Company (KRC), now in bankruptcy, and its dealings with a mutual fund controlled by Investors Overseas Services, Inc. (IOS), headquartered in Switzerland. Ohio had purchased $8 million in KRC notes, and now alleges that in deciding whether to purchase the notes it relied upon certain KRC financial statements and opinions prepared by Andersen.

Ohio contends that the financial statements and opinions released by Andersen were false and misleading. The specific allegations relate to the dealings between KRC and IOS and certain facts that were not revealed in KRC financial statements. Andersen denies any wrongdoing in this suit. We note at the outset that Andersen's knowledge of the KRC-IOS connection is of obvious importance to the lawsuit.

Ohio sought discovery of working papers and other data from Andersen's files concerning IOS which were located in the Swiss office of the firm.

Upon review of the totality of the evidence, briefs and statements of counsel we impose sanctions against Andersen for its disregard of the court's orders for discovery. We find that the actions of Andersen were without good cause or substantial justification, have inordinately delayed resolution of this litigation, and have resulted in waste of time and unnecessary expense to the state. In a flagrant and deliberate way Andersen has undermined the basic aim of the Federal Rules of Civil Procedure "to secure the just, speedy, inexpensive determination of every action" brought before the federal courts. Fed. R.Civ.P. 1. Plaintiff is entitled to reimbursement for its reasonable expenses and attorneys' fees in connection with discovery and other relief as set forth below.

Rule 37 was developed to give trial courts the tools they need to enforce discovery procedures. Under the Rule, where the court has once established the right of the moving party to the information requested, disobedience of the court's order is punishable without further consideration of the objections presented. Fed.R.Civ.P. 37 (b). Where the right of discovery has once been established, and the request enforced by an order compelling discovery, disobedience is punishable by contempt, by dismissal or default judgment, by an order establishing the existence of certain facts alleged by the moving party, or by an order precluding the delinquent from supporting or opposing designated claims or defenses or prohibiting him from introducing designated matters into evidence. Fed.R.Civ.P. 37(b)(2).

Without adequate sanctions, the procedure for pretail discovery would be ineffectual. In the usual litigation, the court need not resort to Rule 37 because counsel recognize their duty to permit discovery, and, in a professional manner, regulate the progression of the lawsuit with minimal court intervention. Such self-regulation is needed if the federal courts are to be a forum in which every litigant can receive close and careful scrutiny of his claim.

The necessary cooperation by Andersen envisioned by Rule 37 has not been present in this case. Documents were not disclosed in full. Attempts to obtain necessary consent for the release of the Swiss file began in earnest 11 full months after the first notice was received from Switzerland that such consents were required. It is an understatement to say that this case has unduly and unnecessarily taxed the judicial time available to the court.

Conduct such as that displayed by counsel for Andersen cannot be tolerated if the judicial system is to continue to be a forum for expedient and fair resolution of controversy. In a sense, this motion for sanctions is not simply a proceeding between the state of Ohio and Arthur Andersen and Company. There are other litigants in this case who have had (and continue) to bear the cost and aggravation of countless hearings and delays. In addition, resolution of problems in other cases was delayed because of Andersen's conduct here.

In observing the dilatory tactics pursued by Andersen, another factor has been of concern to this court. In this case Andersen's opponent is a state of the Union. Like Arthur Anderson and Company, Ohio's financial resources in prosecuting this lawsuit, are, for practical purposes, inexhaustible. Had Andersen's opponent been less affluent, however, it is a foregone conclusion that discovery of the Swiss documents simply would not have been accomplished.

The costs which have been attendant to the delay in this case would prevent most litigants from having access to these documents to which they are entitled under Rules of Civil Procedure. While it is apparent that disparity in financial resources distorts the truth-seeking function in our judicial system, the court should not encourage that disparity by inaction in the face of abuse. The facts of this case compel us to award Ohio the sum of $59,949 and assess this amount against Arthur Andersen and Company to compensate for the reasonable expenses incurred by Ohio in pursuing its discovery request.

This award is made on the basis of both Rules 37(a) and 37(b). We find that Andersen has both withheld documents to which Ohio was entitled and consciously violated court production orders.

Rule 37(b) permits the court to issue any sanction as is just for failure to comply with its order. In particular the rule permits the court to designate certain facts as established, refuse to allow the disobedient party to introduce designated matters into evidence, or the court may strike out pleadings or parts thereof. In addition, the court may impose the "ultimate sanction": entry of a default judgment against a disobedient defendant, or dismissal against a plaintiff.

The "ultimate sanction" of default cannot be administered absent some showing of willful failure to disclose. Here it can hardly be said that Andersen's unjustifiable resistence to discovery and the court's order was the result of accident or involuntary action. The history of this case is replete with misrepresentations and contradictions by Andersen dealing with material discovery matters. While Andersen asserted good faith, it repeatedly distorted the true state of its inaction to the court. Regardless of the necessity of a finding of willfulness, it is clearly present in this case.

The choice of particular sanctions is a matter addressed to the sound discretion of the court. Within that discretion we utilize the formulation found in Rule 37(b)(2)(B). We prohibit Arthur Andersen and Company from introducing any evidence concerning the information possessed by it relating to the financial condition of the mutual fund controlled by IOS which should have led it to conclude that the fund would cease to purchase natural resource interests from KRC. Further we forbid Andersen from introducing evidence concerning its knowledge that KRC's president committed KRC to provide financing to IOS and was negotiating an agreement to give KRC control of IOS.

The sanctions imposed are reasonable, necessary, and warranted. Anything less would be a mockery of professional responsibility and of the tenor and spirit of the Federal Rules of Procedure. A lesser penalty would give license to financially able litigants to use court proceedings to hinder and delay orderly progress of other litigation as well.—Finesilver, J.

USDC Colo; State of Ohio v. Crofters, Inc., 5/23/77.

## Freedom of Information

PRACTICE AND PROCEDURE—

Large number of Freedom of Information Act requests received by Federal Bureau of Investigation, and consequent inability of agency to respond within time limits established by Act, are not "exceptional circumstances" that, under statute, would entitle agency to extension of time limits.

A letter dated April 1, 1976, request-

ed access under the FOIA to all FBI files on the American Civil Liberties Union. The FBI acknowledged the letter, but indicated that, because of an "exceedingly heavy volume" of FOIA requests, such requests were subject to "substantial delays." This answer was interpreted as a refusal to deliver the requested documents within the period of time specified by the statute, and thus, in a letter dated July 8, an appeal was filed. Because of the FBI's failure to respond within the time allowed by statute and their failure to seek an extension as provided by Section 552(a)(6)(B) of the Act, this suit was initiated to compel production of the documents and to enjoin further delay. On January 28, 1977, almost 10 months after the initial request was made, the FBI moved to stay further proceedings pending completion of the administrative review process.

The FBI's motion to stay is based on Section 552(a)(6)(C) of the Act, which provides: "If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records." The FBI claims that the large number of FOIA requests that they have received constitutes such "exceptional circumstances" and that the inability of their staff to respond to such a large volume demonstrates the "due diligence" required by the statute.

The statute does not provide for a stay of proceedings, however, but speaks only of a court-supervised "extension" when specific obstacles prevent timely delivery of the documents. The Senate Report on the Freedom of Information Act amendments specifically discussed the kind of circumstances that could warrant such an extension and said, in part: "Agencies that simply processed large volumes of requests or frequently faced novel questions of legal interpretation could not avail themselves of this procedure." Inadequate staff, insufficient funding, or a great number of requests are not within the meaning of "exceptional circumstances" as used in the statute, nor were they within the contemplation of its framers as evidenced by the legislative history. References throughout the Senate Report indicate that the Congress intended to eliminate the very conduct that the FBI now claims should excuse them from prompt compliance. Further, the Senate Report indicates that Congress deliberately removed from the agencies the authority to delay FOIA requests for the reasons now raised because the agencies could not be trusted to keep their affairs regular with respect to these requests.

The FBI further argues that court-ordered compliance in other cases prevents timely compliance here, and that the requests involved here would be given an unfair preference should this court order the FBI to follow the statutory mandate.

**[Text]** This is an extraordinary argument. Defendants have not only delayed plaintiff's request for more than a year in clear violation of the statutory time limits, but now suggest that this court become a party to their denial of documents and violation of the statute by holding plaintiff in his place in the line of those awaiting the agencies' convenience. Court intrusion to enforce the law, it is suggested, further complicates the agencies' problems and increases the delay for those seeking information.

The fact of pervasive non-compliance as an argument to justify and sustain further non-compliance is bad law and worse logic. Congress established strict time limits to prevent the present practices of defendants, and it is Congress' decision in law and not the agencies in delay which governs this case. **[End Text]**—Will, J.

—USDC NIll; Hamlin v. Kelley, 6/2/77.

## Labor

**EQUAL OPPORTUNITY—**

**Airline policy, incorporated into collective bargaining agreement, that requires pregnant stewardess to take unpaid maternity leave as soon as she becomes aware that she is pregnant violates sex discrimination prohibition of Title VII of 1964 Civil Rights Act and cannot be justified as bona-fide occupational qualification under Act's Section 703(e) to extent that it automatically bars pregnant stewardesses from flying before 20th week of pregnancy.**

The airline's current policy requires a flight attendant to notify the company in writing as soon as she becomes aware that she is pregnant. The flight attendant is immediately placed on unpaid maternity leave. The policy also requires a flight attendant to return to work within 60 days following the birth of her child. However, if a flight attendant is unable to return to work within 60 days and timely notifies the company, supported by medical justification, she may request an extension of her leave to a maximum of six months after delivery. In practice timely requests for extension are automatically granted. The airline's "stop-start" maternity leave policy is challenged as violative of the sex discrimination prohibition of Title VII of the 1964 Civil Rights Act.

Two main issues of law must be resolved: First, the court must determine whether the plaintiffs have sustained their burden of proving a violation of Section 703(a) of the Act, and second if, and only if, that burden has been met, the court must determine whether the defendant has proved that its policy constitutes a bona fide occupational qualification, (BFOQ) as defined in Section 703(e).

The resolution of the first issue before the court is not per se foreclosed by General Electric Co. v. Gilbert, 429 U. S. 125, 45 LW 4031 (1976), in which the Supreme Court held that every distinction based on pregnancy is not "in itself discrimination based on sex." In substance, Gilbert held that an employer's failure to extend coverage for pregnancy-related disabilities under a disability insurance program extended equally to male and female employees does not amount to discrimination based on sex. The issue in the instant case is one of unequal inclusiveness.

In Cleveland Board of Education v. LaFleur, 414 U. S. 632, 42 LW 4186 (1974), the Court addressing the issue of mandatory maternity leaves, held that requiring a teacher to begin maternity leave at a pre-determined point in her pregnancy, without regard to her individual ability to work, constituted a violation of the Fourteenth Amendment's Due Process Clause.

The court must consider the weight to be accorded LaFleur. Although not a Title VII case, its holding must be relevant to the issue before this Court. If the Supreme Court were to hold in Satty v. Nashville Gas Co., 522 F.2d 850 (CA 6), cert. granted, 45 LW 3508 (1977), and Berg v. Richmond United School District, 528 F.2d 1208 (CA 9), cert. granted, 45 LW 3508 (1977) (two cases which present similar issues) that Title VII does not reach the issue of mandatory maternity leaves an anomalous situation would result. Last Term, in Washington v. Davis, 44 LW 4789 (1976), the Court held that constitutional standards were not the same as those of Title VII. The clear import was that the standards employed in Title VII are less restrictive. Thus, to hold that mandatory maternity leave requirements, without regard to individual ability to work, does not create a prima facie case under Title VII would result in the constitutional standard promulgated in LaFleur being less restrictive than the one in Title VII.

Under the airline's policy, when a female flight attendant knows she is pregnant she must cease working, terminating her income. It is this economic factor which distinguishes the case from Gilbert. Because pregnancy is an exclusively female condition, the policy inevitably has a disproportionate impact on females. This is not