commission Docket No. E-8525
V.	:	
PITTSBURGH PRESS COMPANY,	:	
APPELLEE	:	

OPINION

FILED: JAN 24 1979

JUSTICE MANDERINO

This appeal is from the order of the Commonwealth Court reversing the order of the Pennsylvania Human Relations Commission (Commission), and declaring unconstitutional that portion of Section 5(g) of The Pennsylvania Human Relations Act, 43 P. S. § 955(g). Section 5(g) prohibits the publication of advertisements for employment expressing the race, color, religious creed, ancestry, age, sex, or national origin of the advertiser. Pittsburgh Press Co. v. Comm., Human Relations Commission, 31 Pa. Commonwealth Ct. 218, 376 A.2d 263 (1977).

The circumstances surrounding this appeal are as follows. On March 15, 1975, the Commission charged the Pittsburgh Press Company (Press) with "maintain[ing] a pattern and practice of aiding and abetting the doing of an unlawful discriminatory act" in violation of Section 5(e) of The Pennsylvania Human Relations Act. According to the Commission, the Press violated Section 5(e) of the Act by publishing "situation wanted" advertisements alleged to be unlawful under Section 5(g) because the ads identified the advertiser's sex, race, religion, or age.

The Pittsburgh Press is a newspaper of general circulation throughout the greater Pittsburgh metropolitan area. The "situation wanted" section of the Press' classified advertisements provides a vehicle for persons seeking employment to describe themselves, their job qualifications, and the kind of employment they are seeking. The Press accepts and publishes these ads exactly as submitted by the advertisers.

On June 27, 1975, following an investigation from which the Commission determined that there was probable cause to credit the allegations contained in the complaint referred to above, the Commission issued a final order requiring the

Press to cease and desist from publishing "situation wanted" advertisements, the contents of which are prohibited by Section 5(g).

On appeal, the Commonwealth Court reversed the Commission's final order, and ruled that Sub-section 5(g) was unconstitutional. We granted the Commission's petition for allowance of appeal, and this appeal followed.

The Pennsylvania Human Relations Act, Act of October 27, 1955, P. L. 744, § 1, as amended 43 P. S. §§ 951, et seq., establishes it as

> "...the public policy of this Commonwealth to foster the employment of all individuals in accordance with their fullest capacities regardless of their race, color, religious creed, ancestry, handicap or disability, use of guide dogs because of blindness of the user, age, sex, or national origin, and to safeguard their right to obtain and hold employment without such discrimination, to assure equal opportunities to all individuals and to safeguard their rights at places of public accommodation and to secure commercial housing regardless of race, color, religious creed, ancestry, sex, handicap or disability, use of guide dogs because of blindness of the user or national origin."

To further this public policy, Section 5 of the Act makes certain discriminatory employment practices unlawful. 43 P. S. § 955(a) through (j). Among other things, in 5(g), the Act makes it unlawful employment discrimination

> "[f]or any individual seeking employment to publish or cause to be published any advertisement which specifies or in any manner expresses his race, color, religious creed, ancestry, age, sex or national origin, or in any manner expresses a limitation or preference as to the race, color, religious creed, ancestry, age, sex or national origin of any prospective employer."
>
> 43 P. S. § 955(g).

Section 5(e) also makes it unlawful

> "[f]or any person, whether or not an employer, employment agency, labor organization or employe, to aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice,...."

The Commission found that by accepting and presenting "situation wanted" advertisements which included references to the criteria declared unlawful by Section 5(g), the Press had "aided and abetted" the unlawful employment practice proscribed by that section, the Press was therefore found to be in violation of Section 5(e).

The Commonwealth Court recognized that the advertisements which formed the basis of the Commission's complaint clearly violated Section 5(g):

"An indication of the type of advertisement found by the Commission to violate Section 5(g) can be ascertained from the specific examples set forth in the Hearing Panel's findings of fact. These examples were drawn from stipulated exhibits which included the Press' 'Situation Wanted' columns from Sunday, June 1, 1975 to Thursday, June 26, 1975:

> ' COLLEGE GRAD-Born again Christian with Bachelor's Degree and seven yrs. sales and marketing mgmt. experience seeking work with Christian business or organization . . . .'
>
> 'White woman-desires day work, office cleaning.'
>
> 'Parolee-White needs employment to be released. Licensed steam boiler and engineer ....'
>
> 'Salesman-Age 30, looking for career in Pittsburgh, start immediately, 15 years sales experience....'
>
> 'What can I do for you? Recent college grad, good looking, twenty-five years old, B.S. in Business Administration, seeks entry level management position.'
>
> 'Man-mature, accounting, bookkeeping, office management, desires position in these or related fields.'

It is obvious at a glance that the contents of these advertisements are in contravention of the letter of Section 5(g)."

(Footnotes omitted.)

31 Pa. Commonwealth Ct. at 223, 376 A.2d at 265.

The Press did not contend otherwise before the Commonwealth Court, nor does it so contend here. The Press argues, however, that Section 5(g) unlawfully infringes on First Amendment rights. We agree with the Commonwealth Court that the advertiser's rights, as guaranteed by the First Amendment to the United States Constitution, are improperly restricted by the prohibition of Section 5(g).

We therefore affirm the order of the Commonwealth Court.

The Press did not contend before the Commonwealth Court that the state may not prohibit discriminatory employment practices. It argued, however, that the restriction on freedom of expression contained in Section 5(g) is not necessary to promote that legitimate state objective. We agree with the Press that the Commission has not shown that the prior restraint of Section 5(g) is necessary to promote this legitimate state interest. The Commission argued that this case is controlled by Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U. S. 376, 37 L. Ed. 2d 669, 93 S. Ct. 2553 (1973) (Press I). The Press argues that in light of more recent pronouncements of the United States Supreme Court, Press I is no longer viable law. We need not decide this point, however, because unlike the situation in Press I, what the Commission seeks to do in this case is to restrict the expression of the advertiser itself, rather than to restrict the unlawful activity of employment discrimination. While it held that legitimate regulation of an unlawful activity may incidentally effect an advertiser's right to freedom of expression, Press I does not stand for the proposition that prior restraint may be imposed on commercial speech even though that speech does not propose an illegal transaction.

The United States Supreme Court has, of course, said that it is permissible to regulate commercial advertising in some ways: "[a]dvertising that is false, deceptive, or misleading...is subject to restraint" Bates v. State Bar of Arizona, 433 U. S. 350, 383, 53 L. Ed. 2d 810, 835, 97 S. Ct. 2691, ____ (1977); Virginia Pharmacy Board v. Virginia Consumer Council, 425 U. S. 748, 48 L. Ed. 2d 346, 96 S. Ct. 1817 (1976); as is purely commercial advertising concerning transactions

that are themselves illegal, Bates v. State Bar of Arizona, supra; Press I, supra. Similarly, reasonable restrictions may be placed upon the time, place, and manner of advertising Virginia Pharmacy Board, supra; and special restrictions may be allowable with regard to advertising on the electronic broadcast media, cf. Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 882 (D. C. 1971), aff'd sub nom Capital Broadcasting Co. v. Acting Attorney General, 405 U. S. 1000, 31 L. Ed. 2d 472, 92 S. Ct. 1289 (1972).

The restriction imposed by Section 5(g), however, goes directly to the advertiser's right to freely express his or her job qualifications, abilities, personal experience, or educational history. In Press I, the employer's placement of "Help-wanted" containing sex preference designations constituted an act of illegal sex discrimination in the hiring of personnel. As a result, the Supreme Court said in Press I, that

> "[a]ny First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity."
>
> 413 U. S. at 389, 37 L. Ed. 2d at 679, 93 S. Ct. at __ .

In contrast to the advertising employer's illegal, sex-based, employment discrimination in Press I, in the instant case the advertisers are prospective employees proposing commercial transactions - their own employment - which are not illegal. By its terms, the Act applies to employers, and those who aid and abet employers to practice employment discrimination. In Press I the Act clearly proscribed the underlying activity - sex based discrimination by the employer - and by providing sex-designated Help-wanted columns in its classified advertising section, the Press directly aided and abetted such employers' practice of sex based employment discrimination. Indeed, the Press did not challenge the illegality of the underlying acts in Press I. In the present case, the "situation wanted" ads propose no illegal transactions, they simply ask that prospective employers hire the respective individual advertisers. The prospective employees' use of prohibited employment criteria in an advertisement cannot reasonably be said to aid an employer who might be predisposed to utilize such forbidden criteria. Knowledge of such forbidden criteria - age, sex, race, color, etc., - is readily obtainable by the employer simply by scheduling a pre-employment interview, or by requesting submission of an employment resume. Any effect that enforcement of Section 5(g) might have on reducing employment discrimination made illegal by Section 5(e) is thus too speculative to justify Section 5(g)'s direct restriction on the advertiser's freedom of expression.

As was stated by the United States Supreme Court in Linmark Associates, Inc. v. Willingboro, 431 U. S. 85, 92 ft.n.6, 52 L. Ed. 2d 155, 161 ft.n. 6, 97 S. Ct. 1614, ____ (1977):

> "After Virginia Pharmacy Bd. [v. Virginia Consumer Council, 425 U. S. 748, 48 L. Ed. 2d 346, 96 S. Ct. 1817 (1976)] it is clear that commercial speech cannot be banned because of an unsubstantiated belief that its impact is detrimental."

In Linmark, the record failed to support the township's assumption that proscribing the placement of "for sale" signs in front of township homes would reduce public awareness of realty sales and thereby decrease public concern over selling. Likewise, in the instant case, the record fails to establish the statutory assumption contained in 5(g) that because of the revelation of supposed illegal employment criteria contained in the prohibited "situation wanted" ads, employers would be more likely to base their hiring decisions on such illegal criteria.

Order of the Commonwealth Court is affirmed.

Former Justice Pomeroy did not participate in the decision of this case.

Mr. Justice Roberts filed a concurring opinion.

Mr. Justice Nix filed a dissenting opinion.

[262]

IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA PENNSYLVANIA HUMAN RELATIONS COMMISSION,	:	No. 42 March Term, 1978
APPELLANT	:	Appeal from the Order of the Commonwealth Court of Pennsylvania at No. 1275 C. D. 1976 reversing the Order of the Pennsylvania Human Relations Commission at Commission Docket No. E-8525
V.	:	
PITTSBURGH PRESS COMPANY,	:	
APPELLEE	:	

CONCURRING OPINION

FILED: JAN 24 1979

ROBERTS, J.

In my view, Section 5(e) of the Human Relations Act,[1] 43 P.S. §955e (1964),[2] insofar as it authorizes the Pennsylvania Human Relations Commission's order directing the Pittsburgh Press to cease and desist publication of "situation wanted" advertisements, is unconstitutional under article I, section 7 of the Pennsylvania Constitution.[3] As Mr. Justice Stewart observed:

---

1. Act of October 27, 1955, P.L. 744, as amended.

2. §5(e) makes it unlawful "[f]or any person...to aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice...."

3. Pa. Const., Art. I, § 7, provides:
(continued on page 2)

> "If government can dictate the layout of a newspaper's advertising pages today, what is there to prevent it from dictating the news pages tomorrow? ...
>
> [T]he constitutional guarantee of a free press is more than precatory....[I]t is a clear command that government must never be allowed to lay its heavy editorial hand on any newspaper in this country."

Pittsburgh Press Company v. Pittsburgh Commission on Human Relations, 413 U.S. 376, 403-4, 93 S.Ct. 2553, 2568 (1973) (Stewart, J., dissenting, joined by Douglas, J. and specially joined by Blackmun, J.). See generally, William Goldman Theatres v. Dana, 405 Pa. 83, A.2d (1961) (Pa. Const. art. I, §7 bars prior restraints). The Commonwealth Court properly reversed the order of the Pennsylvania Human Relations Commission. I therefore join the Court's affirmance.

---

3. (continued from page 1)
"[T]he printing press shall be free to every person who may undertake to examine the proceedings of the legislature or any branch of government, no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty...."

[J-262]
IN THE SUPREME COURT OF PENNSYLVANIA
Western District

COMMONWEALTH OF PENNSYLVANIA PENNSYLVANIA HUMAN RELATIONS COMMISSION, Appellant	:	No. 42 March Term, 1978
V.	:	Appeal from the Order of the Commonwealth Court of Pennsylvania at No. 1275 C.D. 1976, reversing the Order of the Pennsylvania Human Relations Commission at Commission Docket No. E-8525.
PITTSBURGH PRESS COMPANY	:	

DISSENTING OPINION

FILED: JAN 24 1979

NIX, J.

In Pittsburgh Press Co., v. Human Relations Commission, 413 U.S. 376, 93 S. Ct. 2553, 37 L.ed. 2d 669 (1973) (Press I), the United States Supreme Court held an order prohibiting a newspaper from publishing sex-designated advertisements by employers offering employment not to be violative of the first amendment of the federal constitution. Today, a majority of this Court has found the prohibition of situations wanted advertisements identifying the race, color, religious creed, age and sex of the applicant under circumstances prohibited by the Human Relations Act, Act of Oct. 27, 1955, 43 P.S. §951, et seq. (Supp. 1978-79), P.L. 744, as amended, to be impermissible under the first amendment. To reach this startling result, the majority has given Press I an unwarrantedly narrow interpretation and has read into the recent decision of the United States Supreme Court in the commercial speech area unjustified implications. The majority in its zeal to extend the protection to be given commercial speech, totally ignores this Commonwealth's strong commitment to an egalitarian society. See e.g. Pa. Const. Art. I §28. I therefore must express my most vehement disagreement.

In Press I, the United States Supreme Court avoided the level of protection commercial speech should be accorded by noting:

> [9] Whatever the merits of this contention may be in other contexts, it is unpersuasive in this case. Discrimination in employment is not only commercial activity, it is illegal commercial activity under the Ordinance. We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes. Nor would the result be different if the nature of the transaction were indicated by placement under columns captioned "Narcotics for Sale" and "Prostitutes Wanted" rather than stated within the four corners of the advertisement.
>
> The illegality in this case may be less overt, but we see no difference in principle here. Sex discrimination in nonexempt employment has been declared illegal....
> 413 U.S. at 388 (emphasis in original) (citations omitted)

The Pennsylvania Human Relations Act, supra, announced unequivocally that the practice or policy of discrimination in employment by reason of race, color, religious creed, ancestry, age, sex or national origin is violative of the public policy of this Commonwealth. Section 5 of the Act specifies those practices which have been declared illegal in an effort to eradicate the evils of discrimination. Section 5(g) prohibits an individual seeking employment from attempting to influence the employment decision by supplying information relating to those factors or qualities which have been proscribed in making such a judgment. Section 5 (e) prohibits a third party from aiding and abetting the transmittal of the prohibited information for the purpose of influencing the employment decision. It is conceded that the ads which form the basis of this lawsuit were in violation of Sections 5(g) and (e) and therefore illegal under the law of this Commonwealth. Notwithstanding the fact that it has been conceded that the publishing of these ads was illegal commercial activity under the terms of the Act, the majority seeks to support its result by finding that the advertiser's rights, as guaranteed by the freedom of expression amendment of the federal constitution, have been improperly curtailed by

the mandate of Section 5(g).

While recognizing that a state may prohibit discriminatory employment practices, the majority argues that the restriction of freedom of expression accomplished by Section 5(g) "is not necessary to promote that legitimate state objective." (Slip op. p.6) This position ignores the holding and supporting rationale of Press I. In that case, the United States Supreme Court clearly sanctioned the restriction of the advertiser's right to freedom of expression to effectuate a legitimate regulation of an unlawful activity. Moreover, in its latest decisions the United States Supreme Court has reaffirmed the right to restrain commercial advertising that is inimical to the public welfare. Bates v. State Bar of Arizona, 433 U.S. 350, 97 S. Ct. 2691, 53 L.Ed. 2d 810 (1977); Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 96 S. Ct. 1817, 48 L.Ed. 2d 346 (1976).

> The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely. (citation omitted)
>
> Also, there is no claim that the transactions proposed in the forbidden advertisements are themselves illegal in any way.
>
> Va. Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. at 771-72. (citations omitted).

Here the transactions proposed in the forbidden advertisements are in themselves illegal. The ads encourage the employer to make the employment decision based upon the prohibited considerations. The commercial speech being restrained is simply a solicitation for discriminatory hiring. The majority seeks to disguise the illegality by characterizing the content of these ads as a mere expression of the applicants "job qualifications, abilities, personal experience, or educational history." This gloss does not dismiss the controlling fact that the qualifications sought to be communicated are not

legitimate concerns in the employment decision and are solely for the purpose of encouraging discriminatory hiring decisions. It is not simply a request to be hired as the majority contends, rather it seeks to pollute the hiring decision by introducing the prohibited considerations.

Commercial speech is only distinguishable by its content and the United States Supreme Court has recognized that the first amendment protections should not be withdrawn from it simply because it proposes a mundane commercial transaction. Here, however, the restraint is not being imposed because of the commercial character of the message, but rather the illegal transaction it proposes.

The majority perceives a distinction in the nature of the transactions here and that encountered in Press I. I confess that I am unable to comprehend that distinction. In both instances the illegal activity condemned was discriminatory employment. In Press I, the regulation was directed to the conduct of the prospective employer. In this appeal, the conduct of the prospective employe is being regulated. Both regulations were directed to the same end, i.e. discriminatory hiring. Further, both regulations did not impinge upon the free flow of commercial information necessary to make the employment decision. The only information restrained was information not lawfully relevant to the proposed commercial transaction.

Finally, in both Press I and the instant appeal, we are concerned with the right of the newspaper to publish the information. There is obviously no greater right derived by the newspaper to communicate the expressions of a potential employe than its right to disseminate the needs of a potential employer. I am therefore of the view that the employe's rights of freedom of expression under the first amendment have not been abridged by the state's legitimate exercise of its police power in an attempt to eradicate one of the most pervasive and elusive evils in our society today.

GA-501 12-67

COMMONWEALTH OF PENNSYLVANIA

June 4, 1979

SUBJECT: Petition for Certiorari in PHRC vs. Pittsburgh Press Company

TO: Homer C. Floyd, Dr. E. S. Inocencio, Regional Directors
Division Directors, Attorneys

FROM: Robert S. Mirin, General Counsel
James D. Keeney, AEP Counsel
Edith E. Cox, Assistant General Counsel

Attached is a copy of the petition filed with the United States Supreme Court in "Press II". We have received a docket number, and a petition in opposition from the respondent, but no decision on whether to grant certiorari from the Supreme Court.

RSM/eec/sf
Attachment

In the Supreme Court of the United States

No. ——
Spring Term, 1979

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA HUMAN RELATIONS COMMISSION,

Petitioner

vs.

PITTSBURGH PRESS COMPANY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

ROBERT S. MIRIN,
General Counsel
JAMES D. KEENEY,
Assistant General Counsel
EDITH E. COX,
Assistant General Counsel
Counsel for Petitioner

Pennsylvania Human Relations Commission
100 North Cameron Street
Harrisburg, Pennsylvania 17101
(717) 787-4410

Murrelle Printing Co., Box 100, Sayre, Pa. 18840—(717) 882-0401

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES:

MISCELLANEOUS:

IN THE SUPREME COURT
OF THE UNITED STATES

No. ———
Spring Term, 1979

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA HUMAN RELATIONS COMMISSION,
Petitioner

vs.

PITTSBURGH PRESS COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Pennsylvania Human Relations Commission, Petitioner herein, requests that this Court issue a Writ of Certiorari in order to review the judgment of the Supreme Court of Pennsylvania, entered in this case on January 24, 1979.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is unofficially reported at 396 A.2d 1187, and is set forth in the appendix (App. C, *infra*). There is no official report of the Supreme Court's decision. The opinion of the Commonwealth Court of Pennsylvania is officially reported at 31 Pa. Commonwealth Ct. 218, unofficially reported at 367 A.2d 263, and printed in the appendix (App. B, *infra*). The Pennsylvania Human Relations Commission's findings of fact, conclusions of law, decision and final order are not officially reported, but are set forth in the appendix (App. A, *infra*). Together the findings, decision and final order constitute the Commission's decision which was reviewed by the Commonwealth Court and the Pennsylvania Supreme Court.

JURISDICTION

The decision of the Supreme Court of Pennsylvania was entered on January 24, 1979. No petition for reargument was filed, and the time for filing such a petition has expired.

The jurisdiction of this Court to review the decision of the Supreme Court of Pennsylvania upon writ of certiorari is invoked under 28 U.S.C. §1257 (3).

CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES

A. United States Constitution Amendment I

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

B. Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. 955 *et seq.*, Section 5 (a), 5 (e), 5 (g) and Section 9:

Section 5 (a): It shall be an unlawful discriminatory practice, unless based on a bona fide occupational qualification . . . (a) [f]or any employer because of the race, religious creed, ancestry, age, sex, national origin, or non-job related handicap or disability of any individual to refuse to hire . . . such individual . . . if the individual is the best able and most competent to perform the services required.

Section 5 (e): For any person, whether or not an employer, employment agency, labor organization or employe, to aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, or to obstruct or prevent any person from complying with the provisions of this act or any other issued thereunder, or to attempt, directly or indirectly, to commit any act declared by this section to be unlawful discriminatory practice.

Section 5 (g): For any individual seeking employment to publish or cause to be published any advertisement which specifies or in any manner expresses his race, color, religious creed, ancestry, sex or national origin, or in any manner expresses a limitation or preference as to the race, color, religious creed, ancestry, age, sex or national origin of any prospective employer.

Section 9. Procedure: Any individual claiming to be aggrieved by an alleged unlawful discriminatory practice may make, sign and file with the Commission a verified complaint, in writing, which shall state the name and address of the person, employer, labor organization or employment agency alleged to have committed the unlawful discriminatory practice complained of, and which shall set forth the particulars thereof and contain such other information as may be required by the Commission. The Commission upon its own initiative or the Attorney General may, in like manner, make, sign and file such complaint. Any employer whose employes, or some of them, hinder or threaten to hinder compliance with the provisions of this act may file with the Commission a verified complaint, asking for assistance by conciliation or other remedial action and, during such period of conciliation or other remedial action, no hearings, orders or other actions shall be taken by the Commission against such employer.

After the filing of any complaint, or whenever there is reason to believe that an unlawful discriminatory practice has been committed the Commission shall make a prompt investigation in connection therewith.

If it shall be determined after such investigation that no probable cause exists for crediting the allegations of the complaint, the Commission shall, within ten days from such determination, cause to be issued and served upon the complainant written notice of such determination, and the said complainant or his attorney may, within ten days after such service, file with the Commission a written request for a preliminary hearing before the Commission to determine probable cause for crediting the allegations of the complaint. If it shall be determined after such investigation that probable cause exists for crediting the allegations of the complaint, the Commission shall immediately endeavor to eliminate the unlawful discriminatory practice complained of by conference, conciliation and persuasion. The members of the Commission and its staff shall not disclose what has transpired in the course of such endeavors: Provided, That the Commission may publish the facts in the case of any complaint which has been dismissed, and the terms of conciliation when the complaint has been adjusted, without disclosing the identity of the parties involved.

In case of failure so to eliminate such practice or in advance thereof, if in the judgment of the Commission circumstances so warrant, the Commission shall cause to be issued and served a written notice, together with a copy of such complaint as the same may have been amended, requiring the person, employer, labor organization or employment agency named in such complaint, hereinafter referred to as respondent, to answer the charges of such complaint at a hearing before the Commission at a time and place to be specified in such notice. The place of any such hearing shall be in

the county in which the alleged offense was committed.

The case in support of the complaint shall be presented before the Commission by one of its attorneys or agents. The respondent may file a written, verified answer to the complaint and appear at such hearing in person or otherwise, with or without counsel, and submit testimony. The complainant may likewise appear at such hearing in person or otherwise, with or without counsel, and submit testimony. The Commission or the complainant shall have the power reasonably and fairly to amend any complaint, and the respondent shall have like power to amend his answer. The Commission shall not be bound by the strict rules of evidence prevailing in courts of law or equity. The testimony taken at the hearing shall be under oath and be transcribed.

If, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in or is engaging in any unlawful discriminatory practice as defined in this act, the Commission shall state its findings of fact, and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action including but not limited to hiring, reinstatement or upgrading of employes, with or without back pay, admission or restoration to membership in any respondent labor organization, or selling or leasing specified commercial housing upon such equal terms and conditions and with such equal facilities, services and privileges or lending money, whether or not secured by mortgage or otherwise for the acquisition, construction, rehabilitation, repair or maintenance of commercial housing, upon such equal terms and conditions to any person discriminated against or all persons as, in the judgment of the Commission, will effectuate the purposes of this act, and including a requirement for report of the manner of compliance. When the respondent is a licensee of the Commonwealth, the Commission shall inform the appropriate State licensing authority of the order with the request that the licensing authority take such action as it deems appropriate against such licensee. An appeal from the Commission's order shall act as a supersedeas and stay such action by the state licensing authority until a final decision on said appeal. If, upon all the evidence, the Commission shall find a respondent has not engaged in any such unlawful discriminatory practice, the Commission shall state its findings of fact, and shall issue and cause to be served on the complainant an order dismissing the said complaint as to such respondent.

The Commission shall establish rules of practice to govern, expedite and effectuate the foregoing procedure and its own actions thereunder. Three or more members of the Commission shall constitute the Commission for any hearing required to be held by the Commission under this act. Any complaint filed pursuant to this section must be so filed within ninety days after the alleged act of discrimination. Any complaint may be withdrawn at any time by the party filing the complaint.

QUESTIONS PRESENTED

1. Does a "Situation-Wanted" newspaper advertisement directly specifying the race, color, religious creed, ancestry, age, sex, or national origin of the job seeker, constitute speech protected in its entirey by the First Amendment to the United States Constitution?

2. Does an order issued by a state agency lacking summary contempt power, requiring a newspaper to cease and desist a pattern and practice of publishing *in toto* "Situation-Wanted" advertisements, directly specifying the race, color, religious creed, ancestry, age, sex or national origin of the job seeker, constitute an impermissible prior restraint on protected speech?

3. Did the Pennsylvania Supreme Court correctly balance the First Amendment interests of job seekers who wish to publish advertisements such as those described in Questions One and Two, *supra,* against the interests of the state and federal governments in prohibiting racial and other unlawful discrimination in employment?

4. Is a state statute, which prohibits an individual seeking employment from publishing any advertisement which "specifies or in any manner expresses his race, color, religious creed, ancestry, age, sex, or national origin", susceptible of interpretation consistent with the First Amendment?

STATEMENT OF THE CASE

The instant action was commenced on March 11, 1975, when the Pennsylvania Human Relations Commission (hereinafter "Commission"), the agency charged with enforcement of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §955, *et seq.*, initiated a complaint pursuant to said Act at Docket No. E-8528 against Pittsburgh Press Company (hereinafter "Press"). The complaint alleged that Press "maintains a pattern and practice of aiding and abetting the doing of an unlawful discriminatory act" in violation of Section 5 (e) of the Pennsylvania Human Relations Act, 43 P.S. §955 (e), by publishing advertisements alleged to be unlawful under §5 (g) of said Act, 43 P.S. §955 (g).

A hearing was held before the Commission, at which written stipulations of fact were received into evidence and oral argument was heard. After submission of briefs by Press and the Commission staff counsel, the Commission issued its findings of fact, conclusions of law, decision and final order requiring Press to cease and desist from publishing "situation-wanted advertisements, the contents of which are prohibited by §5 (g) of the [Pennsylvania Human Relations] Act, [43 P.S. 955 (g)]."

In its conclusions of law, the Commission expressly considered and rejected the First Amendment defenses proffered by Press:

3. Such advertisements are not protected by the First Amendment to the Constitution of the United States.

4. The conduct of the respondent in engaging in a pattern and practice of publishing such situation wanted ads is not protected by the First Amendment to the Constitution of the United States.

The Commonwealth Court, by order and opinion issued on July 21, 1977, reversed the final order of the Commission. The Court held that Section 5 (g) of the Pennsylvania Human Relations Act did not significantly further the Commonwealth's concededly substantial interest in eradicating employment discrimination and necessarily had the effect of significantly impairing the flow of "legitimate" and truthful commercial information, in violation of the First Amendment. Thus, the Court reasoned that the Commission's statutory authority which prohibited Press from publishing such advertisements was an unconstitutional legislative incursion upon First Amendment protected rights.

The Supreme Court of Pennsylvania, by opinion and order filed January 24, 1979, affirmed the Commonwealth Court's reversal of the Commission. The Pennsylvania Supreme Court's decision was based upon federal law, specifically, the First Amendment. The Court explicitly rejected the Commission's argument that the case is controlled by *Pittsburgh Press Company vs. Pittsburgh Commission on Human Relations,* 413 U.S. 376, 37 L.Ed. 2d 669, 93 S.Ct. 2553 (1973) "(Press I)". The Majority held, *inter alia,* that:

Press I does not stand for the proposition that prior restraint may be imposed on commercial speech even though that speech does not propose an illegal transaction.

No application for reargument has been filed. Under Pa. R.A.P. 2542, the time for filing any application for reargument expired on February 8, 1979.

REASONS FOR GRANTING THE WRIT

A. The Pennsylvania Supreme Court Incorrectly Concluded That "Situations Wanted" Advertisements, Which Directly Specify the Race, Color, Religious Creed, Ancestry, Age, Sex or National Origin of the Job Seeker, Constitute Speech Which Is Protected in Its Entirety by the First Amendment to the United States Constitution

In *Pittsburgh Press Co. vs. Pittsburgh Commission on Human Rights, et al.*, 413 U.S. 376 (1972) (hereinafter "Press I"), this Court sustained the validity of a Pittsburgh human rights ordinance which, *inter alia,* proscribed sex segregated "help-wanted" advertisements.[1] In the case sub judice, a virtually identical

[1] The Pittsburgh ordinance in issue in *Press I* provided, in pertinent part, that it was an unlawful employment practice, "except where based upon a bona fide occupational exemption certified by the Commission:

> (a) For any employer to refuse to hire any person or otherwise discriminate against any person with respect to hiring . . . because of . . . sex.
>
> (e) For any 'employer', employment agency or labor organization to publish or circulate, or to cause to be published or circulated, any notice or advertisement relating to 'employment' or membership which indicates any discrimination because of . . . sex.
>
> (j) For any person, whether or not an employer, employment agency or labor organization, to aid . . . in the doing of any act declared to be an unlawful employment practice by this ordinance . . ."

provision of the Commonwealth of Pennsylvania's Human Relations Act was held to be unconstitutional by the Commonwealth's Supreme Court on the basis that the statutory provision in issue constituted a prior restraint upon rights protected by the First Amendment. In so doing, the Commonwealth failed to correctly apply the clearly controlling precedent of *Press I, supra.*

The Court's 1973 decision in *Press I* stands as a clear demarcation of this Court's "commercial speech doctrine", as introduced in *Valentine v. Chrestensen,* 316 U.S. 52 (1942). While indicating that purely commercial speech might be entitled to limited First Amendment protection, this Court in *Press I* held that advertisements proposing illegal commercial transactions are entitled to no such protection (413 U.S. at 389). The holding of *Press I* has not been diluted by subsequent commercial speech decisions. Therefore, the decision of the Pennsylvania Supreme Court upon which this petition is predicated decides a federal question of substance never determined by this Court, and in so doing misapplies this Court's decision in *Press I.*

This provision of the Pittsburgh ordinance is virtually identical to the relevant provisions the Pennsylvania Human Relations Act, in issue in this case (*Press II*) which are cited in part Pgs. 3-7, *supra.*

Thus, while the issue in this case involves Pittsburgh Press' status as one who aids or abets the doing of an unlawful practice under this Act (§5(e) of the Pennsylvania Human Relations Act), the ratio decidendi of the Pennsylvania Supreme Court's decision struck down §5(g) itself as an unlawful prior restraint on free speech.

The advertisements here in issue clearly violate Section 5(g) of the Pennsylvania Human Relations Act. For a representative sample, see 31 Pa. Commonwealth Ct. at 223, cited at pp. 11a, 13a-14a, Appendix B. For First Amendment purposes, these advertisements are indistinguishable in terms of content from those held unlawful and unprotected in *Press I*. Those help wanted advertisements proposed the illegal activity of employment discrimination; these situation wanted advertisements invite through proscribed references to race and other forbidden data the very same illegal activity.

Decisions following *Press I*, particularly *Virginia State Board of Pharmacy et al. vs. Virginia Citizens Consumer Council Inc., et al.*, 425 U.S. 749 (1976); *Linmark Associates Inc. vs. Township of Willingboro*, 431 U.S. 85 (1977), and *Bates vs. State Bar of Arizona*, 433 U.S. 350 (1977), have emphasized the societal interest in the free flow of truthful and legitimate commercial information. However, none of these opinions can be read to extend First Amendment protection to information which serves no conceivable purpose other than a patent appeal to prejudice. The underlying illegal activity of employment discrimination is no less illegal when solicited by a prospective employee than when committed by an employer. Thus, the Pennsylvania Supreme Court's reliance upon the post *Press I* "commercial speech" cases is an inapposite and unwarranted extension of First Amendment protection to commercial situation-wanted advertisements calculated to foster discriminatory employment practices. Conversely, the *Press II* rationale erodes this Court's decision in *Press I* in a manner inconsistent with the commercial speech doctrine even as enunciated in this Court's post *Press I* decisions.

B. The Pennsylvania Supreme Court Incorrectly Concluded That the Human Relations Commission's Final Order Constituted an Impermissible Prior Restraint on Protected Speech

The Commission's final order (see Appendix A, pp. 9a-10a) in pertinent part directs the Press to cease publication of ". . . situation wanted advertisements, the contents of which are prohibited by Section 5(g) of the Act." In both its brief and oral argument before the Pennsylvania Supreme Court, the Commission made clear that it did not interpret its final order to require that any advertisement go unpublished because of the inclusion of a prohibited item of information; the order simply directed that prohibited words and phrases (e.g. "white woman", "young man") be replaced by neutral job-related terms (e.g. "person" "experienced worker"). The Commission's final order is thus improperly categorized as a prior restraint. Decisions of this Court relating to prior restraint (e.g. *Near vs. Minnesota*, 283 U.S. 697 (1931), and *New York Times Co. vs. United States*, 403 U.S. 713 (1971)), have struck down total prohibitions against publication and thus do not support the definition of prior restraint adopted by the Pennsylvania Supreme Court.

Further, the Commission lacks summary contempt power (43 P.S. §960); its orders are not self-enforcing. Appellate court review will thus be available

prior to the issuance of any order of enforcement in all cases. Significantly, an identical provision in the Pittsburgh Human Relations Ordinance was noted by this Court in *Pittsburgh Press I,* note 14, 413 U.S. at 390-1, as relevant to this very issue.

Finally, even if the Commission's final order were viewed as a prior restraint, a recent decision of this Court suggests that the prohibition against prior restraints does not apply with the same force in the context of commercial speech as it does in more traditionally protected speech areas, if indeed it applies at all (see *Virginia Pharmacy Board vs. Virginia Consumer Council,* footnote 24, 425 U.S. at 771-2). *See also, Bates vs. State Bar of Arizona,* 433 U.S. 350 (1977).

In *Virginia Pharmacy Board,* commercial speech is described as being more durable than other kinds, and arguably less susceptible to chilling. In the present context, it is doubtful that a suggestion by a Pittsburgh Press classified ad-taker that substitutions, such as those described above be made, would deter placement of advertisements by persons seeking employment solely on the basis of merit.

C. The Pennsylvania Supreme Court Did Not Correctly Balance the Interests of Job Seekers Wishing To Publish Forbidden Data Against the Substantial State and Federal Interest in Preventing Employment Discrimination

---

In striking down Section 5(g), the Pennsylvania Supreme Court's analysis did not assess the competing

interests which prior decisions of this Court establish as controlling.

While the Court below did correctly note the job seeker's First Amendment right to freely express his or her employment qualifications, including education, work experience, and abilities; insufficient consideration was given to the fact that a job seeker's race, sex, religious creed, etc. are not job-related characteristics, and that Pennsylvania employers are forbidden by the Human Relations Act from making hiring decisions based on these factors.[2] In short, no rationale for permitting inclusion of the specific proscribed data was advanced, by either the Pennsylvania Supreme Court or Pittsburgh Press. Instead, the Court held, in effect, that the First Amendment's protection extends not only to legitimate commercial information, as it must, but also to data which serves no purpose other than to further a patent appeal to prejudice. No decision of this Court requires that the First Amendment be so used as a device for the advancement of employment discrimination.

The reliance of the Court below on *Linmark vs. Willingboro Township,* 431 U.S. 85 (1977), is misplaced. While it correctly noted that the record in this case is silent as to the actual impact of the advertisements in question, as was the record in *Linmark* regarding the impact of the ordinance there at issue; the court failed to note an important distinction: "white

---

[2] Even those extremely limited instances involving "bona fide occupational qualifications" can be expressed in neutral, job related terms (i.e., a wet nurse or sperm donor can indicate prior experience by referring to prior experience in the field).

flight" is an objectively quantifiable phenomenon. A community's racial composition and property values may be precisely measured. Employment discrimination is infinitely more elusive. In the instant situation, if discrimination does result from the portions of the advertisements in question, it will be silent, and for all practical purposes undetectable.

Furthermore, unlike the situation in *Linmark*, where the Township sought to ban *all* "For Sale" signs, the Commission's final order does not leave the job seeker without access to the "situation wanted" columns of the Press. No limitation is placed on advertisements which confine themselves to legitimate, employment-related data.

Most importantly, the Commission's position in this situation is not one of support for a paternalistic blanket-type prohibition such as this Court rejected in both *Linmark* and *Virginia Pharmacy*.

In *Linmark* this Court reached the real fear of the Township: that receivers of information might act on the information received, to the detriment of the Township. The Commission, likewise, fears that receivers of information will act on it, to the detriment of all who seek equal, merit-based employment opportunity in the Commonwealth, opportunity which the Commission is mandated by statute to safeguard.

Nor has the Commission adopted the position taken by the Pharmacy Board in *Virginia Pharmacy* of attempting to withhold legitimate commercial information essential to informed decision making by consumers. Rather, the Commission wishes to insure that *only* job-related, legitimate information will reach prospective employers.

D. The Pennsylvania Supreme Court Erred in Failing To Devise a Narrow Interpretation of Section 5 (g) Which Is Consistent With the Requirements of the First Amendment

---

Assuming *arguendo* that a broad reading of §5 (g) contravenes the First Amendment, the Pennsylvania Supreme Court's failure to construe §5 (g) in a narrower but constitutional manner is inconsistent with this court's treatment of the overbreadth doctrine as applied to the "commercial speech" area.

The "commercial speech" in issue in this case involves a potential for unlawful employment discrimination which is not subject to regulation save at the time the situation wanted advertisement is placed. Persons placing such advertisements solicit employment from society as a whole. Absent a subsequent contact from a prospective employer, they have *no way* of ascertaining whether or not they were ever considered for any given employment opportunity. Thus, such acts of employment discrimination will go unmonitored unless all reasonable means of securing unbiased consideration of situation wanted advertisements are assured.

The provisions of §5 (g) of the Pennsylvania Human Relations Act are designed to assist in achieving the unbiased consideration of such advertisements by prospective employers. If situation wanted advertisements do not indicate proscribed characteristics such as race, color, religious creed, ancestry, age, sex, or national origin, the prospective employers will be

limited to the job-related considerations set forth in the advertisement when making initial selections and undertaking initial contacts with prospective employees. Once contact is initiated, the potential for assessment and review of employer conduct against nondiscrimination policy exists (i.e., at that time the prospective employee, for the first time, knows that an actual employment selection procedure was triggered by a situation wanted advertisement). The only way in which, and point in time at which, the significant societal interest in non-discriminatory employment practices can be imposed upon this form of job seeking is through regulation of the content of the "situation wanted" advertisement at the time of placement. *Cf. Bates vs. State Bar of Arizona,* 433 U.S. 350 (1977).

This Court, in *Bates, supra,* clearly indicated that the First Amendment protection of commercial speech was not being extended to unlawful practices such as deceptive or misleading or otherwise illegal advertisements. *See Bates, supra* at 366.

A prospective employer can have no lawful interest in the race, color, religious creed, ancestry, age, sex, or national origin of a prospective employee especially when the prospective employee does not know that such factors are being considered. This is not information of import within the *Bates* rationale. *See also, Regents of the University of California v. Bakke,* U.S. , 98 S.Ct. 2733 (1978). Even employers engaged in proper remedial "affirmative action" can do no more than advertise their status as equal opportunity employers.

The statutory language in issue is not a blanket prohibition upon "situation wanted" advertising and is appropriately construable in a manner consistent with protection of the relevant elements in such advertisements.

> "Since advertising is linked to . . . [economic] . . . well being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulations." (Citations omitted.) *Bates, supra,* at page 381.

Experience in the employment discrimination area has demonstrated the necessity for the vigorous and reasonable regulation of employment practices as a means of eliminating historic prejudices and preconceptions from all aspects of employment. Section 5 (g) is clearly amenable, should the Court deem it necessary, to a narrowing construction which would protect the individual's right to seek employment based upon job-related considerations, rather than invidious stereotypes.

The statutory goal of equal employment opportunity is of the highest societal priority and deserves, *at least,* a reasonable accomodation with First Amendment principles.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania in this case.

ROBERT S. MIRIN,
General Counsel,
JAMES D. KEENEY,
Assistant General Counsel,
EDITH E. COX,
Assistant General Counsel,
Counsel for Petitioner

APPENDIX A

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS
COMMISSION

Docket No. E-8528

PENNSYLVANIA HUMAN RELATIONS
COMMISSION,
Complainant

vs.

PITTSBURGH PRESS COMPANY,
A CORPORATION,
Respondent

HISTORY OF THE CASE, FINDINGS OF FACT, CONCLUSIONS OF LAW, COMMISSION'S DECISION AND FINAL ORDER

HISTORY OF THE CASE

The Pennsylvania Human Relations Commission (hereinafter the "Commission") initiated a complaint on March 11, 1975 at Docket No. E-8528 charging that the Respondent Pittsburgh Press Company "main-

tains a pattern and practice of aiding and abetting the doing of an unlawful discriminatory act prohibited by Section 5 (g) of the Pennsylvania Human Relations Act in that Respondent prints in its situation-wanted column advertisements which specify or express the race and/or sex of the individual placing the advertisement." The complaint charged that this conduct was in violation of Section 5 (e) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §951 et seq., (the "Act"). Section 5 (e) of the Act provides in its pertinent part:

> It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, or in the case of a fraternal corporation or association, unless based upon membership in such association or corporation or except where based upon applicable security regulations established by the United States or the Commonwealth of Pennsylvania . . . for any person, whether or not an employer, employment agency, labor organization or employe, to aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice . . .

Section 5 (g) of the Act provides that is unlawful for any individual seeking employment to publish or cause to be published any advertisement which specifies or in any manner expresses his race, color, religious creed, ancestry, age, sex or national origin, or in any manner expresses a limitation or preference as to the race, color, religious creed, ancestry, age, sex or national origin of any prospective employer.

An investigation by the Commission staff determined that there was probable cause to credit the allegations of the complaint, whereupon the Commission endeavored to eliminate the unlawful pattern and practice complained of by conciliation. Conciliation having failed, the Commission convened a public hearing on August 6, 1975 pursuant to Section 9 of the Act. The Hearing Panel consisted of Commissioner Elizabeth M. Scott, Chairperson of the Panel, and Commissioners Robert Johnson Smith and John P. Wisniewski. Gary L. Lancaster, Esquire, Assistant General Counsel in the Pittsburgh Regional Office of the Commission, presented the case in support of the complaint. Robert H. Shoop, Jr., Esquire, of Thorpe, Reed, and Armstrong, represented the Respondent. Elisabeth S. Shuster, Assistant General Counsel in the Harrisburg Headquarters Office of the Commission sat as Legal Advisor to the Hearing Panel.

Counsel for the parties entered into written stipulations which were entered into the record at the public hearing along with exhibits A1 through A33 and B1 through B7.

The Hearing Panel, upon consideration of oral argument and the record and the briefs submitted subsequent to the hearing by counsel for the parties, unaminously recommended that the full Commission find in favor of the Complainant.

FINDINGS OF FACT

1. The Complainant is the Pennsylvania Human Relations Commission, an administrative agency established by the Pennsylvania Human Relations Act

and charged with effectuating the purposes of the Act, and empowered to initiate complaints charging violations of the Act.

2. The Respondent is the Pittsburgh Press Company, a corporation located at 34 Boulevard of the Allies, Pittsburgh, Pennsylvania.

3. The Respondent publishes a daily newspaper of general circulation called the Pittsburgh Press (hereinafter "the Press").

4. The Press accepts and publishes in its pages so-called "situation-wanted" advertisements from individuals seeking employment.

5. The Press accepts and publishes these advertisements in the language as submitted by these individuals and without regard to whether the content of the advertisement conforms with Section 5 (g) of the Act.

6. Many of these advertisements specify or in some manner express the race, color, religious creed, ancestry, age, sex or national origin of the individual seeking employment.

7. Examples of the advertisements referred to in Finding of Fact No. 6 are:

A. College grad—Born again Christian with Bachelor's Degree and seven yrs. sales and marketing management experience seeking work with Christian business or organization. (Stipulated Exhibit "A-1").

b. White woman, desires day work, office cleaning. (A-1)

c. Parolee—White needs employment to be released. Licensed steam boiler and engineer. (A-1)

d. Salesman—Age 30, looking for career in Pittsburgh, start immediately, 15 years sales experience. (A-1)

e. What can I do for you? Recent college grad, good looking, twenty-five years old, B.S. in Business Administration, seeks entry level management position . . . (A-8).

f. Man, mature, accounting, bookkeeping, office management, desires position in these or related fields. (A-23).

8. The Respondent engages in a pattern and practice of publishing "situation-wanted" advertisements from individuals seeking employment which specify or in some manner express the race, color, religious creed, ancestry, age, sex or national origin of the individual placing the advertisement.

9. This pattern and practice engaged in by the Respondent aids and abets the doing of the act declared to be an unlawful discriminatory practice by Section 5 (g) of the Act.

10. This pattern and practice engaged in by the Respondent also aids and abets discrimination in hiring declared to be an unlawful discriminatory practice by Section 5 (a) of the Act.

11. The Commission has not alleged that advertisements placed by candidates for political office violate any provisions of the Act.

CONCLUSIONS OF LAW

1. At all times herein mentioned the Commission had and still has jurisdiction over the Respondent and

the subject matter of the complaint herein pursuant to the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended.

2. Subject to limitations described generally in Conclusions of Law No. 6, situation-wanted advertisements which specify or in any manner express the race, color, religious creed, ancestry, age, sex or national origin of the individual seeking employment are in violation of Section 5 (g) of the Act.

3. Such advertisements are not protected by the First Amendment to the Constitution of the United States.

4. The conduct of the Respondent in engaging in a pattern and practice of publishing such situation-wanted ads is not protected by the First Amendment to the Constitution of the United States.

5. The Respondent's conduct in publishing situation-wanted advertisements the contents of which are in violation of Section 5 (g) of the Act is in violation of Section 5 (e) of the Act.

6. Not all situation-wanted advertisements which specify or express in some manner the race, color, religious creed, ancestry, age, sex or national origin of an individual seeking employment are in violation of Section 5 (g). Those advertisements clearly directed at or seeking employment from prospective employers who are not within the jurisdiction of the Act are not unlawful.

For example, an employer to be within the jurisdiction of the Act must employ four or more persons within the Commonwealth. An individual employed in agriculture or domestic service or who resides in the personal residence of the employer is not covered.

On the other hand, an advertisement which specifies or otherwise expresses any of the prohibited information and which is written in such general language that it is not clearly limited to employers or positions not within jurisdiction of the Act, or is directed at employers covered by the Act as well as employers not covered, is unlawful.

7. Advertisements placed by candidates for political offices are not affected by these Conclusions of Law.

RECOMMENDATION OF HEARING COMMISSIONERS

AND NOW, this day of , 1976, upon consideration of the record of the public hearing and the arguments of Counsel and briefs submitted by the parties and the proposed History of the Case, Findings of Fact and Conclusions of Law, the Hearing Commissioners recommend to the Commission that an order be entered against the Pittsburgh Press Company finding that it has violated Section 5 (e) of the Act and providing for appropriate relief.

(s) Elizabeth M. Scott
Elizabeth M. Scott
Chairperson

(s) Robert Johnson Smith
Robert Johnson Smith

(s) John P. Wisniewski
John P. Wisniewski

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS
COMMISSION

Docket No. E-8528

PENNSYLVANIA HUMAN RELATIONS
COMMISSION,

Complainant

vs.

PITTSBURGH PRESS COMPANY,
A CORPORATION,

Respondent

COMMISSION'S DECISION

AND NOW, this day of , 1976, upon consideration of the record of the case, the briefs submitted by the parties, the History of the Case, Findings of Fact and Conclusions of Law and the Recommendation of Hearing Commissioners, the Pennsylvania Human Relations Commission finds and determines that the Respondent, Pittsburgh Press Company, has violated Section 5 (e) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, in that it engages in a pattern and practice of accepting and publishing "situation-wanted" advertisements from individuals seeking employment which

specify or in some manner express the race, color, religious creed, ancestry, age, sex or national origin of such individuals, thus aiding and abetting these individuals to violate Section 5 (g) of the Act.

PENNSYLVANIA HUMAN
RELATIONS COMMISSION
By: (s) Joseph X. Yaffe
Joseph X. Yaffe
Chairperson

Attest:
(s) Elizabeth M. Scott
Elizabeth M. Scott
Secretary

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS
COMMISSION

Docket No. E-8528

PENNSYLVANIA HUMAN RELATIONS
COMMISSION,

Complainant

vs.

PITTSBURGH PRESS COMPANY,
A CORPORATION,

Respondent

FINAL ORDER

AND NOW, this day of , 1976, upon consideration of the foregoing History of the Case, Findings of Fact, Conclusions of Law and Recommendation of the Hearing Commissioners and pursuant to Section 9 of the Pennsylvania Human Relations Act, the Pennsylvania Human Relations Commission hereby

ORDERS:

1. The Respondent shall cease and desist from publishing "situation-wanted" advertisements the contents of which are prohibited by Section 5 (g) of the Act.

2. The provisions of this order shall be effective immediately.

PENNSYLVANIA HUMAN
RELATIONS COMMISSION
By: Joseph X. Yaffe
Chairperson

Attest:
Elizabeth M. Scott
Secretary

APPENDIX B

OPINION OF THE COMMONWEALTH COURT OF PENNSYLVANIA

Opinion by Judge Kramer, Filed: July 21, 1977:

This is an appeal by the Pittsburgh Press Company (the Press) from an order of the Pennsylvania Human Relations Commission (the Commission) ordering the Press to cease and desist the publication of "Situation-Wanted" advertisements the contents of which are prohibited by Section 5 (g) of the Pennsylvania Human Relations Act (Act),[1] in that those contents specify or in some manner express the race, color, religious creed, ancestry, age, sex or national origin of the person placing the advertisement.

The facts in this case are quite simple. The Press prints a "Situations Wanted" classification in its classified advertisement pages as a service to its readers. Advertising space is, of course, paid for by the advertisers. Situation-wanted advertisements provide a means by which persons seeking employment may communicate their qualifications and job aspirations to the employing public at large. Usually, such an advertisement consists of a brief description of the jobseeker and the type of job he or she desires. The Press publishes these advertisements exactly as they are sub-

[1] Act of October 27, 1955, P.L. 744, *as amended*, 43 P.S. §955(g).

mitted. Beyond listing the ads alphabetically, the Press in no way alters any ad nor attempts to classify them further than by the simple "Situations Wanted" classification.

Section 5 of the Act provides *inter alia*:

> "It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, or in the case of a fraternal corporation or association, unless based upon membership in such association or corporation, or except where based upon applicable security regulations established by the United States or the Commonwealth of Pennsylvania:
>
> "(a) For any employer because of the race, color, religious creed, ancestry, age, sex, national origin or non-job related handicap or disability of any individual to refuse to hire or employ, or to bar or to discharge from employment such individual, or to other discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, if the individual is the best able and most competent to perform the services required.
>
> . . . .
>
> "(e) For any person, whether or not an employer, employment agency, labor organization or employe, to aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, or to obstruct or prevent any person from complying with the provisions of this act or any order issued thereunder, or to attempt, directly or indirectly, to commit any act declared by this section to be unlawful discriminatory practice.
>
> . . . .
>
> "(g) For any individual seeking employment to publish or cause to be published any advertisement which specifies or in any manner expresses his race, color, religious creed, ancestry, age, sex or national origin, or in any manner expresses a limitation or preference as to the race, color, religious creed, ancestry, age, sex or national origin of any prospective employer."

On March 11, 1975, the Commission initiated a complaint charging the Press with violating Section 5 (e) [2] of the Act by having aided and abetted the doing of an unlawful discriminatory act prohibited by Section 5 (g).

After attempts at conciliation failed, a public hearing was held by the Commission on August 6, 1975, which resulted in a unanimous recommendation by the Hearing Panel that the full Commission find in favor of the complainant. The cease and desist order was subsequently issued by the Commission.

An indication of the type of advertisement found by the Commission to violate Section 5 (g) can be ascertained from the specific examples set forth in the Hearing Panel's findings of fact. These examples were drawn from stipulated exhibits which included the Press' "Situation Wanted" columns from Sunday, June 1, 1975 to Thursday, June 26, 1975:

> "COLLEGE GRAD—Born again Christian with Bachelor's Degree and seven yrs. sales and

[2] 43 P.S. §955(e).

marketing mgmt. experience seeking work with Christian business or organization. . . ."[3]

"White woman—desires day work, office cleaning."[4]

"Parolee—White needs employment to be released. Licensed steam boiler and engineer. . . ."[5]

"Salesman—Age 30, looking for career in Pittsburgh, start immediately, 15 years sales experience. . . ."[6]

"What can I do for you? Recent college grad, good looking, twenty-five years old, B.S. in Business Administration, seeks entry level management position."[7]

"Man—mature, accounting bookkeeping, office management, desires position in these or related fields."[8]

It is obvious at a glance that the contents of these advertisements are in contravention of the letter of Section 5 (g).[9] The Press does not contend otherwise. It does, however, challenge the constitutional validity of Section 5 (g) on the basis of the First and Fourteenth Amendments to the United States Constitution.[10]

[3] Exhibit A-1 (Rec. 27a).

[4] Exhibit A-1 (Rec. 27a).

[5] Exhibit A-1 (Rec. 27a).

[6] Exhibit A-1 (Rec. 27a).

[7] Exhibit A-8 (Rec. 34a).

[8] Exhibit A-23 (Rec. 48a). Due to the misplacement of an exhibit in original stipulation of facts which was corrected in the appellant's printed record, the designation of the exhibits from A-15 to the end of the "A" exhibits, does not coincide in the two records. For example, "A-23" in the original record will appear as "A-22" on page 48a of the printed record. The exhibit references herein are from the original record, but the page in the printed record is also included.

Initially, the Commission raises the question of the Press' standing to challenge Section 5 (g). We are certain that the Press does have standing to challenge that Section of the Act. The order entered against the Press was the result of the Commission's determination that the Press had aided and abetted the violation of Section 5 (g). In the words of the Court in *Griswold v. Connecticut,* 381 U.S. 479, 481 (1965), "Certainly

[9] The Court has analyzed the contents of the Press' situation-wanted ads for June 1, 1975 to June 26, 1975 in terms of the prohibitions in Section 5(g). The figures arrived at are less than exact, because many references, especially as to age, are quite subtle, if they are intentional at all.

Of a total of 845 ads, 307 indicated in some manner the sex of the advertiser. Approximately 55.7 percent of these were males, while 44.3 percent were females. There were 82 ads which gave some indication of age. Some of these were explicit. Many were in terms of "young" or "elderly", while a large number of ads conveyed the advertisers "maturity" in terms of a high figure for years of experience in their fields. Using the figure of 40 years as approximately halfway between entry into the job market and the normal retirement age, we find that 47 of the ads conveyed the impression of "youth" while 35 of the ads expressed the "maturity" of the advertiser. This is approximately a 57.3 percent to 42.7 percent breakdown. There were only four references to race; all to the "white" race. There was one ad which referred to religion, and there were no references to national origin or ancestry.

[10] The First Amendment is applicable to the States via the Fourteenth Amendment. *Schneider v. State,* 308 U.S. 147, 160 (1939).

the accessory should have the standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be, a crime." The same logic is applicable here to confer standing on the Press to challenge Section 5 (g).[11]

The Press asserts that its advertisers have the right to submit for publication, and the Press has the right to publish, situations-wanted advertisements the contents of which are offensive to Section 5 (g), and that the proscription of Section 5 (g) unconstitutionally infringes on those rights in derogation of the First Amendment. The Commission answers first with the contention that these ads propose "purely commercial transactions" and thus do not come within the protection of the First Amendment.

The doctrine that speech is unprotected per se if it is purely commercial in nature was first propounded in *Valentine v. Chrestensen,* 316 U.S. 52 (1942). Any

[11] This particularly true in this case, where the Commission chose not to press its complaint against any of the advertisers, but only against the Press. To accept the Commission's standing argument would be to allow the Commission to forever avoid review of Section 5(g) by simply never commencing proceedings against anyone directly pursuant to Section 5(g).

Moreover, we note that the Press is not merely raising the rights of third persons in its attack on 5(g). From past litigation, the Press has learned that a First Amendment attack on a citation for aiding and abetting may not prevail if the provision creating the underlying substantive offense is left unchallenged. *See Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations,* 413 U.S. 376 (1973). While the aiding and abetting violated may not be so, in which case the Press must challenge the latter provision in order to vindicate its own constiutional rights.

vitality remaining in that doctrine after the decision in *Bigelow v. Virginia* (hereinafter *Bigelow*), 421 U.S. 809 (1975), was completely extinguished in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 96 S.Ct. 1817 (1976) (hereinafter *Virginia Pharmacy*). In *Virginia Pharmacy* the Court stated:

> "Our question is whether speech which does 'no more than propose a commercial transaction' . . . is so removed from any 'exposition of ideas' . . . and from 'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government' . . . that it lacks all protection. Our answer is that it is not." 425 U.S. at 762, 96 S.Ct. at 1826.

The Court recognized that the basic need for the free flow of commercial information for the proper functioning of a free market economy "suggests that no line between publicly 'interesting' or 'important' commercial advertising and the opposite kind could ever be drawn." 425 U.S. at 765, 96 S.Ct. at 1827.[12] The conclusion that purely commercial speech is not unprotected per se has been emphatically reaffirmed by the Court in *Linmark Associates, Inc. v. Township of Willingsboro* (hereinafter *Linmark*), U.S. ,

[12] *Bigelow v. Virginia, supra,* which involved advertising of the availability of abortions, did contain indications that an advertisement must have some special societal or political importance in order to be protected speech. The statement quoted in the text makes it clear that the Court now eschews such a limitation. Advertising per se is now recognized to be of sufficient importance to our society to merit some First Amendment protection.

45 U.S.L.W. 4441 (May 2, 1977), where an ordinance banning "For Sale" and "Sold" signs for the purpose of stemming "panic selling" and "white flight" from the community was held unconstitutional under *Virginia Pharmacy.*

Although it is thus clear that situation-wanted advertisements are not *unprotected per se,* it remains to be decided whether the contents of such an ad which run afoul of Section 5 (g) may be constitutionally suppressed. The Court in *Virginia Pharmacy* recognized that commercial speech is not immune from regulation, 425 U.S. at 770, 96 S.Ct. at 1830, and may require less protection than other varieties of speech in order to insure an unimpaired "flow of truthful and legitimate commercial information." 425 U.S. at 771-72 n. 24, 96 S.Ct. at 1830 n. 24.

In attempting to show that the cease and desist order in this case is pursuant to such a valid regulation of commercial speech, the Commission relies upon the decision in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations* (hereinafter *Press I*), 413 U.S. 376 (1973). In *Press I,* the Court upheld an order directing the Press to cease and desist the publication of *help-wanted* advertisements under sex-based classification headings. In particular the Commission relies on the Court's statement that—

> "Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." *Press I* at 389.

Later cases have also alluded to the validity of advertising restrictions related to the illegality of the transaction proposed by the advertisement. *Virginia Pharmacy* at 771, 96 S.Ct. 1825; *Bigelow* at 821. However, not since *Press I* has the Court actually dealt with a case involving a ban on commercial speech "incidental" to an underlying valid limitation on economic activity or the prevention of an illegal transaction.[13]

There is no doubt that the underlying commercial activity sought to be banned by Section 5 (a) is illegal. The Press in no way challenges the Section 5 (a) prohibition of discrimination in employment on the basis of race, color, religious creed, ancestry, age, sex or national origin. The quote from *Press I* would indicate that we then need only to determine whether the advertising restrictions of Section 5 (g) are "incidental" to that prohibition. If it is, then 5 (g) would be valid and any need for balancing obviated. The posture of *Press I* and the decisions in later cases convince

[13] In *Linmark* and *Virginia Pharmacy* the advertising restrictions were related to the States' general interest in integrated housing and professional standards of pharmacists, respectively, but they were not incidental to any specific regulation in those areas. The restrictions were enacted to further the States' interests *in and of themselves,* and not as *ancillary* to a specific underlying regulation. In *Bigelow,* although abortion was illegal in Virginia, it was not illegal in New York at the time. Naturally, Virginia was without power to regulate abortions in another state, so a ban on the advertising of abortion availability in New York could not be characterized as *incidental* to a *valid* limitation on, or regulation of, abortions.

us, however, that this is no longer the appropriate "test."

Press I must be read in light of the fact that the Press did not there challenge the section of the Pittsburgh Ordinance which prohibited the indicating of sex discrimination in advertising by employers, employment agencies, and labor unions. The Press challenged only that section of the ordinance which made it unlawful for any person to aid in the doing of any act declared to be an unlawful employment practice by the ordinance. Because the Press conceded the illegality of not only sex discrimination in employment but also the advertising of same, and because the facts in *Press I* revealed that the Press was clearly aiding in the propogation of such advertising, the Court was not compelled to formulate any refined "test" for the validity of speech restrictions related to activities which the government may legitimately regulate or prohibit. The word "incidental" was a sufficient description of the relationship under the circumstances of *Press I*.

Two years after *Press I*, the Court decided the *Bigelow* case. Although it was eventually determined that the prohibition of advertising the availability of abortions did not relate in any way to a *valid* underlying regulation of conduct under the particular facts of that case,[14] the *Bigelow* case did prompt the Court to reformulate its "test" or standard of review for this type of commercial speech case. The Court stated:

> "To the extent that commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged." *Bigelow* at 826.

[14] *See* note 13, *supra*.

We believe that a balancing analysis is the appropriate standard of review for the present case. The factors to be weighed are the opposing First Amendment and governmental interests, the effectiveness of the speech restriction in promoting the underlying valid regulation, and the extent of any incidental restrictions on legitimate forms of commercial speech.[15]

[15] As indicated by note 13, *supra*, there appear to be two basic types of commercial speech content regulation. The first type is intended to further the government's interest in an area in and of itself, such as the price advertising ban in *Virginia Pharmacy* or the ban on "Sold" and "For Sale" signs in *Linmark*. The second type is intended to be *ancillary* to, or serve as the natural adjunct of, a specific and direct regulation of some activity, as in *Press I* and the present case. We perceive somewhat different standards of review for each type of regulation.

A reading of *Bigelow* reveals that the Court's approach, at that time, was to determine by balancing whether any individual advertisement was protected by the First Amendment. Advertising was not unprotected per se, but there was a "rebuttable presumption" of no protection. *Virginia Pharmacy* reversed this "presumption" by concluding that commercial speech *in general* was protected. The Court did, however, also conduct a balancing of the factors in the specific case before it, indicating that balancing survived as a means of determining exceptions to the new blanket protection for commercial speech. Finally, in *Linmark* the Court paraphrased a line from *Virginia Pharmacy* and simply held the ordinance involved to be unconstitutional because it "impaired 'the flow of truthful and legitimate commercial information.' " 45 USLW at 4445. This "test" was easy to apply in *Linmark* because truthful information will be legitimate if the activity

The Commonwealth's asserted interest in the prevention of employment discrimination based on race, color, religious creed, ancestry, age, sex or national origin is certainly a substantial one. Pitted against it is the jobseeker's interest in being able to fully, yet truthfully,[16] utilize the press to "advertise" himself or herself in that manner and by such terms as he or she believes will be most efficacious in producing the desired result. That this interest must not be minimized can be seen by looking at its component parts. As a pure matter of expression, there is the basic interest of the individual in being able to tell anyone who will listen just who and what that individual is: to be able to say "I am black" as well as "I am a college graduate" or "I am male" as well as "I am ambitious". The purpose for such expression provides, in the present case, an additional element of import. The Supreme Court long ago recognized the great magnitude of the individual's interest in obtaining employment

or transaction which is the subject of the commercial speech is not prohibited or limited by valid regulation. However, where a speech restriction is ancillary to a specific prohibition or restriction of an activity, that underlying regulation may, in effect, deprive certain speech of its "legitimacy". A ban on the advertising of prostitution, where prostitution itself is illegal, is a clear example. Other cases, like the present one, are not so clear. There is no obvious and direct relationship between situation-wanted ads and discrimination by employers. It is in cases such as this that we believe a proper resolution requires a balancing analysis of the opposing interests, the effectiveness of the ban as ancillary to the underlying valid regulation, and the extent of incidental restrictions on legitimate commercial speech.

[16] The Commission has not alleged that any of the ads are false or misleading.

and earning a living. *Truax v. Raich,* 239 U.S. 33 (1915).[17] Here we are not dealing with the ordinary transaction between a "seller hawking his wares and a buyer seeking to strike a bargain". *Virginia Pharmacy* at 425 U.S. 781, 96 S.Ct. 1835 (Rehnquist, J., dissenting). We are dealing with the efforts of individuals to sell the only thing that they have to offer: their labor. For the users of the situation wanted column, often the least skilled and most desperate jobseekers, the quest for employment may cause the liveliest political or social controversy of the day to shrink to insignificance by comparison.[18]

We now come to the question of the relationship of the speech involved here to the commercial activity subject to regulation. *Bigelow* at 826. The Act does not prohibit individuals from accepting or rejecting jobs on the basis of one of the "forbidden criteria". Thus, the relationship which we must focus upon is the relationship of the speech involved here to illegal discrimination by *employers.* Stated another way, we

[17] "[T]he right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." 239 U.S. at 41.

[18] The recognized qualitative and quantitative difference in the interest of the job-seeker as opposed to the interest of an employer involved in the hiring of employees serves as one way to distinguish this case from one involving a challenge to a ban on the advertising of discriminatory hiring by an employer. The filling of job vacancies in the usual course of business surely must be accorded a lesser weight in a balancing analysis than an individual's interest in obtaining a job. The former is a routine matter of business practice, while the latter is usually one of economic survival.

must assess the extent to which Section 5 (g) promotes the fulfillment of the purpose of Section 5 (a).

The Commission asserts that permitting job-seekers to specify their race or sex, for example, will provide the prejudiced employer with an easy means to perpetrate discriminatory hiring. We do not believe that such an advertisement provides an employer so disposed with an easier or better tool for discrimination than does a resume or job interview.[19] Here, we must distinguish *Press I*. In *Press I*, the advertisers and the Press were classifying *jobs* on the basis of sex. Discriminatory hiring was faciliated because persons of one gender were *discouraged* from even *applying* for a job that was advertised as being of "interest" only to persons of the opposite gender. As the Court stated in *Press I* at 387, "By implication, at least, an advertiser whose want ad appears in the 'Jobs—Male Interest' column is likely to discriminate against women in his hiring decisions." Moreover, the positive relationship between the advertisements in *Press I* and sex discrimination in employment was reflected in the record.

[19] We note that the Commission's argument is unsupported by the record itself in the sense that one would expect a much higher number and proportion of references to characteristics preferred by the prejudiced employer if the situation-wanted column had become an avenue for "easy" discrimination. Yet, no particular group characterized by any of these traits dominates the column. The numerically frequent references to age and sex are fairly evenly divided between age groups and genders. References to race, religion, and national origin rarely appeared, if at all. *See* note 9, *supra*. While these figures cannot prove that discrimination does not occur as a result of the ads, it is likewise true that they do not support a conclusion that it does occur.

Press I at 381 n. 7. In the present case, we are dealing with *individuals who choose to classify themselves* according to race, sex, or one of the other traits. There is no evidence in the record that ads of the type found objectionable by the Commission result in employment discrimination, nor do such ads imply, as did those in *Press I*, that any employer is likely to discriminate in hiring. Section 5 (g) does not directly affect hiring practices one way or another. It affects them only through the reactions it is assumed employers will have to the free flow of information. *See Virginia Pharmacy* at 425 U.S. 755, 96 S.Ct. 1820. And we believe, moreover, that the Commission's assumptions as to employer reactions are narrowly one-sided and thereby fail to draw attention to the impact of Section 5 (g) on other, legitimate, aspects or uses of the commercial speech involved here.

The Commission apparently assumes that only the prejudiced employer will react to or affirmatively utilize the "objectionable" characteristic information in these ads. This overlooks the possibility that a fair-minded employer may react in the negative to any ad that specifies any race, sex, religion, age or national origin. Such an employer may seek to avoid hiring individuals who are themselves prejudiced. More importantly, the Commission overlooks a quite legitimate use of this type of characteristic information. "Equal Opportunity" and "Affirmative Action" employers may use the information in such ads to find more minority applicants to interview for a position.[20] Even

[20] We specifically confine this statement to recruiting minorities for interviews or consideration for a job, and thus need not discuss the issue of the validity of "reverse discrim-

an ad which boldly "specifies" such information has this legitimate use.

Moreover, Section 5 (g) impedes the flow of greater amounts of legitimate commercial information by banning ads which "in any manner" express any of the "forbidden" characteristics. A job-seeker's name is, beyond doubt, a completely legitimate item of information in a situation-wanted ad. Yet Section 5 (g) is obviously offended in one or more respects by, just as examples: Svenson, Weinstein, Tanaka, Kowalski, Garcia, O'Brien, or Schmidt. Most given names, such as Dennis[21] and Joyce,[22] leave little more doubt as to gender than do the titles "Mr.", "Mrs.",[23] and even "Ms."

Section 5 (g) would also suppress vital information relating to job qualifications. A person's alma mater, be it high school or college level, can inform an employer of the quality of education a job-seeker has had. Yet 5 (g) would prohibit the inclusion in an ad of "North Catholic High School" or "Oral Roberts University". For indicating race, "Morgan State" or "Grambling" would offend 5 (g). The graduate of the all-female Carlow College would likewise transgress 5 (g) by advertising that fact. Another important job qualification is experience. However, one with as very much experience as 30[24] or 55[25] years may find that

ination". As to that issue, *see Chmill v. City of Pittsburgh*, , Pa. Commonwealth Ct. , A.2d (No. 1047 1976, filed July 18, 1977).

[21] Exhibit A-13 (Rec. 39a).

[22] Exhibit A-20 (Rec. 45a).

[23] Exhibit A-17 (Rec. 42a).

[24] Exhibit A-14 (Rec. 40a).

[25] Exhibit A-14 (Rec. 40a).

this excellent qualification cannot be advertised because it also expresses a good indication of relative age. The baby-sitter who describes herself as an "experienced mother",[26] perhaps a very persuasive qualification to many with young children, clearly violates 5 (g). Finally, 5 (g) would require the "Salesman",[27] "Body man",[28] "Handyman",[29] and "Cleaning Lady"[30] to find some other way to denote their chosen occupation without connoting gender. While it may very well be completely valid to require an employer-advertiser to substitute "-person" as the suffix of these words when used to describe a job, to compel an individual to describe himself or herself in such stilted and sterile language, or forgo speaking at all, smacks of the imposed linguistic conformity of an Orwellian nightmare.

The result of our balancing analysis should, at this point, be clear. We conclude that the Commission has failed to show that Section 5 (g) in any way significantly furthers the Commonwealth's concededly substantial interest in eradicating employment discrimination. We also conclude, on the other hand, that application of Section 5 (g) would have the effect of significantly impairing the flow of legitimate and truthful commercial information. In view of these conclusions, it is clear that the balance in this case must be tipped in the favor of the First Amendment interest of the advertisers and against the constitu-

[26] Exhibit A-9 (Rec. 35a).

[27] Exhibit A-9 (Rec. 35a).

[28] Exhibit A-10 (Rec. 36a).

[29] Exhibit A-1 (Rec. 27a).

[30] Exhibit A-18 (Rec. 43a).

tional validity of the challenged portion of Section 5 (g).[31] We hold, therefore, that the Commission is without power to prohibit the inclusion in any situation-wanted advertisement of any specification or expression of the advertiser's race, color, religious creed, ancestry, age, sex or national origin. As a natural consequence, we further hold that the cease and desist order entered against the Press for aiding and abetting the publication of such situation-wanted advertisements is constitutionally invalid. We therefore reverse.

Harry A. Kramer,
Judge

[31] The Commission charged the Press only with aiding the publication of advertisements which specify or express the "prohibited" characteristics of the *job-seeker*. That portion of 5(g) which prohibits the job-seeker from expressing in the ad any limitation or preference as to the race, color, religious creed, ancestry, age, sex, or national origin of the prospective *employer* is not presently before us, and, therefore, is not invalidated or directly affected by today's decision.

APPENDIX C

THE SUPREME COURT OF PENNSYLVANIA
Western District

801 City-County Building
Pittsburgh, Pa. 15219
January 24, 1979

Robert S. Mirin, Esquire
Pa. Human Relations Commission
100 N. Cameron Street
Harrisburg, Pa. 17101

John E. Benjes, Esquire
301 Muench Street
Harrisburg, Pa. 17102

In Re: Pa. Human Relations Commission v. Pgh. Press Co., No. 42 March Term, 1978

Dear Messrs. Mirin and Benjes:

Enclosed is a copy of the opinion filed today, together with the judgment order which was entered today.

Very truly yours,
(s) Irma T. Gardner
Deputy Prothonotary

Enclosures
cc: Robert H. Shoop, Jr., Esquire
Thorp, Reed and Armstrong
2900 Grant Building
Pittsburgh, Pa. 15219

Honorable James S. Bowman
for Hon. Harry A. Kramer
President Judge, Commonwealth Court
622 South Office Building
Harrisburg, Pa. 17120

SUPREME COURT OF PENNSYLVANIA
Western District

No. 42 March Term, 1978

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA HUMAN RELATIONS COMMISSION,
Appellant

v.

PITTSBURGH PRESS COMPANY

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the COMMONWEALTH COURT OF PENNSYLVANIA, be, and the same is hereby affirmed.

By the Court:
(s) Sally Mrvos
Sally Mrvos, Esquire
Prothonotary

Dated: January 24, 1979

IN THE SUPREME COURT OF PENNSYLVANIA
Western District

No. 42 March Term, 1978

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA HUMAN RELATIONS COMMISSION,
Appellant

v.

PITTSBURGH PRESS COMPANY,
Appellee

Appeal from the Order of the Commonwealth Court of Pennsylvania at No. 1275 C.D. 1976 reversing the Order of the Pennsylvania Human Relations Commission at Commission Docket No. E-8525.

OPINION

JUSTICE MANDERINO, Filed Jan 24 1979:

This appeal is from the order of the Commonwealth Court reversing the order of the Pennsylvania Human Relations Commission (Commission), and declaring unconstitutional that portion of Section 5(g) of The Pennsylvania Human Relations Act, 43 P.S. §955(g). Section 5(g) prohibits the publication of advertisements for employment expressing the race, color, religious creed, ancestry, age, sex, or national origin of

the advertiser. *Pittsburgh Press Co. v. Comm., Human Relations Commission,* 31 Pa. Commonwealth Ct. 218, 376 A.2d 263 (1977).

The circumstances surrounding this appeal are as follows. On March 15, 1975, the Commission charged the Pittsburgh Press Company (Press) with "maintain[ing] a pattern and practice of aiding and abetting the doing of an unlawful discriminatory act" in violation of Section 5 (e) of The Pennsylvania Human Relations Act. According to the Commission, the Press violated Section 5 (e) of the Act by publishing "situation wanted" advertisements alleged to be unlawful under Section 5 (g) because the ads identified the advertiser's sex, race, religion, or age.

The Pittsburgh Press is a newspaper of general circulation throughout the greater Pittsburgh metropolitan area. The "situation wanted" section of the Press' classified advertisements provides a vehicle for persons seeking employment to describe themselves, their job qualifications, and the kind of employment they are seeking. The Press accepts and publishes these ads exactly as submitted by the advertisers.

On June 27, 1975, following an investigation from which the Commission determined that there was probable cause to credit the allegations contained in the complaint referred to above, the Commission issued a final order requiring the Press to cease and desist from publishing "situation wanted" advertisements, the contents of which are prohibited by Section 5 (g).

On appeal, the Commonwealth Court reversed the Commission's final order, and ruled that Sub-section 5 (g) was unconstitutional. We granted the Commission's petition for allowance of appeal, and this appeal followed.

The Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, §1, as amended 43 P.S. §§951, et seq., establishes it as

> ". . . the public policy of this Commonwealth to foster the employment of all individuals in accordance with their fullest capacities regardless of their race, color, religious creed, ancestry, handicap or disability, use of guide dogs because of blindness of the user, age, sex, or national origin, and to safeguard their right to obtain and hold employment without such discrimination, to assure equal opportunities to all individuals and to safeguard their rights at places of public accommodation and to secure commercial housing regardless of race, color, religious creed, ancestry, sex, handicap or disability, use of guide dogs because of blindness of the user or national origin."

To further this public policy, Section 5 of the Act makes certain discriminatory employment practices unlawful. 43 P.S. §955 (a) through (j). Among other things, in 5 (g), the Act makes it unlawful employment discrimination

> "[f]or any individual seeking employment to publish or cause to be published any advertisement which specifies or in any manner expresses his race, color, religious creed, ancestry, age, sex or national origin, or in any manner expresses a limitation or preference as to the race, color, religious creed, ancestry, age, sex or national origin of any prospective employer."
>
> 43 P.S. §955 (g).

Section 5 (e) also makes it unlawful

> "[f]or any person, whether or not an employer, employment agency, labor organization or employe, to aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, . . ."

The Commission found that by accepting and presenting "situation wanted" advertisements which included references to the criteria declared unlawful by Section 5 (g), the Press had "aided and abetted" the unlawful employment practice proscribed by that section, the Press was therefore found to be in violation of Section 5 (e).

The Commonwealth Court recognized that the advertisements which formed the basis of the Commission's complaint clearly violated Section 5 (g):

> "An indication of the type of advertisement found by the Commission to violate Section 5 (g) can be ascertained from the specific examples set forth in the Hearing Panel's findings of fact. These examples were drawn from stipulated exhibits which included the Press' 'Situation Wanted' columns from Sunday, June 1, 1975 to Thursday, June 26, 1975:
>
> 'COLLEGE GRAD—Born again Christian with Bachelor's Degree and seven yrs. sales and marketing mgmt. experience seeking work with Christian business or organization. . . .'
>
> 'White woman—desires day work, office cleaning.'
>
> 'Parolee—White needs employment to be released. Licensed steam boiler and engineer. . . .'

> 'Salesman—Age 30, looking for career in Pittsburgh, start immediately, 15 years sales experience. . . .'
>
> 'What can I do for you? Recent college grad, good looking, twenty-five years old, B.S. in Business Administration, seeks entry level management position.'
>
> 'Man—mature, accounting, bookkeeping, office management, desires position in these or related fields.'
>
> It is obvious at a glance that the contents of these advertisements are in contravention of the letter of Section 5 (g)."
>
> (Footnotes omitted.)
>
> 31 Pa. Commonwealth Ct. at 223, 376 A.2d at 265.

The Press did not contend otherwise before the Commonwealth Court, nor does it so contend here. The Press argues, however, that Section 5 (g) unlawfully infringes on First Amendment rights. We agree with the Commonwealth Court that the advertiser's rights, as guaranteed by the First Amendment to the United States Constitution, are improperly restricted by the prohibition of Section 5 (g). We therefore affirm the order of the Commonwealth Court.

The Press did not contend before the Commonwealth Court that the state may not prohibit discriminatory employment practices. It argued, however, that the restriction on freedom of expression contained in Section 5 (g) is not necessary to promote that legitimate state objective. We agree with the Press that the Commission has not shown that the prior restraint of

> Wanted' rather than stated within the four corners of the advertisement.
>
> The illegality in this case may be less overt, but we see no difference in principle here. Sex discrimination in nonexempt employment has been declared illegal. . . .
>
> 413 U.S. at 388 (emphasis in original) (citations omitted).

The Pennsylvania Human Relations Act, *supra,* announced unequivocally that the practice or policy of discrimination in employment by reason of race, color, religious creed, ancestry, age, sex or national origin is violative of the public policy of this Commonwealth. Section 5 of the Act specifies those practices which have been declared illegal in an effort to eradicate the evils of discrimination. Section 5 (g) prohibits an individual seeking employment from attempting to influence the employment decision by supplying information relating to those factors or qualities which have been proscribed in making such a judgment. Section 5 (e) prohibits a third party from aiding and abetting the transmittal of the prohibited information for the purpose of influencing the employment decision. It is conceded that the ads which form the basis of this lawsuit were in violation of Sections 5 (g) and (e) and therefore illegal under the law of this Commonwealth. Notwithstanding the fact that it has been conceded that the publishing of these ads *was illegal commercial activity* under the terms of the Act, the majority seeks to support its result by finding that the advertiser's rights, as guaranteed by the freedom of expression amendment of the federal constitution, have been improperly curtailed by the mandate of Section 5 (g).

While recognizing that a state may prohibit discriminatory employment practices, the majority argues that the restriction of freedom of expression accomplished by Section 5 (g) "is not necessary to promote that legitimate state objective." (Slip op. p. 6) This position ignores the holding and supporting rationale of *Press I.* In that case, the United States Supreme Court clearly sanctioned the restriction of the advertiser's right to freedom of expression to effectuate a legitimate regulation of an unlawful activity. Moreover, in its latest decisions the United States Supreme Court has reaffirmed the right to restrain commercial advertising that is inimical to the public welfare. *Bates v. State Bar of Arizona,* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed. 2d 810 (1977); *Virginia Pharmacy Bd. v. Virginia Consumer Council,* 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed. 2d 346 (1976).

> The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely. (citation omitted)
>
> Also, there is no claim that the transactions proposed in the forbidden advertisements are themselves illegal in any way.
>
> *Va. Pharmacy Bd. v. Virginia Consumer Council,* 425 U.S. at 771-72. (citations omitted).

Here the transactions proposed in the forbidden advertisements are in themselves illegal. The ads encourage the employer to make the employment decision based upon the prohibited considerations. The commercial speech being restrained is simply a solicitation for discriminatory hiring. The majority seeks to dis-

> "If government can dictate the layout of a newspaper's advertising pages today, what is there to prevent it from dictating the news pages tomorrow? . . .
>
> [T]he constitutional guarantee of a free press is more precatory. . . . [I]t is a clear command that government must never be allowed to lay its heavy editorial hand on any newspaper in this country."

Pittsburgh Press Company v. Pittsburgh Commission on Human Relations, 413 U.S. 376, 403-4, 93 S.Ct. 2553, 2568 (1973) (Stewart, J., dissenting, joined by Douglas, J. and specially joined by Blackmun, J.). See generally, *William Goldman Theatres v. Dana,* 405 Pa. 83, A.2d (1961) (Pa. Const. art. I, §7 bars prior restraints). The Commonwealth Court properly reversed the order of the Pennsylvania Human Relations Commission. I therefore join the Court's affirmance.

[Caption Omitted]

DISSENTING OPINION

NIX, J., Filed Jan 24 1979:

In *Pittsburgh Press Co. v. Human Relations Commission,* 413 U.S. 376, 93 S.Ct. 2553, 37 L.Ed. 2d 669 (1973) (Press I), the United States Supreme Court held an order prohibiting a newspaper from publishing sex-designated advertisements by employers offering employment not to be violative of the first amendment of the federal constitution. Today, a majority of this Court has found the prohibition of situations wanted advertisements identifying the race, color, religious creed, age and sex of the applicant under circumstances prohibited by the Human Relations Act, Act of Oct. 27, 1955, 43 P.S. §951, *et seq.* (Supp. 1978-79), P.L. 744, *as amended,* to be impermissible under the first amendment. To reach this startling result, the majority has given *Press I* an unwarrantedly narrow interpretation and has read into the recent decision of the United States Supreme Court in the commercial speech area unjustified implications. The majority in its zeal to extend the protection to be given commercial speech, totally ignores this Commonwealth's strong commitment to an egalitarian society. *See e.g. Pa. Const.* Art. I §28. I therefore must express my most vehement disagreement.

In *Press I,* the United States Supreme Court avoided the level of protection commercial speech should be accorded by noting:

> [9] Whatever the merits of this contention may be in other contexts, it is unpersuasive in this case. Discrimination in employment is not only commercial activity, it is *illegal* commercial activity under the Ordinance. We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes. Nor would the result be different if the nature of the transaction were indicated by placement under columns captioned 'Narcotics for Sale' and 'Prostitutes

---

legislature or any branch of government, no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. . . ."

aided and abetted such employers' practice of sex based employment discrimination. Indeed, the Press did not challenge the illegality of the underlying acts in *Press I*. In the present case, the "situation wanted" ads propose no illegal transactions, they simply ask that prospective employers hire the respective individual advertisers. The prospective *employees'* use of prohibited employment criteria in an advertisement cannot reasonably be said to aid an employer who might be predisposed to utilize such forbidden criteria. Knowledge of such forbidden criteria—age, sex, race, color, etc.,—is readily obtainable by the employer simply by scheduling a pre-employment interview, or by requesting submission of an employment resume. Any effect that enforcement of Section 5 (g) might have on reducing employment discrimination made illegal by Section 5 (e) is thus too speculative to justify Section 5 (g) 's direct restriction on the advertiser's freedom of expression.

As was stated by the United States Supreme Court in *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85, 92 ft. n. 6, 52 L.Ed. 2d 155, 161 ft. n. 6, 97 S.Ct. 1614, (1977):

> "After *Virginia Pharmacy Bd.* [*v. Virginia Consumer Council,* 425 U.S. 748, 48 L.Ed. 2d 346, 96 S.Ct. 1817 (1976)] it is clear that commercial speech cannot be banned because of an unsubstantiated belief that its impact is detrimental."

In *Linmark,* the record failed to support the township's assumption that proscribing the placement of "for sale" signs in front of township homes would reduce public awareness of realty sales and thereby decrease public concern over selling. Likewise, in the instant case, the record fails to establish the statutory assumption contained in 5 (g) that because of the revelation of supposed illegal employment criteria contained in the prohibited "situation wanted" ads, employer would be more likely to base their hiring decisions on such illegal criteria.

Order of the Commonwealth Court is affirmed.

Former Justice Pomeroy did not participate in the decision of this case.

Mr. Justice Roberts filed a concurring opinion.

Mr. Justice Nix filed a dissenting opinion.

[Caption Omitted]

CONCURRING OPINION

ROBERTS, J., Filed: Jan 24 1979:

In my view, Section 5 (e) of the Human Relations Act,[1] 43 P.S. §955e (1964),[2] insofar as it authorizes the Pennsylvania Human Relations Commission's order directing the Pittsburgh Press to cease and desist publication of "situation wanted" avertisements, is unconstitutional under article I, section 7 of the Pennsylvania Constitution.[3] As Mr. Justice Stewart observed:

---

[1] Act of October 27, 1955, P.L. 744, as amended.

[2] §5(e) makes it unlawful "[f]or any person . . . to aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice. . . ."

[3] Pa. Const., Art. I, §7, provides:

> "[T]he printing press shall be free to every person who may undertake to examine the proceedings of the

Section 5 (g) is necessary to promote this legitimate state interest. The Commission argued that this case is controlled by *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations,* 413 U.S. 376, 37 L.Ed. 2d 669, 93 S.Ct. 2553 (1973) (Press I). The Press argues that in light of more recent pronouncements of the United States Supreme Court, *Press I* is no longer viable law. We need not decide this point, however, because unlike the situation in *Press I,* what the Commission seeks to do in this case is to restrict the expression of the advertiser itself, rather than to restrict the unlawful activity of employment discrimination. While it held that legitimate regulation of an unlawful activity may incidentally effect an advertiser's right to freedom of expression, *Press I* does not stand for the proposition that prior restraint may be imposed on commercial speech even though that speech does not propose an illegal transaction.

The United States Supreme Court has, of course, said that it is permissible to regulate commercial advertising in some ways: "[a]dvertising that is false, deceptive, or misleading . . . is subject to restraint" *Bates v. State Bar of Arizona,* 433 U.S. 350, 383, 53 L.Ed. 2d 810, 835, 97 S.Ct. 2691, (1977); *Virginia Pharmacy Board v. Virginia Consumer Council,* 425 U.S. 748, 48 L.Ed. 2d 346, 96 S.Ct. 1817 (1976); as is purely commercial advertising concerning transactions that are themselves illegal, *Bates v. State Bar of Arizona, supra; Press I, supra.* Similarly, reasonable restrictions may be placed upon the time, place, and manner of advertising *Virginia Pharmacy Board, supra;* and special restrictions may be allowable with regard to advertising on the electronic broadcast media, *cf. Capital Broadcasting Co. v. Mitchell,* 333 F. Supp. 882 (D.C. 1971), *aff'd sub nom Capital Broadcasting Co. v. Acting Attorney General,* 405 U.S. 1000, 31 L.Ed. 2d 472, 92 S.Ct. 1289 (1972).

The restriction imposed by Section 5 (g), however, goes directly to the advertiser's right to freely express his or her job qualifications, abilities, personal experience, or educational history. In *Press I,* the employer's placement of "Help-wanted" containing sex preference designations constituted an act of illegal sex discrimination in the hiring of personnel. As a result, the Supreme Court said in *Press I,* that

> "[a]ny First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity."
>
> 413 U.S. at 389, 37 L.Ed. 2d at 679, 93 S.Ct. at

In contrast to the advertising employer's illegal, sex-based, employment discrimination in *Press I,* in the instant case the advertisers are prospective employees proposing commercial transactions—their own employment—which are not illegal. By its terms, the Act applies to employers, and those who aid and abet employers to practice employment discrimination. In *Press I* the Act clearly proscribed the underlying activity—sex based discrimination by the employer—and by providing sex-designated Help-wanted columns in its classified advertising section, the Press directly

aided and abetted such employers' practice of sex based employment discrimination. Indeed, the Press did not challenge the illegality of the underlying acts in *Press I*. In the present case, the "situation wanted" ads propose no illegal transactions, they simply ask that prospective employers hire the respective individual advertisers. The prospective *employees'* use of prohibited employment criteria in an advertisement cannot reasonably be said to aid an employer who might be predisposed to utilize such forbidden criteria. Knowledge of such forbidden criteria—age, sex, race, color, etc.,—is readily obtainable by the employer simply by scheduling a pre-employment interview, or by requesting submission of an employment resume. Any effect that enforcement of Section 5 (g) might have on reducing employment discrimination made illegal by Section 5 (e) is thus too speculative to justify Section 5 (g) 's direct restriction on the advertiser's freedom of expression.

As was stated by the United States Supreme Court in *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85, 92 ft. n. 6, 52 L.Ed. 2d 155, 161 ft. n. 6, 97 S.Ct. 1614, (1977):

> "After *Virginia Pharmacy Bd.* [*v. Virginia Consumer Council,* 425 U.S. 748, 48 L.Ed. 2d 346, 96 S.Ct. 1817 (1976)] it is clear that commercial speech cannot be banned because of an unsubstantiated belief that its impact is detrimental."

In *Linmark,* the record failed to support the township's assumption that proscribing the placement of "for sale" signs in front of township homes would reduce public awareness of realty sales and thereby decrease public concern over selling. Likewise, in the instant case, the record fails to establish the statutory assumption contained in 5 (g) that because of the revelation of supposed illegal employment criteria contained in the prohibited "situation wanted" ads, employer would be more likely to base their hiring decisions on such illegal criteria.

Order of the Commonwealth Court is affirmed.

Former Justice Pomeroy did not participate in the decision of this case.

Mr. Justice Roberts filed a concurring opinion.

Mr. Justice Nix filed a dissenting opinion.

[Caption Omitted]

CONCURRING OPINION

ROBERTS, J., Filed: Jan 24 1979:

In my view, Section 5 (e) of the Human Relations Act,[1] 43 P.S. §955e (1964),[2] insofar as it authorizes the Pennsylvania Human Relations Commission's order directing the Pittsburgh Press to cease and desist publication of "situation wanted" avertisements, is unconstitutional under article I, section 7 of the Pennsylvania Constitution.[3] As Mr. Justice Stewart observed:

---

[1] Act of October 27, 1955, P.L. 744, as amended.

[2] §5(e) makes it unlawful "[f]or any person . . . to aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice. . . ."

[3] Pa. Const., Art. I, §7, provides:

> "[T]he printing press shall be free to every person who may undertake to examine the proceedings of the

> "If government can dictate the layout of a newspaper's advertising pages today, what is there to prevent it from dictating the news pages tomorrow? . . .
>
> [T]he constitutional guarantee of a free press is more precatory. . . . [I]t is a clear command that government must never be allowed to lay its heavy editorial hand on any newspaper in this country."

Pittsburgh Press Company v. Pittsburgh Commission on Human Relations, 413 U.S. 376, 403-4, 93 S.Ct. 2553, 2568 (1973) (Stewart, J., dissenting, joined by Douglas, J. and specially joined by Blackmun, J.). See generally, *William Goldman Theatres v. Dana,* 405 Pa. 83, A.2d (1961) (Pa. Const. art. I, §7 bars prior restraints). The Commonwealth Court properly reversed the order of the Pennsylvania Human Relations Commission. I therefore join the Court's affirmance.

[Caption Omitted]

DISSENTING OPINION

NIX, J., Filed Jan 24 1979:

In *Pittsburgh Press Co. v. Human Relations Commission,* 413 U.S. 376, 93 S.Ct. 2553, 37 L.Ed. 2d 669 (1973) (Press I), the United States Supreme Court held an order prohibiting a newspaper from publish-

---

legislature or any branch of government, no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. . . ."

ing sex-designated advertisements by employers offering employment not to be violative of the first amendment of the federal constitution. Today, a majority of this Court has found the prohibition of situations wanted advertisements identifying the race, color, religious creed, age and sex of the applicant under circumstances prohibited by the Human Relations Act, Act of Oct. 27, 1955, 43 P.S. §951, *et seq.* (Supp. 1978-79), P.L. 744, *as amended,* to be impermissible under the first amendment. To reach this startling result, the majority has given *Press I* an unwarrantedly narrow interpretation and has read into the recent decision of the United States Supreme Court in the commercial speech area unjustified implications. The majority in its zeal to extend the protection to be given commercial speech, totally ignores this Commonwealth's strong commitment to an egalitarian society. *See e.g. Pa. Const.* Art. I §28. I therefore must express my most vehement disagreement.

In *Press I,* the United States Supreme Court avoided the level of protection commercial speech should be accorded by noting:

> [9] Whatever the merits of this contention may be in other contexts, it is unpersuasive in this case. Discrimination in employment is not only commercial activity, it is *illegal* commercial activity under the Ordinance. We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes. Nor would the result be different if the nature of the transaction were indicated by placement under columns captioned 'Narcotics for Sale' and 'Prostitutes

> Wanted' rather than stated within the four corners of the advertisement.
>
> The illegality in this case may be less overt, but we see no difference in principle here. Sex discrimination in nonexempt employment has been declared illegal. . . .
>
> 413 U.S. at 388 (emphasis in original) (citations omitted).

The Pennsylvania Human Relations Act, *supra,* announced unequivocally that the practice or policy of discrimination in employment by reason of race, color, religious creed, ancestry, age, sex or national origin is violative of the public policy of this Commonwealth. Section 5 of the Act specifies those practices which have been declared illegal in an effort to eradicate the evils of discrimination. Section 5 (g) prohibits an individual seeking employment from attempting to influence the employment decision by supplying information relating to those factors or qualities which have been proscribed in making such a judgment. Section 5 (e) prohibits a third party from aiding and abetting the transmittal of the prohibited information for the purpose of influencing the employment decision. It is conceded that the ads which form the basis of this lawsuit were in violation of Sections 5 (g) and (e) and therefore illegal under the law of this Commonwealth. Notwithstanding the fact that it has been conceded that the publishing of these ads *was illegal commercial activity* under the terms of the Act, the majority seeks to support its result by finding that the advertiser's rights, as guaranteed by the freedom of expression amendment of the federal constitution, have been improperly curtailed by the mandate of Section 5 (g).

While recognizing that a state may prohibit discriminatory employment practices, the majority argues that the restriction of freedom of expression accomplished by Section 5 (g) "is not necessary to promote that legitimate state objective." (Slip op. p. 6) This position ignores the holding and supporting rationale of *Press I.* In that case, the United States Supreme Court clearly sanctioned the restriction of the advertiser's right to freedom of expression to effectuate a legitimate regulation of an unlawful activity. Moreover, in its latest decisions the United States Supreme Court has reaffirmed the right to restrain commercial advertising that is inimical to the public welfare. *Bates v. State Bar of Arizona,* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed. 2d 810 (1977); *Virginia Pharmacy Bd. v. Virginia Consumer Council,* 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed. 2d 346 (1976).

> The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely. (citation omitted)
>
> Also, there is no claim that the transactions proposed in the forbidden advertisements are themselves illegal in any way.
>
> *Va. Pharmacy Bd. v. Virginia Consumer Council,* 425 U.S. at 771-72. (citations omitted).

Here the transactions proposed in the forbidden advertisements are in themselves illegal. The ads encourage the employer to make the employment decision based upon the prohibited considerations. The commercial speech being restrained is simply a solicitation for discriminatory hiring. The majority seeks to dis-

guise the illegality by characterizing the content of these ads as a mere expression of the applicants "job qualifications, abilities, personal experience, or educational history." This gloss does not dismiss the controlling fact that the qualifications sought to be communicated are not legitimate concerns in the employment decision and are solely for the purpose of encouraging discriminatory hiring decisions. It is not simply a request to be hired as the majority contends, rather it seeks to pollute the hiring decision by introducing the prohibited considerations.

Commercial speech is only distinguishable by its content and the United States Supreme Court has recognized that the first amendment protections should not be withdrawn from it simply because it proposes a mundane commercial transaction. Here, however, the restraint is not being imposed because of the commercial character of the message, but rather the illegal transaction it proposes.

The majority perceives a distinction in the nature of the transactions here and that encountered in *Press I*. I confess that I am unable to comprehend that distinction. In both instances the illegal activity condemned was discriminatory employment. In *Press I*, the regulation was directed to the conduct of the prospective employer. In this appeal, the conduct of the prospective employe is being regulated. Both regulations were directed to the same end, i.e. discriminatory hiring. Further, both regulations did not impinge upon the free flow of commercial information necessary to make the employment decision. The only information restrained was information not lawfully relevant to the proposed commercial transaction.

Finally, in both *Press I* and the instant appeal, we are concerned with the right of the newspaper to publish the information. There is obviously no greater right derived by the newspaper to communicate the expressions of a potential employe than its right to disseminate the needs of a potential employer. I am therefore of the view that the employe's rights of freedom of expression under the first amendment have not been abridged by the state's legitimate exercise of its police power in an attempt to eradicate one of the most pervasive and elusive evils in our society today.

APPENDIX D

TEXT OF PERTINENT PROVISIONS OF §5 OF THE PENNSYLVANIA HUMAN RELATIONS ACT, 43 P.S. §955

It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, or in the case of a fraternal corporation or association, unless based upon membership in such association or corporation or except where upon applicable security regulations established by the United States or the Commonwealth of Pennsylvania:

(a) For any employer because of the race, color, religious creed, ancestry, age, sex, national origin, or non-job related handicap or disability of any individual to refuse to hire or employ, or to bar or to discharge from employment such individual, or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, if the individual is the *best able and most competent* to perform the services required. The provision of this paragraph shall not apply to (1) termination of employment because of the terms or conditions of any bona fide retirement or pension plan, (2) operation of the terms or conditions of any bona fide retirement or pension plan which have the effect of a minimum service requirement, (3) operation of the terms or conditions of any bona fide group or employe insurance plan.

(b) For any person, whether or not an employer, employment agency, labor organization or employe, to aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, or to obstruct or prevent any person from complying with the provisions of this act or any order issued thereunder, or to attempt, directly or indirectly, to commit any act declared by this section to be unlawful discriminatory practice.

IN THE SUPREME COURT OF PENNSYLVANIA

Western District

No. 42 March Term 1978

PENNSYLVANIA HUMAN RELATIONS COMMISSION,
Appellant

vs.

PITTSBURGH PRESS COMPANY,
Appellee

Brief for Appellant

Appeal from the Order of the Commonwealth Court of Pennsylvania at No. 1275 C.D. 1976 reversing the Order of the Pennsylvania Human Relations Commission at Commission Docket No. E-8525.

Robert Mirin
General Counsel
Pa. Human Relations Commission

John E. Benjes
Assistant General Counsel
Pa. Human Relations Commission
301 Muench Street
Harrisburg, Pennsylvania 17102

(Attorneys for Appellant)

TABLE OF CONTENTS

TABLE OF CITATIONS

Page

Cases

STATUTES

Pennsylvania Human Relation Act of October 27, 1955, P.L. Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §951, et seq.

CONSTITUTION

OTHER

I. STATEMENT OF JURISDICTION

Jurisdiction is based upon Section 204(a) of the Appellate Court Jurisdiction Act of 1970, Act of July 31, 1970, P.L. 673 No. 223, Article II, 17 P.S. §211.204(a) which provides for discretionary allowance of appeals from orders of the Commonwealth Court and upon the order entered by the Supreme Court of Pennsylvania on Appellant's Petition for Allowance of Appeal; "April 7, 1978. Petition granted. Per Curiam."

II. STATEMENT OF QUESTIONS INVOLVED

Did the legislature in enacting Section 5(g) of the Human Relations Act create an unconstitutional infringement on speech?

(Answered in the affirmative by the court below)

III. STATEMENT OF THE CASE

This is an appeal from the decision and order of the Commonwealth Court of Pennsylvania appearing at 31 Pa. Cmwlth 218, 376 A.2d 263 (1977), which reversed the order of the Pennsylvania Human Relations Commission (hereinafter "the Commission") entered on June 27, 1976 at Commission docket number E-8528 (R. 67a-76a).

On March 11, 1975 the Commission initiated a complaint (Docket No. E-8528) charging that the respondent, Pittsburgh Press Company (hereinafter "Press"), "maintains a pattern and practice of aiding and abetting the doing of an unlawful discriminatory act" in violation of Section 5(e), of the Pennsylvania Human Relations Act through publication of advertisements alleged to be unlawful under Section 5(g) of the Act.

An investigation by the Commission determined that there was probable cause to credit the allegations of the complaint whereupon the Commission endeavored to eliminate the unlawful pattern and practice complained of by conciliation. Conciliation having failed, the Commission convened a public hearing on August 6, 1975. Counsel for the parties agreed to written stipulations which were entered into the record of the public hearing along with Exhibits A-1 thru A-33 and B-1 thru B-7. The hearing panel, upon consideration of oral argument, the record and the brief submitted subsequent to the hearing, unanimously recommended that the full Commission find that the Press' acceptance and publication of situation wanted ads referring

to and making use of race or sex violated Section 5(e)

On June 27, 1975, the full Commission adopted and issued Findings of Fact, Conclusions of Law, and Decision in favor of the complainant as well as a Final Order requiring the Press to cease and desist from publishing "situation-wanted" advertisements, the contents of which are prohibited by Section 5(g).

The Commonwealth Court by its opinion of July 21, 1977, reversed the Final Order of the Commission. The Court ruled that Section 5(g) of the Act did not significantly further the Commonwealth's concededly substantial interest in eradicating employment discrimination and necessarily had the effect of significantly impairing the flow of legitimate and truthful commercial information. Thus, the Court reasoned that the Commission was without power to prohibit the Press from publishing such advertisements. The Commission appeals from this Opinion and Order.

IV. SUMMARY OF ARGUMENT

The Court below struck down the Commission's authority to enforce that portion of Section 5(g) of the Human Relations Act which prohibits an individual seeking employment from specifying their race, color, religious creed, ancestry, age, sex or national origin. It is respectfully submitted that the Commonwealth Court's decision is based upon an overly broad reading of recent decisions of the U.S. Supreme Court in the commercial speech area. The Commonwealth Court failed to recognize the continuing vitality of the principle that commercial speech which attempts to achieve an illegal purpose is not given First Amendment protection. The activity inter alia which the legislature proscribed under Section 5(g) is speech designed to facilitate illegal employment discrimination contrary to the Pennsylvania Human Relations Act.

The rule of law enunciated in the U.S. Supreme Court recent decisions is that the First Amendment protects some forms of commercial speech. However, none of the considerations present in cases extending First Amendment protection to commercial speech are present here. Recent decisions have stressed the public's right to know important commercial information and have struck down restrictions on commercial speech which significantly limit the speaker's ability to propose a lawful commercial transaction. There is no public right to know the race or sex of job seekers, nor does Section 5(g) limit the ability of individuals to seek employment by advertising actual job qualifications.

The decision below gives inadequate weight to the clear governmental interest and policy underlying Section 5(g) by holding that individuals may, in proposing a commercial transaction, encourage and assist employers to violate the Human Relations Act. The Commonwealth Court gives insufficient deference to the legislature's perception that Section 5(g) was an important tool necessary to combat unlawful discrimination.

The Court's invalidation of Section 5(g) also rests on its abstract perception of abuses possible in future applications of this section. None of the examples contained in the Commission adjudication approach the examples seized upon by the Court in reversing the Commission. Courts may appropriately review and restrain unreasonable administrative applications of a statute without striking down the statute as unconstitutional. The appropriate response to a statute applied reasonably by the lower tribunal, but possibly subject to abuse,is to clarify the areas of prohibited application on an actual case or controversy basis.

V. ARGUMENT

A. THE HOLDING OF PITTSBURGH PRESS I, THAT COMMERCIAL SPEECH AIDING AN ILLEGAL PURPOSE IS UNPROTECTED, IS AFFIRMED BY RECENT DECISIONAL LAW.

The Commission in its final order found the Pittsburgh Press Company guilty of a violation of Section 5(e)[1] of the Human Relations Act (hereinafter "the Act")[2] which provides that:

> It shall be an unlawful discriminatory practice...
>
> (e) "For any person whether or not an employer, employment agency, labor organization, or employee to aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, or to obstruct or prevent any person from complying with the provisions of this Act or any order issued thereunder or to attempt directly or indirectly to commit any Act declared by this Section to be an unlawful discriminatory practice."

The Commission found that by accepting and printing the advertisements as submitted by job applicants, the Press had clearly aided and abetted the unlawful practice proscribed by Section 5(g)[3] of the Act which provides in pertinent part:

> It shall be an unlawful discriminatory practice...
>
> (g) for an individual seeking employment to publish or cause to be published any advertisement which specifies or in any manner expresses his race, color, religious creed, ancestry, age, sex or national origin...4

---

1 43 P.S. §955(e)

2 Act of October 27, 1955, P.L. 744, as amended, 43 P.S.§§951, et seq.

3 43 P.S. §955 (g)

4 The last clause of Section 5(g) prohibiting individuals from "expressing a preference as to the race, color, religious creed, ancestry, age, sex or national origin of any prospective employer," is not an issue in this litigation, 31 Pa. Cmwlth 218, 234, 376 A. 2d 263, 270, n. 31.

The Court below recognized that the advertisements sub judice are clearly in contravention of Section 5(g) of the Act, 31 Pa. Cmwth 218,223, 376 A. 2d 263, 265 (1977)[5] and the Press has not challenged this fact. However, the Court proceeded to find that Section 5(g) does not further the Commonwealth's strong interest in encouraging hiring based on qualifications as oppossed to classifications such as race and sex, 31 Pa. Cmwlth 219, 233, 376 A. 2d 263, 270. Thus, the Court reversed the Commission's order in an unnecessarily broad opinion invalidating Section 5(g) of the Act as an unconstitutional legislative infringement upon a job applicant's freedom of speech and holds the Commission powerless to order the Press to cease publishing the advertisements in question, 31 Pa. Cmwlth 218, 235, 376 A. 2d 263, 271.

The Court below in considering the difficult issues raised in this case found Pittsburgh Press Co. vs. Pittsburgh Commission on Human Relations, 413 U.S. 376, 93 S. Ct. 2553, 37 L. Ed. 2d 669 (1973), (hereinafter "Pittsburgh Press I") inapposite. It is the Commission's view that Pittsburgh Press I is controlling in this litigation.

Pittsburgh Press I, involved "help wanted" advertisements which were placed in sex-designated columns in the Press. The participation of the Press in a practice which facilitated unlawful employment discrimination was found to be unprotected

5 The Commonwealth Court Opinion is attached (as it appears in the Atlantic Reporter, Second Series) as Appendix A to this brief.

commercial speech. Thus, the statute's restriction upon commercial speech was deemed incidental to a valid limitation on economic activity,413 U.S. 376, 389. Similarly, the publication by the Press of the advertisements in this case which propose a commercial transaction which encourages and facilitates illegal job discrimination must be held to be unprotected. Clearly, the Press in this case aids and abets in the commission of an illegal act by the same act; publication of advertisements in contravention of Section 5(g) of the Act.[6]

The Court below notes correctly that recent Supreme Court decisions indicate that commercial speech is entitled to some First Amendment[7] protection in furtherance of lawful objectives 376 A. 2d 263, 266-268. However, it fails to distinguish those cases from Pittsburgh Press I and from the facts of the instant case. It is submitted that the holding of Pittsburgh Press I has not been diluted by the more recent decisions of the U.S. Supreme Court in the area.

Bigelow vs. Virginia, 421 U.S. 809, 95 S. Ct. 2222, 44 L. Ed. 600 (1975), relied upon by the Commonwealth Court, did not involve speech which encouraged illegal activity but rather the advertisement in Virginia of abortion referral services available in the state of New York; characterized by the Supreme Court as important lawful commercial information.

---

6 Other cases regulating speech in commercial settings include: Ohralik v. Ohio State Bar Association, U.S. (46 U.S.L.W. 4511, May 30, 1978) solicitation of clients; National Society of Professional Engineers v. U.S. U.S. (46 U.S.L.W. 41, April 25, 1978) restriction on advertisements regarding the ethics of competitive bidding; Williamson v. Lee Optical Co. 348 U.S. 483 (1955), advertisement for dental services.

7 U.S. CONST. amend. I.

The Supreme Court was careful to point out that the State of Virginia was powerless to prohibit the conduct which was advertised in its newspapers. Thus, it could not "under the guise of exercising internal police powers, bar a citizen of another state from dissemenating information about an activity that is legal in that state." 421 U.S. 809, 826.

It is the Commission's view that Bigelow reaffirms the vitality of the holding of Pittsburgh Press I that advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest. In Bigelow the interest of the advertiser clearly coincided with the public interest in access to information regarding abortions. 421 U.S. 809, 826. There was no claim by the state of Virginia that the advertised services were illegal in Virginia, or that the advertisement furthered any illegal scheme, or that it would invade the privacy of citizens or infringed on any other rights. In Bigelow the central issue is the public's right to access to lawfully disseminated commercial information without interference by the Government.

The public's right to know was also crucial to the Supreme Court's decision in Virginia Board of Pharmacy vs. Virginia Citizen's Consumer Council 425 U.S. 748, 96 S. Ct. 1877, 48 L. Ed. 2d 346 (1976) also mentioned in this Commonwealth Court's decision. In that case the Supreme Court reaffirmed the holding of the Pittsburgh Press I case that commercial speech is not totally lacking in First Amendment protection and found that the Virginia statute prohibiting advertisements of the prices of prescription drugs could not be supported in light of the public's right to know. In its opinion the Supreme Court

notes several cases which allow some regulation of advertising for professional services but found a strong controlling interest in the free flow of important commercial information which furthers articulated social policies (i.e. price competition). Where, as in this case, advertisers publish their race or sex in seeking employment there is no public right to know such as articulated in Virginia Pharmacy and in Bigelow.

Further the Supreme Court in Virginia Pharmacy points out that despite the fact that the First Amendment provides some protection for commercial speech, such speech is not wholly undifferentiable from other forms of speech. In Virginia Pharmacy there was no claim that the advertisements in question were false or misleading in any way or that they were themselves illegal within the meaning of Pittsburgh Press I. Clearly, the advertisements in this case, which facilitate illegal employment discrimination, are not entitled to protection under the Virginia Pharmacy rationale.

Of recent Supreme Court decisions, Linmark vs. Township of Willingboro, 431 U.S. 85, 97 S. Ct. 1614, 52 L. Ed. 2d 155 (1977), is most closely related to the facts of this case. The Supreme Court agains recognized the substantial public interest in the free flow of commercial information. In Linmark, homeowners, successfully challenged an ordinance prohibiting the use of "for sale" signs enacted to stem "panic" selling. The Court held that the public's right to know could not be abridged by the township when no suitable alternative for advertising the sale of property was available. The Court explicitly reaffirmed the holding of Pittsburgh Press I that commercial speech is not wholly undifferentiable from other speech and noted that:

> "Laws dealing with false or misleading signs or laws requiring such signs to appear in such a form or include such additional information ... as (is) necessary to prevent (their) being deceptive ...would raise very different constitutional questions. 431 U.S. 85, 98 .

Thus, the Supreme Court provides an indication of how situation-wanted advertisements should be treated. The Commission in this case has not restricted the ability of job applicants to seek employment, nor has it denied them the opportunity of advertising their actual lawfully relevant qualifications. The restriction imposed by the legislature in section 5(g) is directed against the encouragement and facilitation of illegal employment discrimination by advertising race and sex of the applicant.[8]

---

8 The effect of Section 5(g) in reference to the advertisements cited by the Commission in its adjudication (70a) would be to allow the individuals to place ads such as: "College grad-Bachelor's Degree with 7 years sales and marketing experience," (A-1, 27a); "Desire day work, office cleaning," (A-1, 27a): Parolee needs employment to be released, Licensed steam boiler and engineer," (A-1, 27a); 'Salesperson, looking for a career in Pittsburgh, start immediately, 15 years sales experience", (A-1, 27a); "What can I do for you ? Recent college grad, good looking, B.S. in Business Administration, seeks entry level management position," (A-8, 34a); "Mature, accounting, bookkeeping, office management, desires position in these or related fields," (A-23, 34a). Due to the missplacement of an exhibit in the original stipulation of facts which is corrected in the printed record, the designation of the exhibits from A-15 to the end of the "A" exhibits does not coincide in the two records. For example A-23 in the original record will appear as A-22 on page 48a of the printed record. The exhibit references herein are from the original record, but the page in the printed record is also included.

B. A CORRECT BALANCE BETWEEN A PROSPECTIVE EMPLOYEES RIGHT TO SEEK EMPLOYMENT UPON LAWFUL MERIT-BASED CONSIDERATIONS AND THE COMMONWEALTH'S STATE POLICY OBJECTIVE OF ELIMINATING UNLAWFUL DISCRIMINATION REQUIRES THAT THE PENNSYLVANIA HUMAN RELATIONS COMMISSION'S DECISION BE AFFIRMED.

The decision below fails to give appropriate weight to the legitimate purpose of the legislature in enacting Section 5(g) as part of a comprehensive scheme to combat employment discrimination.[9] The Court recognizes the Commonwealth's substantial interest in preventing job discrimination but substitutes its own judgment for the legislature in finding Section 5(g) unrelated to this substantial interest.

It is unquestionable that the legislature saw a clear connection between Section 5(g) and the policies and goal of equal employment opportunity.

---

9 Section 2, 43 P.S. §952 of the Act provides in pertinent part: (a) The practice or policy of discrimination against individuals or groups by reason of their race, color, religious creed, ancestry, handicap or disability, use of guide dogs because of blindness of the user, age, sex, or national origin is a matter of concern to the Commonwealth. Such discrimination foments domestic strife and unrest, threatens the rights and privileges of the inhabitants of the Commonwealth, and undermines the foundations of a free democratic state. The denial of employment...because of such discrimination, and the consequent failure to utilize the productive capacities of individuals to their fullest extent, deprives large segments of the population of the Commonwealth of earnings necessary to maintain decent standards of living, necessitates their resort to public relief and intensified group conflicts, thereby resulting in grave injury to the public health and welfare...(b) It is hereby declared to be the public policy of this Commonwealth to foster the employment of all individuals in accordance with their fullest capacities regardless of their race, color, religious creed, ancestry, handicap or disability, use of guide dogs because of blindness of the user, age, sex or national origin, and to safeguard their right to obtain and hold employment without such discrimination.

A review of the legislative history of the Pennsylvania Human Relations Act supplies the connection that the legislators perceived between such advertisements and employment discrimination. The following comments of Mr. Readinger, Majority Leader of the House, indicate the reason for the inclusion of Section 5(g):

> "You would have no right to profess it (a person's religion) for the purpose of seeking employment because the very statement of your creed, your color, and so forth, is specifying a part of you which is the basis for this discrimination which we are trying to eliminate. If you are going to stop employers from discriminating because of race, color and creed, you have to stop the people seeking employment from saying I want employment because I am White, or because I am Colored, or because I am a Jew, or a Catholic, or something else. You do not stop it at one end, you stop it at both ends.
>
> ***
>
> ...We are not telling anybody that he cannot profess to be a Christian, or that he is a Communist, or something of that kind; but when it comes to advertising for employment we are saying, "you can't do it," because as long as you do, you are going to foster and spawn more discrimination on the part of certain people who are looking for an opportunity to discriminate against a certain religion person or a certain color of person and so forth." Volume 1, House Legislative History, February 21, 1955, pp 442-3 (emphasis added).

The Commonwealth Court propounds several reasons for the substitution of its judgment for that of the legislature [10] in finding there to be no connection between Section 5(g) and illegal discrimination. The court asserts that because all groups of job applicants seek to promote the reliance of employers on illegal criteria there is no easy avenue of discrimination. 31 Pa. Cmwlth 218, 231, 376 A 2d, 263, 269 n. 19. This finding of the court supports the need for regulation in this area. The fact that both black and white, young and old, and male and female encourage employment decisions based on reasons other than qualification does not diminish the Commonwealth substantial interest in eliminating to the extent possible, these factors from employment decisions.

Further, the Courts speculative supposition that allowance of such advertisements may actually foster affirmative action by certain employers is not a valid reason to ignore the illegal abuses to which the advertisements are subject. It is submitted that the legislature perceived the evils inherent in an atmosphere fraught with appeals to employers to rely on illegal considerations.[11]

---

10 See e.g.; Dennis v. United States, 341 U.S. 494, 539-40 (1951) (Frankfurter; J., concurring): (W)e are not legislators...How best to reconcile competing interests is the business of legislatures, and the balance they strike is a judgment not to be displaced by ours, but to be respected unless outside the pale of fair judgment;

11 There can be little doubt that some applicants who obtain employment through appeals to the prejudices of employers will themselves make employment decisions based on suspect criteria.

In opposition to the governmental interest reflected in the statute, the Court posits the right of the individual to seek employment.[12] However, the court failed to recognize the limited impact of Section 5(g) on job applicants and elevates the right of an individual job applicant to encourage and facilitate violations of the Human Relations Act to a special protected status. The Court's distinction between the interest of an individual seeking employment and an employer's interest in filling a job vacancy, in order to avoid the holding of Pittsburgh Press I, is unpersuasive. Neither interest may serve as a basis upon which to override the Commonwealth's interest in equal opportunity, the very interest upheld in Pittsburgh Press I. The observation of the court below that finding a job may be a matter of economic survival does not warrant the creation of a right to encourage and facilitate discrimination; especially where the statute allows the non-invidious pursuit of economic survival. (See footnote 8, supra.)

---

12 As emphasized in Truax v Reich, 239 U.S. 33,41, 36 S. Ct. 7, 60 L. Ed. 131 (1915) a case involving discrimination against aliens: if employment "could be refused solely upon the ground of race or nationality, the prohibition of the denial ... of equal protection of the laws would be a barren form of words."

C. THIS HONORABLE COURT SHOULD NOT STRIKE DOWN SECTION 5(g) OF THE PENNSYLVANIA HUMAN RELATIONS ACT WHICH MAY BE, AND WAS, INTERPRETED IN A CONSTITUTIONAL MANNER.

Another basis of the Commonwealth Court's decision is potential for abuse which it sees from future over-zealous application of Section 5(g), 31 Pa. Cmwlth 218, 234, 376, A.2d 263, 270. Indeed, the Court below describes such possibilities as suggesting the "imposed linguistic conformity of an Orwellian nightmare."[13] However, the Commission, in its adjudication, indicated generically the types of advertisements which it viewed as being in violation of Section 5(g), such white woman desires day work"[14] "(M)an, mature...desires position...[15] The recitation of the lengths to which application of 5(g) could reach goes far beyond the case or controversy actually before the Commonwealth Court.

---

13 Id. The requirement that ads state "college graduate," 'experienced in the field", "cleaner seeks employment" bears scant resemblance to the linguistic abuses saterized "War is Peace," "Freedom is Slavery", "Ignorance is strength" G.Orwell, Nineteen Eighty-Four (1949).

14 A-1, 27a

15 A-23, 48a

The court below would apparently have held Section 5(g) unconstitutional even if it found some connection between it and the goal of the Act because of its speculation [16] that part of Section 5(g) might prohibit the mention of one's name in an advertisement.[17]

Should this Honorable Court perceive the possibility of unconstitutional application of that part of Section 5(g) which prohibits expressing, "in any manner," one's race color, religious creed, ancestry, age, sex or national origin, the proper response is to strike down only this offensive applications of the statute.[18]

The requirement of the overbreadth doctrine that the degree of overbreadth be substantial [19] is necessary in light of the potential of most statutes for some missapplication.[20]

---

16 Any uncertainity on the part of the Press as to which advertisements fall within Section 5(g) does not raise to the level of a prior restraint. The inability of the Commission to penalize by contempt, 43 P.S. §960, and the comcomitant appellate review prior to any injunction in future cases adequately protects the paper from any chilling of legitimate editorial freedom. In this regard see Pittsburgh Press I, 413 U.S. 376, n. 14.

17 376 A.2d 263, 270. A review of the record indicates that fewer than 5% of the advertisements include the job seeker's name.

18 Section 13, 43 P.S. §963, provides for the separability of all provisions of the Act.

19 Thornhill v. Alabama, 310 U.S. 88, 98, 60 S. Ct. 236, 84 L. Ed. 2d 1093 (1940)

20 See, 93 Harv. L. Rev. 844, 859 (1970)

Similarly, the dangers of overbroad application are normally not present in the area of commercial speech.[21] Even if present in the commercial context the danger resulting from overbroad application must:

> "...not only be real, but substantial as well, judged in relation to the statutes plainly legitimate sweep." 22

In light the reasoned adjudication of the Commission in this case, focusing on advertisements clearly within Section 5(g), the danger of overbroad application is speculative at best.

---

21 Bates v State Bar of Arizona, 433 U.S. 350, 380, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977).

22 Broadrick v. Oklahoma, 413 U.S. 601, 613, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973).

VI. CONCLUSION

The Court below fails to recognize the relationship between advertisements which encourage and facilitate unlawful employment discrimination and the purposes of the Human Relations Act. The precedent cited by the Commonwealth Court in extending First Amendment protection to the Pittsburgh Press involve considerations not present in this litigation. There is no public right to know the race or sex of a job seeker nor does the Commission's order preclude job seekers from advertising their bona fide occupational qualifications.

Even if this Honorable Court perceives a possibility of unreasonable application of portions of Section 5(g); the Court need not strike down the entire provision but rather should proscribe any area of impermissable application.

Accordingly, and for the reasons set forth above, the order of the Commonwealth Court must be reversed and the Final Order of Commission reinstated in its entirety.

Respectfully submitted,

Robert Mirin
General Counsel
Pennsylvania Human Relations
Commission

John E. Benjes
Assistant General Counsel
Pennsylvania Human Relations
Commission

IN THE SUPREME COURT OF PENNSYLVANIA

Western District

No. 42 March Term 1978

PENNSYLVANIA HUMAN RELATIONS COMMISSION,
Appellant

vs.

PITTSBURGH PRESS COMPANY,
Appellee

CERTIFICATE OF SERVICE

I hereby certify that on this day of , 1978, I did serve five copies of the foregoing Brief for Appellant upon the persons and in the names indicated below, which service satisfies the requirements of Pa. R.A.P. 121:

Service by Certified Mail
Addressed as follows:
Robert H. Shoop, Jr.
THORP, REED & ARMSTRONG
2900 Grant Building
Pittsburgh, Pennsylvania 15129
(Attorney for Appellee)

John E. Benjes
Assistant General Counsel
301 Muench Street
Harrisburg, Pennsylvania 17102