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Title VII: Sex Discrimination and the BFOQ

John F. Cassibry

TITLE VII: SEX DISCRIMINATION AND THE BFOQ

Title VII of the Civil Rights Act of 1964 prohibits sex discrimination in employment.[1] In enacting Title VII Congress undertook to aid minorities in entering the mainstream of American life by ensuring that they could compete for jobs on a non-discriminatory basis.[2] Section 703(a) of the Act provides

> [i]t shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . .; or
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex . . . .[3]

However, Congress did not prohibit all discrimination on the basis of sex as was done for discrimination based on race and color. A statutory exception was created in section 703(e) of the Act which provides

> [n]otwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his . . . sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.[4]

Thus, there are two basic problems present in any sex-discrimination case arising under Title VII: Is there in fact sex discrimination, and, if there is, does the discrimination fit within the "bona fide occupational qualification" (BFOQ) exception. The scope of the BFOQ is therefore the key issue in determining to what extent an employer may discriminate on the basis of sex when he believes that it will maximize the profits of his business.

It has been said that the underlying policy of Congress in forbid-

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1. 42 U.S.C. § 2000e—2000e-15 (1970). Title VII was subsequently amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e—2000e-17 (Supp. 1972).

2. *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1166 (1971) [hereinafter cited as *Developments*].

3. 42 U.S.C. § 2000e—2 (a) (1970).

4. 42 U.S.C. § 2000e—2(e)(1) (1970).

ding sex-based discrimination was to ensure equal access to the job market for both men and women.[5] However, the determination of what constitutes sex discrimination is difficult to discover because the addition of sex as a prohibited basis of employment discrimination came only one day prior to the passage of the entire Act.[6] This precluded any legislative hearings or significant debate on the scope of sex discrimination. In addition, the amendment was offered by an opponent of the measure in an effort to bring about defeat of the entire bill.[7]

There is no question that explicit sex discrimination is forbidden by the Act; that is, sex used as the sole criterion for the employment determination. It has been suggested that explicit sex discrimination also includes classification schemes based on physical attributes that are characteristic of only one sex—such as the ability to become pregnant.[8] Furthermore, the United States Supreme Court has held that discrimination on the basis of sex plus some other neutral characteristic is a form of unlawful sex discrimination.[9]

Legislative intent is also lacking concerning the BFOQ exception. Certain legislators have offered examples of when an employer could use sexual characteristics, nationality, or religion as a qualification for employment: an elderly woman who might want a female nurse as her attendant;[10] a male as a masseur; an all male baseball team; a French cook in a French restaurant; and a book salesman for a particular religion.[11] It has been suggested that these examples show that Congress intended that employers should be able to recognize certain functional and perhaps cultural differences between the sexes.[12] These seem to have in common a recognition of the cultural

5. Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

6. *See* Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 882 n.2 (1967).

7. *See* Comment, 1968 U. ILL. L.F. 418; Kanowitz, *Sex Based Discrimination in American Law*, 20 HAST. L.J. 305, 311-12 (1968); Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 880-83 (1967).

8. *See Developments* at 1170.

9. Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (refused to hire females with pre-school age children while hiring males with pre-school age children). Also Congress rejected an amendment which would have limited its scope to discrimination based solely on sex. *See* 110 CONG. REC. 2728, 13,825 (1964). In addition, the effect of the statute is not to be diluted because discrimination affects only a portion of the protected class. Sprogis v. United Air Lines, 444 F.2d 1194 (7th Cir. 1971).

10. 110 CONG. REC. 2718 (1964).

11. *Id.* at 7212-13. The examples come from an interpretative memorandum by Senators Clark and Case, floor managers of the bill, and these examples illustrate all three classifications where the BFOQ is applicable — sex, nationality, and religion.

12. *See Developments* at 1176.

differences between the sexes based upon customer expectation.

The Equal Employment Opportunity Commission (EEOC) was given authority to interpret and enforce the provisions of Title VII by issuing guidelines and decisions interpreting the statute.[13] From the beginning the BFOQ exception has been interpreted narrowly;[14] the basic tenet being that an employer cannot use a sexual stereotype about the class to which the employee belongs to evaluate him, but must instead consider each employee according to his individual capabilities.[15] The EEOC recognizes the applicability of the BFOQ where necessary only for authenticity or genuineness,[16] but disapproves the use of customer preference as a factor in determining the BFOQ.[17]

This narrow interpretation of the BFOQ by the EEOC has been substantially followed by the courts, but the decisions have created a somewhat broader exception. The Fifth Circuit Court of Appeals has been instrumental in shaping the judicial interpretation of the BFOQ. In *Weeks v. Southern Bell Telephone Co.*,[18] the female plaintiff had been denied a job as a switchman by the defendant. Southern Bell admitted its policy of restricting the job of switchman to males was a prima facie violation of Title VII, but claimed the job fit within the BFOQ exception because of its strenuous nature.[19] The court rejected this argument, saying

13. The EEOC was originally vested with investigative and conciliatory powers, but only limited enforcement authority. The Equal Employment Opportunity Act of 1972, 42 U.S.C.A. § 2000e—2000e-17 (Supp. 1972), among other provisions, strengthened the EEOC's enforcement powers (42 U.S.C.A. § 2000e-5 (Supp. 1972)), and expanded the jurisdictional coverage of Title VII (42 U.S.C. § 2000e—2000e-1 (1972)). For a good discussion of the amendments, see Sape and Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972,* 40 GEO. WASH. L. REV. 824 (1972).

14. 29 C.F.R. § 1604.2(a) (1973). *See* EEOC Decision No. 71-2088 (1971), CCH EMP. PRAC. GUIDE ¶ 6250; EEOC Decision No. 71-2343, CCH EMP. PRAC. GUIDE ¶ 6256 (1971); EEOC Decision No. 71-1938, CCH EMP. PRAC. GUIDE ¶ 6272 (1971); EEOC Decision No. 71-2040, CCH EMP. PRAC. GUIDE ¶ 6275 (1971).

15. 29 C.F.R. § 1604.2(a)(1)(i)(ii) (1973).

16. 29 C.F.R. § 1604.2(a)(2) (1973).

17. 29 C.F.R. § 1604.2(a)(1)(iii) (1973); EEOC Decision No. 71-2343, CCH EMP. PRAC. GUIDE ¶ 6256 (1971). The EEOC also prohibits expense of providing separate facilities, unless unreasonable, as a factor in considering the BFOQ. *See* EEOC Decision No. YNY 9, CCH EMP. PRAC. GUIDE ¶ 6010 (1969).

18. 408 F.2d 228 (5th Cir. 1969).

19. A Georgia statute prohibiting women from employment in jobs requiring lifting of objects over 30 pounds was no longer at issue when the case was tried because the statute had been repealed. Today, state protective legislation for women that in fact limits their job opportunities, does not give an employer a BFOQ for discriminatory hiring. When these state statutes conflict with Title VII, the state statutes are invalid, overridden by the supremacy clause of the United States Constitution. *See* Rosenfield v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971). A Louisiana case so

> [l]abeling a job as 'strenuous' simply does not meet the burden of proving that the job is within the BFOQ exception.[20]

The test then articulated by the court was that

> [i]n order to rely on the BFOQ exception, an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing that all of substantially all women would be unable to perform safely and efficiently the duties of the job involved.[21]

Although the court stated that the EEOC guidelines were to be given great weight,[22] the "all or substantially all" test set forth by the court does not force an employer to consider each employee individually—the goal of the EEOC.[23] The *Weeks* test adapted well to state protective legislation cases and other situations, but the safety and efficiency requirements could not answer the problems raised when customer preference became an issue.

The *Weeks* test needed refinement which subsequently came in *Diaz v. Pan American World Airways, Inc.*[24] At issue in *Diaz* was Pan American's rule restricting the position of flight cabin attendant to females. In the lower court, the defendant introduced testimony by an expert psychologist concerning the superiority of women in meeting the psychological needs of passengers in the unique environment of the flight cabin.[25] Pan American also showed that sex discrimination was the most efficient screening method in which to find those employees having the desired personality characteristics for a flight cabin attendant.[26] The district court applied the BFOQ exception, allowing Pan American to continue their discriminatory hiring practices.[27]

On appeal the Fifth Circuit reversed.[28] The court began by looking at the word "necessary" within the BFOQ exception and created a business *necessity* test rather than a business *convenience* test.

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holding was *LeBlanc v. Southern Bell Telephone Co.*, 333 F. Supp. 602 (E.D. La. 1971). This is in accord with the EEOC guidelines (29 C.F.R. § 1604.1(b) (1972)). For a good discussion of state protective legislation and Title VII, see Comment, 24 ALA. L. REV. 567 (1972).

20. Weeks v. Southern Bell Tel. Co., 408 F.2d 228, 234 (5th Cir. 1969).

21. *Id.* at 235.

22. *Id.*

23. *See* text at note 15 *supra.*

24. 442 F.2d 385 (5th Cir.), *cert. denied,* 404 U.S. 950 (1971).

25. Diaz v. Pan American World Airways, Inc., 311 F. Supp. 559 (S.D. Fla. 1970).

26. *Id.* at 565.

27. *Id.* at 569.

28. Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir.), *cert. denied,* 404 U.S. 950 (1971).

> Discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively.[29]

Having made the essence of an employer's business the key to lawful discrimination, the court decided that "[t]he primary function of an airline is to transfer passengers from one point to another," and thus the personality and psychological attributes of females were only "tangential" to the business enterprise rather than "essential."[30] Therefore, the requisite business necessity for hiring only females was lacking.

The court also considered the *Weeks* test, and decided that Pan American had not carried their burden of proving that "all or substantially all" men could not perform the requisite job function of a flight cabin attendant.[31] Turning to the issue of customer preference, the court adopted the EEOC guidelines which prohibit consideration of customer preference in determining the application of the BFOQ.[32] The court said the guidelines were entitled to great deference[33] but added

> customer preference may be taken into account only when it is based on the company's inability to perform the primary function or service it offers.[34]

For an employer to discriminate on the basis of sex, *Diaz* requires proof of a business necessity, which is present only when the essence of the employer's business is involved. Thus, the determination of the essence of an employer's business becomes the key to the sex discrimination issue. It has been suggested, however, that consideration of customer preference will be involved in the process of deciding what the essence of the employer's business is as reflected in a particular occupation.[35]

In *Willingham v. Macon Telegraph Publishing Co.*,[36] the Fifth Circuit held that an employer's grooming code which prohibits long hair on males while allowing it on females is an unlawful form of sex discrimination in violation of Title VII. While becoming the first

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29. *Id.* at 388.
30. *Id.*
31. *Id.*
32. *Id.* at 389.
33. *Id.*
34. *Id.*
35. *See* Oldham, *Questions of Exclusion and Exception Under Title VII—"Sex-Plus" and the BFOQ*, 23 HAST. L.J. 55, 90 (1971).
36. 482 F.2d 535 (5th Cir. 1973), *rehearing en banc granted*, Sept. 5, 1973.

appellate court to hold that differentiation in hair lengths is sex-based discrimination,[37] the court remanded the case to the lower court to determine if the grooming code was a BFOQ for the position which the plaintiff was applying.[38]

On remanding the case the court stated that community reaction to long hair was pertinent to the BFOQ defense rather than the issue of whether the grooming code was sex discrimination.[39] This recognition of the applicability of community reaction—or customer preference—to the BFOQ exception seems to be more in line with the court's prior language in *Diaz* and legislative intent[40] than the EEOC's rejection of customer preference as a consideration.

The Fifth Circuit in *Diaz* said that customer preference could not justify sex discrimination because the job aspects in question were merely "tangential" to the airline's business. It has been suggested that this language implies that with regard to the functions that are "necessary" or "central" to the job, demonstrable customer preference may justify sex discrimination.[41] The court in *Willingham* seems to agree by allowing an examination of customer preference where the job in question—an advertising position—could well be deemed essential to the operation of a newspaper.

Furthermore, the lower court in *Diaz* stated that the Clark-Case Memorandum[42] with examples of the BFOQ (all male baseball team, French cook, religious salesman) showed that customer preference

37. The United States District Courts have divided on the issue. *Accord,* Aros v. McDonnell Douglas Corp., 348 F. Supp. 661 (C.D. Cal. 1972); Donohue v. Shoe Corp. of America, 337 F. Supp. 1357 (C.D. Cal. 1972); Roberts v. General Mills, Inc., 337 F. Supp. 1055 (N.D. Ohio 1971). *Contra,* Boyce v. Safeway Stores, Inc., 351 F. Supp. 402 (D.D.C. 1972); Baker v. California Land Title Co., 349 F. Supp. 235 (C.D. Cal. 1972); Dodge v. Giant Foods, Inc., 3 Emp. Prac. Decisions ¶ 8184 (D.D.C. 1971). For a good discussion of these cases, see Note, 46 S. CAL. L. REV. 965 (1973). The EEOC says that the differentiation is unlawful discrimination. EEOC Decision No. 71-1529, CCH EMP. PRAC. GUIDE ¶ 6231 (1971); EEOC Decision No. 72-1380, CCH EMP. PRAC. GUIDE ¶ 6364 (1972); EEOC Decision No. 72-1931, CCH EMP. PRAC. Guide ¶ 6373 (1972) (Refusal to hire long-haired applicants where long haired females were hired constitutes discrimination in the absence of showing a business necessity.)

38. Willingham was applying for position as display or layout artist in the retail advertising department of the Macon Telegraph Publishing Co.

39. Willingham v. Macon Tel. Pub. Co., 482 F.2d 535, 538 (5th Cir. 1973), *rehearing en banc granted,* Sept. 5, 1973.

40. *See* text at note 12 *supra.*

41. *See* Hillman, *Sex and Employment Under the Equal Rights Amendment,* 67 NW. U.L. REV. 789, 822 (1973).

42. *See* text at note 11 *supra.* An examination of all examples given for the BFOQ, even those for religion and nationality, more clearly point to Congressional recognition of customer preference.

was a valid ingredient of the BFOQ.[43] The Fifth Circuit in *Diaz* avoided discussing the memorandum, but it has been suggested that the lower court was correct, and the examples do contemplate customer preference in determining the BFOQ.[44] Thus the approach of the court in *Willingham* does seem to be responsive to Congressional intent.

There remains the problem of the EEOC guidelines and the weight given them. The Supreme Court in *Griggs v. Duke Power Co.*[45] said to give deference to the guidelines, and also that "[s]ince the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress."[46] Thus, the Court's deference was related to its agreement with the EEOC on the merits. Deference, therefore, would not preclude an independent examinationof the conformity of the guidelines to Congressional intent.[47] It seems that the court in *Willingham* has come closer to following Congressional intent than the EEOC guidelines by allowing the consideration of customer preference.

Title VII prohibits sex-based discrimination in employment, yet Congress inserted a statutory exception that allows discrimination on the basis of sex in certain instances. To ensure Congress' goal of equal access to the job market for men and women, the exception must be construed narrowly. However, examination of customer preference when the job aspect in question is essential to the employer's business is consistent with Congressional intent and will not so undermine the statute so as to defeat the legislative purpose in enacting it. This interpretation will help balance the right of the employee to equal employment opportunity and that of the employer to make the decisions that he believes will maximize the profits of his business.

John F. Cassibry

43. Diaz v. Pan American World Airways, Inc., 311 F. Supp. 559, 568 (1970).

44. *See* Oldham, *Questions of Exclusion and Exception Under Title VII—"Sex-Plus" and the BFOQ*, 23 HAST. L.J. 55, 90 (1971).

45. 401 U.S. 424 (1971).

46. *Id.* at 434.

47. *See* Note, 46 S. CAL. L. REV. 965, 976 n.61 (1973).