SEX DISCRIMINATION IN EMPLOYMENT:
AN ATTEMPT TO INTERPRET TITLE VII
OF THE CIVIL RIGHTS ACT OF 1964

Four years have elapsed since the enactment of federal fair employment practice legislation banning sex discrimination which is not justified by a "bona fide occupational qualification." In delineating those employment practices which violate the sex discrimination proscription, however, lower federal courts and the Equal Employment Opportunity Commission have frequently reached conflicting conclusions. This comment compares those conclusions with the Act's legislative history and attempts to construct an analytical framework within which the meaning of the sex discrimination ban may be determined.

IN PROMULGATING Title VII of the Civil Rights Act of 1964, Congress squarely challenged the traditional assumption that sex constitutes a proper basis for employment differentials. That Act declares it an unlawful employment practice for an employer, employment agency, or labor organization to deny an individual equal employment opportunity because of that individual's sex, unless the resulting discrimination is justified by a "bona fide occupational qualification." Complementing federal and state equal-pay-for-equal-work laws and state fair employment practice (FEP) legislation, Title VII's policy against sex discrimination, in addition to being carried out under the Act's own provisions, is also being implemented at present by executive and administrative regulation in areas such as government contracts and labor-management relations. Although the impact of the Title VII ban thus promises to be widespread, its exact dimensions and content are not yet clear. Therefore, this com-

\footnote{42 U.S.C. § 2000e (1964).}
\footnote{This legislation is discussed in a historical context at notes 14-24 infra and accompanying text.}
\footnote{Prior to Title VII's enactment only two state FEP laws, Hawaii's and Wisconsin's, prohibited sex discrimination. Present state FEP laws which ban sex discrimination are discussed with respect to their enforcement procedures at notes 64-66 infra and accompanying text.}
\footnote{Title VII enforcement, executive regulation and the possibility of sex discrimination sanctions under the federal labor legislation are discussed in text accompanying notes 52-89 infra.}
ment will attempt to ascertain the extent to which employment practices may legitimately continue to be based upon sex considerations.

**TITLE VII'S HISTORICAL BACKGROUND**

Sex discrimination in employment has traditionally restricted the American woman's occupational alternatives and deprived her of equal compensation for her work. The eradication of such discrimination, however, has not been the consistent goal of those attempting to improve the conditions of female work. Rather, improvement efforts have run in two divergent and basically antagonistic currents. One effort, politically viable since the mid-nineteenth century, has been to secure legislation protecting the female worker from exploitation. Countering this paternalistic approach is the twentieth century philosophy stressing the equality of the sexes—a creed which rejects the necessity of protection.

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7 Because of the arduous tasks assigned to women, sexual segregation of occupations has sometimes been difficult to explain. See R. Smuts, *Women and Work in America* 18-19, 88 (1959). Although such sexual segregation has been slightly reduced during this century, primarily because men have moved into formerly "female jobs," the segregation is still much more severe than racial segregation. See E. Gross, *Plus Ca Change... The Sexual Structure of Occupations Over Time* 6, 10, August 30, 1967 (revision of paper read at 62nd annual meeting of the American Sociological Association, Department of Sociology, University of Washington).

8 Differentials in pay between men and women performing the same work have frequently been justified on the grounds that women are more expensive to employ and less useful as employees. See, e.g., *Hearings on H.R. 3861 and Related Bills Before the Special Subcomm. on Labor of the House Comm. on Educ. and Labor*, 88th Cong., 1st Sess. 95-108, 184-86, 241-47 (1963) [hereinafter cited as *Hearings on H.R. 3861* (greater turnover and absenteeism rate; higher cost of providing special facilities required by law)]. The vast pay differentials which do exist, see *Hearings on H.R. 3861*, 13-57, may not be statistically justified, however. See *Women's Bureau, U.S. Dep't of Labor, What About Women's Absenteeism and Labor Turnover?* (rev. August 1965). One historian has observed that the typical female worker of 1890 was single, interested in a short career only, and not dependent upon her wages for the necessities of life. R. Smuts, *supra* note 7, at 23-24, 38-51. See also E. Baker, *Technology and Woman's Work* 80-83 (1964). The advent of equal pay legislation at least in part reflects the changing pattern of the female labor force.

9 These currents are observed in R. Smuts, *supra* note 7, at 106-09.


Superficially, Title VII seems to mark both the ascendance of the latter feminist movement and the decline of the "sweat shop" conditions which had motivated much of the earlier paternalism. However, to the extent that Title VII is interpreted to require business to absorb the cost of discovering unusually able women or the cost of disregarding cultural prejudices, the Act may actually reflect the earlier viewpoint that women workers are properly the object of protective welfare legislation. Thus, the Act may encompass the goals of both currents of thought.

Title VII is not the first legislative product to bear the imprint of the feminists’ demand for employment equality. The State of Washington enacted a law in 1890 declaring that no person was to be disqualified from any business, calling or employment on account of sex. More representative of efforts toward employment equality were the equal pay laws which first began to appear in the aftermath of World War I. Prohibiting wage differentials between the sexes where equal work was being performed, such legislation was enacted as early as 1919 by Michigan, Montana and Texas. Benevolence was not the only motivation for the equal pay laws; the influx of women into industry during the war years compelled organized labor to support such laws, in order to avoid competition from cheap female labor which would otherwise be available. Labor’s same self-interest largely explains the passage of equal pay laws in other states during World War II. However, some of these early statutory enactments were rather ineffective. All but two of the early laws

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10 *But cf.* Rossi, *Equality Between the Sexes: An Immodest Proposal*, 93 *Daedalus* 607, 608 (1964): “There is practically no feminist spark left among American women. . . . Young women seem increasingly uncommitted to anything beyond early marriage, motherhood and a suburban house.”


18 *See E. Baker, supra* note 8, at 412-13.

provided only penal sanctions,\textsuperscript{19} and the burden of proving criminal guilt rendered their enforcement quite difficult.\textsuperscript{20} The Washington law, which provided for civil recovery, meant little to the employee whose damages would not offset the high cost of bringing the action.\textsuperscript{21} However, as state legislative activity continued, improvements were made in the enforcement provisions.\textsuperscript{22} For instance, the Massachusetts Act,\textsuperscript{23} which was based in part upon the New York Act and which still serves as a model


\textsuperscript{20} For example, although the Illinois law has been on the books for nearly three decades, not a single reported case has construed it. Comment, 1967 U. of Ill. L.F. 202, 203 n.5 The same disability plagued early FEP laws. See Bonfield, The Origin and Development of American Fair Employment Legislation, 52 Iowa L. Rev. 102, 103 (1967).

\textsuperscript{21} WASH. REV. CODE § 49.12.175 (1963).


provided employees the opportunity to recover double damages and attorney's fees and costs; made possible employee class actions; and authorized the State Commissioner of Labor to sue on behalf of employees.

Similar equal pay activity was evidenced in Congress, where equal pay bills were offered yearly from 1945. Such bills actually passed both houses in 1962, but Senate-House conferees failed to resolve their differences before adjournment. The following year brought passage of the Equal Pay Act of 1963 as an amendment to the Fair Labor Standards Act (FLSA), but because of the FLSA's limited coverage, only slightly more than half of the "female nonsupervisory employees" were provided with protection. The 1966 amendments to the FLSA, however, have significantly broadened this coverage. To the extent that the Equal Pay Act would increase women's wages, some feared that it might actually lessen female employment opportunities. This consequence was pre-

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26 H.R. 11677 passed the House on July 25, 1962. 108 Cong. Rec. 14782 (1962). A version of the same bill then passed the Senate on October 3, 1962. Id. at 22085. Since the Senate version was passed as an amendment to an embassy construction bill, however, it could not go to the appropriate conference where differences between the two equal pay bills could have been eliminated.


28 See note 217 infra.


31 Congressman Findley feared that the effect of the equal pay bill's enactment would be "to get women back home on the range . . . ." 109 Cong. Rec. 9206 (1963). His anxiety was probably prompted by the predictions of a personnel administrator before his committee. See Hearings on H.R. 3861, supra note 8, at 106. To insure that women would not be replaced by men, the Congressman offered an amendment which would have permitted wage differentials which did "not exceed [the] ascertainable and specific added cost resulting from employment of the opposite sex." 109 Cong. Rec. 9217 (1963). The amendment was defeated, partly on the ground that such a differential was permissible without the amendment. Cf. S. Rep. No. 176, 88th Cong., 1st Sess. (1963), reprinted at 109 Cong. Rec. 8914, 8915 (1963), where the Senate Committee on Labor and Public Welfare expressed its feeling that such a wage differential is analogous to one based upon a bona fide seniority system.
cluded, however, by the unexpected inclusion of sex as a prohibited ground for employment discrimination in the Civil Rights Act of 1964.

When the House Rules Committee voted to clear the Administration's comprehensive civil rights bill for debate on January 30, 1964, the bill contained no prohibition of sex discrimination. After several attempts to include a sex discrimination ban in other titles of the bill had failed, Congressman Smith, an outspoken critic of the bill, proposed an amendment to include sex as a proscribed ground of discrimination under the equal employment section — Title VII. Admitting that the previous amendments regarding sex had been "offered at inappropriate places in the bill," Congressman Smith noted that sex discrimination in industry was a serious problem. Even though every man voicing support for

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Under the bill favorably reported out of the House Rules Committee, it was apparently assumed that there would be no right to a jury at the trial de novo. See H.R. Rep. No. 914, 88th Cong., 2d Sess. (1964); 2 U.S. Code Cong. & Ad. News 2391, 2477 (1964) (separate minority views). Though the Senate stripped the Equal Employment Opportunity Commission of the power to bring suits itself, see text accompanying notes 52-66 infra, there was never any suggestion that jury trial would be permissible under the new enforcement provisions.

33 Congressman Dowdy, a Southern opponent of the bill, offered an amendment which would have prohibited sex discrimination under the Public Accommodations section of the bill. 110 Cong. Rec. 1978 (1964). Denounced as a "diversionist" tactic designed to make the legislation ultimately "unpalatable," Id. at 1979 (remarks of floor manager, Representative Celler), Dowdy's amendment was defeated 115 to 43. Id. Attempts by the same Congressman to include sex as a prohibited ground of discrimination under the Public Facilities and Public Education titles met similar fates. Id. at 2264-65, 2280-81. The Public Facilities amendment would have prohibited discrimination on account of "sex or any other reason." Id. at 2264-65 (emphasis added).

34 Id. at 2577.

35 Id. The Congressman's own seriousness was brought into question when he illustrated the plight of the American woman by reading a letter from a female
Smith's amendment ultimately voted against the House bill,\textsuperscript{36} most of the women in the House fully supported the amendment's serious adoption. Echoing the sentiments of the female colleagues,\textsuperscript{37} Congresswoman Kelly asserted that "[i]n this amendment we seek equal opportunity in employment for women. No more — no less."\textsuperscript{38} Congresswoman Green, however, took the Administration's position opposing the amendment,\textsuperscript{39} stating the fear that the inclusion of sex would clutter up the bill and that "it may later — very well — be used to help destroy this section of the bill by some of the very people who today support it."\textsuperscript{40} Since the opponents of the amendment failed to produce stronger arguments against its adoption, the House accepted the sex provision by a comfortable margin.\textsuperscript{41}

Despite the speedy House approval and initial support by opponents of the bill as a whole, Title VII's sex discrimination provisions were the product of serious legislative purpose. While accepting the sex amendment constituent who lamented the fact that wars have killed off eligible males and created a sexual imbalance in the population. She facetiously requested legislative protection of every spinster's "right" to a husband and family. Id. Mr. Smith has since denied that the amendment was "slipped in" to delay voting. Miller, Sex Discrimination and Title VII of the Civil Rights Act of 1964, \textit{51} MINN. L. REV. 877, 883 n.34 (1967). On the contrary, Smith may well have desired the entire bill's swift defeat.\textsuperscript{50} The only Congressmen vocally supporting the amendment were Smith (of Virginia), Dowdy, Tuten, Pool, Andrews (of Alabama), Rivers (of South Carolina), Gary, Huddleston, Watson and Gathings. Their votes against H.R. 7152 are recorded at 110 \textit{CONG. REC.} 2804-05 (1964). Every man voicing opposition to the sex amendment—Celler, Thompson (of New Jersey), Lindsay, Mathias and Roosevelt—voted for the civil rights bill. Id. at 2804.

\textsuperscript{51}Congresswoman St. George reasoned that a sex discrimination ban would make the fair employment title "comprehensive," "logical" and "right." \textit{Id.} at 2581. \textit{Contra}, \textit{id.} at 2578 (remarks of Congressman Celler, who called the sex amendment "illogical, ill-timed, ill-placed, and improper"). Congresswoman Griffiths argued that without a sex discrimination ban Title VII would further inhibit the white female worker by protecting only the Negro. \textit{Id.} at 2579-80. \textit{See also id.} at 2582 (remarks of Representative May).

\textsuperscript{52} \textit{Id.} at 2583 (emphasis added).

\textsuperscript{53} The Women's Bureau of the Department of Labor opposed the sex amendment on the basis of the report of the President's Commission on the Status of Women, which indicated that sex discrimination should be separately dealt with due to its unique problems. \textit{Id.} at 2577.

\textsuperscript{54} \textit{Id.} at 2581. Congresswoman Green also noted that biological differences between the sexes result in the problems of sex discrimination being quite different from those of racial discrimination and that therefore they demand special treatment. \textit{Id.} at 2584.

\textsuperscript{55} \textit{Id.} at 2584 (adopted 168 to 133). Hasty adoption necessitated a corrective amendment to include the word "sex" in certain parts of Title VII which Congressman Smith had overlooked, including the section dealing with the bona fide occupational qualification exception. \textit{Id.} at 2720-21.
ment, the House discriminately rejected a similar amendment to prohibit age discrimination in employment — an addition equally pregnant with diversionist possibilities.42 Also, an effort to weaken the sex discrimination provisions met with failure.43 Furthermore, the Senate's retention of the sex provisions was apparently influenced by a rather high level policy determination on the part of the Johnson administration, reflecting a political acknowledgement of the fact that sex discrimination had become a serious domestic problem.

Statistics bear out the present need for Title VII's proscription of sex discrimination in employment.45 The fair sex now accounts for over one-third of the United States' civilian labor force, which includes nearly one-half of the women between the ages of eighteen and sixty-four.46 Almost half of the five million American families headed by women live near the poverty level.47 Equally startling is the fact that the 1964 median wage for year-round, full-time women workers was only sixty percent that of their male counterparts.48 Not only had this wage gap widened during the preceding decade,49 but the proportionate increase of women

42 Id. at 2596-99 (defeated 123 to 94). Although introduced by Representative Dowdy, who had earlier attempted to have "sex" inserted in other titles of the bill, see note 33 supra, the age amendment received the sincere backing of liberal Congressman Pucinski, despite the views of some that it, like the sex recommendations, was merely a diversionary tactic.

43 110 CONG. REC. 2728 (1964). Congressman Griffin's amendment, which would have precluded consideration of sex discrimination charges unless the spouse of the charging party was unemployed, was soundly defeated (96 to 15). Id.

44 One commentator reports that after Senator Dirksen announced his intention to remove the sex provisions when the bill reached the Senate, Dr. Pauli Murray, then a Senior Fellow at Yale University Law School, prepared a memorandum supporting the amendment and distributed copies to Senators Margaret Chase Smith and Maurine Neuberger, the Attorney General, and Mrs. Lyndon B. Johnson. Several days later, Mrs. Johnson's secretary informed Dr. Murray that the sex provisions would remain in the bill. P. Cromer, Sex Discrimination in Private Employment: The Conflict between the Civil Rights Act of 1964 and State Labor Laws for Women 32-33, 1967 (unpublished masters thesis, Wharton School, University of Pennsylvania).

45 See generally Perella, Women in the Labor Force, 91 Mo. LAB. REV. No. 1 (February 1968); Peterson, Working Women, 93 DAEDALUS 671 (Spring 1964).

46 Women's Bureau, U.S. DEP'T OF LABOR, BACKGROUND FACTS ON WOMEN WORKERS IN THE UNITED STATES (May 1966).


48 BACKGROUND FACTS, supra note 46.

49 In 1955 the median wage for year-round, full-time women workers was sixty-four percent that of similarly employed males. Women's Bureau, U.S. DEP'T OF LABOR, UNDERUTILIZATION OF WOMEN WORKERS (October 1964).
in the work force was accompanied by a striking decline in their proportionate share of technical and administrative positions. Despite Title VII's enactment, a serious underutilization of women in top management positions still exists, and it seems certain that efforts to eradicate this and other manifestations of sex discrimination will be pursued vigorously.

**Enforcement of the Sex Discrimination Ban**

Although primary responsibility for urging compliance with Title VII requirements rests with the five-member Equal Employment Opportunity Commission (EEOC) and its staff, actual enforcement of the Act is delegated to private litigants, state agencies, the Attorney General, and possibly other agencies of the federal government. Upon the filing of a written charge of discrimination by either a private person "claiming to be aggrieved" or a member of the EEOC, the Commission is authorized to eliminate "by informal methods of conference, conciliation and persuasion" any discriminatory employment practice which it has reasonable cause to believe exists. The charge must be filed with the Commission

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60 Prior to World War II, women constituted twenty-five percent of the labor force and occupied forty-five percent of the professional and technical positions. They now constitute thirty-five percent of the labor force but hold only thirty-six percent of the professional and technical jobs. Id.

62 EEOC Release, CCH EMPLOYMENT PRACTICES GUIDE ¶ 8192 [hereinafter cited as CCH GUIDE] (statistical analysis of employment patterns among employers in large cities who are subject to Title VII).

63 Title VII enforcement procedures have been dealt with thoroughly elsewhere. See generally Walker, Title VII: Complaint and Enforcement Procedures and Relief and Remedies, 7 B.C. IND. & COM. L. REV. 495 (1966); Comment, Enforcement of Fair Employment under the Civil Rights Act of 1964, 32 U. of Chi. L. REV. 430 (1965).

64 42 U.S.C. § 2000e-5(a) (1964). The charge is not to be made public, nor is anything said or done during the conciliation effort to be made public or to be used as evidence in any subsequent proceeding. Whether information discovered during investigation of the charge may later be used as evidence is unclear. Presumably the reason for barring from evidence information received during conciliation is that cooperation would be inhibited. Since investigation of the charge is not dependent upon cooperation by the discriminator, it would not seem necessary to bar the fruits of investigation from later proceedings.

Although the original House version of Title VII provided the EEOC with stronger enforcement power, see note 32 supra, the Senate "leadership compromise" relegated the Commission to its present weak role of investigator and conciliator. Berg, Equal Employment Opportunity under the Civil Rights Act of 1964, 31 BROOKLYN L. REV. 62, 66-68 (1964).
within ninety days after the occurrence of the alleged unlawful practice, and the Commission thereafter is given sixty days to secure voluntary compliance. If the Commission is unsuccessful, it must so notify the complaining party, who may institute a civil action in the federal courts "within thirty days thereafter." If the court finds that the defendant has

For criticism of the individual complaint procedure and the use of secret conciliation efforts see Hill, Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis with Recommendations, 14 Buffalo L. Rev. 22 (1964).

42 U.S.C. §§ 2000e-5(d), (e) (1964). These time limits are extended when the EEOC defers to a local agency. The problem of deferral is considered in more detail at text accompanying notes 63-66 infra.

This short period has created a "time bind" which renders effective conciliatory effort nearly impossible. Speech of EEOC Deputy Counsel Berg, 1965 Midwest Labor Conference, Columbus, Ohio, paraphrased in 60 L.R.R.M. 81 (1966); see, e.g., Quarles v. Philip Morris, Inc., 271 F. Supp. 842 (E.D. Va. 1967).


The Miller-Cunningham requirement that suit be brought within ninety days of the filing of the charge with the EEOC, coupled with holdings of those cases which did not require actual conciliatory efforts, suggest a solution to the statute of limitations problem. In order to prevent stale claims from reaching the courts, a sound interpretation of the Act might be to require that the action be commenced within ninety days of filing with the Commission. The court is presently authorized to stay the proceedings for another two months pending Commission efforts to obtain voluntary compliance. 42 U.S.C. § 2000e-5(e) (1964). Under such procedure the EEOC
intentionally discriminated in violation of the Act, it may enjoin that practice and order "appropriate" affirmative relief such as reinstatement or hiring, with or without back pay.\textsuperscript{57}

Congress also recognized that the burden of bringing a private action might weigh heavily upon persons in the lower income groups, who are most often the objects of discrimination.\textsuperscript{58} Therefore, it included in Title VII, provisions authorizing the courts, in their discretion, to appoint counsel for the plaintiffs;\textsuperscript{59} to permit the action to be commenced without the payment of fees, costs or security;\textsuperscript{60} and to allow the prevailing party costs and a reasonable attorney's fee.\textsuperscript{61} Furthermore, the Attorney General is authorized to intervene in any private action which he certifies to be "of general public importance."\textsuperscript{62}

could be expected, as a matter of course, to notify the charging party at the end of sixty days that conciliation efforts had not yet been successful. Requiring commencement of the action within thirty days of the receipt of such notice would insure that the discriminator would receive notice of the charge within six months of the alleged discriminatory act (EEOC charge must be filed within ninety days of the act; suit must be brought within ninety days of the filing with the EEOC). The failure of the Commission to attempt conciliation within another sixty-day stay of proceedings should not in that case be a bar to the action, since the \textit{Dent} requirement of actual conciliation effort seems to be at odds with the admittedly unclear legislative intent. Both Senators Humphrey and Javits attempted to make it clear that Commission effort was not requisite to the bringing of the civil action. 110 \textit{Cong. Rec.} 14188, 14191 (1964).

\textsuperscript{57} 42 U.S.C. § 2000e-5(g) (1964). There is apparently no right to trial by jury in this judicial proceeding. See note 32 \textit{supra}.

\textsuperscript{58} See M. Sovere, \textit{Legal Restraints on Racial Discrimination in Employment} 33 (1966). Since women subjected to sex discrimination come from all strata of society, many of them may be adequately equipped to bring private actions. Social pressures may inhibit the professional woman, however. See White, \textit{Women in the Law}, 65 \textit{Mich. L. Rev.} 1051, 1108-09 (1967).


\textsuperscript{60} \textit{Id}.


\textsuperscript{62} 42 U.S.C. § 2000e-5(e) (1964). The Attorney General is also authorized to bring his own action whenever he "has reasonable cause to believe that any person ... is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by" Title VII. 42 U.S.C. § 2000e-6 (1964). Until recently very few such suits had been brought. However, the Justice Department anticipates a striking increase in this type of litigation in the race area. See \textit{Bearing Down on Job Bias}, \textit{Business Week}, Dec. 23, 1967, at 18. Because of the uncertainty of the sex discrimination ban and because of the importance of alleviating racial discrimination, however, the Attorney General has no present intention of bringing suits to enjoin sex discrimination. Interview with Attorney General Ramsey Clark, Duke University School of Law, May 8, 1968.
While creating a federal cause of action under Title VII, Congress was also careful to preserve the primary role of the states. Thus, if an established state or local agency may “grant or seek relief from” the alleged discriminatory practice or may “institute criminal proceedings with respect thereto,” then no charge may be accepted by the EEOC until sixty days after the commencement of state or local proceedings, unless those proceedings are earlier terminated. At the present time, fourteen states and the District of Columbia have fair employment practice laws containing sex discrimination prohibitions substantially identical to the Title VII ban. Along with investigation and conciliation procedures, most of the FEP statutes provide for judicially enforceable administrative hearings and orders — an enforcement procedure patterned after that of the National Labor Relations Board. Because they generally possess greater power than the EEOC, the state agencies may account for much of the actual enforcement of the policy underlying Title VII's sex discrimination ban.

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63 42 U.S.C. §§ 2000e-5(b), (c) (1964). The period of deferral is extended to one hundred and twenty days during the state agency's first year of activity, and the same deferral is required when the original charge is filed by a Commission member. In deferral situations the charge must be filed with the EEOC within two hundred and ten days after the discriminatory practice's occurrence or within thirty days of receiving notice that state proceedings have terminated, whichever is earlier. 42 U.S.C. § 2000e-5(d) (1964).

It would not seem that a state determination against the charging party would deprive him of further relief from the EEOC and the courts. See Comment, Enforcement of Fair Employment under the Civil Rights Act of 1964, 32 U. Cht. L. Rev. 430, 440-42 (1965).

64 The states are Arizona, Connecticut, Hawaii, Idaho, Maryland, Massachusetts, Michigan, Missouri, Nebraska, Nevada, New York, Utah, Wisconsin, and Wyoming. The state FEP laws are fully cited in CCH GUIDE, ¶ 20,000. Alaska's FEP law prohibits wage discrimination on account of sex and therefore is merely an equal pay law. Where the charge alleges wage discrimination on account of sex, the EEOC may be expected to defer to the state agency responsible for enforcing the state wage legislation. See notes 21-23 supra and accompanying text. The Colorado FEP law prohibits sex discrimination only in training and apprenticeship programs.


66 For a discussion of state enforcement procedures see Witherspoon, Civil Rights Policy in the Federal System: Proposals for a Better Use of the Administrative Process, 74 YALE L.J. 1171, 1180-1205 (1965); Bonfield, State Civil Rights Statutes:
In addition to the federal/state remedies specifically recognized by Title VII, other federal remedies may be invoked to eliminate sex discrimination in employment. Three weeks prior to Title VII’s final enactment, the Senate rejected Senator Tower’s amendment, which would have made Title VII procedure the exclusive federal remedy for the proscribed discriminatory practices. Purportedly designed to give the EEOC primary jurisdiction over cases also subject to sanctions by the President’s Committee on Equal Employment Opportunity (CEEO), the amendment was rejected on the grounds that its effect might be much more “far-reaching, complex, and complicated.” However, the failure of the Tower amendment also clearly demonstrates a Congressional desire to avoid interference with the President’s power to regulate discrimination. Executive authority, exercised since 1941, presently prohibits employment discrimination by federal agencies, government contractors, and federally assisted construction programs. Recently extended to expressly prohibit sex discrimination, the Presidential regulation imposes heavy sanctions for violations.


President Kennedy’s CEEO was established in 1961 by Exec. Ord. No. 10925, 3 C.F.R. (1959-63 Comp.), and provided fairly effective regulation of government and government contractor employment practices. See generally M. Sovrin, supra note 58, ch. 5, at 103-42 (1966); Means, Fair Employment Practice Legislation and Enforcement in the United States, 93 INT’L LAB. REV. 211, 220-21 (1966). Shortly before Kennedy’s death the Committee’s power was extended to the regulation of discrimination in federally-assisted construction programs. Exec. Ord. No. 11114, 3 C.F.R. (1959-63 Comp.). Discrimination on account of sex, however, was never prohibited under the CEEO.

Senator Tower suggested that his amendment would give the CEEO secondary jurisdiction if the EEOC failed to investigate or had completed investigation. 110 CONG. REC. 13650 (1964).

President Kennedy’s CEEO was abolished by Exec. Ord. No. 11246, supra note 72.
Whether the rejection of the Tower amendment is indicative of a Congressional intent to preserve other federal remedies is uncertain. Under both the National Labor Relations and Railway Labor Acts, a union designated by a majority of the employees within an appropriate bargaining unit is the exclusive representative of the entire unit and has a corresponding duty to represent fairly all employees within the unit, without irrelevant or invidious discrimination. Though this prohibition extends to all types of discrimination, the Supreme Court has consistently emphasized that the union is to be accorded a "wide range of reasonableness" in balancing the competing interests of bargaining unit members.

Not until 1962, when the NLRB held that a union's failure to fairly represent constitutes an enjoinable unfair labor practice, did the duty actually begin to weigh heavily upon labor organizations. During Con-

Presently the Civil Service Commission supervises the elimination of discrimination in government employment. The Secretary of Labor administers provisions relating to prime and first-tier government contractors. All government agencies must include non-discrimination clauses in their contracts. The contractors, who are subject to investigation, must file compliance reports including information respecting the membership policies of the unions with which they deal. Sanctions for violation include contract termination, refusal of future contracts, publicity of violation, and recommendation to the EEOC or Justice Department that proceedings be initiated. Each executive agency is made independently responsible under for the elimination of discrimination in construction programs which they assist.

Supra note 77, at 161.

The judiciary was only infrequently called upon to enforce the duty, presumably because of litigation expense. See Sovern, Race Discrimination and the National Labor Relations Act: The Brave New World of Miranda, N.Y.U. 16th Ann. Conf.
gressional debate on Title VII, Senator Clark stated in a memorandum that it was “not entirely clear” whether racial discrimination was covered by the NLRA.82 The uncertainty was erased on the day before Title VII’s enactment when the NLRB handed down the Hughes Tool Company decision, which held that racial discrimination by a union constitutes an unfair labor practice.83 Though it was persuasively argued that Title VII enforcement procedures would be seriously undermined if the NLRB were allowed to assert such jurisdiction,84 the Board continued to apply the Hughes theory,85 which has been upheld by the Fifth Circuit86 and ratified by three members of the Supreme Court in a recent concurring opinion.87 As a final step, in the recent St. Louis Cordage Mills decision, the NLRB clearly implied that the duty of fair representation comprehends the obliga-

82 101 CONG. REC. 7207 (1964). Senator Clark referred to the fact that the NLRB was considering at that time a case involving racial discrimination.
83 147 N.L.R.B. 1573, 1574-75 (1964).
84 Sherman, supra note 81, at 809-20. Such an argument seems to assume that the political compromise which weakened EEOC enforcement powers is to be honored under judicial interpretations of what the NLRA was intended to accomplish. More direct attacks upon the Miranda theory have been made by pointing out that the Taft-Hartley Act itself did not envision NLRB activity in the area of racial discrimination. E.g., Albert, NLRB-FEPC?, 16 VAND. L. REV. 547, 550-52 (1963). The so-called “suspicion of creativity,” Molinar, The National Labor Relations Act and Racial Discrimination, 7 B.C. IND. & COM. L. REV. 601, 602 (1966), will be further heightened if the Board finds that sex discrimination is an unfair labor practice. See Bankers Warehouse Co., 146 N.L.R.B. 1197, 1199 (1964): “It is, of course, not the purpose of the [National Labor Relations] Act to restrict an employer’s choice of employees based solely upon considerations of efficiency, work performance or sex.”
85 Local 12, Rubber Workers, 150 N.L.R.B. 312 (1964), aff’d, 368 F.2d 12 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967), noted in 1967 DUKE L.J. 1037; Local 1367, Longshoremen, 148 N.L.R.B. 897 (1964), aff’d, 368 F.2d 1010 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967).
86 See note 85 supra.
87 Vaca v. Sipes, 386 U.S. 171, 198 (1967) (Fortas, J., joined by Warren, C.J., & Harlan, J.). Because the Court has denied certiorari in the Fifth Circuit cases, however, there remains doubt as to the Court’s position. See note 85 supra.
tion to avoid sex discrimination which violates the Title VII command. Whether the Supreme Court will eventually hold that a breach of the duty of fair representation constitutes an unfair labor practice is an open question, but it is likely that the NLRB will meanwhile apply Title VII standards in its own determinations as to whether discrimination based upon sex violates that duty.

UNLAWFUL EMPLOYMENT PRACTICES BASED ON SEX

The basic thrust of Title VII is to delimit the activities of employers, employment agencies and labor organizations by prohibiting various “unlawful employment practices.” An employer brings himself within

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88 1968-1 CCH NLRB Dec. (168 N.L.R.B. No. 135) ¶ 22,003, at 28,923 (Dec. 21, 1967). When parties to a collective bargaining agreement extend that agreement during its term, such a premature extension will not bar other unions from organization efforts beyond the original term, unless the existing contract would not have been a bar to an election. Delux Metal Furniture Co., 121 N.L.R.B. 995, 1001-02 (1958). However, in order to validate the extension under the Delux rule, the existing contract must have been invalid on its face without reference to extrinsic evidence. Paragon Prods. Corp., 134 N.L.R.B. 662, 666-67 (1961).

In St. Louis Cordage Mills, the Board held that the contract was prematurely extended since the contract was not invalid on its face—even though it limited jobs on the basis of sex. Implying that sex discrimination in violation of Title VII would render such a contract invalid as a bar to an election, the Board could not say that the contract was invalid on its face since whether sex was a bona fide occupational qualification for the jobs depended upon extrinsic evidence.


90 The Act defines an “employer” to be “a person engaged in an industry affecting commerce who has twenty-five or more employees . . . .” Specifically exempted are seasonal employers, the United States government and its wholly-owned corporations, states and their political subdivisions, and private membership clubs. 42 U.S.C. § 2000e(b) (1964).


In comparison to Title VII, state FEP laws generally do not exempt the state or its political subdivisions as “employers.” E.g., CONN. GEN. STAT. ANN. § 31-122(f) (Supp. 1967). Contra, Md. ANN. CODE art. 49B, § 18(b) (Supp. 1967). Furthermore, the minimum number of employees which will bring a person within the definition of “employer” is generally much less than twenty-five. E.g., CONN. GEN. STAT. ANN. § 31-122(f) (Supp. 1967) (three); HAWAI’I REV. LAWS § 90A-1.5 (Supp. 1965) (one). Contra, Mo. ANN. STAT. § 296,010 (Supp. 1967) (twenty-
the purview of Title VII proscriptions when he discriminates against an individual with respect to hiring, discharge, compensation, or other terms, conditions or privileges of employment, because of the individual's sex, race, color, religion, or national origin.91 Employment agencies92 and labor organizations93 are similarly restrained with regard to their respective referral, classification or membership policies.94 The Act's proscription

91 Section 703(a) provides: "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a) (1964) (emphasis added). Section 703(d), which is somewhat overlapping, prohibits discrimination in training programs by employers, labor organizations and joint labor-management committees. 42 U.S.C. § 2000e-2(d) (1964). Section 704(a) prohibits employer, labor organization or employment agency discrimination against any individual because he has opposed an unlawful employment practice. 42 U.S.C. § 2000e-3(a) (1964). Section 704(b) declares it to be an unlawful employment practice for an employer, labor organization, or employment agency to print or publish any employment advertising or notice which indicates "any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin...." 42 U.S.C. § 2000e-3(b) (1964) (emphasis added).

92 The Act applies to all employment agencies regardless of size, if they regularly undertake to procure employees for covered employers. United States agencies, except for the United States Employment Service, and state or local agencies, except those which are federally assisted, are specifically exempted. 42 U.S.C. § 2000e(c) (1964). State laws generally apply to all such agencies, private and public. 42 U.S.C. § 2000e(d) (1964). State laws generally cover such organizations without regard to their size or affect upon commerce. 42 U.S.C. § 2000e(e) (1964). State laws generally cover such organizations without regard to their size or affect upon commerce. E.g., Md. Ann. Code art. 49B, § 18(d) (Supp. 1967). A labor organization is covered if it is "engaged in an industry affecting commerce, ... and includes any organization of any kind ... in which employees participate and which exists for the purpose ... of dealing with employers ...." 42 U.S.C. § 2000e(f) (1964). Such an organization is deemed to be engaged in an industry affecting commerce if (1) it maintains a hiring hall serving a covered employer, or (2) it has twenty-five or more members and either represents employees of a covered employer or is part of a parent organization which represents or actively seeks to represent employees of a covered employer. 42 U.S.C. § 2000e(g) (1964). State laws generally cover such organizations without regard to their size or affect upon commerce. 42 U.S.C. § 2000e(h) (1964). State laws generally cover such organizations without regard to their size or affect upon commerce. See also 42 U.S.C. § 2000e-2 (1964), discussed in note 91 supra.
of discrimination on the basis of sex, religion, or national origin, however, is significantly different from the prohibition of discrimination on the basis of race or color. Whereas employment discrimination on the basis of race or color is unlawful per se, there "is a limited right to discriminate on the basis of religion, sex, or national origin where the reason for the discrimination is a bona fide occupational qualification." Thus, determining the legitimacy of sex discrimination requires a two-step analysis: first, a definition of those practices which constitute discrimination on the basis of sex, and which therefore fall within Title VII's ambit; and second, once the initial outer limit has been fixed, a decision as to whether such activities are sanctioned by the bona fide occupational qualification exception.

The Meaning of Discrimination on Account of Sex

Inquiry into the breadth and content of the bona fide occupational qualification exception is unnecessary unless the employment practice is first found to be discriminatory. Despite the fact that certain Congressional proponents of Title VII professed that discrimination could be readily defined, that concept eludes precise isolation. Logic and legislative history, however, provide certain guidelines which will aid in determining whether "a difference in treatment or favor" indeed exist.

(1) Discrimination may be accomplished by establishing a job qualification which eliminates only members of one sex, or which is capable of

Section 703(c) provides: "It shall be an unlawful employment practice for a labor organization—(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin; (2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or (3) to cause or attempt to cause an employer to discriminate against an individual in violation of [section 703]." 42 U.S.C. § 2000e-2(c) (1964) (emphasis added). See also 42 U.S.C. §§ 2000e-2(d), -3 (1964), discussed in note 91 supra.

* This approach to interpreting the meaning of discrimination is not without precedent. See, e.g., State v. Arkansas Louisiana Gas Co., 227 La. 179, 187, 78 So. 2d 825, 827 (1955).
fulfillment only by members of one sex. A job qualification which eliminates some members of only one sex, for example, would be the requirement that employees not have a physical characteristic which is biologically peculiar to one sex — such as lack of pregnancy potential. The fact that some members of both sexes could satisfy the qualification would not save the requirement, since it penalizes only members of one sex.

However, not all job qualifications which eliminate only members of one sex, or which only members of one sex can satisfy, should be considered discriminatory. For example, an employer might refuse to hire graduates of a certain woman's college. This standard, though it eliminates only members of one sex, would not be sexual discrimination: first, because almost all members of both sexes could qualify for the job; and second, because qualification is not intimately linked with those genetic characteristics which basically define sexual status. The practice of refusing to hire graduates of any woman's college, however, would appear to be discrimination on account of sex. Even though the employer is willing to employ female graduates of coeducational institutions, he discriminates against women by denying prospective female employees an option which has not been denied to men—the option of attending other than a coeducational institution. Equally discriminatory would be the practice of restricting employment to graduates of a long list of colleges, all of which happen to be men's colleges.

Disabilities unique to men, scientifically denominated as "recessive X-linked traits," include red-green color blindness, hemophilia (factor VIII deficiency), and G-6-PD deficiency. P. Beeson & W. McDermott, Textbook of Medicine 1234 (Cecil-Loeb ed. 1963). Obviously, an absence of red-green color blindness could be shown to be a bona fide occupational qualification for a job as an interior decorator. The ease of justifying such a qualification, however, does not negate the fact that it eliminates only members of one sex.

In the case of pregnancy potential, hysterectomy would render a woman quite fit for the job.

An analogous example of a qualification which only members of one sex could meet would be a requirement that employees possess a physical characteristic which is peculiar to one sex. Once again, the mere fact that substantial numbers of the favored sex are without the requisite characteristic would not save the standard. The type of qualification under discussion is that which could be met by many members of one sex and no members of the other sex, however. Therefore, a qualification which can only be met by a few human beings (e.g., the ability to lift four hundred pounds) is not discriminatory simply because those few human beings all happen to be men.

An analogous example of a qualification which only members of one sex could meet would be the requirement that all employees be graduates of a certain men's college. Such a standard seems a bit more discriminatory than the example in the text since restricting employment to graduates of a certain men's college effectively eliminates all women. Since very few men could meet the standard, however, it would not appear to be sex discrimination.
Whether or not job qualifications requiring training or experience available only to members of one sex fall within the Act's general proscription is an admittedly perplexing and unresolved question. Only a general touchstone can be suggested: Insofar as the training qualification admits many members of one sex and none of the other, or insofar as it eliminates many members of one sex and none of the other, the qualification seemingly constitutes sex discrimination violative of Title VII unless justified by the bona fide occupational qualification exception.102

(2) Irrelevant job qualifications, having as their sole purpose the intentional elimination of members of one sex, may be considered discriminatory. The fact that Title VII enjoins only intentional discrimination103 may actually broaden, rather than contract,104 the Act's proscription. Thus, an employer's intentional attempt to eliminate members of one sex by establishing job qualifications which, in absence of such intent, would

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102 The Act specifically sanctions one type of qualification which is based upon experience commonly open primarily to men: "Nothing in this subchapter shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preferences for veterans." 42 U.S.C. § 2000e-11 (1964).

103 Judicial relief is available only if the court finds that "the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice..." 42 U.S.C. § 2000e-5(g) (1964).

104 It has been pointed out that "unintentional discrimination" is impossible since discrimination "involves both an action and a reason for the action." Berg, Equal Employment Opportunity Under the Civil Rights Act of 1964, 31 BROOKLYN L. REV. 62, 71 (1964). "However, in an effort to attach meaning to the word, some courts may find in it a requirement that the respondent intended to violate Title VII, thus permitting defenses based on ignorance of the law.... This would be an unfortunate and incorrect result. 'Intentionally' means no more than that the asserted act of discrimination must have been knowingly and deliberately based upon an individual's...sex...." Id.

Merely because an employer is not aware of the fact that red-green color blindness is peculiar to one sex would not seem to render the sex discrimination unintentional. See notes 98-102 supra and accompanying text. Once it had been established that the qualification in fact discriminates on the basis of sex, the intent requirement would be satisfied by showing that the employer intentionally established the qualification. Excusing discrimination, which the employer is not astute enough to realize is discrimination, seems no more justifiable than excusing a Title VII violation merely because the employer did not realize he is covered by the Act and that his conduct constitutes an "unlawful employment practice." But see 110 CONG. REC. 12724 (1964) (remarks of Senator Humphrey): "It means simply that the respondent must have intended to discriminate." If one intends to do an act which constitutes sex discrimination, however, it would seem that he intends to discriminate.
SEX DISCRIMINATION

not be discriminatory. For example, a law firm which is so ardent in its desire to avoid hiring women that it establishes the irrelevant job qualification that each new associate must be capable of lifting a one-hundred pound weight over his head would seemingly violate the Act. Even though such a strength requirement would not normally be considered discrimination on account of sex, the existence of an intent to discriminate renders the qualification unlawful;

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105 The legislative history of Title VII indicates that job qualifications are not normally discriminatory simply because proportionately fewer members of one sex (or one race) than the other possess the qualification. Senator Case, Title VII's floor manager, stated that an employer could lawfully require an applicant for employment as an engineer to have a Ph.D. despite the fact that few Negroes possess such degrees. This very reasonable hypothetical was used to explain the broader statement: "Whatever its merit as a socially desirable objective, Title VII would not require . . . an employer to lower or change the occupational qualifications he sets for his employees simply because proportionately fewer Negroes than whites are able to meet them." 110 Cong. Rec. 6416 (1964) (emphasis added in order to indicate that the Senator was not necessarily considering the establishment of new qualifications designed to defeat the effect of the Act). In another memorandum Senator Case joined Senator Clark in stating: "There is no requirement in Title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes ...." Id. at 7213 (emphasis added).

106 Such an interpretation of the Act perhaps may be supported by analogy to the treatment of the fraud concept under the federal securities laws. Thns, a practice in the securities field which is not fraudulent on its facts may be violative of rule 10b-5 of the Securities and Exchange Act of 1934, 17 C.F.R. § 240.10b-5 (1968), if an intent to circumvent the protections of the Act is discovered. See, e.g., SEC v. Capital Gains Research Burcau, Inc., 375 U.S. 180 (1963); A.T. Brod v. Perlow, 375 F.2d 393 (2d Cir. 1967); Vine v. Beneficial Finance Corp., 374 F.2d 627 (2d Cir.), cert. denied, 389 U.S. 970 (1967).

107 Admittedly, a broad reading of Senator Clark's hypothetical, see note 105 supra, could be used to justify a weight-lifting test for lawyers. However, a Ph.D. degree has a close rational relation to employment as an engineer. One wonders whether the Senator would have distinguished the practice of an Alabama restaurant which requires its waiters to have thin lips and inconspicuous cheek bones—physical characteristics common to caucasians and rare among Negroes. Just as some caucasians would be eliminated by the thin-lip test, so would some outstanding male law students be eliminated by the firm's weight-lifting test. Similarly, most Negroes and most women would be eliminated by the respective tests. Another Senator suggested that a qualification quite similar to the thin-lip test would be permissible where the restriction has a rational relation to job performance. Senator Clark visualized a movie company filming an "extravaganza on Africa," and stated that the director could lawfully require that extras have "the physical appearance of a Negro—but such a person might actually be a non-Negro." 110 Cong. Rec. 7217 (1964). Though Senator Clark's example primarily points up the analytical need for an exception to racial discrimination where race is a bona fide occupational qualification, it also indicates that requiring a physical qualification, such as thin lips or strength,
and it is the irrelevancy of the qualification to performance of the particular job which establishes the intentional element. Such an interpretation of the Act's ban should be narrowly construed since scrutinizing such qualifications will entail difficult determinations as to which standards are so intimately connected with sex that their irrelevant imposition will render them discriminatory. Only the most blatant irrelevancy should spark the inquiry, and where the job qualification is at all rationally related to job performance, the court should recognize its validity and refuse to hold that it constitutes discrimination.

(3) Sex discrimination exists insofar as a woman is not accorded the same freedom to "be a woman" that is accorded a man to "be a man." Conversely, an employer has a right to insist that his employees conform to their essential cultural-biological sex "roles." Ironically, in order to avoid sex discrimination an employer must treat his male and female employees differently. This seeming contradiction is merely a function of the fact that Title VII's sex discrimination ban is an attempt to eliminate the disparate treatment of two groups which are inherently and fundamentally different. To the extent that the sexes are essentially different, an employer discriminates on the basis of sex by requiring one sex to sacrifice that basic difference to a greater degree than he requires of the opposite sex. The difficult task is to ascertain which employment standards, because of biology or culture, affront the basic sexual identity of one sex. Since a sex discrimination proscription aims at the equality of the sexes, however, only those biological-cultural attributes absolutely basic to womanhood or manhood should be protected. Thus, although a specification that all employees work bare-chested would constitute discriminatory treatment of women, a requirement that job applicants renounce any...
intention of quitting after a few years to manage a household and raise a
can not seem discriminatory. As regards the woman's mother-
maternal role, respect for the cultural position of women should neces-
sitate that an employer hire mothers if he hires fathers, but freedom to
be a mother should not include the larger role of housewife, a role com-
monly associated with motherhood, but not essential to basic female iden-
tity.

The counterpart of the employer's duty to treat the sexes differently to
avoid discrimination arises in determining the degree to which a woman
can insist upon being treated exactly as a man. Although an employer
has the right to insist that his employees conform to their essential sexual
roles, the number of these roles should again be sharply limited in order
to retain the Act's basic policy of employment equality. Thus, until cigar
smoking becomes an acceptable part of the female cultural role, the em-
ployer may justifiably insist that his female employees refrain from such
smoking.

On the other hand, the fact that numerous businessmen believe that business is incompatible with the female disposition does not

anatomy as well as upon our culture's high regard for sexual privacy. The essence of the discrimination is that the standard denies the woman which is essential
to her femininity. Thus, under most circumstances, requiring all employees to dress
or style their hair in a manner which is peculiar to one sex would constitute a dis-
criminatory invasion of the other sex's identity. Where female clothing would be
dangerous or impractical, however, there would be no discrimination in requiring
everyone to wear coveralls. In the presence of dangerous machines, a woman would
not be thought abnormal simply because she wears safe clothing.

Arguably, such a requirement discriminates against women since (1) only
women will be eliminated, and (2) this career pattern is common to women. The
answer to the first objection is that many members of both sexes can still qualify for
the position. See discussion in text accompanying note 102 supra. The second
argument can only be answered by stressing that such a career pattern is both in-
compatible with most jobs and inessential to the maintenance of sexual identity.

The EEOC has stated that a refusal to hire women with pre-school age
children unless the woman is divorced or putting her husband through college is
 discriminatory. EEOC Digest of Legal Interpretations to Oct. 8, 1965, § .043, CCH
GUIDE ¶ 17,251.

See Rossi, Equality Between the Sexes: An Immodest Proposal, 93 DAEDALUS
614 (Spring 1964). See also NATIONAL MANPOWER COUNCIL, WORK IN THE LIVES OF
MARRIED WOMEN 74-207 (1959).

Perhaps in some areas of the country a woman in a given job would not be
thought of as abnormal because she smokes cigars. The hypothetical is merely used
to illustrate the reliance which must be placed upon basic cultural prejudices in order
to determine the existence of sex discrimination.

Such beliefs are apparently widespread. See Bowman, Worthy & Greyson,
Are Women Executives People?, 43 HARV. BUS. REV. 14 (July-August 1965).
justify excluding women from employment in business on the basis that such employment is not in conformity with the female sexual role.

(4) Title VII is primarily concerned with harmful discrimination, and its overriding purpose is to improve female employment opportunity. Although the preceding attempt to define discrimination analytically is essential to an understanding of Title VII, it should be realized that the Act speaks politically — in the context of a value judgment — and not abstractly. Those who called for such legislation felt that discrimination was a moral problem, and indeed the language of the Act reflects their moral solution by prohibiting action or discrimination "against" individuals. The Act prohibits not segregation or classification per se, but rather such separation as "would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee. . . ."  

More specifically, Congress' overriding purpose was to improve the lot of the woman worker: "a vote against this [sex] amendment today by a white man is a vote against his wife, or his widow, or his daughter, or his sister." In order to implement this policy, courts and administrative agencies enforcing the Act should subject practices which eliminate female job opportunity to slightly more scrutiny than those which tend to restrict male job opportunity.

Employment practices which result in the disparate treatment of the sexes, and which therefore constitute "unlawful employment practices" under Title VII, will be difficult to prove in many instances. Though the absolute elimination or exclusive qualification of one sex will generally be the best evidence of prohibited discrimination, other factors, such as prevailing cultural attitudes or the presence of an intention to discriminate, may also be employed to establish the existence of discrimination.

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116 Griswold, Foreword to DISCRIMINATION AND THE LAW (V. Countryman ed. 1965): "Discrimination is basically a moral problem. We tend too often to forget that." The book records the proceedings of a conference held the weekend of President Kennedy's death concerning the problem of racial discrimination.


118 42 U.S.C. §§ 2000e-2(a)(2), (c)(2) (1964) (emphasis added), cited note 91 supra. Therefore, since sexually segregated washrooms in no way connote inferiority, such segregation is permissible. Other segregated facilities, such as lunchrooms, might be considered discriminatory if they in any way diminish the employee's stature or eliminate possibilities for advancement—such as the possibility of eating lunch with the boss.

119 110 CONG. REC. 2580 (1964) (remarks of Congresswoman Griffiths). See also notes 37 & 38 supra and accompanying text.
The Bona Fide Occupational Qualification (BFOQ) Exception: Search for a Rationale

Although initially determining the presence of discrimination will involve difficulties, the magnitude of Title VII's interdiction of sex discrimination will depend primarily upon the interpretation given that section of the Act which provides that some sex differentials are legitimate "in those certain instances where...sex...is a bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business or enterprise...."120 Because statutory exceptions are generally narrowly construed,121 the burden of pleading 122 and proving123 that sex is a bona fide occupational qualification (BFOQ) should

120 42 U.S.C. § 2000e-2(e) (1964). Where it can be shown that sex, religion, or national origin is such a bona fide occupational qualification (BFOQ), the Act provides "it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin...." 42 U.S.C. § 2000e-2(e) (1964) (emphasis added). Further, section 704(b) provides that employment advertising may specify such limitations where religion, sex, or national origin is a BFOQ. 42 U.S.C. § 2000e-3(b) (1964). Perhaps the best statement as to the BFOQ's import has been made by a recent commentator: "[T]he chief difficulty with the sex discrimination ban of Title VII [is that] the law attempts to change some existing social mores while retaining others, with the dividing line being extremely unclear.... [T]he Commission has the task of defining what the dividing line shall be under Title VII by giving content to the phrase 'bona fide occupational qualification.'" Oldham, Sex Discrimination and State Protective Laws, 44 DENVER L.J. 344, 364 n.104 (1967).

Another article has suggested that insofar as the BFOQ exception officially sanctions sex discrimination in private employment, "this most important area of discrimination against women may be brought within reach of the fifth amendment." Murray & Eastwood, Jane Crow and the Law: Sex Discrimination and Title VII, 34 GEO. WASH. L. REV. 232, 241-42 (1965). The Supreme Court does not seem sympathetic to this view, however. See cases cited notes 171-72 infra and accompanying text.


122 Cf. Choate v. Caterpillar Tractor Co., 274 F. Supp. 776, 777 n.3 (S.D. Ill. 1967). In this case the court held that the plaintiff's complaint sufficiently alleged a cause of action when she pleaded that the defendant's agent had told her she would not be hired as long as men were available. The court stated this was sufficient despite the fact that she had not specifically alleged that the sole reason for the refusal to hire was because of her sex.

123 The general rule is that the party who "claims the benefits of an exception to the prohibition of a statute" bears the burden of proving himself within the exception. United States v. First City Nat'l Bank, 386 U.S. 361, 366 (1967).
properly rest upon the person accused of discrimination. However, the quality and amount of proof requisite to carrying this burden remains unclear.

Relying mainly upon certain segments of the BFOQ language, several versions of the kind of proof necessary to take advantage of the exception have been suggested. One court, ignoring the fact that the sex qualification is to be “reasonably necessary” as well as “bona fide,” held that an employer’s “honest purpose” in establishing an otherwise discriminatory job requirement suffices to justify job denial on the basis of sex.124 A more restrictive interpretation is that an employer is limited to discrimination which “is rationally related to an end which he has a right to achieve—production, profit, or business reputation....”125 Although it is perhaps difficult to improve upon a broad “reasonableness” test, the keystone BFOQ language is deserving of more extensive analysis. It cannot be said with certainty that Congress intended the short-run maximizing of profit to be considered such a reasonable business necessity as would justify all sex discrimination, irrespective of the cultural prejudices which would have to be tolerated in order to achieve that goal. Rather, it would seem that the meaning of “reasonably necessary” should depend upon the balance of a variety of factors:126 The necessity of a sex-oriented job qualification to normal business operation must be weighed against the extent to which the discrimination diminishes employment opportunity.

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<th>burden of pleading and the burden of proof often go hand in hand because they involve similar policy considerations. The party who discriminates has readier access to the reasons for his act. Furthermore, the party who wishes to discriminate on the basis of broad assumptions concerning sex should be required to substantiate his beliefs. See generally F. James, Civil Procedure § 7.8, at 257-58 (1965).</th>
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<td>124 Ward v. Firestone Tire &amp; Rubber Co., 260 F. Supp. 579, 581 (W.D. Tenn. 1966). In Ward a male employee sought transfer to a “light work” category reserved for women and men with physical defects. The court accepted the defendant’s contention that the work would actually involve greater effort, but also added that even if the plaintiff could have shown that the job would bring tangible benefit, he would not be entitled to it because sex was a BFOQ for the position.</td>
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<td>125 Note, Classification on the Basis of Sex and the 1964 Civil Rights Act, 50 Iowa L. Rev. 778, 795-96 (1965). The commentator’s standard seems doubtful in light of the example which he provided: “Thus, where a woman applies for a job as a barber, the employer can establish his case merely by showing that hiring her would cause him to lose a significant number of patrons.” Id. No express consideration is given to the possibility that the attitude may be susceptible of eradication, and that the customers will only be lost temporarily.</td>
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<td>126 The relative weight given to each factor will have to be determined from case to case, and will be influenced by the particular industry, job, and job qualification involved and by the underlying purposes of Title VII.</td>
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SEX DISCRIMINATION

for one sex, especially for women, and the likelihood that the reason for the discrimination will disappear under the influence of equal employment opportunity. Two major conditions will bear upon the judicial balancing of these factors in determining the reasonableness of sex discrimination. First, each sex has certain biological and cultural characteristics which may affect job performance. Second, many states legislatively "protect" women workers, making them impossible or unprofitable to employ.

(1) Sexual Characteristics as a BFOQ Basis

(a) Attributes Unique to One Sex

Each sex, besides having traits which are more characteristic of it than of the opposite sex, also possesses certain exclusive characteristics which result from either biological endowment or cultural inducement. Although it is impossible to differentiate completely between absolute biological characteristics and those culturally induced, it is difficult to imagine situations in which a basic physical prerequisite of gender would be essential to job performance. Thus, litigation concerning characteristics which are allegedly unique to one sex will primarily entail the investigation of cultural attitudes and expectations. The mere fact that a characteristic is based upon cultural preference, however, should not weaken its stature as an attribute possessed exclusively by one sex.

117 The basic purpose of Title VII's sex discrimination ban being to provide better opportunity for women, it would seem that Congress was more concerned with attitudes which restrict female employment opportunity than with attitudes which tend to enhance it. Welfare legislation for women has been passed in many states which restricts the employment of women. Enhancing these employment opportunities through federal legislation should certainly seem no more objectionable. See note 119 supra and accompanying text. The state "protective" laws are discussed at notes 165-200 infra and accompanying text.

118 Traits which are characteristic of one sex but also found in unusual members of the opposite sex are discussed at notes 151-64 infra and accompanying text.

119 A hospital which renders "wet nurse" services or an artificial insemination clinic perhaps provides an example of those unusual employment opportunities which absolutely require hiring on the basis of sex.

120 The fact that cultural preferences are probably never shared by all members of the culture does not mean that unusual members of the "unpreferred" sex possess the characteristic of cultural acceptance. Female attendants are not deprived of their exclusive cultural acceptance in ladies' powder rooms simply because one woman in a thousand actually prefers a male attendant. Rather than tending to prove that some men might be found with this cultural acceptance, such evidence tends to negate the existence of the attitude altogether—i.e., it tends to prove that males would be as readily accepted as females in ladies' powder rooms.
In determining whether a particular cultural attitude is a proper basis for the BFOQ exception, three basic inquiries must be made. First, it must be determined whether the attitude actually exists. Second, the attitude must be shown to have a meaningful effect — in terms of profit — upon job performance.\textsuperscript{131} If it does, then the inquiry progresses to the third and crucial issue: whether, in light of Title VII, the continued recognition of the attitude is permissible.\textsuperscript{132} In deciding that question, it must be kept in mind that Congress did not intend to eliminate all culturally-induced sex attitudes in promulgating its sex discrimination prohibition. Indeed, a key motivation for including sex in the BFOQ exception stemmed from a willingness to allow employers to recognize such sexual distinctions.\textsuperscript{133} Nevertheless, the insertion of “sex” in the BFOQ section surely did not reflect a congressional desire to recognize the validity of all such prejudices.\textsuperscript{134}

Among those attitudes which may have an effect upon job performance, one which promises to receive great deference by the courts is the desire

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\textsuperscript{131} Profit may be affected by the attitudes of other employees, who may work less effectively—less productively—with members of one sex. The attitudes of clients and customers may also limit profit.

\textsuperscript{132} Factors to be weighed against business needs in determining if a particular job qualification based on sex-oriented cultural attributes falls within the BFOQ exception are enumerated at notes 126-27 supra and accompanying text.

\textsuperscript{133} During discussion of the corrective amendment, which added sex to the BFOQ section, see note 41 supra and accompanying text, Congresswoman Green argued that such a sex exception was necessary so that a college might hire only men for the job of dean of men or so that a hospital might seek only a female nurse to care for an elderly lady. 110 CONG. Rec. 2718, 2720-21 (1964).

\textsuperscript{134} Typical of the hypothetical examples used to illustrate the application of the BFOQ language to the sex provisions was that offered by Senators Case and Clark, floor managers of the bill: The exception would permit a male baseball team to hire male players. 110 CONG. Rec. 7213 (1964) (memorandum). Such application of the BFOQ is fairly innocuous. Not only does it not threaten female employment opportunity to any significant degree (it is difficult to imagine the Amazon who could qualify on the merits anyway), but such application could easily be based upon considerations other than player or crowd attitude, such as the cost of installing additional dressing-room facilities. But see Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.1 (a)(1)(iv) (1968).

The EEOC has stated that the “preferences” of co-workers, employers, customers, or clients do not constitute appropriate BFOQ bases. \textit{Id.} at § 1604.1(a)(1)(iii). However, its position is somewhat clouded since it has also stated that sex \textit{will} be a BFOQ where it “is necessary for purposes of authenticity or genuineness.” \textit{Id.} at § 1604.1(a)(2). This exception, however, seems to extend only to fashion models and actresses or actors. See \textit{id.} at § 1604.1(a). The EEOC has recently held that sex is not a BFOQ for the position of flight cabin attendant-stewardess. Decision of the EEOC, February 21, 1968, CCH GUIDE ¶ 17,304.63.
to be free of intimate sexual exposure to members of the opposite sex. Thus, a recent arbitration decision held that it was proper for a hospital to refuse to hire male licensed vocational nurses because such personnel would not be tolerated by female patients to whom they would be required to render intimate personal care.\textsuperscript{135} Though that decision is seemingly in line with Title VII's legislative intent,\textsuperscript{136} there may be limits upon the use of sexual privacy to justify sex-based job qualifications. For example, because of the burden it would place upon employment opportunity, the desire of female patients to retain their modesty might not justify the refusal to employ a male anesthetist.

Another biological-cultural characteristic which may be of proper concern to an employer is the female vulnerability to sexual assault.\textsuperscript{137}

\textsuperscript{135} Kaiser Foundation Hosps. & Medical Centers v. Building Serv. Employees Local 399, 67-2 CCH LAB. ARB. AWARDS 4665, 4670 (1967). In the Kaiser decision the arbitrator apparently assumed that the issue was whether the refusal to promote violated Title VII. Other arbitrators, however, have refused to consider the impact of Title VII on the grounds that this is beyond their jurisdiction if compliance with the law has not been agreed upon between the parties to the collective bargaining agreement. Mead Corp. v. UMW Local 12943, 65-2 CCH LAB. ARB. AWARDS 5329 (1965); see United Air Lines v. Air Line Pilots Ass'n, 67-1 CCH LAB. ARB. AWARDS 3720 (1967); Eaton Mfg. Co. v. Automobile Workers Local 263, 66-3 CCH LAB. ARB. AWARDS 6795 (1966). A contrary decision was made in National Lead Co. v. Teamsters Local 270, 67-1 CCH LAB. ARB. AWARDS 3458 (undated). Although the collective bargaining agreement contained no non-discrimination clause, the arbitrators felt that such a grievance was arbitrable since "any agreement entered into must be considered in light of statutory obligations which are effective at the time the agreement is signed or which become effective during the period the contract is in effect ...." \textit{Id.} at 3460. \textit{See also} Braniff Airways, Inc. v. Air Line Pilots Ass'n, 65-2 CCH LAB. ARB. AWARDS 5434 (1965). Although the National Lead decision is perhaps explainable on the grounds that the agreement contained a very broad arbitration clause, such a decision may threaten the integrity of the arbitration procedure—especially where applicable law has not been clearly interpreted in the courts. On the other hand, because courts may place reliance upon the legal interpretations of arbitrators, difficulties may arise when the arbitrator refuses to give effect to Title VII. \textit{See} Weeks v. Southern Bell Tel. & Tel. Co., 277 F. Supp. 117, 118-19 (S.D. Ga. 1967). Where a clause in the agreement forbids sex discrimination, the arbitrator will apparently feel free to apply Title VII. \textit{See} Buco Prods., Inc. v. Automobile Workers Local 985, 66-3 CCH LAB. ARB. AWARDS 6524 (1966).

\textsuperscript{136} See note 133 \textit{supra} and accompanying text. However, the suggestion made in the House was that a hospital could seek a female to care for an elderly lady. Such a patient might be more sensitive to exposure to a male nurse than younger women who are less modest. Furthermore, it would seem that patient attitudes could be respected by limiting the male nurse to male patients.

\textsuperscript{137} Though males are sometimes sexually assaulted, this does not negate the fact that in our culture it is the female who is endangered. No male—even the one who is assaulted—has the characteristic of being the normal object of ravishment. The cultural "preference" is always for the female. \textit{See} note 130 \textit{supra}. 
The EEOC has indicated that a publisher might reasonably refuse to employ female minors as newspaper carriers where there is reason to believe that they will be subjected to possible physical or moral hazard.\footnote{G.C. Op. Ltr. Aug. 19, 1966, CCH Guide § 17,304.24.} Moreover, in *Weeks v. Southern Bell Telephone & Telegraph Company*,\footnote{277 F. Supp. 117 (S.D. Ga. 1967).} the court determined, in dicta, that a refusal to hire a female as a "switchman" was reasonable because such an employee was required to be on twenty-four hour call, which frequently would have necessitated working alone during the late hours of the night.\footnote{Id., at 118.} The possible implication is that hiring restrictions may be legitimately imposed upon jobs which involve an unusually high possibility of rape or assault. It would seem that an employer has a legitimate interest in restricting such potentially hazardous employment, especially in a service industry, where an attack upon an unprotected female could cause a backlash of public outrage, seriously affecting the employer’s business. Alternatively, the cost of providing adequate protection would significantly diminish the financial practicality of employing female workers. In such cases, an employer would be justified in establishing hiring differentials based upon sex.\footnote{In a related situation, it might be argued that since laboring men often use abusive language, women should not be permitted to work with them. However, even if women are generally somewhat more offended by such language, the possible harm would not seem to be so great as to justify denying women employment in such situations. The EEOC agrees that the danger of "argumentive discussions" should not be allowed to bar female employment in areas largely staffed by males. Digest of EEOC Legal Interpretations, October 1965-March 1966 § .04, CCH Guide § 17,252.}

The same cultural “preferences” which render the female sexually vulnerable may, in other situations, render the employment of women desirable. Female sex appeal, perhaps the world’s oldest and most effective marketing device, promises to endure as a cultural attitude despite congressional legislation. Indeed, the continued recognition of female sex appeal as an occupational qualification implements the basic policy of Title VII to provide better employment opportunities for women.\footnote{274 F. Supp. 781 (E.D. La. 1967).} To suppose that Congress intended to destroy the competitive advantage of female sex appeal, even where that quality enhances business profits, is to ignore this basic purpose. Such reasoning was seemingly approved in *Cooper v. Delta Air Lines, Incorporated*,\footnote{See note 119 supra.} where a district court strongly...
implied that sex may remain a valid basis for hiring flight cabin attendants. Specifically disclaiming that it was dealing with the BFOQ exception, the court nevertheless stated:

Congress did not outlaw Delta's discretion to hire only stewardesses who are single and young, 20 to 26 years of age, average height . . . slim . . . educated . . . have "good complexions," must be "neat," must be "attractive," and their "family background" and "moral character" must be "good."144

Although the EEOC apparently disagrees,145 the implication of the Cooper case would seem to be the better view.

However, the desire of patrons or clients to be served by a male would seem to be distinguishable from female sex appeal and probably would not justify the application of the BFOQ exception. Whereas female sex appeal is based rather directly upon physical characteristics, the desire of patrons to deal with a man is frequently based upon supposed mental or emotional differences between the sexes.146 In Bowe v. Colgate-Palmolive Company,147 an Indiana district court, though readily acknowledging the general physical limitations of women, suggested that perhaps "stereotyped characteristics of taste or talent or emotions or tactile facility and the like cannot be made the basis for generic classification" of the sexes.148 The court's position may reflect its unwillingness to assume that such differences exist between the sexes absent scientific proof. Such a judicial attitude may be readily sustained on the basis of Congress' obvious desire to promote equality in employment opportunity.149 Accordingly, courts may consider attitudes based upon physical differences to be more legitimate than those grounded upon mental or emotional differences. Further, insofar as the courts may doubt that women possess a lesser degree of business capability, they may look to equal employment opportunity to eventually eliminate that attitude itself.150 This considera-

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144 Id. at 782.
145 See note 134 supra.
146 Men may also desire to deal with another male for reasons of sexual privacy or modesty and job qualification resting on this ground may be sustained. See notes 135 & 136 supra and accompanying text.
148 Id. at 365.
149 See notes 116-19, 121-23 supra and accompanying text.
150 One commentator suggests that the employer can mitigate the loss resulting from client prejudice by carefully exposing his female employee to his clients. White, Women in the Law, 65 Mich. L. Rev. 1051, 1097-98 (1967).
tion would tend to negate use of the attitude as a BFOQ basis, despite the fact that it presently has a substantial effect upon job performance.

(b) Traits Characteristic of One Sex but also Found in Unusual Members of the Opposite Sex

Certain characteristics, though more common to one sex, are also found in unusual members of the opposite sex. Once having ascertained that such a characteristic meaningfully affects job performance, a policy question must be resolved in determining whether the characteristic invokes the BFOQ exception: does an employer retain the right to hire and employ on the basis of general, but not universal characteristics, or must he seek out unusual members of the normally deficient sex? Though the intent of Congress was never made clear, two factors would seem to be of primary importance: (1) the difficulty — and consequent cost — of determining individual capacity with respect to the characteristic, and (2) the likelihood that the characteristic is a mere result of occupational discrimination, so that the sexes will become equally competent under the influence of equal employment opportunity.

One type of sexual characteristic which may not justify discrimination could be denominated "general employment characteristics" — those based upon the comparative working patterns of men and women. These working patterns, primarily turnover and absenteeism rates, would be a significant business consideration in establishing employment criteria for any job. In this respect, general employment characteristics differ from sex-related aptitudes and abilities, such as strength or dexterity, which are requisite for only certain jobs. The EEOC has taken the position that "assumptions of the comparative employment characteristic of women in general" cannot be made the basis for hiring differentials under the BFOQ exception. Though such a position may appear analytically too rigid, its

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151 The test of a characteristic's effect upon job performance is applied in considering attributes unique to one sex. See discussion in text preceding note 131 supra. The existence and significance of the characteristic should be proven by the party who wishes to bring himself within the BFOQ exception. See note 123 supra. Such a burden may be difficult to carry without extensive statistical data.


153 A preferable reading of the EEOC guideline is that an "assumption" constitutes "a generalization made without a sufficient foundation of supporting experience." White, Women in the Law, 65 Mich. L. Rev. 1051, 1104 (1967). However, the EEOC does not assent to such an interpretation of its guideline, feeling that every person should be "considered on the basis of individual capacities and not on the
application seems satisfactory in a practical sense, since work pattern differences between male and female workers have been shown to be far less significant than frequently claimed.\textsuperscript{154} Furthermore, absenteeism and turnover rate differentials may be susceptible of eradication insofar as equality of opportunity would provide greater incentive to work outside the home.\textsuperscript{155} Although contrary to the EEOC position, significant differences between the employment patterns of men and women should constitute a valid basis for the BFOQ exception. The employer, however, should bear the burden of qualifying for the exception by showing (1) that his statistics compare men and women in equal job categories, and (2) that business considerations make it reasonably necessary to employ on the basis of such working patterns. The difficulty of carrying such a burden of proof should be sufficient to prevent unjustifiable discrimination.

Though the very existence of general employment characteristics for a particular sex may be doubted, certain abilities and aptitudes characteristic of one sex may be considered proper bases for the BFOQ exception because of the certainty of their existence and impact upon job performance. The EEOC, however, has voiced disapproval of such a view in asserting that "stereotyped characterizations of the sexes" are not to be considered legitimate BFOQ bases.\textsuperscript{156} Despite its general rule, the Com-

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\item \textsuperscript{154} The frequent claims that women have far higher turnover and absenteeism rates than men, see, e.g., \textit{Hearings on H.R. 3861 and Related Bills before the Special Subcomm. on Labor of the Comm. on Educ. and Labor}, 88th Cong., 1st Sess., 95-108, 184-86, 241-49 (1963) (testimony of businessmen on the need for a "cost justification exception" in Equal Pay Act), are generally based upon statistics which do not account for the fact that the women being compared are in lower job categories than the men. \textit{See Women's Bureau, U.S. Dept of Labor, What About Women's Absenteeism and Labor Turnover?} (revised August 1965); \textit{Hearings on H.R. 3861, supra}, at 241-47 (committee member's remarks on data presented). Furthermore such claims usually announce differentials far higher than have been substantiated by independent study. \textit{See Public Health Service, U.S. Dept of Health, Education and Welfare, Worktime Lost Throughout the Economy, July 1959-June 1960} (1960); White, \textit{Women in the Law}, 65 Mich. L. Rev. 1051, 1090-92 (1967).

\item \textsuperscript{155} Perhaps, however, more study is needed before such a conclusion can be drawn. \textit{See White, Women in the Law}, 65 Mich. L. Rev. 1051, 1092 (1967). It has been suggested that the theory that women seek work which does not threaten their major role as wife and mother is not necessarily valid. E. Gross, \textit{Plus Ca Change . . . The Sexual Structure of Occupations over Time}, August 30, 1967 (revision of paper read at 62nd annual meeting of American Sociological Association, Department of Sociology, University of Washington).

\item \textsuperscript{156} Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.1(a)(1)(ii) (1968).
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\end{footnotesize}
mission has indicated a slight hesitancy in applying such a standard to jobs which require physical strength. Such restraint is justified in light of Bowe v. Colgate-Palmolive Company, which held that an employer could bar his female employees from jobs requiring the regular lifting of over thirty-five pounds. Acknowledging "general and generally recognized and basic differences in the physical characteristics, abilities, capacities, restrictions and limitations of the respective sexes," the court reasoned that individual consideration of each woman could only result in interminable dissension... which, under the peculiar system now a part of the normal operation of Colgate's plant, would make it utterly impractical and virtually impossible to achieve any reasonable operation of the plant.

The court's emphasis upon the "peculiar" nature of Colgate's seniority system, which involved a weekly "crewing up" process necessitated by the fact that the same products were not produced each week, seems entirely unwarranted. Women restricted to "light" work classification can be expected to complain irrespective of whether or not jobs change weekly, if other women are permitted to engage in "heavy" work. Once the job structure between "light" and "heavy" has been classified, the issue simply becomes whether or not capable women may be restricted from working in the "heavy" classification. The reasonableness of such a policy should chiefly involve consideration of the expense and difficulty of ascertaining the existence of the desired characteristic. The Bowe case involved a characteristic which might very easily be determined—strength. Where the job requires, in addition to strength, qualities such as speed and endurance, then the female might be given a short trial period or a medical examination. Such reasonable alternatives to an outright refusal to hire

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157 See G.C. Op. Ltr., July 28, 1966, CCH Guide ¶ 17,304.07: "The Commission is not as yet prepared to conclude that the physical requirements involved in a job may justify denying consideration to qualified members of either sex." (emphasis added).


159 Id. at 365 (emphasis added).

160 Id. at 357. Weekly job assignments were based upon departmental seniority. Surplus labor in one department was "forced out" and assigned to jobs in other departments on the basis of plant-wide seniority. Female "bumping" rights—the right to displace another on the basis of seniority—were of course limited by the weight lifting restriction. Id. at 341-47.

161 Many women could quickly prove their ability to lift over thirty-five pounds by simply performing the feat.
have been suggested by arbitration decisions. However, if the testing procedure resulted in great expense while discovering few qualified women, then an employer might be permitted to adopt a more generalized sex-oriented standard.

Insofar as Bowe drew a distinction between generally recognized physical differences between the sexes and possible mental or emotional differences, the judiciary may not be amenable to the suggestion that women and men are different in their mental and emotional performance. However, where such differences can be proven to exist, the employer may more easily show the business necessity of avoiding the cost of discovering the unusual individual, since it may be far more expensive to ascertain the emotional stability of an individual than it is to determine his mere physical strength.

(2) State Protective Legislation as a BFOQ Basis

A second major factor which may effect the dimensions of Title VII's BFOQ exception is the existence of state regulations upon the conditions of female employment—so-called "protective legislation." Common since the beginning of this century, such laws were presumably enacted for the purpose of protecting women from "sweat shop" conditions, and therefore frequently restrict the occupations which women may pursue.

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162 International Paper Co. v. Papermakers Local 398, 66-3 CCH LAB. ARB. AWARDS 6535 (1966); Northwest Airlines, Inc. v. Brotherhood of Ry. & Steamship Clerks, 66-1 CCH LAB. ARB. AWARDS 4180 (1966) (trial period); Miami Copper Co. v. Steelworkers Local 4338, 65-1 CCH LAB. ARB. AWARDS 3719 (1965) (trial period). See also Buco Prods., Inc. v. Automobile Workers Local 985, 66-3 CCH LAB. ARB. AWARDS 6524 (1966) (job bid denial violates agreement not to discriminate on grounds female has necessary strength).

163 Proof of the unreasonableness of requiring the employer to seek out unusual women would justify a BFOQ exception. See note 123 supra and accompanying text.

164 See notes 148-50 supra and accompanying text.

165 See Women's Bureau, U.S. Dep't of Labor, Bull. No. 66, History of Labor Legislation for Women in Three States (1929), which suggests that some exclusionary legislation, see note 166 infra, is actually the product of craft union attempts at self-protection. See also note 10 supra.

regulate the hours and times they may work, establish the minimum

wife, widow, daughter, or sister of proprietor). Occasionally the employment of female minors in certain capacities is forbidden. E.g., LA. REV. STAT. ANN. § 23:169 (1964) (newspaper carriers). Other statutes establish a higher eligibility age for girls than for boys in certain "street trades," such as vendors and messengers. E.g., LA. REV. STAT. ANN. §§ 23:164, 165 (1964); WIS. STAT. ANN. § 103.23 (1957). Other statutes prohibit female work in specific crafts, but the most comprehensive of these is the Ohio statute which prohibits females in the following occupations or capacities: "Crossing watchman, section hand, express driver, metal moulder, bell hop, taxi driver except [during day], gas or electric meter reader, as workers in blast furnaces, smelters, mines, or quarries except in the offices thereof, in shoe shining parlors, bowling alleys as pin setters, poolrooms, barrooms and saloons or public drinking places which cater to male customers exclusively, in delivery service on motor propelled vehicles of over one ton capacity, in operating freight or baggage elevators if such elevators and the doors thereof are not automatically or semi-automatically controlled, in baggage handling, freight handling, trucking, and handling by means of hand trucks heavy materials of any kind, or in employments requiring frequent or repeated lifting of weights over twenty-five pounds." OHIO REV. CODE ANN. § 4107.43 (Page 1965).

Most states currently fix the maximum number of hours which women may work during a given period of time. Some statutes fix a maximum for women employees generally and then provide that certain occupations, such as nurses and telephone operators, are not to be limited by the normal maximum. E.g., ILL. ANN. STAT. ch. 48, § 5 (Smith-Hurd 1950); MIII. STAT. ANN. § 181.18 (1963); UTAH CODE ANN. § 34-4-3 (1966). Other statutes fix maximum hours for women in certain establishments, such as factories or retail stores, and then proceed to exempt women who work in professional, administrative or other special capacities. E.g., CONN. GEN. STAT. ANN. §§ 31-12, -13, -18 (Supp. 1966); LA. REV. STAT. ANN. §§ 23:311, 331, 332, 337 (1964); TEX. REV. CIV. STAT. ANN. art. 5172(a), §§ 1-3 (1962); VT. STAT. ANN. tit. 21, § 440 (1967); WYO. STAT. ANN. § 27-218 (1967). A few states delegate regulation to an administrative agency. E.g., WIS. STAT. ANN. § 103.02 (Supp. 1968).


Exceptions to the hours laws are numerous. Often the statute will allow longer hours during emergencies, or seasonal peaks. E.g., CONN. GEN. STAT. ANN. § 31-13 (1960); ME. REV. STAT. ANN. tit. 26, § 733 (1965). Similar exemptions are made for seasonal businesses such as canning plants and tobacco warehouses. E.g., ILL. ANN. STAT. ch. 48, § 5 (Smith-Hurd 1950); N.C. GEN. STAT. § 95-17 (Supp. 1967). Domestics are frequently exempted. E.g., MISS. CODE ANN. § 6993 (1953); N.M. STAT. ANN. § 59-5-4 (1960). A somewhat analogous exemption is sometimes made for persons employed in towns under a certain population. E.g., NEB. REV. STAT. § 48-203 (1960). Longer hours are occasionally permitted if premium pay is paid for overtime. E.g., IDAHO CODE ANN. § 44-1107 (Supp. 1967); WYO. STAT. ANN. § 27-218 (1967). Increasingly, professional, administrative and sometimes clerical workers are being exempted. E.g., CAL. LABOR CODE § 1352.1 (West Supp. 1967);
wage they must be paid, and require that certain facilities be provided at places of employment for their health, safety, privacy and comfort. While it has been persuasively argued that the limits these laws place upon female employment opportunity abridge the constitutional guarantees of due process and equal protection, the Supreme Court has traditionally rejected such claims. In light of the Court's present reluctance to strike down state economic legislation on fourteenth amendment grounds, it seems unlikely that the Court will soon reverse its


Some of the hours laws are ineffective since excess hours may be worked in the employ of a second employer—absent, of course, the advantage of premium pay. See Reynolds v. Mountain States Tel. & Tel. Co., Op. & Ord., Arizona Civil Rights Com'n, Case No. 17-12E (December 2, 1966) CCH GUIDE ¶ 8111, at 6184. This defect is avoided by a few laws. E.g., CAL. LABOR CODE § 1351 (West Supp. 1967).

⁶¹⁶ Only two states actually establish the minimum wage for women by statute. NEV. REV. STAT. §§ 609.030, .040 (1965) ($1.25 per hour); S.D. CODE § 17.0607 (Supp. 1960) ($15 per week in cities with population over 2500). Much more common is the creation of an administrative agency or commission that establishes a binding minimum wage for women. E.g., ARK. STAT. ANN. §§ 81-613 to -619 (1960); CAL. LABOR CODE §§ 1171-1198 (West 1955); PA. STAT. ANN. tit. 43, §§ 331 a-o (1964).

⁶¹⁸ State law commonly requires that women be provided with separate toilets, dressing rooms and similar facilities. E.g., COLO. REV. STAT. ANN. § 80-2-10 (1963); PA. STAT. ANN. tit. 43, § 25-3 (1964) ("retiring rooms"). Many states require that seats be provided and that women be allowed to use them when not actively engaged in work. E.g., ALA. CODE tit. 26, § 337 (1958); ME. REV. STAT. ANN. tit. 26, § 735 (1964); VA. CODE ANN. § 40-33 (Supp. 1966). A few states require that stairs be screened, presumably for the privacy of female users. E.g., MO. ANN. STAT. § 292.150 (1965). Other states require certain safety facilities, such as pulleys for heavy lifting and handrails on stairs. E.g., MASS. ANN. LAWS ch. 149, §§ 53, 54 (1965); TEX. REV. Civ. STAT. ANN. art. 5176 (1962). Healthful and safe conditions are required in several states, and administrative agencies are established to determine and enforce the standards. E.g., COLO. REV. STAT. ANN. §§ 80-7-3, -5 to -11 (1963).

Wisconsin requires that employers of women keep special records, which is a burden analogous to the requirement of special facilities. WIS. STAT. ANN. § 104.09 (Supp. 1968).


¹⁷¹ See, e.g., Goeaert v. Cleary, 335 U.S. 464 (1948) (decision upholding state statute prohibiting female bartenders); cf. WEST COAST HOTEL CO. v. PARRISH, 300 U.S. 379 (1937) (decision upholding state regulation of women's wages).

¹⁷² The court last invalidated state economic legislation on substantive due process grounds in Thompson v. Consolidated Gas Corp., 300 U.S. 55 (1937). In recent Supreme Court history, only once has the equal protection clause been the basis for successful attack upon state economic legislation. MOREY v. Doud, 354 U.S. 457 (1957). The Court has apparently "abdicated the field." See McCloskey, Economic Due Process and the Supreme Court: An Exhumation and Reburial, 1962 SUP. CT. REV. 34, 38, 59.
position on state female employment restrictions. The enactment of Title VII, however, provides the Court with an alternative basis for invalidating these laws, for insofar as they render women impossible or unprofitable to employ, such regulations conflict with the obligations imposed by Title VII. Therefore, either employers should be insulated from liability under state law, on the grounds that Title VII has preempted such legislation, or compliance with the state regulation should excuse such sex discrimination as would ordinarily be violative of Title VII.

The preemptive implication of Title VII must be determined without substantial guidance from the legislative history.173 Congresswoman Griffiths, arguing in support of the sex amendment, did declare that “[m]ost of the so-called protective legislation has really been to protect men’s rights in better paying jobs.”174 However, her other remarks and the statements of other Congresswomen indicate that the House as a whole never reached a firm decision as to the wisdom and necessity of the state protective legislation.175

Section 708 of the Act, which attempts to deal with preemption, is similarly confusing:

Nothing in this [title] shall be deemed to exempt or relieve any person from any . . . duty . . . provided by any present or future law of any State . . ., other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this [title].176

Litigation as to the constitutionality of the protective legislation under Title VII and the Fourteenth Amendment is now pending. CCH Guide ¶ 8145. A trial judge recently convicted a defendant of violating California’s law against employing female bartenders, but urged appeal in order to raise the constitutional issues. People v. Gardner, L.A. Munic. Ct., No. 247955, February 23, 1966, CCH Guide ¶ 9015.


Congresswoman Griffiths stated: “I have yet to find a lawyer on this floor who cares to state unequivocally that the State law will continue to prevail.” Id. Other statements were confusing. Though Congresswoman St. George strongly questioned the continued validity of protective legislation, id. at 2580-81, Congresswoman Kelly interpreted her remarks to mean that the laws would not be affected by the amendment and stated: “I believe in equality for women, and am sure the acceptance of the amendment will not repeal the protective laws of the several States.” Id. at 2583. Since Mrs. Kelly was also speaking about an equal pay amendment which she did not support, it is not certain that she was referring to the preemptive scope of the sex amendment.

SEX DISCRIMINATION

In the context of the entire Act, which seeks the elimination of discrimination on the basis of race, color, religion, and national origin in addition to dealing with sex discrimination, section 708's primary purpose seems to be to insure affirmatively the continued vitality of state fair employment practice laws.\(^{177}\) Furthermore, much of the protective legislation, rather than requiring or permitting the doing of discriminatory acts, simply renders women inconvenient or expensive to employ. Even those laws which do require the total exclusion of women from employment\(^ {178}\) do not necessarily violate the section's "unlawful employment practice" prohibition, for the language is susceptible only of a circular analysis: if Congress "intended" the state laws' preservation, then the disabilities which such legislation imposes becomes a proper basis for a BFOQ exception; and practices based thereon do not constitute unlawful employment practices.

The EEOC has been reluctant to suggest a solution to the state protective law problem. Its initial reaction was to suggest that Congress did not intend to disturb those laws "which are intended to, and have the effect of, protecting women against exploitation and hazard."\(^ {179}\) The Commission, however, recognized that some state laws might be used to justify what would otherwise be an unlawful employment practice, and therefore pledged itself, in cooperation with other agencies, to effect the elimination of state laws which were irrelevant and discriminatory rather than protective.\(^ {180}\) Furthermore, the EEOC has consistently demanded that employers, before asserting the necessity of discrimination under state law as a BFOQ basis, seek all available administrative exceptions to the law invoked.\(^ {182}\) Finally, although the Commission for a long while

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\(^{177}\) See notes 63-64 supra and accompanying text.

\(^{178}\) See notes 166-67 supra.

\(^{179}\) Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.1(c) (1968).


\(^{182}\) Guidelines, supra note 179, at § 1604.1(b).

\(^{182}\) The EEOC required a Pennsylvania employer to seek exceptions to the state hours law when this law was invoked as justifying the refusal of an otherwise qualified female's bid. EEOC Decision, CCH GUIDE ¶ 17,304. The Pennsylvania law is somewhat unusual in that it gives the State Secretary of Labor broad discretion to excuse certain employees from the law's coverage. Pa. STAT. ANN. tit. 43, §§ 103-104 (Supp. 1967). Massachusetts has provided similar exemptions on a temporary basis. Mass. Gen. Laws Ann. ch. 149, §§ 53-105 (Supp. 1967). Administratively approved exceptions are frequently provided for contingencies such as emergencies,
avoided any substantive consideration of the state legislation, it has recently announced that it will begin such investigation, and that it will not recognize, as a BFOQ basis, state laws which discriminate rather than protect.\textsuperscript{183}

The EEOC's decision to begin distinguishing between acceptable and unacceptable protective legislation probably stems partly from a realization that its former abstention had been interpreted to mean that the EEOC did not believe Title VII was to have any preemptive effect whatsoever. In \textit{Weeks v. Southern Bell Telephone and Telegraph Company},\textsuperscript{184} the only case which has dealt directly with the continued vitality of protective legislation, the court found nothing in the Act "to indicate that Congress intended to nullify or limit the application of such laws . . . ."\textsuperscript{185} The court further stated that EEOC guidelines "recognize the validity of state protective legislation concerning weight-lifting for women."\textsuperscript{186} The Commission's initial reluctance has been similarly influential in several arbitration decisions, all of which have sustained the state law.\textsuperscript{187}

\textit{e.g.}, COLO. REV. STAT. ANN. \S 80-14-10(2) (1963) ("relaxation permit"), seasonal peaks, \textit{e.g.}, CONN. GEN. STAT. ANN. \S 31-12 (Supp. 1966), or other special conditions, \textit{e.g.}, N.J. STAT. ANN. \S 34:2-28 (Supp. 1967) (night work permitted where adequate facilities and transportation).

\textsuperscript{188}From the middle of 1966 to early 1968, the Commission took the position that in cases involving protective legislation it would merely advise the complainant of his right to bring suit challenging the law. EEOC Release, Processing of Cases Involving State Protective Laws, Aug. 19, 1966, CCH GUID\textsuperscript{e}N 16,900.001 n.2. The stance was justified on the grounds that the Commission's limited powers could not insulate the employer from liability under state law. The EEOC has now reaffirmed its initial guideline published in 1965. Guidelines on Discrimination Because of Sex, 29 C.F.R. \S 1604.1(c) (1968). Under this policy the Commission will recognize only those laws which are designed to protect, and not those laws which discriminate against women. CCH GUID\textsuperscript{e}N 16,900.001.

\textsuperscript{189}Id. at 118; \textit{see} Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332, 364 (S.D. Ind. 1967) (dictum).

\textsuperscript{190}Id. at 118. Recall also the limited application Title VII has to arbitration. \textit{See} note 135 supra.

But see Northwest Airlines, Inc. v. Brotherhood of Ry. \& S.S. Clerks, 66-1 CCH LAB. ARB. AWARDS 4180 (1966), where the arbitrator felt that Minnesota's forty-pound weight-lifting limit could not be invoked to deny a job to a female since (1)
attorney general opinions supporting the laws have also relied partially
upon the EEOC's seeming approval.\textsuperscript{188}

Only the Arizona Civil Rights Commission has forthrightly dissented
from the proposition that protective legislation has not been preempted.
In \textit{Reynolds v. Mountain States Telephone and Telegraph Company},\textsuperscript{189}
the Arizona Commission, which is charged with enforcing that state's fair
employment practice law, held that the state law regulating the hours of
employment for women must yield to both Title VII and the state FEP
law. Reasoning that the protective legislation was an anachronism based
upon the questionable assumption that women are physically inferior to
men, the state commission declared:

\begin{quote}
\textit{The spirit} of [Title VII] is clear. It was enacted to provide equal em-
ployment for all persons, including women. That opportunity is restricted
and prevented by [the state hours law]. We believe that Congress was
not unmindful of the effect of protective legislation on employment oppor-
tunities for women and that it was the \textit{intent} of Congress that [such] legisla-
tion . . . yield to Title VII.\textsuperscript{190}
\end{quote}

Though the legislative history does not provide as ready an answer as
the \textit{Reynolds} case implies,\textsuperscript{191} a number of stronger arguments may be
made in support of the position that Title VII preempts state legislation.
Such a holding would quickly effect changes without the necessity of over-
coming legislative inertia. Further, Congress would be squarely chal-
led to respond if it in fact wished the protective laws to stand.\textsuperscript{192} Fi-
nally, any Congressional reaction would be likely to produce useful dia-
logue as to the ultimate desirability of state laws which regulate the em-
ployment of one sex only.

Other considerations, however, mitigate against judicial invalidation
of state law on preemption grounds. In the first place, the judiciary is
not well equipped to ascertain the necessity of such legislation as com-
pared to a legislative body, which is in a position to make decisions based

\begin{footnotes}
\item[188] E.g., Mo. \textsc{Att'y Gen. Op.} (January 19, 1966), \textsc{CCH Guide} \textsuperscript{¶} 8044; Mo.
\textsc{Att'y Gen. Op. No.} 45 (1967), \textsc{CCH Guide} \textsuperscript{¶} 8136.
\item[189] \textsc{Op. & Ord., Arizona Civil Rights Comm'n, Case No.} 17-12 E (December 2,
1966), \textsc{CCH Guide} \textsuperscript{¶} 8111.
\item[190] \textit{Id.} at 6185 (emphasis added).
\item[191] See notes 173-75 \textit{supra} and accompanying text.
\item[192] See \textit{Note, Pre-emption as a Preferential Ground: A New Canon of Construc-
\end{footnotes}
upon scientific and historical research, and upon informative hearings. But the primary practical reason for the exercise of judicial restraint is that the states themselves have begun to reform their protective laws. Since Title VII's passage, two states, Delaware and Michigan, have repealed virtually all of their protective legislation. Several other states, rather than simply removing the protection, have extended their minimum wage benefits to men. North Dakota has more generally extended its laws regulating labor standards, and apparently Indiana, and Pennsylvania, and apparently Indiana, have repealed former prohibitions against women bartenders. Even Ohio has shown signs of relaxing its strict standards by recently deleting its prohibition against using women as operators of buffing and grinding machinery. South Carolina no longer restricts women from performing night work, and numerous other states have relaxed their hour laws through ameliorative exceptions.

In view of the rapid changes being effected by the state legislatures, it would seem a wise policy for both the EEOC and the courts to continue recognizing state law as a BFOQ basis. The only alternatives to such a course are to investigate each law on an individual basis—a task which the courts are not well equipped to do, or to hold that all such legislation is preempted. Thus, it is suggested that where no administrative exceptions are available and compliance with the state law would make the equal employment of women an unreasonable burden, sex should be considered a BFOQ.

Practical Application of Title VII's Proscription

In addition to ascertaining the abstract meaning of discrimination and the content of the BFOQ exception, there is also the related problem of

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determining how these concepts may be applied in actual employment situations. The actual impact of the discrimination prohibition, for example, will be affected by whether the courts permit employees in different job categories to be compared. Similarly, the breadth afforded the BFOQ exception will depend partly upon whether it may be used to justify benefit, as well as hiring, differentials.

(1) **Discrimination**

An outright refusal to hire or retain an individual, to refer him for employment, or to admit him to union membership because of the individual's sex constitutes the most obvious form of employment discrimination, a stark violation of the very language of Title VII. Equally blatant would be a refusal to compensate him equally because of his sex. Furthermore, discriminatory "hiring" is manifested during the employment relation, insofar as the employee's rights to bidding, promotion, bumping, or recall are limited on the basis of sex, or insofar as his freedom from layoff is restricted on that basis. In addition, Title VII specifically prohibits employment advertising which indicates "any preference, limitation, specification, or discrimination, based on . . . sex."

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201 It is curious that the BFOQ exception for labor organizations is not coextensive with the initially proscribed activities. In section 703(c)(1) labor organizations are forbidden "to exclude . . . from [their] membership . . . any individual because of his . . . sex . . ." 42 U.S.C. § 2000e-2(c)(1) (1964) (emphasis added) (see note 94 supra). On the other hand, the BFOQ exception merely permits labor organizations "to classify" their membership and refer for employment on the basis of sex where sex is a BFOQ. 42 U.S.C. § 2000e-2(e)(1) (1964) (emphasis added) (see note 120 supra). If a union deals solely with an employer who, because of a BFOQ, is justified in refusing to hire women, one wonders if the union would be justified in excluding women from membership altogether. Perhaps the BFOQ exception was drafted under the assumption that all unions would represent bargaining units in which some jobs were open to women. If the drafters did make this assumption, then this provision seems to indicate that they felt the BFOQ was to be very narrowly interpreted. For example, if a union which represents only miners may not exclude women from membership, then this would seem to imply that sex is not a BFOQ for the job of miner—even in the presence of state protective legislation.

The other BFOQ provisions are coextensive with the general proscription of the Act. Employers are forbidden to engage in specifically enumerated activities by section 703(a), but the BFOQ exception permits them "to hire and employ" on the basis of sex where sex is a BFOQ. 42 U.S.C. § 2000e-2(e)(1) (1964) (see note 120 supra). The words "and employ" seem an implicit recognition of the fact that hiring differentials are inextricably linked to differentials in other terms and conditions of employment. The word "employ" connotes more than the initial act of engaging a person's services. The various bases on which one continues to work—the terms and conditions of employment—are included in the term.

203 Where the free play of the seniority system is limited because certain jobs are closed to members of one sex, then it would seem that the employer is guilty of
unless sex is a BFOQ. 203 Correspondingly, the EEOC has stated that pre-employment inquiries are subject to the same limitations. 204

Discriminatory employment practices, however, may be effected by more subtle means than a flat refusal to hire, employ, refer, or admit members of one sex. Discrimination takes place when members of one sex are denied employment for reasons which are not used to deny employment to members of the opposite sex. Typical examples of such differentials include the refusal to hire or employ women who are mar-

"refusing to hire." The label used, however, is not important, since employers are also forbidden to discriminate with respect to terms, conditions or privileges of employment. 42 U.S.C. § 2000e-2(a)(1) (1964). Furthermore, employers are forbidden to "limit" employees in any way which would deprive them of employment opportunities. 42 U.S.C. § 2000e-2(a)(2) (1964). See note 118 supra.

Surplus labor will normally be laid off on the basis of seniority. When alternative jobs are open, senior employees are frequently given the right to "bid" for them, and, as jobs open up after layoff, senior employees are generally recalled first. Bumping situations may likewise give rise to discrimination. "Bumping" is a common type of job displacement whereby an employee laid off on the basis of his departmental seniority may displace—"bump"—an employee in another department who is his junior on the basis of plant wide seniority. If some or all of the junior positions available happen to be restricted as to sex, then members of the disadvantaged sex are limited in their opportunity to bump.

A system utilizing most of these features and restricting jobs on the basis of sex is found in Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332 (S.D. Ind. 1967). See note 160 supra and following text.

203 42 U.S.C. § 2000e-3(b) (1964). The EEOC's original interpretation was that advertisements could not be published in columns classified by publishers under "male" or "female" headings unless (1) the advertisement specifically stated it was open to both men and women, and (2) there was a notice on every other page of the classified section stating that jobs under such headings were open to both sexes. EEOC Digest of Legal Interpretations, October 1965-March 1966, § .03, CCH GUIDE ¶ 17,252.

Widespread non-compliance resulted in a change of policy. Now employment advertising may be placed in columns under the headings "male" and "female," on the theory that such headings merely direct the reader to those jobs which are normally of greater interest to members of one sex. The Commission will consider only the advertisement itself, which, of course, may not specify a sex limitation unless sex is a BFOQ. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.4 (1968).

204 Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.6 (1968). This regulation would seem to be consistent with the Act's prohibition of publishing any notice relating to employment which specifies a sex limitation. "Publish" would not seem to be limited to that which is manifested in writing. Nor need "notice" come in the form of direct statement; it may be conveyed by a sex based rhetorical question. The EEOC of course feels that inquiry as to sex is permissible if made for a non-discriminatory purpose, such as the record keeping required by the Act. See 42 U.S.C. § 2000e-8(c) 1964).
women who are under a certain age, or women who have children, while accepting men with those same characteristics. Furthermore, the possibility that employment differentials are unlawfully based upon sex is not necessarily eliminated merely because the employees being compared occupy different job categories. The outlines of this possibility appear in section 703(h) of the Act, which sanctions different treatment of employees of the opposite sex when such differentiation is made

pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate...

The language of section 703(h) would seem susceptible of two interpretations. On the one hand, it might be read to justify differentials between men and women where (1) they rank differently in seniority, perform different tasks, or work in different locations, and (2) the job structure itself has not been established for the purpose of discrimination. If these conditions are found to exist, the holding should be “no discrimination,” and therefore, no need to determine further whether the difference constitutes a BFOQ. This broad interpretation of 703(h) was apparently accepted in the recent case of Cooper v. Delta Air Lines, Incorporated, which held that it was not discriminatory to require that stewardesses resign upon marriage, even though no similar restriction was imposed upon male employees. Noting that Delta did not employ males as flight cabin attendants, the court stated “[t]he discrimination lies in the fact that the plaintiff is married—and the law does not prevent discrimination against married people in favor of the single ones.”

The court thus refused to compare the treatment of employees in different job categories, assuming that since there are no male flight cabin attendants, any differential between male and female crew members is per se legitimate.

205 Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.3(a) (1968); EEOC Digest of Legal Interpretations, July 1965-October 1965, § .043, CCH Guide ¶ 17,251.
207 EEOC Digest of Legal Interpretations, July 1965-October 1965, § .043, CCH Guide ¶ 17,251.
210 Id. at 783.
211 Flight cabin attendant is, after all, merely a subdivision of the larger job category of crew member. The contention made here is that job categorization should not automatically stop any inquiry into employment differentials between the sexes.
A better interpretation of section 703(h) seems to be that hiring or benefit differentials are permissible only when they are in fact based upon seniority, production, or location, rather than upon sex. Under this view, the question of discrimination would first be answered by comparison of employment qualifications in different job categories. If a sex-based differential between employees in different jobs is discovered, then the employer should bear the burden of showing that the BFOQ exception somehow justifies the differential. One way he might do so is by proving the actual existence of one of the factors listed in section 703(h). Thus, in Cooper, Delta might have been able to show that the marriage differential between pilots and stewardesses was either not based upon sex or was justified as a BFOQ, and the court should have heard evidence on the question.\textsuperscript{212}

While multi-category comparisons may be made in determining the discriminatory nature of other conditions of employment, such comparison is probably impermissible in ascertaining the existence of wage or compensation discrimination. Because of an amendment by Senator Bennett, Title VII provides that wage differences between the sexes are not unlawful "if such differentiation is authorized by the provisions of section 6(d) of Title 29 (the Fair Labor Standards Act of 1938, as amended)."\textsuperscript{213} The wage differentials which are most likely to be considered "authorized" by section 6(d) of the FLSA, which is generally known as the Equal Pay Act of 1963,\textsuperscript{214} are those made pursuant to one of the four exceptions

\textsuperscript{212} Proof that Delta did not terminate the employment of other types of female help, such as secretaries or women pilots, would be evidential of the fact that the no-marriage rule is not based upon sex, but it would not be conclusive. Hiring married women as secretaries would only tend to show that the airline feels that crew members have unique obligations to be punctual or to be flexible for schedule changes—obligations not imposed upon office workers. That the airline may employ a few married women as pilots would only tend to prove that women who wish to acquire employment as married crew members must be very unusual in order to overcome assumptions normally made about them because of their sex.


\textsuperscript{214} The Equal Pay Act of 1963, amending section 6, provides in pertinent part: "No employer having employees subject to [the minimum wage coverage of the Fair Labor Standards Act] shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which meas-
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listed at the end of that Act: seniority, merit, production, or considerations other than sex. The presence of these same exceptions at the beginning of section 703(h) has led one commentator to conclude that in order to give both parts of the statute meaning, the Bennett amendment "must be interpreted to mean that discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act." Such an interpretation would mean that an employee who is protected from sex discrimination with respect to all other aspects of the employment relation would not be protected with respect to his wages unless he was subject to the limited FLSA coverage.

Despite the fact that Senators Bennett and Dirksen, the two original supporters of the hastily-adopted Bennett amendment, have subsequently stated that this anomalous interpretation of Title VII coincides exactly with their original understanding, Senator Clark has disputed this reading, strongly criticizing the use of "ex post facto legislative history." As an amendment to section 6 of the FLSA, the Equal Pay Act coverage extends only to employees "engaged in commerce or in the production of goods for commerce" or to employees who are "employed in an enterprise engaged in commerce or in the production of goods for commerce." The extent of such coverage, explained in Wage-Hour Administrator Interpretations, 29 C.F.R. §§ 800.5-15 (1968), is more narrow than Title VII coverage which affects employees of "employers" who hire 25 or more employees and are "engaged in an industry affecting commerce." See Kirschbaum v. Walling, 316 U.S. 517, 520-23 (1942). Furthermore, the Equal Pay Act is also subject to numerous section 13(a) exemptions under the FLSA. See also notes 28-30 supra and accompanying text.

Nearly one year after Title VII's enactment, and after having read the Berg article, cited supra note 216, Senator Bennett placed a brief in the Congressional Record, explaining "it is not an unlawful employment practice . . . to differentiate on the basis of sex in determining the compensation of white collar workers and other employees who are exempt under the provisions of the Fair Labor Standards Act." Dirksen's statement at the time of the amendment's passage conformed to this anomalous interpretation: "The Fair Labor Standards Act carries out certain exceptions. All that the pending amendment does is recognize those exceptions, that are carried in the basic Act." For Senator Clark's understanding of the Equal Pay Act/Title VII relationship before Bennett offered his amendment see.

218 See note 208 supra and accompanying text.
Though the Bennett-Dirksen interpretation is a possible reading, it does not appear that such an interpretation is necessary in order to give meaning to the Bennett amendment. The Equal Pay Act provides on its face that wage differentials are unlawful when members of one sex are paid at a rate less than members of the opposite sex within the same establishment "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . ." Though job content rather than job title will determine whether such job equality exists, it is clear that the wages of workers doing very different work or working in different establishments will not be compared under the Equal Pay Act in determining first-stage discrimination. Similar standards should be applied under Title VII to all employers, unions, and employment agencies covered by Title VII, and not just to those persons encompassed within the Equal Pay Act's terms. Not only does such an interpretation provide a comfortable reading of the Act; it would also appear to provide a very reasonable standard of comparison. Where job content is different, wages are almost certain to be different. Other job benefit differentials, however, such as smoking or marriage privileges, are more likely to be based upon sex.

222 See Wirtz v. Basic Inc., 256 F. Supp. 786, 790 (D. Nev. 1966). See also 1967 U. ILL. L.F. 202, 203-05 (criticizing the decision on grounds substantially different working conditions were present).
223 The concept of equal work is analyzed by the Wage-Hour Administrator at 29 C.F.R. §§ 800.119 -.132 (1968).
224 Although employees at one establishment need not be within the same "physical plant," the Administrator contends that the legislative history makes it clear that employees at different establishments are not to be compared. See 29 C.F.R. §§ 800.103 -.104 (1968).
225 The proposed interpretation has been suggested by other commentators. Murray & Eastwood, Jane Crow and the Law: Sex Discrimination and Title VII, 34 Geo. Wash. L. Rev. 232, 255-56 (1965). Furthermore, it is in line with the EEOC's interpretation. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.7 (1968).
226 Should the courts adopt the proposed interpretation, they will face the difficult problem of distinguishing between "wages or compensation" and other terms, conditions and privileges of employment. The Wage-Hour Administrator has provided rather detailed guidelines as to the meaning of "wages" under the Equal Pay Act, and they will probably be followed under Title VII interpretation. Generally, wages are payments made to or on behalf of employees as remuneration for employment, including holiday, vacation and premium pay. See generally 29 C.F.R. §§ 800.110, .112-.116 (1968).
(2) The BFOQ Exception

Once having determined that a discriminatory differential exists, courts must then ascertain whether such a differential may be sanctioned by the BFOQ exception. Because the phrase "bona fide occupational qualification" connotes threshold competency, capacity, or initial suitability, there exists a temptation to assume that the BFOQ only justifies discrimination which limits a person's ability to acquire a job, and not benefit differentials once the job itself has been acquired. Such an analysis is somewhat misleading, however, since it fails to recognize the intimate relationship between job benefits and job qualifications. Insofar as the maintenance of a job qualification is a prerequisite to job retention, the qualification simultaneously limits a privilege of employment and creates a condition of that employment. For example, where an applicant must be a non-smoker in order to qualify for a particular job, the qualification thereafter restricts what would ordinarily be a privilege of employment (the right to smoke). The ability to meet the qualification depends upon what the worker is (a non-smoker) as well as upon what the worker is willing to be (a continued non-smoker). Indeed, the most obvious form of job benefit—wages—is basically a function of an initial "qualification": the quality of being willing to work for a given wage. Because the terms and conditions of employment are inextricably linked to those qualifications which the employer initially demands of his employees, the BFOQ exception must necessarily be available to justify benefit differentials as well as qualification differences.

When an employer is employing men and women to perform the same tasks, however, it seems difficult conceptually to maintain that sex is a bona fide occupational qualification which somehow justifies an employment differential, such as a requirement that women—but not men—be non-smokers, or be willing to accept a lower wage. Indeed, the EEOC's position is quite rigid: the BFOQ can never justify sex benefit differentials in such things as insurance benefits, advancement opportunities.

Insurance benefits (life, health, medical or accident) must not be less comprehensive for women than for men, solely on the basis of sex. EEOC Release, June 29, 1966, CCH Guide ¶ 17,303; EEOC Digest of Legal Interpretations, July 1965-October 1965, ¶ .044, CCH Guide ¶ 17,251. Lower benefits for employees who are not the "principal wage earner" in their family, however, are legitimate. G.C. Op. Ltr. Aug. 25, 1966, CCH Guide ¶ 17,304.31; EEOC Release, June 29, 1966, CCH Guide ¶ 17,303. Furthermore, an employer may reject an application based on the insurability of the employee's spouse where "reasonable standards" are used. EEOC Release, June 29, 1966, CCH Guide ¶ 17,303. If the program is arranged with the
opportunities, profit sharing plans, and guaranteed work weeks. Furthermore, the Commission refuses to permit different hiring standards for the same job to be applied to the sexes. It is unclear whether the Commission's position results from its conviction that significant differences between the sexes simply do not exist, or whether it stems from the feeling that the BFOQ exception can only justify total exclusion from employment, rather than benefit/hiring differentials once the initial decision to hire both sexes has been made. If the Commission's position takes root in a conviction that the BFOQ cannot analytically justify such benefit/hiring differentials, then it would seem to be in error. Where an employer refuses to hire or employ married women but willingly accepts married men, it admittedly appears difficult to justify the differential under the BFOQ language. Sex does not seem to be a BFOQ since the employer is perfectly willing to employ single women. This conceptual difficulty may be overcome, however, by recognizing that the employer actually maintains two job categories: unmarried workers and married workers. The employer may justify his no-marriage-for-women rule by proving that sex is a BFOQ for the position of married worker. Just as he would prove that sex is a BFOQ for a job requiring great physical strength, an employer seeking to justify the marriage restriction would argue that a characteristic common to women, such as high absenteeism following marriage, is incompatible with profit-producing job performance, and that avoidance of the cost of discovering the unusual woman who would remain dependable following marriage is reasonably necessary to the normal operation of his business.

(3) Pregnancy

One area of employment differentiation in which there has been a notable lack of any attempt to analyze either the meaning of discrimina-


228 EEOC Digest of Legal Interpretations, October 1965-March 1966, ¶ .04, CCH Guide ¶ 17,252.


231 Different hiring standards are applied when women are refused employment for reasons, such as marital status, which are not used to restrict male employment. See text following note 204 supra.

232 The presentation of this hypothetical example is not meant to imply that the employer could necessarily carry the burden of actually proving that sex is a BFOQ in either case. See notes 123, 154 & 161 supra and accompanying text. Rather, the example is used only to illustrate that, conceptually, the BFOQ exception may justify employment benefit differentials as well as absolute hiring exclusions.
tion or the possibility of BFOQ justification is that of maternity benefits. The EEOC has stated that “since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most employees,” absences due to pregnancy must be accorded “special recognition” in order to provide “substantial equality of economic opportunity for both sexes . . . .”233 The Commission recommends that this special recognition should normally take the form of a leave of absence, except where such a leave would unduly burden the employer. Where a leave is impractical because of the difficulty of holding the job open or of filling it on a temporary basis, then the Commission feels that the employee should be reassigned to similar work upon return or at least given preferential consideration in future hiring.234 Although maternity leaves are to be granted regardless of whether leaves are granted for ordinary sickness or injury, the employer is not obligated to provide the same benefits for a woman on maternity leave that he would for an employee on sick leave.235 Further, the Commission approves compulsory leaves of absence for pregnancy only when the leave begins after a reasonable duration of pregnancy.236

Though the conclusions reached by the Commission seem satisfactory, its “equitable” approach to the problem has frequently failed to find rationalization within the terms of the Act.237 The resulting confusion has led one commentator to suggest that requiring an employer to provide maternity leave is analogous to requiring that a male employee be granted “a leave of absence in order to effectuate an adoption.”238 The analogy seems unsound, however, since women, to be treated without discrimina-

tion, must be permitted to be women. Because the maternal function is so basic to the female biological-cultural role, penalizing the fulfilling of that role seems an undeniable discrimination, at least where men are not similarly required to surrender part of their basic cultural role. The extent to which restrictions may lawfully be placed upon the right to be a mother would seem to depend upon the application of the BFOQ exception.

Where a woman who is capable of performing her job is discharged or compelled to take a leave of absence because she is pregnant, sex discrimination has occurred; she has been eliminated on the basis of a physical condition peculiar to her sex. The situation is analytically no different than where a capable man is eliminated because of a condition peculiar to men, such as spermatorrhea or red-green color blindness. However, since the discrimination consists in elimination on the basis of a condition unique to one sex, the application of the BFOQ exception takes unusual form. Rather than proving that being a man is BFOQ for the job, the employer proves that the absence of the unique sexual condition (e.g., "x" months pregnant) is a BFOQ. This could be done by showing that women who are "x" months pregnant are generally less productive workers, and that, because of the expense of discovering unusual individuals, it is reasonably necessary to base employment practices on such a generalization. The Commission's standards seem to provide the types of limitations which may be placed upon the pregnant female under the "reasonably necessary" criteria of the BFOQ exception.

**Conclusion**

Title VII's sex discrimination proscription, though involving myriad lesser problems, primarily necessitates inquiry into two areas: (1) the meaning of sex discrimination, and (2) the substance of the BFOQ justification. While an overly broad definition of discrimination will result in preferential treatment for one sex, or "reverse discrimination," recognition still must be afforded the fact that discrimination exists insofar as employment standards exclusively favor or penalize one sex.

Though not wholly the source of the logical inconsistencies of the inquiry into the meaning of discrimination, investigation of the BFOQ exception adds difficult policy and factual determinations. In balancing

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239 See notes 110-13 *supra* and accompanying text.
240 See note 98 *supra*. 
the many considerations, either of two basic approaches might be followed. On the one hand, it might be assumed that the Act's purpose was merely to insure that henceforth sex discrimination in employment would be rational and reasonable. Such an interpretation, however, supposes that Congress, lacking confidence in the free play of the market, desired only to deal with irrational and purposeless discrimination, and that the primary objective of the ban was to proscribe employment practices based upon the irrational prejudices of employers. The alternative to this sweeping interpretation of the BFOQ exception is the reading suggested by this comment: Congress, in an attempt to provide greater female employment opportunity outlawed certain forms of profitable, and hence reasonable, sex discrimination. Certainly, the Act's prohibition of racial discrimination contemplates the temporary reduction of profits in the interest of eliminating the discriminatory evil. It would seem that the elimination of sex discrimination should likewise become a cost of business. Under this view, the BFOQ should only be applied to sustain sex-based job qualifications which are probably impossible to eradicate or whose removal would impose too great a financial burden on the employer. Only through such a restrictive interpretation of the BFOQ can the ultimate congressional goal of equal employment opportunity be realized.