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James C. Oldham

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Questions of Exclusion and Exception Under Title VII—"Sex-Plus" and the BFOQ

By James C. Oldham*

The fundamental law of the state, as embodied in its constitution, provides that "no person shall . . . be deprived of life, liberty, or property without due process of law." . . . Under our laws men and women now stand alike in their constitutional rights and there is no warrant for making any discrimination between them with respect to the liberty of person, or of contract. . . . [This] legislation cannot, and should not, be upheld as a proper exercise of the police power. It is, certainly, discriminative against female citizens, in denying to them equal rights with men in the same pursuit. [Judge Gray, writing for the New York Court of Appeals in 1907.]

Enlightened words, those of Judge Gray—words with a familiar ring to them, as if appearing in an advance sheet of just the other day. The legislation invalidated by the New York Court was designed to restrict the employment of women to certain hours; it was a form of protective legislation intended to alleviate some of the untoward industrial conditions to which women in the labor force were subjected in the early part of this century.

But Judge Gray was strangely out of joint in time. Only a year later Louis Brandeis, representing the active feminist efforts of the National Consumers League at the request of his sister-in-law, successfully defended before the United States Supreme Court an Oregon stat-

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* B.S., 1962, Duke University; LL.B., 1965, Stanford University; M.S.B.A., 1967, University of Denver; Assoc. Prof. and Ass't Dean, Georgetown University Law Center; Member, Colorado Bar.


2. The New York Labor Law which was declared unconstitutional provided: "No minor under the age of 18 years, and no female shall be employed, permitted or suffer to work in any factory in this state before six o'clock in the morning, or after nine o'clock in the evening of any day . . . ." Ch. 184, § 77 [1903] N.Y. Laws 439. The court pointed out that "defendant's guilt was rested, solely, upon his failure to observe the provision of the statute against a female being at work after nine o'clock in the evening." 189 N.Y. at 133, 81 N.E. at 779.

3. The conditions have been chronicled by many. E.g., G. Butler, Women and the Trades: Pittsburgh 1907-08 (reprint ed. 1969).
ute placing maximum limits on the hours of work of women in industry.\(^4\) Opposing counsel argued that women possessed equally with men the fundamental right of free contract—an argument which has been described as the "dry bones of legalism" rattling in favor of a socially unsound result.\(^5\) Based as it was on the carefully documented realities of industrial life of the time, the Muller decision was generally regarded as a progressive victory in advancing the status of women.\(^6\)

Since Muller, the movement to secure equality for women has been episodic, languishing in particular during the 1920's.\(^7\) The drive to secure an Equal Rights Amendment to the Constitution has been launched year after year without success\(^8\) and the Supreme Court has not acknowledged to date that sex discrimination is sufficiently invidious to be proscribed by the Fourteenth Amendment.\(^9\)

Nevertheless, over the past decade there has been a new awakening. Legislation originally fashioned as that in Muller to protect women and to advance their station has been challenged as outmoded and un-

\(^4\) Muller v. Oregon, 208 U.S. 412 (1908). This case is widely known as the first significant instance in which a lawsuit was argued and won on the basis of nonlegal (sociological and economic) proof, and marked the origin of the so-called "Brandeis brief."


\(^6\) See BUTLER, supra note 3, at 351-57; Brandeis, The Living Law, 10 ILL. L. REV. 461 (1916). There have been detractors from this view—those who argue that the real impetus for protective legislation, even in the early 1900's, was an awareness that such legislation would preserve work opportunities for males. See R. RIEGEL, AMERICAN WOMEN 273-74 (1970); Dorsen & Ross, The Necessity of a Constitutional Amendment, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 216, 222-23 (1971).

\(^7\) For an instructive historical narrative see W. O'NEILL, THE WOMEN'S MOVEMENT (1969).

\(^8\) Hundreds of joint resolutions have been introduced in the Congress designed to amend the constitution to secure equal rights for men and women. For a compilation of those resolutions since 1923 see Brown, Emerson, Falk & Freedman, The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 YALE L.J. 871, 981-85 (1971). Victory has at times seemed near, especially in 1970. See id. at 886-88. The 1971 hearings have also raised hopes for success. A proposed constitutional amendment has passed the House. 117 CONG. REC. H9392 (daily ed. Oct. 12, 1971). It is now pending before the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee, along with several different versions of an equal rights amendment. However, Senator Sam J. Ervin, Jr. (Dem.-N.C.) is mustering forces to oppose the amendment in the event it clears the Judiciary Committee. Washington Post, Oct. 14, 1971, at 22, cols. 1 & 2.

Likewise, the lamentably numerous other features of American life which operate in discriminatory ways against women have come under attack.11

The catalyst has been Title VII of the Civil Rights Act of 1964,12 the basic structure of which is by now familiar. Discrimination in employment on the basis of race, color, religion, sex or national origin con-

10. At least two recent cases have attacked such statutes as violative of the Fourteenth Amendment. Mengelkoch v. Industrial Welfare Comm'n, 3 FAIR EMP. PRAC. CAS. 55 (9th Cir. Jan. 11, 1971), modified, 3 FAIR EMP. PRAC. CAS. 471 (9th Cir. May 3, 1971); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971). As a rule, the challenges in the courts and in the treatises have taken the position that protective legislation is no longer valid and should be stricken altogether. E.g., Pater-


stitutes an unlawful employment practice. In cases involving actions allegedly based on religion, sex or national origin, there is an exception in the statute; discrimination is exonerated if the prohibited ground for discrimination constitutes "a bona fide occupational qualification [bfoq] reasonably necessary to the normal operation" of the employer's business. The Equal Employment Opportunity Commission (EEOC) was formed to administer Title VII, although unfortunately the commission's powers were restricted to "conference, conciliation and persuasion." Notwithstanding this handicap, the commission has accomplished a great deal in its five-year history, in large part through its formulation of various sets of guidelines, publication of written decisions, and, perhaps most significant, its appearance as amicus curiae in most of the important litigation which has taken place under Title VII.

The scope of Title VII is circumscribed by jurisdictional requirements and by its applicability only to employment relationships;
clearly the statute cannot accomplish what the Equal Rights Amend-
ment would. Yet the sex discrimination ban of Title VII has been
and will continue to be important reform legislation. Much pro-
tective legislation has already been declared invalid under Title VII
and the supremacy clause, and it may be that the words of Judge Gray
are slowly coming into phase with underlying economic and social
realities.

The ultimate content of the sex discrimination ban in Title VII is yet
undefined, but there have been two areas of recent litigation germane
to the definition process. One, argued before the Supreme Court in the
case of Phillips v. Martin Marietta Corp., is the "sex-plus" theory of
defense, attempting to place limits on what constitutes prohibited dis-


crimation under the act. The second area of litigation, also dealt
with in the Phillips case and in a number of recent lower court deci-
sions, is the bfoq exception to Title VII. These two areas, as they
evolve through judicial interpretation, should largely determine the
eventual scope of Title VII's sex discrimination coverage. They com-
prise the subjects for the discussion and analysis to follow.

The "Sex-Plus" Theory

"If 'sex-plus' stands, the Act is dead." This memorable, blunt
pronouncement was that of Judge Brown in his dissent from the decision
of the United States Court of Appeals for the Fifth Circuit denying a pe-
tition for rehearing in the Phillips case. The term "sex-plus" was coined
by Judge Brown to describe two-pronged employer practices which do not

18. See Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969);
June 9, 1971); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969) (com-
pany system restricting women to jobs not requiring lifting more than 35 pounds vio-
lated Title VII).

19. For a comprehensive treatment of developments to date see Developments—
Title VII, supra note 9, at 1109.

20. 400 U.S. 542 (1971), rev'g 411 F.2d 1 (5th Cir. 1969).

21. The Phillips case and the sex-plus theory have been the subject of comment
elsewhere. E.g., Comment, Civil Rights of 1964: An Exception to Prohibitions on Em-
ployment Discrimination, 55 IOWA L. REV. 509 (1969); Developments—Title VII, supra
note 9, at 1171-76. The bfoq exception has also received several careful analyses.
E.g., Note, Sex Discrimination in Employment: An Attempt to Interpret Title VII of the
Civil Rights Act of 1964, 1968 DUKE L.J. 671; Developments—Title VII, supra note 9,
at 1176-95. To traverse the same ground already worked by the foregoing and other
studies would not be fruitful. However, important recent decisions have occurred, and
developing trends may be more perceptible than heretofore.

22. Phillips v. Martin Marietta Corp., 416 F.2d 1257, 1260 (5th Cir. 1969)
(Brown, J., dissenting) (emphasis added).
discriminate solely on the basis of sex, but which embody sex plus some other neutral factor. This section shall examine the circumstances which occasioned the "sex-plus" theory and the ramifications of its rejection.

**Phillips v. Martin Marietta Corp.**

At issue in *Phillips* was Martin Marietta's policy of declining employment applications from mothers with preschool age children, without applying a like rule to fathers with preschool age children. Martin Marietta's position, accepted at both the district court and appellate levels, was simply that it had not engaged in proscribed discrimination against Ida Phillips based on sex; indeed, between 75 and 80 percent of Martin Marietta's employees were female. As put by the Fifth Circuit Court of Appeals: "Ida Phillips was not refused employment because she was a woman nor because she had preschool age children. It is the coalescence of these two elements that denied her the position she desired." In an opinion written by Judge Morgan, the Fifth Circuit took a rather rigid view of the position of the EEOC and concluded that a per se violation of Title VII based on sex had not been established. Judge Brown, dissenting from the court's failure to grant a rehearing en banc, was led to speculate that discrimination would be possible under the majority's view by adding any token factor to race, sex or other prohibited ground under Title VII. Yet these polemics were not entirely necessary. The *Phillips* case involved the application of a policy to one sex only, and this inequality of treatment proved to be the critical problem.

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23. According to Martin Marietta's brief to the Supreme Court, the company's policy may not have been as clear as indicated in the lower court decisions. Brief for Respondent at 5-7, 18-19.

24. This fact was uncontroverted. See Phillips v. Martin Marietta Corp., 1 FAIR EMP. PRAC. CAS. 363 (M.D. Fla. 1968).

25. 411 F.2d at 4.

26. *Id.*

27. 416 F.2d at 1260. Perhaps one example of the type of problem Judge Brown feared was presented in EEOC Decision No. 7090, 2 FAIR EMP. PRAC. CAS. 236 (1969). There, a Negro applicant for the job of stewardess was rejected, not because of her race, but because of having, according to the interview form, "unattractive, large lips." Clearly the commission was correct in disapproving this action. Employers should not be permitted to single out characteristics which may be prevalent in one race and identify the absence of that characteristic as a job qualification.

28. See note 35 & accompanying text *infra.*
criminatory effect (such as the example by Judge Brown of a 175 pound minimum weight requirement) were not necessarily raised.\textsuperscript{29}

Nevertheless, the result reached by the Fifth Circuit was wrong since the opinion could have debilitated Title VII badly—an unhappy result not intended by Congress. Contrary to Judge Morgan's statement that "no helpful discussion is present from which to glean the intent of Congress,"\textsuperscript{30} the sex-plus notion is a rare instance in which the legislative history is relatively clear.\textsuperscript{31} On June 15, 1964, Senator McClellan proposed an amendment to Title VII to insert the word "solely" before the proscribed categories of discrimination.\textsuperscript{32} Senator Case responded by stating:

The difficulty with this amendment is that it would render Title VII totally nugatory. . . . [T]his amendment would place upon persons attempting to prove a violation of this section, no matter how clear the violation was, an obstacle so great as to make the title completely worthless.\textsuperscript{33}

Had Senator McClellan's amendment passed, the sex-plus theory would have been part of the statute—only acts discriminating solely because of sex would have been unlawful. But the amendment did not pass; it was defeated by a roll call vote.\textsuperscript{34}

The Supreme Court disposed of the Phillips case in a concise per curiam opinion. Vacating and remanding the decision of the court of appeals, the per curiam opinion stated that under Title VII persons of like qualifications must be extended equal employment opportunities irrespective of sex, and the lower court "therefore erred in reading this section as permitting one hiring policy for women and another for men—each having pre-school age children."\textsuperscript{35} The court then aimed a glanc-

\textsuperscript{29} These types of problems are now being faced by the EEOC, and a business necessity test is being fashioned along the lines of the recent decision of Griggs v. Duke Power Co., 401 U.S. 424 (1971), which dealt with the racially discriminatory effects of neutral employment tests which may or may not be job-related.

\textsuperscript{30} 411 F.2d at 3.

\textsuperscript{31} It may be that the pertinent congressional history went unobserved in the Phillips litigation until the case reached the Supreme Court. In its brief to the Supreme Court, the EEOC documented the salient congressional events, but no mention of them was made by the court in its opinion. See Brief for EEOC as Amicus Curiae at 9. Recently at least one circuit court of appeals has made reference to the legislative history in question. Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971).

\textsuperscript{32} 110 CONG. REC. 13837 (1964).

\textsuperscript{33} Id.

\textsuperscript{34} Id. at 13838.

\textsuperscript{35} 400 U.S. at 544.
ing blow at the bfoq exception, indicating that the existence of conflicting family obligations, "if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction under § 703(e) of the Act." Since this point had not been developed in the preceding litigation, the case was remanded for further consideration.

**Ramifications of the Sex-Plus Rejection in Phillips**

On the question of whether there was discrimination proscribed under Title VII in the employment policies of Martin Marietta, the result reached by the Supreme Court is a good one. A policy unequally applied between the sexes, even if only to subcategories within the respective sexes, is ordinarily not justifiable. More challenging questions remain, however. From the standpoint of the act's permissible limits, cases are cropping up before the EEOC and the courts which test the logical extensions of the rejection of sex-plus in Phillips. Moreover, the much more difficult evidentiary problems involved in neutral rules (applied equally to both sexes) which have discriminatory effects are being litigated. Recently, the EEOC and the courts have begun to approach these problems.

**The Long Hair Cases**

In the judgment of the EEOC, an employer's refusal to employ males with long hair while employing hirsute females is an unlawful employment practice under Title VII. The argument, akin to that in Phillips, is that only males with long hair, not males generally, have

36. *id.* In a strongly worded concurring opinion protesting the court's offhand treatment of the bfoq question, Justice Marshall stated: "I fear that in this case, where the issue is not squarely before us, the Court has fallen into the trap of assuming that the Act permits ancient canards about the proper role of women to be a basis for discrimination. Congress, however, sought just the opposite result." 400 U.S. at 545. See notes 110-33 & accompanying text infra for a discussion of the development of the bfoq in the courts.

37. Martin Marietta did not raise the bfoq defense in the lower courts. However, the company did indicate in its brief against Phillips's petition for certiorari that if the case were reversed and remanded it would then advance the bfoq defense "and seek to support it with the appropriate evidentiary showing." Respondent's Brief in Opposition to Certiorari at 5 n.2, Phillips v. Martin Marietta Corp., 397 U.S. 960 (1970). See also Brief for Respondent at 28-29, Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

What evidentiary showing Martin Marietta might have made on remand will not be known, however; the case was dismissed by order of the district court, pursuant to stipulation of the parties involved.
been discriminated against. This argument has not succeeded. Thus, in the first case of this type decided by the EEOC, no questions of safety or efficiency were raised, and the EEOC concluded that the “Charging Party was discriminated against because of his sex by Respondent’s unequal application of its long-hair policy.” In a subsequent decision, the commission has clearly stated that customer preference is no defense, and the only recourse is for an employer to meet its burden of demonstrating that its discriminatory hair length policy has a manifest relationship to the primary function of the job in question.

The most recent long hair case to be decided by the commission dealt with an employer’s policy preventing the wearing of beards, moustaches and long sideburns. The decision, not surprisingly, was that “the grooming standard had a foreseeable exclusive impact upon males” and this was unlawful absent a bfoq showing.

38. EEOC Decision No. 71-1529, CCH EMP. PRAC. GUIDE ¶ 6231, at 4410 (Apr. 2, 1971). What the appropriate remedy would be is yet another question. An employer cannot cure the discrimination by enforcing a rule against hiring anyone with long hair—such a rule would probably be discriminatory against women because of a disproportionate impact on the female sex. Cf. notes 80-102 & accompanying text infra. The employer must adopt an affirmative hiring policy under which he would hire members of either sex without regard to hair length.

39. EEOC Decision No. 71-2343, CCH EMP. PRAC. GUIDE ¶ 6256 (June 3, 1971). The commission’s formulation of the bfoq test in this decision is patterned after that in Diaz v. Pan American Airlines, 442 F.2d 385 (5th Cir. 1971), cert. denied, 40 U.S.L.W. 3212 (1971), discussed in some detail hereafter. See text accompanying notes 116-30 infra.

In the case before the EEOC the employer’s policy precluded males from wearing hair longer “than shoulder length,” while requiring only that females comply with current “fashion trends.” EEOC Decision No. 71-2343, CCH EMP. PRAC. GUIDE ¶ 6256, at 4453 (Appended Regional Director’s Findings of Fact). These standards had been established after some number of customer complaints, in an effort to present a favorable impression to the public so as to avoid conditions that might adversely affect business. Id. Nevertheless, in light of the narrow role permitted customer preference in the Diaz decision, this defense was determined by the commission to be inadequate.

40. EEOC Decision No. 71-3003 (July 2, 1971). Because beards are possible for males only, this situation resembles the question of pregnancy as treated under Title VII. Pregnancy has been viewed by the commission as a special condition inherently associated with the female sex and, therefore, invalid as a basis for discrimination. See EEOC Decision No. 70-495, 2 FAIR EMP. PRAC. CAS. 499 (1970) (employee health plan which provided maternity benefits for wives of employees, but not for female employees was discriminatory); EEOC Case No. YAU 9-026, 2 FAIR EMP. PRAC. CAS. 294 (1969) (employer must grant leave of absence for pregnancy); EEOC Commissioner’s Decision, LRX 1841 (1966) (pregnancy not a legitimate reason for termination of accumulated seniority rights).

Logically, too, an analogy can be drawn between pregnancy in the case of a woman
The hair problem under Title VII has not reached many courts. The only reported decisions at the time of this writing were two federal district court cases, Roberts v. General Mills, Inc.,\(^4\) and Dodge v. Giant Food, Inc.\(^4\) In Roberts, General Mills’s motion for summary judgment was denied on the basis of Title VII. Roberts had been discharged because his hair grew too long to be contained by a hat, and General Mills required that, to preserve food processing cleanliness, men wear hats and women wear hairnets. This rule was judged to be of the stereotype variety precluded by Title VII.\(^4\) In the Dodge case, Giant Food Stores utilized different personal appearance rules for males and females. Males could not have hair “below the earlobe,” but females were subject merely to a requirement that “long hair must be secured and may not fall freely.”\(^4\) In its brief as amicus curiae in this case, the EEOC relied on Phillips to show that Giant Food’s “male plus short hair” requirement was impermissible under Title VII.\(^4\) However, Judge Green\(^4\) found that the grooming regulations were “not unreasonable,” applying to male and female, black and white alike, for the purpose of insuring a “neat and attractive, well groomed male or female clerk.”\(^4\) Without discussion, Judge Green concluded that no unlawful sex discrimination under Title VII had been shown.\(^4\) The judge’s point may have been that the composite package of grooming rules for females (precluding, for example, “off beat” hair styles) was and military conscription in the case of a man. Certainly, the latter is unique in America to the male sex. Moreover, it is a condition which for public policy reasons, is given special treatment; just as the pregnant woman will often be the recipient of maternity benefits, the veteran receives benefits for having been subjected to the military “condition” which befalls only members of his sex. Finally, the draft situation involves a period of defined and predictable duration during which he is rendered unavailable for employment. In EEOC Case No. 7067, 2 Fair Emp. Prac. Cas. 167 (1969), the complainant was refused admission into respondent bank’s two-year management program because of his uncertain draft status. The argument was made that, because males only were subjected to military conscription, the respondent’s policy violated Title VII. The commission found that there was no reasonable cause to believe that the situation amounted to unlawful sex discrimination. However, the commission expressed the view that “this is a question of fact to be decided on all of the considerations of a given case.” The decision used the words “not unreasonable,” which might indicate a movement toward the “business necessity” standard referred to above. See note 29 supra.

41a. — F. Supp. at —, 3 FAIR EMP. PRAC. CAS. at 1082.
42. Id. at —, 3 FAIR EMP. PRAC. CAS. at 375.
43. Brief for EEOC as Amicus Curiae at 16-17.
44. Interestingly, Judge Green is a woman.
45. — F. Supp. at —, 3 FAIR EMP. PRAC. CAS. at 376.
46. Id.
as stringent in terms of overall neatness and appearance as the composite grooming package for males. Phrased thus, there arguably was not any unequal treatment based on sex. But the facts in *Dodge* do not particularly support such a theory; moreover, Judge Green did not explicate her ruling. The ruling appears incorrect under Title VII. Hair length is simply a habit of culture; no functional reason ordinarily exists to utilize different policies for men and women. Neatness can be required, to be sure, but this requirement would extend to both sexes. *Phillips* was directly on point and should have controlled.

Other long hair actions are pending in the courts; it remains to be seen how they will be decided. Judges frequently refer to the importance of paying deference to the position of the EEOC. Often this seems ritualistic—if judicial judgments happen to accord with EEOC positions, deference will be shown. Nevertheless, the long-hair issue is one as to which the commission's position is sound and should be accepted by the courts.

**Matters of Marriage**

The marriage question in airline stewardess cases is fairly well settled. Although two federal district court decisions, *Cooper v. Delta Airlines, Inc.* and *Landsdale v. Air Lines Pilots Ass'n*, determined that termination of a stewardess upon her marriage was lawful even though no similar requirement was utilized for men, both cases were decided before the *Phillips* decision by the Supreme Court. One, *Landsdale*, was subsequently reversed by the Fifth Circuit Court of Appeals.

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47. The EEOC's amicus curiae brief in the *Dodge* case cited eight cases in progress in various federal district courts, presenting the long-hair question in a number of ways. In one action, a preliminary injunction has been issued restraining an employer from discharging the plaintiffs because of the length of their hair. *Diddams v. University Hospitals, CCH Emp. Prac. Guide ¶ 8244* (W.D. Wis. Apr. 15, 1971).


52. 437 F.2d 454 (5th Cir. 1971).
after the Supreme Court's *Phillips* decision. Other courts and the EEOC are now in accord that a marriage ban cannot be applied only to women employees, absent a bfoq showing.

Perhaps the most important sex-plus cases to reach the commission pertaining to marital status are those involving unwed mothers. In one case the commission has put the matter unequivocally: "Clearly it would be an unlawful employment practice to apply an illegitimacy standard to female applicants only." In another dispute concerning a collective bargaining contract provision limiting leaves of absence for pregnancy to married females, a union requested that the word "married" be deleted; the employer's response was: "[T]his is a distinction that is rooted in morality and not sexual discrimination." The commission disagreed and, noting the absence of any claim that employees who became fathers while unmarried would be terminated, found the employer's policy violated Title VII.

The EEOC's position in these cases is surely correct. So far, the

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55. No case has decided that a "singles only" requirement for women could amount to a bfoq. In the case of *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971), defendant's proof on this question was deemed insufficient to show a bfoq. 444 F.2d at 1199. The point was also argued in *Cooper v. Delta Air Lines, Inc.*, 274 F. Supp. 781 (E.D. La. 1967), but the decision did not reach the question. *Id.* at 782. The possibility of establishing unmarried status as a bfoq for women employees seems quite remote. See notes 147-151 & accompanying text infra. Clearly, the EEOC would not receive such an argument favorably. *Cf.* Neal v. American Airlines, Inc., CCH EMP. PRAC. GUIDE ¶ 6002 (1968).

Likewise, disparate standards for men and women based on age have been rejected by the commission. *Dodd v. American Airlines, Inc.*, CCH EMP. PRAC. GUIDE ¶ 6001 (1968) (rule requiring stewardesses to resign at 32 years of age without a similar policy for male flight cabin attendants violated Title VII); see EEOC Decision No. 70-145 CCH EMP. PRAC. GUIDE ¶ 6066 (Sep. 9, 1969) (retail store wrongfully refused to hire an 18-year old Negro female in a situation where the average age of female workers was considerably higher than that of male workers).


56. EEOC Decision No. 71-332, CCH EMP. PRAC. GUIDE ¶ 6164 (Sept. 28, 1970).

57. EEOC Decision No. 71-562, 3 *FAR EMP. PRAC. CAS.* 233 (Dec. 4, 1970).

58. *Id.* at 235. The commission noted that the employer was a government contractor, and that the Sex Discrimination Guidelines issued by the Office of Federal Contract Compliance provide in part that: "Any distinction between married and unmarried persons of one sex that is not made between married and unmarried persons of the opposite sex will be considered to be a distinction made on the basis of sex." 41 C.F.R. § 60-20.3(d) (1971).
commission's cases have been disposed of on the basis of an equality standard. But there is another theory which the commission has used as a parallel ground for decisions—a notion of "disproportionate impact" on one sex. This theory is linked with the recent decision of *Griggs v. Duke Power Co.* by the United States Supreme Court, and it has far-reaching implications. Discussed in detail below, the disproportionate impact test is pertinent here as the basis for a recent unwed mother decision by the New York Supreme Court. In *Cirino v. Walsh*, the plaintiff was a Puerto Rican with eight illegitimate children by five different fathers. She was a good employee and had an outstanding reference from one part-time employer. She sought additional part-time work as a school crossing guard, but was denied the job because of a lack of "good character." Quoting from *Griggs*, Judge Tyler held that the plaintiff was arbitrarily discriminated against because of both race and sex. His reasons were remarkably simple, but potent.

If more Puerto Ricans have children out of wedlock than Caucasians, then a refusal of a position on that ground affects them more and is discriminatory. If the fact of children is more easily discovered about the mother who looks after them than the father who does not, then it is discriminatory against women.

**Homosexuality**

More deeply "rooted in morality" than unwed motherhood is homosexuality. Whether homosexuals are protected by Title VII from discrimination in employment because of their personal sexual behavior is a question not yet faced by the EEOC or the courts.

The question may come up in various ways, but there are two situations which may be treated distinctly. First, homosexuality may not be suspected by an employer. There may be no outward signs, but the employer in some way may learn of an individual's homosexuality and, because of this knowledge, alter or terminate the employer-employee relationship. Secondly, outward behavior characteristics causing a male to seem effeminate or a female to seem masculine could be offensive to an employer and the basis for denial of an employment opportunity. In both of these situations, notwithstanding the delicacy of the problem, a strong case can be made that discrimination should not be permitted

61. *See* notes 82-99 & accompanying text infra.
63. *Id.* at 451, 321 N.Y.S.2d at 495.
without a business necessity or bfoq defense.

The second situation is the easier since conceptually the “effeminate male” or “masculine female” question is similar to the long-hair cases. Very likely an employer who would balk at hiring an effeminate male would not reject a female applicant with masculine traits. If so, as in the long-hair situations, males have been discriminated against because of physical characteristics bearing a cultural stigma which attaches to males but not to females. Conceivably, an employer could defend his actions by saying that a lack of effiminacy in males is a matter of business necessity or a bfoq, but at least a showing of the job-relatedness of any such rule should be required under Title VII.

The other situation, where an employer’s action is not based upon stereotyped physical traits which he might associate with homosexuality, is more difficult. Here, it may be assumed that an employer would not discriminate between males and females but his denial of employment opportunity would be based simply on the fact of homosexuality. The question then presented is whether the term “sex” as used in Title VII can be said to encompass homosexual behavior. Certainly such a result was not envisioned by Congress when Title VII was passed. No one thought about the question at the time, and the legislative history is not helpful.

Of interest by way of analogy is a recent case in Minnesota, *McConnell v. Anderson*. At issue was whether, under the Civil Rights Act of 1871, the Board of Regents of the University of Minnesota deprived Jim McConnell, a homosexual, of any rights provided him by the Fourteenth and First Amendments of the United States Constitution. McConnell had been hired by the regents, but this decision was retracted after he publicly announced his homosexuality by applying for a license to marry another man. McConnell brought suit to secure the job he had been promised. Several important assumptions were first made by the court. Among them were the following: that no claim

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64. This supposition assumes that most persons making personnel decisions will be male, although perhaps most female employers would harbor the same type of prejudice.

65. For purposes of discussion of homosexuality under Title VII, assume, too, that no question of violation of state statutes dealing with “abnormal” sexual behavior is presented. Such a question would raise independent issues beyond the scope of the present analysis. Many state statutes are unquestionably out of harmony with the times, but the moral cement in which they are embedded remains strong.


was asserted under the 1964 Civil Rights Act;\(^88\) that no attempt had been made to show that he was incompetent as a librarian or that "his homosexual tendencies might affect the performance of his duties or his efficiency as a librarian";\(^69\) and that he would not be in a position to handle or be exposed to information involving national security.\(^70\)

The district court reviewed the state of the law in some detail. Although no case was found to be exactly on point, Judge Neville placed heavy reliance on two cases from the District of Columbia Circuit Court of Appeals.\(^71\) These decisions held that the Civil Service Commission was not justified in refusing employment eligibility to an individual because of "immoral conduct" when the basis for the commission's conclusion was an admission of homosexuality and there was no evidence of any practice of that proclivity. Judge Neville recognized that an individual does not have an inalienable right to public employment.\(^72\) But noting that there was a constitutional right requiring the terms of public employment to be "reasonable, lawful, and non-discriminatory,"\(^73\) the judge concluded: 

\[\text{To justify dismissal from public employment, or... to reject an applicant for public employment, it must be shown that there is an observable and reasonable relationship between efficiency in the job and homosexuality.}\]

Judge Neville may not have meant exactly what he said. Elsewhere in his opinion, he indicated that no question of national security was presented, no question was presented of criminal acts by homosexuals, and no question was presented of exposing the homosexual employee to children of tender years. Yet none of these considerations would have a particular bearing on "efficiency in the job." Thus, this test may

\(^{68}\) "The term homosexual is significantly omitted from this statute." 316 F. Supp. at 812.

\(^{69}\) Id.

\(^{70}\) Id.

\(^{71}\) Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969); Scott v. Macy, 349 F.2d 182 (D.C. Cir. 1965).

\(^{72}\) 316 F. Supp. at 814.

\(^{73}\) Id. at 814-15.

\(^{74}\) Id. at 814. The logical extensions of Judge Neville's conclusion regarding the constitutional aspects of public employment are troublesome. The Fourteenth Amendment does not prohibit all forms of discrimination; only discrimination based on invidious classifications is precluded. But if a lack of job-relatedness is sufficient to make the discrimination invidious, the Fourteenth Amendment should extend to many classifications not yet litigated. A person who is not hired because he is overweight might be capable of efficient job performance, for instance. A long list of like examples could easily be constructed.
only be reached after concluding that a variety of other risks or problems are not present in a given case.\textsuperscript{75}

The \textit{McConnell} case has recently been reversed on appeal.\textsuperscript{75a} The position of the Eighth Circuit Court of Appeals was that, by his demonstrative public behavior, McConnell was seeking not merely a job but a job on his own terms—one of which was to "foist" on his employer "tacit approval" of McConnell's "right to pursue an activist role in implementing his unconventional ideas concerning the societal status to be accorded homosexuals."\textsuperscript{75b} This concept was viewed by the appellate court as "socially repugnant" and legally unprotected. Nevertheless, the court pointed out that

\begin{quote}
[t]his is not a case involving mere homosexual propensities on the part of a prospective employee. Neither is it a case in which an applicant is excluded from employment because of a desire clandestinely to pursue homosexual conduct.\textsuperscript{75c}
\end{quote}

While the use of the word "clandestinely" instead of "privately" was unfortunate, the court may have been indicating its willingness to have upheld the district court had Jim McConnell been a less aggressive—a less \textit{public}—individual. If so, notwithstanding the difficulties inherent in a distinction which turns on how discreet a person happens to be, the lower court decision in \textit{McConnell} may still stand for the proposition that \textit{private} homosexual behavior which is not shown to be job-related should not be the basis for preventing a person from gaining public employment.\textsuperscript{76} This proposition is reasonable enough. Likewise, it is reasonable to conclude that the ban on sex discrimination in Title VII could extend to similar factual patterns in private employment. In the district court Judge Neville offered the gratuitous observation that "[t]he term 'homosexual' is significantly omitted from [Title VII]

\textsuperscript{75} A recent case in the District of Columbia raised the national security question, Ulrich v. Laird, Civil No. 203-71 (D.D.C., filed Jan. 26, 1971). Otto Ulrich's security clearance for government contract work had been revoked because of his admitted homosexuality and his refusal to respond to certain questions about his private behavior. Citing Norton v. Macy and Scott v. Macy, note 71 supra, in an order dated September 28, 1971, Judge Pratt ruled that ordinarily an individual has a right under the First Amendment to keep the details of his sex life private. Further, Judge Pratt concluded that "where a man has admitted that he is a homosexual and will continue to be one, there must be proof of a nexus between that condition and his ability effectively to protect classified information." No such nexus having been found, Mr. Ulrich's security clearance was ordered reinstated. Thus, even the preliminaries which were referred to by Judge Neville in \textit{McConnell} are coming under close judicial scrutiny.

\textsuperscript{75a} 40 U.S.L.W. 2225 (8th Cir. Oct. 18, 1971).
\textsuperscript{75b} \textit{Id}.
\textsuperscript{75c} \textit{Id}.

\textsuperscript{76} The Fourteenth Amendment was the basis for this conclusion in \textit{McConnell}; the First Amendment argument was not considered. 316 F. Supp. at 815.
and thus it is of no assistance to a decision of the case except gen-
erally to indicate to the court the adoption of a national policy by
the Congress against discriminatory hiring and employment practices
and for equal employment opportunities.\textsuperscript{77} This observation is incon-
clusive. Like pregnancy, homosexuality could be viewed as an indi-
vidual condition sufficiently sex-related to be enveloped by the term
"sex" as used in Title VII.\textsuperscript{78} Such a conclusion, embellished by special
considerations unique to the homosexual problem of the type men-
tioned by Judge Neville in \textit{McConnell}, would be appropriate under a
liberal construction of Title VII\textsuperscript{79} and would advance individual rights
in private employment alongside those which are beginning to be af-
irmed by the courts in public employment.

\textit{The Problem of Neutral Rules—"Sex-Minus"}

Most of the cases currently being dealt with by the EEOC involve
problems which arise out of the impact of so-called "neutral rules". No discrimination is discernible in these employment practices on their
face; sex and other invidious bases of discrimination have been factored
out or were never present to begin with. Yet discrimination may occur
because of a neutral rule's substantially disproportionate impact on one
sex or the other. By definition this problem occurs as a jurisdictional
concern—whether proscribed discrimination took place—rather than as
a question of exception under the bfoq provision.

The neutral rule problem of sex discrimination has its antecedent in
racial discrimination cases before the commission and the courts. In
\textit{Local 189 Papermakers v. United States}\textsuperscript{80} the Fifth Circuit Court of
Appeals held that a uniformly applied seniority system which had a
much greater impact on blacks than on whites violated Title VII because
"the effect of the standard is to lock the victims of racial prejudice into an
inferior position."\textsuperscript{81}

This year, the Supreme Court in the acclaimed \textit{Griggs}\textsuperscript{82} decision has dealt with the neutral rule question. The Court adopted the EEOC's
position that employment tests which are not racially discriminatory on

\textsuperscript{77} \textit{Id.} at 812.
\textsuperscript{78} For a discussion of pregnancy question under Title VII see note 40 &
accompanying text \textit{supra}.
\textsuperscript{79} For a discussion of the judicial construction of civil rights legislation see
notes 186-88 & accompanying text \textit{infra}.
\textsuperscript{80} 416 F.2d 980 (5th Cir. 1969), \textit{cert. denied}, 397 U.S. 919 (1970).
\textsuperscript{81} \textit{Id.} at 989.
their face but which have a substantially disproportionate impact on blacks must be shown to be job-related before they may be used as employment criteria. Proving job-relatedness, according to Chief Justice Burger, centers around a showing of "business necessity." The EEOC has employed the rationale of the Griggs case in disapproving various neutral employment practices. For instance, in a recent decision involving an employer's rule preventing employees from wearing beards or moustaches, the commission not only found sex discrimination but also found race discrimination. Observing that beards and moustaches may operate as an expression of heritage and racial pride for black men, the commission concluded that the employer's standard had a foreseeably disproportionate impact upon Negroes which was improperly discriminatory, absent a showing of business necessity.

83. Id. at 431. Speaking for the Court, Justice Burger wrote "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." 401 U.S. at 431. More fundamentally, Justice Burger pointed out that "what is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." Id.

84. Id. The term "business necessity" was articulated in Griggs as a defense in neutral rule situations where unintended discrimination takes place. The EEOC has picked up the term in its decisions, but the commission has confused matters somewhat by using words from bfoq decisions of the Fifth Circuit Court of Appeals in giving content to "business necessity." As indicated below (text accompanying note 114 infra), the Fifth Circuit has defined the bfoq in terms of safe and efficient job performance by women. See Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969). In turn the EEOC has indicated that to prove business necessity in a situation involving a rule having a substantially disproportionate impact on women, an employer must show "that the policy is so necessary to the safe and efficient operation of his business as to justify the policy's discriminatory effects." EEOC Decision No. 71-1529, CCH EMP. PRAC. GUIDE ¶ 6231, at 4411. This statement may be completely sound, but the business necessity feature of neutral rules involved in determining whether or not discrimination exists under Title VII should be kept separate from whatever tests are developed for the bfoq. The business necessity test will be applicable to all areas of proscribed discrimination. But, the bfoq does not apply to race. Customer preference, for instance, is wholly inappropriate in racial discrimination situations. Yet, there may be a limited area in which customer preference can be the basis for a bfoq where customer preference is central to the employer's business, or perhaps, to the performance of the job in question. See note 181 & accompanying text infra. Obviously it would not do to say that customer preference can provide the basis for a business necessity defense in cases of racial discrimination under Title VII. Other problems of this sort may surface. Consequently, notwithstanding the use by the Fifth Circuit Court of Appeals of similar language in defining the bfoq, it seems desirable to keep these two concepts separate.

85. EEOC Decision No. 72-3003 (July 2, 1971).
86. Id. at 2.
Similar reasoning has supported the commission's views with regard to unwed mothers. The commission has observed that, even assuming an employer attempts to apply an illegitimacy standard to males and females equally, the realities of life are such that illegitimate parenthood by a male can easily be concealed, but an illegitimate pregnancy and childbirth generally cannot be. Without evidence of business necessity, such an employment standard has a foreseeably disproportionate impact on females and is unlawful.

Another example of a neutral rule disapproved by the commission is an arbitrary height requirement. The commission has said that without a showing of business necessity, an employer's utilization of a minimum height requirement of five feet six inches for production jobs could not stand because of its foreseeably disproportionate impact on groups protected by Title VII. Relying upon a recent Supreme Court decision under the Taft-Hartley Act, *NLRB v. Great Dane Trailers, Inc.*, the commission has further ruled that the burden of proceeding on the issue of business necessity lies with the employer. This requirement seems logical and comports with procedural assumptions underlying the *Griggs* decision.

87. EEOC Decision No. 71-332 (Sept. 28, 1970). As previously indicated (see text accompanying note 63 supra), the New York Supreme Court concurs in this view. See Cirino v. Walsh, 66 Misc. 2d 450, 321 N.Y.S.2d 493 (Sup. Ct. 1971).


89. EEOC Decision No. 71-1529, CCH EMP. PRAC. GUIDE ¶ 6231, at 4411 (Apr. 2, 1971).

90. Id. The groups in question were both women and Spanish American males. The commission noted that 80% of American women were less than 5' 5" tall, and that while the average heights of Anglo-American males was 5' 7" tall, the average height of Spanish American males was 5' 4½".


92. EEOC Decision No. 71-332 (Sept. 28, 1970).

93. Reliance on the *Great Dane* case for burden of proof purposes is not objectionable, although even this aspect of the case has been criticized as having been both unnecessary and unsupported by precedent. E.g., Janofsky, *New Concepts in Interference and Discrimination Under the NLRA: The Legacy of American Ship Building and Great Dane Trailers*, 70 COLUM. L. REV. 81 (1970).

However, before the Supreme Court decided the *Griggs* case, the EEOC relied on *Great Dane* as authority for the “business necessity” requirement in neutral rule situations. EEOC Decision No. 71-332 (Sept. 28, 1970). To focus on *Griggs* for the business necessity requirement is one thing; to focus on *Great Dane* for that purpose is quite another. *Great Dane* wag a tail—a concatenation of Supreme Court decisions evolving the motive standards under section 8(a)(3) of the National Labor Relations Act, such as the “inherently destructive” category of acts dealt with in several previous decisions. E.g., American Ship Building Co. v. NLRB, 380 U.S. 300 (1965); NLRB v. Brown, 380 U.S. 278 (1965). If acts fall within this category, no amount of business justification need be listened to by the NLRB. This feature of the “business
Additional topography of the neutral rule cases should appear soon.\textsuperscript{94} The potential for litigation and for encompassing somewhat startling notions is large. By way of illustration, albeit speculative, an example might be formulated involving the use of arrest records in employment practices.

In \textit{Gregory v. Litton Systems}\textsuperscript{95} the United States District Court for the Central District of California held that it was an unlawful employment practice under Title VII for an employer to follow a policy which refused consideration of applicants with significant arrest records, since this policy was viewed as having a discriminatory effect against Negroes as a class without any predictable bearing on job performance. The holding was carefully limited to arrests not leading to conviction.\textsuperscript{98} Given this qualification, the court found

\begin{quote}
no evidence to support a claim that persons who have suffered no criminal convictions but have been arrested on a number of occasions can be expected, when employed, to perform less efficiently or less honestly than other employees.\textsuperscript{97}
\end{quote}

The analogy to the sex discrimination area fairly leaps to mind. The percentage spread between the number of males arrested and the number of females arrested is substantially greater than the spread between blacks and whites.\textsuperscript{98} It follows, per the \textit{Gregory} case, that employer utilization of rules which deny employment opportunities be-

\textsuperscript{94} The staff of the EEOC compliance division estimates that approximately 80 percent of the cases currently being processed fall into this category.

\textsuperscript{95} 316 F. Supp. 401 (C.D. Cal. 1970), \textit{appeal docketed}, No. 26669, 9th Cir., Sept. 9, 1970. This decision has been relied upon by the EEOC as authority for its disapproval of neutral employment rules which have an unjustifyably disproportionate impact on a protected group under Title VII. \textit{E.g.}, EEOC Decision No. 71-322 (Sept. 28, 1970).

\textsuperscript{96} 316 F. Supp. at 402-04.

\textsuperscript{97} \textit{Id}. at 402.

\textsuperscript{98} The President's Commission on Law Enforcement and Administration of Justice reported in 1967: "One of the sharpest contrasts of all in the arrest statistics on offenders is that between males and females. Males are arrested nearly seven times as frequently as females for Index crimes [murder and nonnegligent manslaughter, forcible rape, aggravated assault, burglary, larceny of $50 and more and motor vehicle theft] plus larceny under $50. The rate for males is 1,097 per 100,000 population and the corresponding rate for females is 164. The difference is even greater when all offenses are considered.

\begin{quote}
\ldots For Index offenses plus larceny under $50 the rate per 100,000 blacks in 1965 was four times as great as that of whites (1,696 to 419)."
\end{quote}
cause of non-conviction arrest records constitutes a violation of Title VII because of an unjustifiably disproportionate impact on the male sex. 99

There is an argument that the race and sex situations are not comparable with regard to arrest records. The Gregory case could be based on the fact that the black population experiences a larger proportion of arrests which do not lead to convictions than is true of the white population. This could be due to a number of factors including the basic prejudices of white arresting officers. 100 But this distinction was not relied upon by the court in the Gregory decision; in fact, the language of the court is pointedly broad. 101 Thus, the argument might stand that the use in employment practices of nonconviction arrest records involves inherent sex discrimination as well as race discrimination which should not be permitted absent a showing of business necessity. 102

99. The question is of considerable importance since arrest records are widely used as an employment criterion. Comment, Arrest Records as a Racially Discriminatory Employment Criterion, 6 Harv. Civ. Rights-Civ. Lib. L. Rev. 165, 174-75 (1970) [hereinafter cited as Arrest Records]. If the use of arrest records does constitute unlawful sex discrimination, the appropriate remedy would be, as in Gregory, to preclude the use of arrest records altogether as an employment standard. 316 F. Supp. at 404; Neal v. American Air Lines, Inc., CCH Emp. Prac. Guide ¶ 6002 (1968). Ideally, if Gregory were taken to heart by employers, nonconviction arrest records would be recognized as an arbitrary, unsatisfactory employment standard, and there would be no need to carry the Gregory analysis from race cases to sex cases. That such a development will occur is, to put it mildly, unlikely.

100. The types of crime in question may also have a bearing on the problem. It has been noted that acquittal rates are higher in crimes against the person (for which blacks are arrested more often than whites) than in property crimes. See Arrest Records, supra note 99, at 69-70.

101. For example, the court dealt with the subject of intent by commenting that Litton's practice was unlawful, "even if it appears, on its face, to be racially neutral and, in its implementation, has not been applied discriminatorily or unfairly as between applicants of different races. [Citations omitted]. In a situation of this kind, good faith in the origination or application of the policy is not a defense. An intent to discriminate is not required to be shown . . . ." 316 F. Supp. at 403.

The Bona Fide Occupational Qualification Exception

The bona fide occupational qualification exception to Title VII initially pertained only to religion and nationality. The exception was extended to cover sex by an amendment offered by Representative Goodell who apparently thought the exception would have wide application in sex cases. His fellow congressmen seem to have perceived of sex as a limited bfoq, because specific examples in the legislative history are scarce. Senators Joseph Clark and Clifford Case, floor managers of the Title VII bill, prepared a written memorandum interpreting the bill in which the following bfoq examples were given: French cook in a French restaurant, all male professional baseball teams, masseurs, salesmen of a particular religion for businesses seeking patronage of particular religious groups, and employees of a particular religion for religiously affiliated educational institutions. The examples were embellished and supplemented somewhat in the floor debate.

The following year, a bill was offered to give the EEOC enforcement powers. The bill passed the House but died at the end of the session. In the course of the debate on the house floor, it was made very clear that the bill would not change Title VII at all with respect to the bfoq. The House report described the bfoq exception as lan-

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103. In offering the amendment, Representative Goodell stated: "There are so many instances where the matter of sex is a bfoq. For instance, I think of an elderly woman who wants a female nurse. There are many things of this nature which are bfoq's, and it seems to me they would be properly considered here as an exception." 110 CONG. REC. 2718 (1964) (emphasis added).

104. Id. at 7212-13.

105. Representative Dent indicated that a French cook in a French restaurant and an Italian cook in an Italian restaurant would qualify, and pointed out that "there's nothing wrong with that because [the employer] would hardly be doing his business justice by advertising for a Turk to cook spaghetti." Id. at 2549. It was then asked whether this would extend to waiters, cashiers and dishwashers in such a restaurant. Representative Dent answered that it would not. Representative Dent also gave as an example bfoq the situation of a Roman Catholic employed as a sales girl in a religious articles store. Representative Cramer asked why the bfoq exception should apply to labor unions as well as to employers. Representative Roosevelt answered that it should be so extended because there are "instances where labor unions that dealt with a particular language group had to have and had to be able to hire . . . people who were able to speak the particular language used by the people of a certain national origin." Id. at 2549-50. The debate after this point was not very fruitful due to the confusion on the part of a number of southern representatives who tended to equate race and national origin for purposes of the bfoq exception. In a later session, however, Representative Green suggested that deans of men and women at a university would be further examples of sex as a bfoq. Id. at 2721.


107. In response to a question by Congresswoman May, Representative Hawkins, the bill's author, stated that the proposed legislation would in no way change the scope
language which

is meant to apply in those rare circumstances where a reasonable, good faith, cause exists to justify occupational distinctions based on religion or national origin, or the more common circumstances, widely accepted by contemporary standards, where a reasonable, good faith, and justifiable ground exists to perpetuate occupational distinctions based on sex. 108

This language was tempered by the remarks of Representative O'Hara to the effect that Congress is not the judge of what are bfoqs: "[T]hat is a subject to be decided by the Commission and by the courts in the light of all the evidence presented to them on the particular occupation involved." 109 The House report must also be tempered by its ex post facto nature and by the fact that it deals with a piece of legislation which did not pass in both houses of Congress.

Development of the BFOQ in the Courts

Much has already been written about the initial shaping of the bfoq exception in Bowe v. Colgate-Palmolive Co. 110 and in other early decisions. 111 While that chronology need not be restated here, attention should be given to later developments in the Fifth and Ninth Circuit Courts of Appeal.

The Fifth Circuit has been prominent in defining the bfoq because of its decisions in Weeks v. Southern Bell Telephone & Telegraph Co. 112 and Diaz v. Pan American World Airways, Inc. 113 The Weeks case, by now widely cited, involved a state statute placing maximum limits on weight lifting by females. This statute was found insuf-
ficient to justify an employer's practice against hiring women in jobs involving heavy weight lifting. The test articulated by the court was that

in order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe . . . that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.114

That burden not having been carried, the employer's rule relating to female employees was disallowed.115

The Fifth Circuit's test of safety and efficiency adapts well to the state protective law context, but it is inconclusive in other situations. For instance, safety and efficiency have little to do with customer preference. Thus, refinement of the test proved to be necessary. The occasion was the Diaz case.

In Diaz at issue was the stewardess question—the validity of an employer's rule restricting the position of flight cabin attendant to the female sex. The defendant, Pan American, secured Dr. Eric Berne, popularly known for his authorship of Games People Play, to develop testimony about the psychological impact of female and male flight cabin attendants on passengers. Dr. Berne testified that an airplane cabin constituted a "sealed enclave" which creates three typical emotional states: apprehension, boredom and excitement. In Dr. Berne's opinion, females are better able to deal with each of these states because of the nature of their psychological relationship as females to persons of both sexes. He particularly emphasized this with regard to the relief of anxiety of passengers.116

Dr. Berne's testimony was supplemented by evidence of Pan American to the effect that male stewards had been used throughout most of the airline's history, but had been abandoned in 1959.117 According to Pan American, the prime function of the cabin attendant job after the introduction of jets in 1958 was "to provide passengers, so far as possible, with friendly personalized service, to instill a sense of comfort and well-being in flight, and to provide maximum reassurance to the new 'mix' of travellers Pan Am was carrying."118 In Pan American's judgment, females performed this job function significantly better than

114. 408 F.2d at 235.
115. Id. at 236.
117. Id. at 562.
118. Id. at 563.
males. Complicating the picture was the difficulty of isolating by the interview process those males who would have psychological skills comparable to the average female in the context of flight cabin attendant duties.

The United States District Court for the Southern District of Florida was convinced. Because of the bfoq exception, no unlawful employment practice under Title VII was found to exist in Pan American's hiring policies. Two features of the district court's conclusions were particularly significant. First, the court concluded "that it was not practically possible to identify in the hiring process those few men" who possessed the aggregate of personality characteristics which Pan Am was entitled to seek in its flight attendants. Secondly, after quoting from the "Interpretive Memorandum" submitted by Senators Clark and Case during the debate on the Civil Rights Act of 1964, the court concluded that

[t]he clear import of this legislative history is that customer preference can provide a basis for an employer's selecting employees on the basis of sex where the preference is a legitimate one, related to differences in the ways in which the work will be performed by persons of different sexes, and the manner in which such performance will be received by the customer because of such differences.

On appeal, the Fifth Circuit reversed. Adopting the position stated by the EEOC in its amicus curiae brief, the court began with the proposition that the word "necessary" within the bfoq qualification required the application of "a business necessity test, not a business

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119. Id.
120. Id. at 569.
121. Id. at 568. The court acknowledged that there might be situations, unlike that in Weeks, where individual screening and testing would be nigh impossible. Id. And, according to the court, it may be that where an employer sustains the burden of demonstrating that it is impossible or highly impractical to deal with women on an individualized basis, it may apply a reasonable general rule. Id.

In Gudbrandson v. Genuine Parts Co., 297 F. Supp. 134 (D. Minn. 1968), a bfoq exception dealing with heavy weight lifting jobs was upheld because, even though some women could perform the work, "the process of selecting those few who may be able to do so involves a high risk of danger and inefficiency." Id. at 136. This distressingly broad test has been the subject of criticism. Developments—Title VII, supra note 9, at 1178 n.60. Similarly, the use in Diaz of an "impracticality" standard is unsettling; to further the purpose of Title VII, individual testing and screening, absent any other basis for a bfoq finding, should be required unless virtually impossible.

122. 110 CONG. REC. 7212-13 (1964).
123. 311 F. Supp. at 569.
convenience test." Alternatively phrased, "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." Having said this, the court decided that "[t]he primary function of an airline is to transport passengers safely from one point to another," and the attributes of female stewardesses, while important, "are tangential to the essence of the business involved."

The court of appeals translated the district court's finding that it was "not practically possible" to identify the few men in the hiring process who possessed the aggregate of personality characteristics to which Pan American was entitled, into a more relaxed finding that the actualities of the hiring process "would make it more difficult to find these few males." Customer preference was treated as a separate question. Again following the lead of the EEOC in its amicus curiae brief, the conclusion was reached that customer preference comes into play, if at all, only in those situations where the essential nature of the business is the satisfaction of certain customer preferences.

The *Diaz* case before the Fifth Circuit could have been resolved rather easily under the formulation of the bfoq test stated in *Weeks*. Clearly it could not have been shown by Pan American that all or substantially all men could not perform the job of flight cabin attendant safely and efficiently. Yet the *Weeks* formulation was insufficient because it says nothings about customer preference, and the job of flight cabin attendant is thoroughly laced with customer preference nuances.

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125. *Id*. at 388. See Brief for EEOC as Amicus Curiae at 10.
126. 442 F.2d at 388.
127. *Id*. at 387.
128. *Id*. Pan American argued vigorously that the district court findings stated a test not of convenience but of "practical possibility," and that since this finding was not refuted, it should have been binding on appeal. Brief for Appellant on Petition for Rehearing, at 3.
129. 442 F.2d at 389. See Brief for EEOC as Amicus Curiae at 9. In its brief, the EEOC was addressing that portion of the district court's opinion dealing with the Clark-Case Memorandum in the legislative history and the bfoq examples given there. To some extent, the EEOC played word games in suggesting that "the legislative history clearly indicates that it is not customer preference but business necessity upon which the 'bona fide occupational qualification' is based." *Id*. But the commission's point was that customer preference is pertinent only when central to the essential nature of the business. Specifically with regard to the Clark-Case examples, the commission argued that "the very business of the specialty restaurant is the product of a special ethnic appeal, and the very business of a religious bookstore, the satisfaction of religious needs." *Id*. at 9-10.
130. Pan American and Dr. Berne argued that customer preference was not a necessary ground for the district court's decision. Brief for Appellant at 26-27 (testimony
In contrast to Diaz, leaving aside customer preference for the moment, one other federal court of appeals decision addressing the bfoq should be mentioned. In Rosenfeld v. Southern Pacific Co., the Court of Appeals for the Ninth Circuit decided that physical requirements for the job of agent-telegrapher on the Southern Pacific Railroad did not justify the exclusion of the female sex from that job because of a bona fide occupational qualification. The job in question allegedly required, during harvesting season, work in excess of 10 hours a day and 80 hours a week, heavy physical effort in climbing over and around box cars, and lifting various heavy objects. The court cited the customary bfoq decisions, Bowe and Weeks, but the exact bfoq test formulated in Weeks was not mentioned. Instead, the court focused on the guidelines of the commission and concluded that:

Based on the legislative intent and on the Commission's interpretation, sexual characteristics, rather than characteristics that might, to one degree or another, correlate with a particular sex, must be the basis for the application of the BFOQ exception. This phrasing of the bfoq test is the most narrow to date, and, while understandable from the overall objectives of Title VII, it is perhaps the most difficult to square with the bfoq examples contained in the legislative history.

EEOC Guidelines and Decisions

The EEOC guidelines on discrimination because of sex prescribe a very narrow range of behavior which may be justifiable under the bfoq exception. Except for rare instances where a particular sex may be required for purposes of authenticity or genuineness, the thrust of the guidelines is that stereotyped generalizations by employers in favor of one sex or the other are bad. Also disapproved are factors such as customer preference and the expense, unless unreasonable, of

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of Dr. Berne). But in its brief on petition for rehearing, Pan American argued that making passengers comfortable and relaxed so that they will use a particular airline was not merely tangential to the airline's business, but was fundamental. Brief for Appellant on Petition for Rehearing at 5-6.

131. 444 F.2d 1219 (9th Cir. 1971).
132. Id. at 1223.
133. Id. at 1225. The test as phrased by the court was initially suggested by Developments—Title VII, supra note 9, at 1178-79.
134. See notes 103-05 & accompanying text supra.
135. See 29 C.F.R. § 1604.1(a) (1971). This range may be even more narrow in the future; the EEOC General Counsel's Office has indicated that the guidelines are currently being revised.
136. Id. § 1604-1(a)(2).
137. Id. § 1604.1(a)(1)(ii).
making separate facilities available to another sex.\textsuperscript{138}

In practice, the EEOC has been true to its guidelines, and the bfoq exception has been given exceedingly sparing content. Several recent decisions by the EEOC are illustrative.

The commission has ruled that an employer cannot refuse to hire women as "courier guards" notwithstanding the employer's argument that risks to the property being protected, and to the women themselves, would be significant, since working conditions included night hours and working in unlit areas in and around banking facilities.\textsuperscript{139} The fear that banking customers would cease using the courier service once female guards were on the payroll was also disregarded by the commission. This latter argument, according to the EEOC, "presumes that customers' desires may be accommodated even at the price of rendering nugatory the will of Congress."\textsuperscript{140}

In two instances, the commission has ruled that employers have failed to carry their burden of proof when they attempted to show that unreasonable expense would be incurred to provide separate facilities for women. One case involved a female welder with eighteen years of experience who applied for work in a welding yard which had accommodated females during World War II and still had surplus water and sewage lines which could be reactivated.\textsuperscript{141} The other presented the issue of how to work the logistics of male and female crew members aboard freight and passenger vessels operated by a maritime cargo and passenger carrier.\textsuperscript{142} Coast Guard regulations require adequate separate toilet and shower facilities for crew members of different sexes. Even so, the commission concluded that logical and reasonable solutions on board could be worked out, depending on the size of the female complement, so that there was "no persuasive evidence which would warrant application of the bona fide occupational qualification exception under . . . Title VII to the maritime industry."\textsuperscript{143}

Two additional recent bfoq rulings by the commission are noteworthy. An employer's policy of refusing to consider male applicant for nursing positions was disapproved even though three-fourths of the

\textsuperscript{138} Id. §§ 1604.1(a)(1)(iii), (iv).
\textsuperscript{139} EEOC Decision No. 7011, 2 Fair Emp. Prac. Cas. 118 (1969).
\textsuperscript{140} Id. at 119.
\textsuperscript{141} EEOC Decision No. 70558, 2 Fair Emp. Prac. Cas. 538 (1970).
\textsuperscript{142} EEOC Case Nos. NY6-11-144, NY6-11-144U, 2 Fair Emp. Prac. Cas. 296 (1969).
\textsuperscript{143} Id. at 297. The commission did acknowledge that male and female crew members need not be berthed together, although reasonable allocation of space would generally avoid any such problem.
employer's patients were females.\textsuperscript{144} Relying on both the \textit{Weeks} and \textit{Diaz} cases,\textsuperscript{146} the commission concluded that the employer could not act lawfully based on prejudice of its female patients unless it was able to show not only that all or nearly all of its patients shared the prejudice, but also that the prejudice was such as to make it impossible for all or nearly all male nurses to perform the essential elements of the nursing profession.\textsuperscript{146}

The other recent decision dealt with the delicate question of how sex enters into the hiring of over-the-road truck drivers who work long hauls in team assignments.\textsuperscript{147} The employer's policy was to refuse to hire qualified females unless they were married and their husbands were also employed as truck drivers in the same company. Again relying on \textit{Weeks} and \textit{Diaz}, the commission stated that the employer must sustain the burden of showing that all or substantially all single women would be unable to perform safely and efficiently as truck drivers, \textit{and} that the essence of the employer's business operation would be undermined by not hiring single females.\textsuperscript{148} The employer did not sustain this burden; his argument was based largely on moral grounds. To this the commission responded:

\begin{quote}
We need not decide the question of whether as a general matter an employer's private standards of morality or public standards of morality are a lawful basis for invoking the narrow bona fide occupational qualification exception . . . because it would appear that Respondent's morality standards are easily accommodated by Respondent's exercising its option to assign a single female to work with another female, married or single.\textsuperscript{149}
\end{quote}

Further, citing \textit{Griggs} and another of its own decisions,\textsuperscript{150} the commission added that "since there is a reasonable alternative available to Respondent which avoids the disproportionate impact of its present stand-

\begin{itemize}
\item \textsuperscript{144} EEOC Decision No. 71-2410 (June 5, 1971).
\item \textsuperscript{145} See notes 112-30 & accompanying text \textit{supra}.
\item \textsuperscript{146} EEOC Decision No. 71-2410 at 2 (June 5, 1971).
\item \textsuperscript{147} EEOC Decision No. 71-2048, CCH EMP. PRAC. GUIDE ¶ 6244 (May 12, 1971).
\item \textsuperscript{148} \textit{Id.} at 4432. That public morality can be the basis of a bfoq is surely correct. The most common illustration is the job of restroom attendant. Anyone touring Europe observes that either sex can perform this job equally well in restrooms of the opposite sex yet standards of morality in this country are undoubtedly such that the female sex would be a bfoq for the occupation of restroom attendant in a women's restroom, and vice versa. However, the categories of jobs in which this type of moral impasse will be encountered are few; the problem is more theoretical than real.
\item \textsuperscript{149} EEOC Decision No. 71-2048, CCH EMP. PRAC. GUIDE ¶ 6244, at 4432 (May 12, 1971).
\item \textsuperscript{150} EEOC Decision No. 71-1332, CCH EMP. PRAC. GUIDE ¶ 6212 (Mar. 2, 1971).
\end{itemize}
ards, continued use of the latter is unlawful."\(^\text{151}\)

**Proving the BFOQ**

Constructing convincing proof of a bfoq based on sex is no small challenge. Pan American made an heroic effort in *Díaz* but failed. Others have failed before, and others will henceforth.\(^\text{152}\)

The trend is distinctly toward individual testing of each individual on his or her own capabilities. Fundamentally, this is what the sex discrimination ban of Title VII is about. After all, women have been subjected to protestations, medical and otherwise, inhibiting their emergence as persons with individual capabilities for quite a long time. During the last century, considerable medical testimony existed to the effect that women were physically too frail to undergo the experience of a college education.\(^\text{153}\) To contemporary society, that medical proposition is preposterous, and no doubt many of the cases currently being decided in which proof of a bfoq is attempted will seem foolish in retrospect years hence.

A fascinating example of the failure of proof of a bfoq in an area long considered sacrosanct to males was decided by the New York Supreme Court earlier this year in *New York State Division of Human Rights v. New York-Pennsylvania Professional Baseball League*.\(^\text{154}\) Baseball umpires in the minor leagues in New York and Pennsylvania are required to be approved by the Baseball Umpire Development Program. That program in turn establishes qualifications for umpires which include an age limit of 35, minimum height of 5'10", minimum weight of 170 pounds, and graduation from high school and from an

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151. EEOC Decision No. 72-3003 (May 12, 1971).

152. A notable example of attempted proof of sex as a bfoq is found in Cheatwood v. South Cent. Bell Tel. & Tel. Co., 303 F. Supp. 754 (M.D. Ala. 1969). There, the question was the application of the bfoq exception to the telephone company's job of commercial representative, which involved heavy duties of rural canvassing, bill collecting and occasional lifting. Considerable medical testimony was taken by the court concerning the differences between male and females. Both medical experts agreed that there were genetic and musculoskeletal differences between the sexes which meant that men can perform greater amounts of heavy work for longer periods of time than women. The telephone company's witness did not estimate the percentage of women who could perform the job in question, although he did indicate that there would be some who could do so. The plaintiff's witness estimated that 25-50% of the female sex could perform the job. The testimony of the plaintiff's witness was credited by the court, and, under the *Weeks* test, no bfoq was found to exist. *Id.* at 760.

153. E.g., E. Clarke, *Sex in Education* (1873) (education of women claimed to weaken their reproductive capacity and to be dangerous to the race).

approved umpire school. Not surprisingly, the complainant, a woman, failed to meet the height and weight requirements. Testimony was given in the case that the various qualifications were "born of the judgment of men with long experience in professional baseball," and that the standards were required in order to command the respect of big men, to cope with increased size of professional baseball catchers, to deal with the possibility of confrontation with large athletes, and to overcome the physical strain of arduous travel conditions and lengthy games.\textsuperscript{155} The court found these standards to be inherently discriminatory against women and insufficient to sustain a bfoq exception, particularly in light of the fact that male umpires were occasionally employed who weighed less than 170 pounds or who stood shorter than 5'10".

Insurmountable difficulties of proof would have characterized Martin Marietta's position in the \textit{Phillips} decision on remand had the case not been settled. There would have been some generalizations available concerning the importance of maternal care for preschool age children,\textsuperscript{156} and there might have been a slight statistical edge in the company's favor.\textsuperscript{157} But the evidence could not be other than indecisive. There are too many variables and too many instances of successful fe-

\begin{itemize}
\item \textsuperscript{155} Id. at 396, 320 N.Y.S.2d 793-94.
\item \textsuperscript{156} For example, one study for the National Institute of Mental Health begins with the sentence: "Of all the duties usually expected of the mother, the care of her preschool children is considered the most crucial." Nye, Perry & Ogles, Anxiety and Anti-Social Behavior in Pre-School Children, in F. Nye & L. Hoffman, The Employer Mothers in America (1963). It has also been suggested that: "When there are preschool children in the home, most women choose to focus their identity in the home at the center of the family. These women are more likely to assess their marriage as happy than are women who choose the labor market." Orden & Bradburn, Working Wives and Marriage Happiness, 74 Am. J. Soc. 392, 402 (1969).
\item \textsuperscript{157} A recent study by the Department of Labor indicated that: "Among 'ever married persons,' there were more days of sick absence for women (6.1 days) than men (4.7 days) when compared by the total age-adjusted data as well as by individual age groups. It was thought that women's greater responsibility for child rearing and probably their lesser dependency on their own jobs for economic support might explain the relatively higher sick absence of the 'ever married woman.'" Wage and Labor Standards Administration, U.S. Dep't of Labor, Facts About Women's Absenteeism and Labor Turnover 5 (1969).
\end{itemize}
male employees with preschool age children to permit generalizations under the colors of the bfoq.\textsuperscript{158}

What is Left of the BFOQ

Most of the contemporary cases presenting bfoq questions fall into three areas: those dealing with protective laws, those raising problems of social mores or morality, and those involving the preferences of consumers or co-workers. The protective law problem has produced a rather large wave of cases striking down state legislation. Although there may be some cause for concern over the haste with which this is being accomplished and the frequent lack of solid data to support the results reached,\textsuperscript{159} many of the protective laws are in varying degrees obsolete and unsupported under Title VII.

A good current example representative of the protective law cases is the California decision in \textit{Sail'er Inn, Inc. v. Kirby}.\textsuperscript{160} In a carefully worded opinion, the California Supreme Court held that the state statute preventing women from becoming bartenders was invalid not only under Title VII of the Civil Rights Act of 1964, but also under the state


158. One important variable is the availability of day care centers for the children of working mothers. The establishment and support of such centers has been given a high priority by the federal government. \textit{See} 33 Fed. Reg. 10026 (1968) (Work Incentive Program regulations providing vocational training to mothers who are receiving or who might in the future receive public assistance and providing day care centers for their preschool children).

In his 1969 Address to the Nation on Domestic Programs, President Nixon stated: "As I mentioned previously, greatly expanded day-care center facilities would be provided for the children of welfare mothers who choose to work. However these would be day-care centers with a difference. There is no single idea to which this administration is more firmly committed than to the enriching of a child's first five years of life, thus helping lift the poor out of misery, at a time when a lift can help out the most. Therefore, these day-care centers would offer more than custodial care; they would also be devoted to the development of vigorous young minds and bodies. As a further dividend, the day-care centers would offer employment to many welfare mothers themselves." \textit{5 Weekly Compilation of Presidential Documents} 1108 (Aug. 11, 1969).

Surely it is not the office of the bfoq to frustrate these efforts through rules such as that utilized by Martin Marietta in its employment practices. The federal government has stated its position clearly with regard to such rules where government contract work is involved. The OFCC guidelines state: "[A]n employer must not deny employment to women with young children unless it has the same exclusionary policies for men . . ." 41 \textit{C.F.R.} § 60-20.3(d) (1971).

159. The concern in this regard has generally addressed the area of maximum hour laws. See note 2 \textit{supra}.

160. 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).
and federal constitutions.\textsuperscript{161} Showing "great deference" to the guidelines of the EEOC, and relying upon the \textit{Bowe} and \textit{Weeks} cases, among others, the California court held that the bfoq exception was inapplicable.\textsuperscript{162} The state's chief argument was that a bartender must be physically strong in order to protect himself against inebriated customers—an ability which women as a class did not have. Observing that "the saloon days of the Wild West" were no longer in existence, the court found no evidence that "substantially all women" would be unable to deal with the problem raised by the state.\textsuperscript{163}

The real issue in the state protective law area is whether a state's statutory generalizations about its residents for purposes of employment should be treated any differently than an employer's generalization reflected in rules or policies. A pair of Ohio cases, one state\textsuperscript{164} and one federal,\textsuperscript{165} illustrate contrasting positions on this issue. Under consideration in both cases was an Ohio statute preventing women from engaging in frequent or repeated lifting of weights over 25 pounds.\textsuperscript{166} In the state case, \textit{Jones Metal Products Co. v. Walker},\textsuperscript{167} the Ohio Court of Appeals perceived plaintiff's argument as a contention that "each female employee should be in some manner individually tested to determine whether or not she is capable of lifting weights over some limit."\textsuperscript{168} But, according to that court, if plaintiff's argument were accepted the effect would be to write the bfoq out of the Civil Rights Act.\textsuperscript{169} Sex could never be the basis for classification, but classification would always be based on individual ability. Moreover, the burden of proof is on the plaintiff with regard to a state statute and as opposed to a private employment policy where the burden shifts to the employer.\textsuperscript{170}

\textsuperscript{161} The bartending problem raised questions as to the applicability of the Twenty-first Amendment of the United States Constitution. Judge Peters was able to resolve these questions without difficulty, despite the fact that a federal district court in California had earlier held the Twenty-first Amendment applicable and had supported the statute's continued validity. \textit{Compare id. with Krauss v. Sacramento Inn}, 314 F. Supp. 171 (E.D. Cal. 1970).

\textsuperscript{162} 5 Cal. 3d at 14, 485 P.2d at 537, 95 Cal. Rptr. at 337.

\textsuperscript{163} Id.


\textsuperscript{165} Ridinger v. General Motors Corp., 325 F. Supp. 1089 (S.D. Ohio 1971).

\textsuperscript{166} \textit{OHIO REV. CODE ANN.} § 4107.43 (Page 1965).


\textsuperscript{168} Id. at 156, 267 N.E.2d at 823.

\textsuperscript{169} Id.

\textsuperscript{170} "Where there is a statutory determination that sex is a bona fide occupational qualification reasonably necessary to the normal operation of a particular type of business or enterprise, the person challenging the reasonableness of such determination must
The United States District Court for the Southern District of Ohio reached a different judgment with regard to the same statute in *Ridinger v. General Motors, Corp.*\(^{171}\) The Ohio Court of Appeals decision was acknowledged, although in the district judge's opinion, the state court had been influenced by the fact that an employer instead of a female employee had been challenging the validity of the Ohio statute.\(^{172}\) Noting that the state court of appeals opinion contained no discussion of either the *Bowe* or the *Weeks* case, the district court concluded "that the state court in the *Jones Co.* case failed to give proper consideration to the narrow construction given the occupational qualification exception by the Equal Employment Opportunity Commission and the federal courts."\(^{173}\) Accordingly, the district court concluded that compliance with the state statutes pertaining to weight lifting would not constitute a valid defense to an otherwise established unlawful employment practice violative of Title VII.\(^{174}\)

Even though there is a logical appeal to the language used by the Ohio Court of Appeals in the *Jones Co.* case, the result reached was unsound under Title VII, and the federal district court was correct to have disagreed. In general, the protective law problem is relatively well taken care of by the *Weeks* test. Thus, under the facts of the *Jones Co.* case, it could not have been shown that all or substantially all women could not have performed work involving lifting weights greater than 25 pounds. Or, accepting the burden of proof, the plaintiffs could have easily demonstrated that a significant portion of women can lift greater than 25 pound weights without adverse effect. All women who have been mothers of small children can attest to this fact.

Also, the *Weeks* formulation should take care of the type of situation presented in the *Phillips* case. Questions involving the ability of females to perform a job without excessive absenteeism, turnover or accidealling with social mores and customer or co-worker preference rendent risks are easily tested against a "safe and efficient" job performance standard.

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\(^{172}\) *Id.* at 1096-97.


\(^{174}\) 325 F. Supp. at 1097.
Apart from the protective law and Phillips types of problems, cases main. These are situations where a particular sex is at most reasonably necessary to job performance. The jobs might involve a need for authenticity and genuineness in a business (actors and actresses) or the individual preferences of customers and co-workers (all male baseball teams; stewardesses). Also, there are numerous jobs invoking deeply ingrained social mores (restroom attendants, masseurs and masseuses for persons of the opposite sex, male nurses for female patients, models, escorts, athletic trainers, sales persons dealing in intimate apparel and the like).

Not all of these examples of jobs in which sex is “reasonably necessary to job performance” are determinable satisfactorily under the Weeks, Diaz or Rosenfeld tests. Weeks is the least helpful. Generally no questions of safety or efficiency are present. Rosenfeld provides an answer for most cases, since, by definition, virtually all of these examples depend on characteristics which correlate with a particular sex, rather than upon sexual characteristics themselves. But to say the bfoq is not applicable to all of the “reasonably necessary” examples is a dramatic step—a step which clearly conflicts with the examples given in the legislative history. Such a position is uncomfortably extreme. Some heed must be paid to the elusive concept of congressional intent.

The Diaz test is the most workable. Flexibility is provided in determining what the essence of the employer's business is. How this question is answered will, as a practical matter, often decide the case.

175. There is another category about which there is no argument—those rare instances in which a particular sex is a bfoq because it is absolutely necessary to job performance. Examples are wet nurses, sperm donors, or topless waitresses. These examples obviously pertain to a miniscule portion of the job market.

176. Several examples were given in Congress which would qualify in this category. See notes 103-105 & accompanying text supra.

In Utility Workers Local 246 v. Southern Cal. Edison Co., 320 F. Supp. 1262 (C.D. Cal. 1970), the “reasonably necessary” category was discussed. Examples given were Chinese waiters and waitresses in a Chinese restaurant, and actors and actresses playing male and female roles respectively. Id. at 1265. Dame Judith Anderson’s portrayal of Hamlet was cited as an example of the fact that sex may be only “reasonably necessary.” Id. at 1265 n.1.

177. See notes 103-05 & accompanying text supra.

178. For a discussion of the interpretation of the legislative history of civil rights statutes see notes 186-87 & accompanying text infra.

179. This flexibility, while desirable, carries with it the risk of abuse. Because of this fact, it must be monitored by the courts as carefully as possible. An example of the type of abuse risked might be drawn from the Taft-Hartley Act emergency strike provisions which cannot be invoked without a finding that a substantial portion of an industry is affected by a strike to the detriment of the national security. Labor-Manage-
In this respect, the Fifth Circuit opinion in *Diaz* may be faulted somewhat. To phrase the test as the essence of the employer’s entire business removes the bfoq from specific job-relatedness and fuzzes the inquiry, particularly where a business may be diversified. It is true that the bfoq refers to a condition reasonably necessary to the normal operation of a particular “business or enterprise.”\(^\text{180}\) But, it is an *occupational* qualification which is being defined, and it is appropriate to investigate the necessity for a particular sex to perform a particular job. The *Diaz* test, accordingly, should be refined to examine the essence of the employer’s business as reflected in the job under consideration.

Customer preference, although stated by the Fifth Circuit Court as a separate issue, will be involved in the process of deciding what the essence of the employer’s business is as reflected in a particular occupation.\(^\text{181}\) If the central function of the business is to make retail sales and the job is selling lingerie, customer preference could be properly considered to be central to the business as reflected in that job, and the bfoq exception might well apply. But, if the business is providing nursing care to sick patients and the nursing position is not limited to the care of female patients, customer preference may not be so central, and the bfoq exception could appropriately be held inapplicable.

The last example given, nursing, illustrates the degree to which many cases will be inextricably interwoven with social mores. There is no functional reason why female nurses are accepted in the performance

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\(^{181}\) The district court in the *Diaz* case was correct in saying that the Clark-Case Memorandum examples showed customer preference as a valid ingredient of the bfoq. While finespun theories other than customer preference might be fashioned to justify the existence of an all male baseball team, a French cook in a French restaurant, and a salesman of a particular religion, customer preference is at the core of these examples, and Senators Clark and Case were certainly mindful of this fact. The Fifth Circuit Court of Appeals avoided this problem by not discussing it.
of intimate duties with male patients when the reverse is rarely true. Yet judges must deal with these problems; an integral feature of a judge's task is the care and manipulation of social mores. As put by Cardozo:

You may say that there is no assurance that judges will interpret the *mores* of their day more wisely and truly than other men. I am not disposed to deny this, but in my view it is quite beside the point. The point is rather that this power of interpretation must be lodged somewhere, and the custom of the constitution has lodged it in the judges. If they are to fulfill their function as judges, it could hardly be lodged elsewhere.\(^{182}\)

The *Diaz* formulation of the bfoq test, modified by the refinement suggested above, comprises a workable vehicle with the means to handle the question of social mores under Title VII. It does so, moreover, without requiring complete inattention to the legislative background against which the bfoq rests.

**Conclusion**

Perhaps the most basic and most frequently invoked of the many tenets of statutory construction is that a statute should be interpreted in light of and in furtherance of the underlying purpose for which the legislation was enacted.\(^{183}\) Justice Holmes put the matter succinctly: "[t]he general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down."\(^{184}\)

On the other hand, the words of the statute are there and they cannot be given too long a leash. To borrow Justice Frankfurter's words, "judges are not unfettered glossators."\(^{185}\) Somewhere in support of the statutory purpose but within an interpretive range which does not impose undue violence on the words of the statute lurks the objective. Often it is a moving target, especially as time passes and social conditions and attitudes become rearranged.

Title VII, as is true of civil rights statutes generally, is a remedial piece of legislation.\(^{186}\) Accordingly, it is deserving of a liberal construction and wide range of permissible interpretation in support of its underlying purpose.\(^{187}\) A good formulation of the fundamental goal of Title VII is that articulated in the *Griggs* case: "What is required by Con-

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185. Frankfurter, supra note 183, at 534.
186. 3 J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 7217, at 174-75 (Supp. 1971).
187. Id.
gress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."\textsuperscript{188} Viewed in this light, nice distinctions such as the sex-plus theory advanced in the \textit{Phillips} case cannot stand. Likewise, Title VII should be taken to deal with developing sex-related problems of society, such as unwed motherhood or homosexuality, which continue to be the basis for employment discrimination, as well as with the manifold ramifications of neutral rules which effect and perpetuate varying degrees and types of discrimination.

For the same reasons, the bfoq must be dealt with gingerly. As an exception to a civil rights statute, it automatically should be viewed suspiciously.\textsuperscript{189} That offhand speculation which took place in congressional floor debate about what might constitute a bfoq means very little.\textsuperscript{190} The examples given in the committee report and the Clark-Case Memorandum are more significant.\textsuperscript{191} But even they must not be per-

\begin{footnotesize}
\begin{enumerate}
\item[189.] E. Crawford, \textit{The Construction of Statutes} § 299, at 610 (1940).
\item[190.] The floor debates in the House of Representatives should be approached cautiously. For years the prevailing view of the courts was that the remarks of individual members of the legislature were "inadmissible as an aid in construing the statute." 2 J. Sutherland, \textit{Statutes and Statutory Construction} § 5011, at 500 (3d ed. 1948). This refusal to admit such remarks was based upon the subjectivity and personal interpretation which each member would interject into his statements. Another factor was the ignorance of most members on any given piece of legislation. The expertise and knowledge which a committee theoretically has at its disposal will usually be lacking in the membership as a whole. Floor consideration of the bfoq provision was certainly not indicative of common agreement among the House membership. If it showed anything, it pointed out the confusion which surrounded the matter. Not only was the scope of the exception left in doubt, but a number of Congressmen were sufficiently confused to include race as one of the permissible types of discrimination. 110 Cong. Rec. 2554-55 (1964). "Although generally entitled to little weight, the value of such [debates] should depend upon how well informed their author appeared to be and how well he seemed to represent the views of his colleagues." 2 J. Sutherland, \textit{supra}, § 5011, at 502. Applying this principle to the bfoq question, the debate is of very limited value.
\item[191.] Committee reports are generally regarded as more reliable and more valuable indicia of congressional purpose than are the remarks of individual legislators made during floor debate. E. Crawford, \textit{supra} note 189, §§ 213-16, at 375-86. Compare 2 J. Sutherland, \textit{supra} note 190, § 5005 with id. § 5011. This is understandable in light of the fact that such reports are made by those groups whose function is to investigate, evaluate, and recommend to the legislative membership. Reports are issued to explain the legislation being proposed. However, the value of the particular committee report on the bfoq and its application to sex discrimination lies only in the analogy drawn from its treatment of religion and national origin. At the time the report was issued, sex was not forbidden as an employment criterion. Nevertheless, the analogy can be drawn, in light of the subsequent addition of sex and the sex bfoq. Despite its shortcomings, this report is probably the most reliable of the available legislative sources. The report's treatment of the bfoq exception is very restrictive; the exception was originally intended for
\end{enumerate}
\end{footnotesize}
mitted to obfuscate Title VII’s central message—that artificial, arbitrary and unnecessary barriers to employment which are wrongly discriminatory must be eliminated. Representative O’Hara was surely correct in 1965 in his statement that what is a bfoq is “to be decided by the Commission and by the courts in light of all the evidence presented to them on the particular occupation involved.”

Nevertheless the bfoq should not be read entirely out of the act. Its adoption and application to sex discrimination by Congress was not frivolous; the exception was designed to do more in sex discrimination cases than deal with those isolated instances in which sexual characteristics make it absolutely necessary for sex to be a bfoq. For these reasons the *Weeks* and *Diaz* formulations of the bfoq test have been discussed at some length. With some refinements, and within their contexts, those tests have been judged to be workable means to implement the bfoq exception in a manner harmonic with the central message of Title VII and, accordingly, beneficial to persons aggrieved by the discriminatory conditions which Title VII was drafted to eliminate.

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use in rare circumstances. Statements, whether by special memoranda or otherwise, by floor managers of a bill are comparable to committee reports. “These statements are in the nature of supplemental committee reports and are entitled to the same weight.

... [I]f in the course of debate on a bill a change is made in its wording, the statement of the member suggesting the amendment is accepted by the courts as a legitimate aid to determine the meaning of the amendment.” 2 J. SUTHERLAND, *supra* note 190, § 5012, at 504.

192. 112 CONG. REC. 9134 (1965).