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The Pregnant Employee’s Appearance As a BFOQ Under the Pregnancy Discrimination Act

INTRODUCTION

Even prior to the passage of the Pregnancy Discrimination Act of 1978,1 eighteen federal district courts and seven courts of appeals already had decided that employment practices contingent on pregnancy constituted sex discrimination2 under Title VII of the Civil Rights Act of 1964.3 Nonetheless, the United States Supreme Court rejected the lower courts’ interpretation and held,

   The amendment provides:
   The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . .
   For a discussion of case law and legislative history, see Comment, The 1978 Amendment to Title VII: The Legislative Reaction to the Geduldig-Gilbert-Satty Pregnancy Exclusion Problem in Disability Benefits Programs, 27 LOY. L. REV. 532 (1982) [hereinafter cited as Comment, Legislative Reaction].

   Title VII prohibits, inter alia, actions which “deprive or tend to deprive any individual of employment opportunities . . . because of such individual’s . . . sex . . .” 42 U.S.C. § 2000e-2(a)(2). Pregnancy is not explicitly mentioned.

   (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual’s race, color, religion, sex, or national origin; or
   (2) to limit, segregate, or classify his employees or applicants for employment 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.
   Id. § 2000e-2.
   For a discussion of its legislative history, see Miller, Sex Discrimination and Title VII of the Civil Rights Act of 1964, 51 MINN. L. REV. 877, 879-85 (1967) [hereinafter cited as Miller].
in a series of cases,⁴ that not all pregnancy-based classifications constituted impermissible sex discrimination. The difficulty experienced by subsequent courts in determining just when employment policies attributed to pregnancy⁵ were discriminatory prompted legislative response. In 1978, Congress passed the Pregnancy Discrimination Act to clarify its original definition of sex discrimination as it applies to Title VII. The Act unequivocally defines discrimination in the job market based on pregnancy as per se sex discrimination.

Despite Congress’ explicit intent to redefine sex discrimination to include discrimination against pregnant women, the Act left unresolved an important issue: when is a woman’s physical attractiveness, and particularly her sexual attractiveness, so integral to her job that her employer can legally terminate her employment or demand her leave of absence once she becomes visibly pregnant?

This article will focus on this issue. It will first discuss the judicial treatment of pregnancy-related employment policies both before and after the passage of Title VII. Second, an overview of the three Supreme Court cases which led Congress to pass the Pregnancy Discrimination Act will be provided. The article will then examine the primary statutory defense employers have used to defend themselves against charges of employment discrimination based on sex. Finally, the article will present an approach courts should use to determine whether an employee’s physical appearance and sexual attractiveness, defined by the employer as her continuing freedom from pregnancy, should be a sufficient defense to relieve the employer of Title VII’s prohibition against sex discrimination.

⁴ See infra text accompanying notes 37-69. Numerous articles have been written on the cases. E.g., Comment, Three Cases Against Motherhood, 2 GLENDALE L. REV. 313 (1978); Comment, Legislative Reaction, supra note 1; Comment, Sex Discrimination and Insurance Planning: The Rights of Pregnant Men and Women Under General Electric Co. v. Gilbert, 22 ST. LOUIS U.L.J. 101 (1978) [hereinafter cited as Comment, Pregnant Men and Women].

⁵ The Pregnancy Discrimination Act states that the terms “because of sex” and “on the basis of sex” include not only pregnancy but also childbirth and related medical conditions. 42 U.S.C. § 2000e(k) (1976 & Supp. IV 1980).

Pregnancy-based sex discrimination can occur against women whose pregnancies have gone full term or against those whose pregnancies result in early termination. The employer, therefore, is also prohibited from firing or refusing to hire women who have undergone abortions. 29 C.F.R. § 1604.10 app. (1981). The Act does not require employers to pay for abortions that are medically unnecessary. Employers must pay the expenses resulting from abortion only where (1) the abortion is recommended because the mother’s life would be endangered if the pregnancy were allowed to go full term and (2) medical complications result from the abortion. An employer, however, may provide abortion benefits even
THE JUDICIAL APPROACH TO MANDATORY-LEAVE AND EMPLOYMENT-TERMINATION POLICIES BASED ON PREGNANCY

Conflict Among the Circuits

Prior to the passage of Title VII, the federal courts had reached conflicting outcomes when addressing the issue of the constitutionality of employment-termination and mandatory-leave policies based on pregnancy. The Supreme Court granted certiorari in the case of Cleveland Board of Education v. LaFleur and its companion case, Cohen v. Chesterfield County School Board, because of this division. Both cases involved mandatory leaves of absence imposed on teachers after they reached their fourth and fifth months of pregnancy, respectively. The Fourth and Sixth Circuits had reached contrary decisions respecting the constitutionality of the mandatory-leave policies.


6. E.g., deLaurier v. San Diego Unified School Dist., 588 F.2d 674, 681-85 (9th Cir. 1978) (mandatory-leave policies imposed on teachers at the beginning of the ninth month of pregnancy upheld under due process and equal protection attacks); Buckley v. Coyle Pub. School Sys., 476 F.2d 92, 94 (10th Cir. 1973) (school system’s policy of terminating teachers’ employment at the end of the sixth month of pregnancy presented sufficiently substantive constitutional issues to justify a hearing on the merits); Green v. Waterford Bd. of Educ., 349 F. Supp. 687, 690-93 (D. Conn. 1972) (teaching contract provision requiring expectant teacher to apply for and accept leave of absence at least four months prior to expected confinement was not a denial of equal protection), rev’d, 473 F.2d 629 (2d Cir. 1973); Bravo v. Board of Educ., 345 F. Supp. 155 (N.D. Ill. 1972) (mandatory-leave policies for teachers are not a denial of equal protection), rev’d, 525 F.2d 695 (7th Cir. 1975); Pocklington v. Duval County School Bd., 345 F. Supp. 163, 164 (M.D. Fla. 1972) (school board’s policy of demanding teacher’s leave of absence midway through a pregnancy is a denial of due process because an individual teacher is not allowed an opportunity to establish her physical fitness to continue teaching); Williams v. San Francisco Unified School Dist., 340 F. Supp. 438, 443-45 (N.D. Cal. 1972) (school district’s policy that pregnant teachers take a mandatory leave of absence at least two months before birth violated the equal protection clause because it singled out pregnant employees without any rational relationship to the state’s legitimate objectives); Schattman v. Texas Employment Comm’n, 330 F. Supp. 328 (W.D. Tex. 1971), rev’d, 459 F.2d 32, 41 (5th Cir. 1972) (policy of terminating employment of pregnant employees two months prior to delivery does not violate the equal protection clause), cert. denied, 409 U.S. 1107 (1973).

8. Id.
9. Id. at 638.
10. At the time these teachers were placed on mandatory leave, Title VII did not apply to state agencies and educational institutions. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103 (1972), subsequently amended Title VII to withdraw the exceptions. 414 U.S. at 639 n.8.
11. 414 U.S. at 634-38.
The Supreme Court declined this opportunity to bring pregnancy discrimination within the definitional ambit of sex discrimination, finding, instead, that mandatory-maternity regulations placed a constitutionally impermissible burden on the right to bear children\(^1\) and created an unconstitutionally irrebuttable presumption that no woman was able to work beyond some arbitrary date during her pregnancy.\(^2\) The Court resolved the issue on due process grounds\(^3\) and did not reach the equal protection issue raised by the lower courts.\(^4\)

The Court's holding left the school board with a great deal of control over the pregnant teacher's decision to continue working. The board could require advance notice of pregnancy\(^5\) and, subject to some restrictions, could require all pregnant teachers to cease teaching at a fixed date during the final weeks of pregnancy.\(^6\) Moreover, the board could restrict the teacher's return to the school term following delivery.\(^7\) The Court found these employment limitations valid under the due process clause. Justice Douglas, concurring in the result, would have used traditional equal protection standards to uphold such broad class-wide rules for pregnant teachers.\(^8\)

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12. Id. at 639-40.
13. Id. at 644.
14. "[F]reedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." Id. at 639. See also Ackerman, The Conclusive Presumption Shuffle, 125 U. Pa. L. Rev. 761, 771-98 (1977) (discussion of the due process analysis used by the Court).
16. Id. at 643.
17. Id. at 647 n.13. The court in deLaurier v. San Diego Unified School Dist., 588 F.2d 674, 682 (9th Cir. 1978) subsequently used these standards to uphold a mandatory, nine-month maternity-leave policy under an "irrebuttable presumption" attack.
18. 414 U.S. at 648-50.
The passage of Title VII in 1964 gave aggrieved women an alternative theory by which to plead their cases. Actions involving employment-termination and forced-leave policies due to pregnancy fared better under Title VII than they had under a constitutional analysis. Federal courts used a number of rationales to strike down these employment policies. Some courts, following guidelines set by the Equal Employment Opportunity Commission, found mandatory-leave and employment-termination policies to be impermissible sex discrimination when the pregnant woman was physically able to continue her work. Another frequently used approach derived from the disparate impact theory of Griggs v. Duke Power Co. The applicable analysis under this theory is that mandatory-leave or employment-termination

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20. See, e.g., Jacobs v. Martin Sweets Co., 550 F.2d 364, 369-71 (6th Cir.) (constructive termination due to unwed pregnancy is prima facie violation of Title VII), cert. denied, 431 U.S. 917 (1977); Holthaus v. Compton & Sons, Inc., 514 F.2d 651, 653-54 (8th Cir. 1975) (firing an employee for time off from work due to complications arising from pregnancy violates Title VII when other employees were allowed time off without pay for illnesses); Farris v. Bd. of Educ., 417 F. Supp. 202, 205 (E.D. Mo. 1976) (school board’s mandatory-leave policy for pregnant teachers violates Title VII); Schattman v. Texas Employment Comm’n, 330 F. Supp. 328, 329-30 (W.D. Tex. 1971) (involuntary termination because of pregnancy made pursuant to defendants’ maternity-leave policy violates Title VII), rev’d on consti, grounds, 459 F.2d 32 (5th Cir. 1972), cert denied, 409 U.S. 1107 (1973). Contra Condit v. United Air Lines, Inc., 558 F.2d 1176, 1176 (4th Cir. 1977) (airline’s policy of requiring stewardesses to discontinue flying as soon as they learn they are pregnant is consistent with the carrier’s duty to exercise highest degree of care for passengers’ safety), cert. denied, 435 U.S. 934 (1978); Harris v. Pan Am. World Airways, Inc., 437 F. Supp. 413, 419-24 (N.D. Cal. 1977) (airline’s policy of requiring flight attendants to begin unpaid maternity leave upon discovery of pregnancy is not a violation of Title VII because it is a good faith effort on the airline’s part to protect passengers by ensuring flight attendants’ maximum emergency capabilities), aff’d in part, rev’d in part, 649 F.2d 670 (9th Cir. 1980).


22. See Jacobs v. Martin Sweets Co., 550 F.2d 364 (6th Cir.) (defendant company violated Title VII when it terminated unwed pregnant employee due to pregnancy, not work performance), cert. denied, 431 U.S. 917 (1977); Wetzel v. Liberty Mut. Ins., 511 F.2d 199, 206 (3d Cir. 1975) (Title VII requires that a pregnant employee be considered individually on her ability to continue work, not on characteristics generally attributed to pregnant women as a group), vacated and remanded, 424 U.S. 737 (1976); Schattman v. Texas Employment Comm’n, 330 F. Supp. 328, 330-32 (W.D. Tex. 1971) (mandatory-leave policy applied to pregnant women violates Title VII when it is broadly applied to all women instead of being applied on the basis of individual medical or job characteristics), rev’d on consti, grounds, 459 F.2d 32 (5th Cir. 1972), cert. denied, 404 U.S. 1107 (1973).

23. 401 U.S. 424 (1971). The disparate impact theory developed in the context of race
policies based on pregnancy invidiously discriminate against a disproportionate number of women because they are based on a characteristic unique to women.24

Other courts cited the congressional intent behind the passage of Title VII in striking at an "entire spectrum of discriminatory practices."25 These courts enjoined subtle forms of discriminatory practices arising out of stereotyped assumptions as well as blatant forms which expressly singled out women and subclasses of women for disparate treatment. Courts following this approach often utilized a "sex plus" rationale.


In Griggs, the Supreme Court recognized that facially neutral employment policies, e.g., the requirement of a high school diploma, could nonetheless perpetuate the effects of past discrimination. These requirements, although facially neutral and perhaps even instituted in good faith, operated in a discriminatory manner to exclude from employment opportunities a disproportionately large percentage of the protected class. Id. at 430. Courts will thus scrutinize the consequences of a given employment practice to determine whether it operates in a discriminatory manner. If it does discriminate by operation, the employment practice must be shown to be related to job performance in order to avoid Title VII prohibitions. Id. at 431. Accord Albermarle Paper Co. v. Moody, 422 U.S. 405, 425-35 (1975); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803 (1973); Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1257 (6th Cir. 1981); Robinson v. Lorillard Corp., 444 F.2d 791, 797-800 (4th Cir.), cert. denied, 404 U.S. 1006 (1971). See Greenspan v. Auto. Club of Mich., 496 F. Supp. 1021, 1026-33 (E.D. Mich. 1980) for an example of a court's painstaking use of statistics to arrive at the conclusion that certain facially neutral employment practices had a disparate impact on women. See also infra note 66.

24. See, e.g., Wetzel v. Liberty Mut. Ins., 511 F.2d 199, 207-08 (3d Cir. 1975) (applying a separate leave policy for pregnancy and another for all other instances of temporary disability is sex discrimination because pregnancy is a disability found only among women), cert. denied, 424 U.S. 737 (1976); Macnennan v. American Airlines, Inc., 440 F. Supp. 466, 470-72 (E.D. Va. 1977) (airlines “leave-upon-knowledge”-of-pregnancy policy, though it is neutral on its face, violates Title VII because it has an adverse effect on women); Singer v. Mahoning County Bd. of Mental Retardation, 379 F. Supp. 986 (D.C. Ohio 1974) (compelling women to take maternity leave is sex discrimination because it is based on a condition peculiar to their sex), aff'd, 519 F.2d 748 (6th Cir. 1975).

This rationale is often restated in terms of the Satty benefit-burden distinction. See infra text accompanying notes 55-65. See also Thompson v. Board of Ed. of Romeo Community Schools, 526 F. Supp. 1035, 1041 (W.D. Mich. 1981) (mandatory leave policy imposed without consideration of the individual's ability to continue teaching violates Title VII because it burdens women's employment opportunities); Greenspan v. Auto. Club of Mich., 496 F. Supp. 1021, 1054 (E.D. Mich. 1980) (company's mandatory employment-termination policy applied to female employees constitutes sex discrimination under Title VII because it places a significant burden on women's employment opportunities).

In the definitive case of Phillips v. Martin Marietta Corp., the Supreme Court established that section 703(a) of Title VII mandates that equally qualified persons be given equal employment opportunities without regard to sex. Accordingly, an employer could not apply one hiring policy to men with pre-school-age children and a different one to women in the same situation. Because the employment standards were not applied neutrally to both sexes, the employment policy discriminated on the basis of sex. These employment standards could withstand attack under Title VII only if the employer could demonstrate that the existence of conflicting family responsibilities were more relevant to a woman's job performance than they were to a man's.

Courts have subsequently utilized this "sex plus" theory to hold a wide variety of employment criteria applied to one sex but not the other to be impermissible sex discrimination. Employment criteria that burden a person because of immutable characteristics or burden that person's fundamental rights have been struck down under the prohibitions of Title VII. Courts have utilized this rationale to hold that mandatory-leave or termination policies based on pregnancy impermissibly discriminate against women, because pregnancy is a condition peculiar to the female sex. As a whole,

27. Id. at 544.
28. Id.
29. Id.
30. Id.
31. Harper v. Thiokol Chem. Corp., 619 F.2d 489, 492-93 (5th Cir. 1980) (requirement that employee sustain a normal menstrual cycle before she could return to work from maternity leave); Barnes v. Costle, 561 F.2d 983, 990-94 (D.C. Cir. 1977) (male superior's sexual advances constituted sex discrimination); Allen v. Lovejoy, 553 F.2d 522, 524 (6th Cir. 1977) (plaintiff suspended from work without pay when she did not change employment records to show her husband's name rather than her birth-given name); Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971) (female but not male employees discharged upon marriage), cert. denied, 404 U.S. 991 (1971); EEOC v. Sage Realty Corp., 507 F. Supp. 599 (S.D.N.Y. 1981) (requirement that female lobby attendant wear sexually provocative uniform).
the courts were moving in a single direction, holding that employment-termination and mandatory-leave policies based on pregnancy were illegal under Title VII as long as a woman was physically able to perform her job duties safely and effectively.

THE SUPREME COURT CASES

The Supreme Court injected uncertainty into this developing area of law by handing down three decisions in the mid-1970's. Read together, this triad of cases stood for the proposition that not all dissimilar treatment in the job market based on pregnancy classifications constituted prima facie cases of sex discrimination under Title VII. The major impact of these cases was to allow the lower federal courts to enforce Title VII's prohibition on a case by case basis, the same approach the courts had used under a constitutional analysis. In retrospect, the grounds for some of the decisions worked to perpetuate what have been recognized as overly broad myths about pregnant women.34

The first of the three Supreme Court cases, Geduldig v. Aiello,35 came before the Court on a motion to stay pending appeal of the district court's enjoinment of a state statute. The plaintiff had challenged the constitutionality of a provision in California's disability insurance system which dealt with the payment of benefits to temporarily disabled employees.36 The provision excluded from

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*neutral* mandatory maternity-leave requirements affected only one class of employees—females—and had a disparate impact on their employment opportunities, *cert. denied*, 450 U.S. 965 (1981); Singer v. Mahoning County Bd. of Mental Retardation, 379 F. Supp. 986, 988-89 (D.C. Ohio 1974) (discrimination is not to be tolerated under the guise of physical properties possessed by one sex), *aff'd*, 519 F.2d 748 (6th Cir. 1975).

34. deLaurier v. San Diego Unified School Dist., 588 F.2d 674, 678-81 (9th Cir. 1978) (potential dangers to the health of both mother and fetus in the last month of pregnancy, the woman's impaired ability and physical condition (fatigue, increased irritability, awkwardness) to perform "multifarious" teaching duties as the delivery date approaches, and the inability to predict the time of birth justify a mandatory-leave policy imposed on all teachers at the beginning of the ninth month of pregnancy); Schattman v. Texas Employment Comm'n, 459 F.2d 32, 3940 (5th Cir. 1972) (mandatory-leave policy passed constitutional muster because the teacher was discharged not because she was female or pregnant but, rather, because pregnancy was advanced. Women advanced in pregnancy "are frequently given to headaches, little irritable things; their personalities change . . . and they are not only hard to live with but they are hard to employ. . . ."), *cert. denied*, 409 U.S. 1107 (1973); Green v. Waterford Bd. of Educ., 349 F. Supp. 687, 691 (D. Conn. 1972) (mandatory-leave policy for teachers does not infringe on the right to bear children but on the right to decide when to become "physically disabled" and accordingly not able to teach).


36. *Id.* at 486-87. The insurance program was funded entirely from contributions deducted from wages of participating employees; participation was mandatory unless the
the coverage disabilities resulting from pregnancy.\textsuperscript{37} The Court held that the provision did not violate the equal protection clause of the fourteenth amendment.\textsuperscript{38} Rather, the Court found that California had simply chosen to insure some but not all risks.\textsuperscript{39} The Court concluded that the selection of insured risks did not discriminate against either sex in terms of the aggregate risk protection: there was no risk from which men were protected and women were not and none from which women were protected and men were not.\textsuperscript{40} Consistent with the equal protection clause, the Court noted, a state could address a problem on a step-by-step basis, applying a remedy to a selected aspect of the field while simultaneously neglecting others.\textsuperscript{41}

In a short footnote, the Court explained that discrimination based on pregnancy is not sex discrimination.\textsuperscript{42} California’s insurance program simply removed “an objectively identifiable physical condition with unique characteristics” from the list of covered disabilities.\textsuperscript{43} It divided potential recipients “into two groups—pregnant women and nonpregnant persons.”\textsuperscript{44} Furthermore, rea-
sioned the Court, the program's fiscal and actuarial benefits accrued to both sexes; although the first group was exclusively female, the latter included both males and females.

Geduldig gave lower federal courts an obvious rationale for holding that pregnancy-based classifications were not per se discriminatory. Some courts, however, sought to distinguish Geduldig by confining its application to suits brought under the equal protection clause of the fourteenth amendment. Thus, if a plaintiff elected to sue under Title VII, a court might ignore Geduldig, decide the issue on the basis of statutory interpretation and hold that pregnancy-based discrimination was indeed gender discrimination.

45. Id. In summary, the Court stated that because the equal protection clause does not compel the state to create a more comprehensive insurance program than it had, California's insurance plan passed muster even though the state's classification denied benefits on the basis of the sex-unique trait of pregnancy. Id. at 496-97. The Court recognized, however, that a different result would be reached if the distinctions based on pregnancy were a pretext used to discriminate against either sex. Id. at 497 n.20.

46. The Second Circuit's approach in Communications Workers v. American Tel. & Tel. Co., 513 F.2d 1024 (2d Cir. 1975), vacated and remanded, 429 U.S. 1033 (1977) is representative. Plaintiffs brought suit under Title VII, seeking declaratory, injunctive and monetary relief against AT&T for its discrimination against female employees respecting rights, benefits, and privileges afforded women under temporary disability due to pregnancy and childbirth. Id. at 1025-26. While a motion concerning class certification was pending before the district court, the Supreme Court decided Geduldig. The court then requested briefs and heard arguments on the issue of whether the Title VII complaint should be dismissed in light of Geduldig. The district court concluded that Geduldig controlled and dismissed the complaint for failure to state a claim for which relief could be granted under Title VII. Id. at 1026-27.

The district court certified to the appellate court the question of whether Geduldig had established that disparity between treatment of pregnancy-related and other disabilities did not constitute sex discrimination within the prohibition of either Title VII or the fourteenth amendment. Id. at 1027. The Second Circuit restated the issue as whether Geduldig required the complaint's dismissal as a matter of law for failure to state a claim for which relief could be granted under Title VII. Id. The court found that the district court had erred in holding that Geduldig was controlling because Geduldig had involved a challenge under the equal protection clause, not Title VII. Id. at 1028.

The Sixth Circuit Court of Appeals in Satty v. Nashville Gas Co., 522 F.2d 850 (6th Cir. 1975), aff'd, 434 U.S.136 (1977) explained its refusal to find Geduldig (Aiello) controlling as follows:

It is apparent from our reading of footnote 20 that the Court's observations are made in the particular and narrow confines of the state's power to draw flexible and pragmatic lines in the social welfare area. To conclude that the Court's footnote is dispositive of an action brought under Title VII would be to ignore the traditional doctrine that the precedential value of a decision should be limited to the four corners of the decisions' factual setting. The reasoning and policy behind this doctrine are readily appreciated when Aiello is compared with the facts in this case. Here, the question is whether the exclusion by a private employer of
The Supreme Court specifically rejected the lower courts' attempts to distinguish between statutory and constitutional analysis in *General Electric Co. v. Gilbert.* In *Gilbert,* the plaintiffs challenged a disability plan General Electric Company provided to its employees. They alleged that the plan violated section 703(a)(1) of Title VII by paying benefits for nonoccupational sickness and accidents, but denying benefits for absence due to pregnancy.

The Fourth Circuit Court of Appeals had ruled for the plaintiffs, holding that *Geduldig* did not control because the case involved a statutory violation, not a constitutional denial of equal protection. The Supreme Court reversed the lower court, holding that the equal protection analysis of *Geduldig* did apply to Title VII cases. The Court reasoned that because Congress had not defined the term “discrimination” in Title VII, the concepts found in the pregnancy-related disabilities from its sick leave and seniority program is a violation of a congressional statute, essentially, a dissimilar question from the issue before the *Aiello* Court—whether a legislative classification dividing disabilities into two classes for the purposes of a disability income protection program finds a rational basis. It is this very degree of dissimilarity that rejects a blind adherence to footnote 20. To import a different effect to footnote 20 would be to extend the impact of *Aiello* beyond its intended effect.


Other Title VII cases, e.g., Washington v. Davis, 426 U.S. 229 (1976), where the Court held that constitutional standards and Title VII standards are not the same, support this proposition.

47. 429 U.S. 125 (1976).

48. 42 U.S.C. § 2000e-2(a)(1) (1976 & Supp. IV 1980). It provides in pertinent part that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate . . . with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ."


50. *Id.* at 133. *See also* Miller, *supra* note 3, at 879-85 (contains a general discussion of the legislative history respecting the inclusion of the mandate against sex discrimination).

51. 429 U.S. at 35. The Court found no impermissible pretext because pregnancy is often a desired and voluntarily undertaken condition, “not a ‘disease’ at all. . . .” *Id.* at 136. The Court found in these characteristics a neutral basis for the pregnancy exclusion which vitiated any claim of sexually discriminatory pretext. *Id. But cf.* Wetzel v. Liberty Mut. Ins., 511 F.2d 199, 204-05 (3d Cir. 1975) (Congress intended that Title VII eliminate any artificial or arbitrary barrier to employment. Discrimination based on “stereotypes and overly categorized distinctions between men and women” is forbidden by Title VII. A maternity-leave policy that is applied only to women is based on generalizations about the female sex. Such
equal protection case law were relevant to its interpretation. The Court accordingly superimposed the equal protection analysis of *Geduldig* onto the plaintiffs' Title VII sex discrimination claim based on pregnancy. The Court found that sex discrimination does not exist under Title VII unless a plaintiff demonstrates that the allegedly discriminatory pregnancy-based classifications are in fact a pretext for sex discrimination or operate in effect to discriminate against members of one of the sexes.

The effect of *Gilbert* was to overrule other recent cases which had held that employment discrimination against pregnant women did in fact constitute sex discrimination in violation of Title VII. In summary, *Gilbert* left the courts without clear guidelines in determining when employment practices based on pregnancy were in fact instances of sex discrimination.

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52. 429 U.S. at 137. Although the Court indicated that a Title VII violation could be demonstrated in some instances upon proof that the effect of an otherwise facially neutral plan or classification discriminated against members of one of the sexes, the plaintiffs in this instance failed to establish that the selection of compensational risks operated to discriminate against women. *Id.* at 138. The program's fiscal and actuarial benefits accrued to members of both sexes, covering the same category of risks for each. *Id.* Sex discrimination did not occur simply because women disabled by pregnancy did not receive benefits. *Id.* Rather, the plan was merely underinclusive; pregnancy disabilities were an additional risk confined to women. *Id.* at 138-39. Failure to compensate for this risk did not destroy the parity of benefits accruing to both sexes which resulted from the "facially even-handed" coverage of risks. *Id.* at 139. Consequently, the Supreme Court reversed the court of appeals because it found no sex discrimination as that term was defined in *Geduldig* and no showing of sex-based discriminatory effect in violation of § 703(a)(1). *Id.* at 137. In effect, the Court concluded that pregnancy-based discrimination, absent a finding of discriminatory effect, is not discriminatory treatment based on sex. *Id.* Recognizing that only women can become pregnant, the Supreme Court nonetheless reaffirmed that not all pregnancy-based classifications are based on sex. *Id.* at 36. See the dissenting opinion for a summary of the evidence concerning General Electric's history of discriminatory treatment of female workers. *Id.* at 147 (Brennan, J., dissenting).


54. Mitchell v. Board of Trustees of Pickens County School Dist., 599 F.2d 582 (4th Cir. 1978), *cert. denied*, 444 U.S. 965 (1979) illustrates the difficulty courts experienced in conforming with Supreme Court mandates. School officials used knowledge of a teacher's pregnancy to decline to renew her contract for the following year. *Id.* at 583. The district court initially granted the defendant school officials summary judgment under Title VII but then entered judgment for plaintiff on the basis of *Gilbert* and *Griggs*. *Id.* at 584.
In *Nashville Gas Co. v. Satty*, the last of the Supreme Court triad, the Court attempted to correct some of the confusion generated by *Geduldig* and *Gilbert* by attempting to clarify the standard for determining when pregnancy-based classifications constitute sex discrimination. The Supreme Court granted certiorari to decide, in light of *Gilbert*, whether the district court and the court of appeals had properly applied Title VII to Nashville Gas's employment policies respecting pregnancy.

Nashville Gas required all its pregnant employees to take a formal leave of absence without sick pay. Moreover, pregnant employees on such leave lost their accumulated seniority upon their return to work. In holding that the denial of accumulated seniority to employees returning from mandatory pregnancy leave violated section 703(a)(2) of Title VII, the Court qualified *Gilbert* by distinguishing between employee "benefits" and "burdens." Even though *Gilbert* did not require that greater economic benefits be paid to one sex because of its "differing role" in life, the employer's facially neutral seniority policy violated Title VII.

When the Supreme Court reversed *Gilbert*, the district court withdrew its then extant judgment. The court reached a different conclusion of law but retained its conclusions of fact, concluding that the defendants' unwritten policy of the nonrenewal of pregnant teachers' contracts did not constitute gender-based discrimination and was not shown to be gender-based in effect. *Id.* at 585-86. The court of appeals reversed, finding that the district court had read *Gilbert* too broadly. *Id.* at 586.

See also *Harris v. Pan Am. World Airways, Inc.*, 437 F. Supp. 413, 429 (N.D. Cal. 1977) (the court found that *Gilbert* stood for two propositions: (1) exclusion of pregnancy coverage from a general disability insurance program is not per se sex-based discrimination in violation of Title VII and (2) pregnancy-based classifications do not violate Title VII, unless they are either "mere pretexts" for sex discrimination or produce a sex-based effect), *aff'd in part, rev'd in part*, 649 F.2d 670 (9th Cir. 1980); *In re National Airlines, Inc.*, 434 F. Supp. 249, 256 (S.D. Fla. 1977) (pursuant to the Supreme Court holding in *Gilbert* that classifications based on pregnancy are not per se sex discrimination, the court determined whether the defendant's maternity-leave policy constituted sex discrimination). See generally Barkett, *Pregnancy Discrimination—Purpose, Effect, and Nashville Gas Co. v. Satty*, 16 J. OF FAM. L 401 (1978).

57. 434 U.S. at 137.
58. *Id.* at 138.
59. 42 U.S.C. § 2000e-2(a)(2) (1976). This provision prohibits an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would 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."
60. 434 U.S. at 142.
because it deprived women of their accumulated seniority on the basis of their sex by "impos[ing] on women a substantial burden that men need not suffer."61

Despite the Court's ruling, Satty did not establish that all pregnancy-based distinctions were per se discriminatory and violated Title VII on the basis of sex. By framing its holding in terms of the "benefit-burden" dichotomy, the Court indicated that some but not all instances of pregnancy-based classifications violated Title VII. Thus, the federal courts were left to make a case-by-case determination of sex discrimination by finding a discriminatory effect.62 After Satty, it seemed clear that employers could discriminate on the basis of pregnancy so long as they maintained the facial neutrality of their employment policies.63

The Satty decision left still another opening. Even if a plaintiff established a prima facie case of sex discrimination by providing enough statistical evidence for the court to find a sex-based discriminatory effect, an employer could still prevail by demonstrat-

61. Id.

62. The Court's rationale is consistent with its approach to other cases of disparate impact whereby courts have recognized that facially neutral employment requirements can operate in a discriminatory manner to exclude from employment a disproportionately large percentage of the protected class. A plaintiff establishes a prima facie case of disparate impact by putting enough statistical evidence into the record to demonstrate that the challenged practice, although facially neutral because no particular group is singled out for dissimilar treatment, nonetheless excludes a disproportionately large number of a given class. Examples are not hiring an individual unless he or she is 5'10" and weighs 150 pounds, or has a high school diploma. The first requirement effectively eliminates 99% of female applicants. 1 A. Larson, Employment Discrimination § 12.21 at 3-30 (1982). The latter, at one time, eliminated a disproportionately large percentage of blacks. Griggs v. Duke Power Co., 401 U.S. 424 (1971). The business necessity defense is applied to cases of disparate impact. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Dothard v. Rawlinson, 433 U.S. 321 (1977).

63. "Facial neutrality" meant that the employer could separate employees into classes based on pregnancy/non-pregnancy but not based on sex per se. See Geduldig v. Aiello, 417 U.S. 484, 496-97 n.20. Accord General Elec. Co. v. Gilbert, 429 U.S. 125 (1976). The Court's mistaken premise is that pregnancy-based classifications are facially neutral. Although the employment policy does not explicitly refer to sex as such, pregnancy-based employment policies and practices concern a physical characteristic that is exclusively possessed by only one sex. "Such dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination." Geduldig, 417 U.S. at 501 (Brennan, J., dissenting). See also 1 A. Larson, supra note 62, §§ 12.00-12.22.

The recognition that pregnancy-based classifications are in fact sexually discriminatory on their face renders such classifications as instances of disparate treatment, not disparate impact. "'Disparate treatment'... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin." Burwell v. Eastern Air Lines, Inc., 633 F.2d 361, 367 (4th Cir. 1980), cert. denied, 450 U.S. 965 (1981).
ing that the employment policy was motivated by a business necessity. According to the Court, the defendant in Satty had lost by failing to demonstrate that the employment policy resulted from a business necessity. Satty thus made it clear that plaintiffs who alleged pregnancy-based discriminatory treatment had to establish that these pregnancy classifications had a disparate impact on women in order to bring them within Title VII's definitional ambit of sex discrimination. Although Satty indicated that some instances of pregnancy classifications did violate Title VII, the case left the courts without any judicial guidelines in deciding whether a given employment practice was a benefit or burden and accordingly constituted sex discrimination in violation of Title VII.

64. 434 U.S. at 141-43. The Supreme Court developed the business necessity defense because it recognized that facially neutral employment practices may nonetheless operate to render ineligible a disproportionate number of a given class. Griggs v. Duke Power Co., 401 U.S. at 429. Because the Court did not want to insulate this subtle and perhaps even unintentional discrimination from Title VII's remedial action, it held that employment practices which impacted disparately on protected classes were unlawful unless shown to be job related.

65. Nashville Gas Co. v. Satty, 434 U.S. 136, 143 (1977). The Court reaffirmed Gilbert with respect to the denial of sick pay to pregnant employees. As in Gilbert, the Court left open the possibility that the presentation of evidence could indicate that the pregnancy exclusion was a "pretext designed to effect an invidious discrimination against the members of one sex or the other." Id. at 144.

66. Id. at 139-43.

Congress reacted to *Geduldig-Gilbert-Satty* pronouncements by amending Title VII. The amendment, the Pregnancy Discrimination Act of 1978 (PDA), provides that sex discrimination, as defined under Title VII, includes pregnancy discrimination. By defining pregnancy-based discrimination as a per se violation under Title VII, the PDA clarified and reaffirmed Congress' original intent to protect working women against all forms of sex discrimination, including those based on the sex-unique trait of pregnancy. Thus, Congress overturned *Gilbert* and substituted for *Satty's* benefit-burden test a per se finding that pregnancy-based discrimination is a prima facie case of sex discrimination.


70. See Thompson v. Board of Educ. of Romeo Community Schools, 526 F. Supp. 1035, 1039-40 (W.D. Mich. 1981) (the PDA establishes that policies which create classifications or discriminate on the basis of pregnancy are Title VII violations unless the employer establishes a bona fide occupational qualification).


Under the PDA, employment-termination and mandatory-leave policies based on pregnancy are per se sex discrimination and presumptively in violation of Title VII. This redefinition of sex discrimination has a dual effect. First, it enables a plaintiff to establish a prima facie case of sex discrimination if she demonstrates that she was accorded dissimilar treatment because of her pregnancy. She need only demonstrate that she was discharged or forced to take a leave of absence at a time when she was able to perform her job duties safely and efficiently. Once the plaintiff


In Gilbert, the Supreme Court had refused to follow the guidelines because the EEOC’s position conflicted with its earlier pronouncements. 404 U.S. at 141-45. The Court had stated in earlier cases that, although the EEOC guidelines were not administrative regulations promulgated by formal procedures, the guidelines nonetheless constituted the interpretation of the enforcing agency and were accordingly entitled to “great deference.” Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 433 (1971); Phillips v. Martin Marietta Corp., 400 U.S. 542, 545-47 (1971). See generally Comment, The Pregnancy Discrimination Act of 1978 and the EEOC Guidelines: A Return to “Great Deference”, 41 U. Pitt L. Rev. 735 (1980).

73. To help the courts interpret and apply the amendment, the EEOC promulgated amended guidelines. 29 C.F.R. § 1604 (1981). The guidelines state in part the following:

Title VII prohibits discrimination in employment against women affected by pregnancy or related conditions... [W]omen affected by pregnancy or related conditions must be treated the same as other applicants and employees on the basis of their ability or inability to work. A woman is therefore protected against such practices as being fired... merely because she is pregnant.... She usually cannot be forced to go on leave as long as she can still work....

.... Title VII has always prohibited an employer from firing... a woman because of pregnancy or related conditions...

Id. § 1604 app. (1981).


The appropriate model for a prima facie case of discriminatory treatment necessarily varies with the facts of each case. See Texas Dept of Community Affairs v. Burdine, 450 U.S. 248, 253-54 & n.6 (1980); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1225 (9th Cir. 1971); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 232-36 (5th Cir. 1969).

75. When the plaintiff’s disability is in issue, the plaintiff need only demonstrate that she was disabled due to pregnancy, her employment was terminated or she was suspended because of her pregnancy, and others were not so treated when they were disabled by conditions other than pregnancy. Pregnancy-related disabilities must be treated as other temporary disabilities. Holthaus v. Compton & Sons, 514 F.2d 651, 653 (8th Cir. 1975);
has demonstrated a prima facie case of discriminatory treatment, the burden shifts to the defendant to establish a defense.\(^7\)

Secondly, because the PDA redefines sex discrimination to include pregnancy discrimination, pregnancy discrimination cases are disparate treatment,\(^7\) not disparate impact,\(^8\) cases. Accordingly, the employer’s only defense against a finding of sex discrim-

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Evidence that other women were discharged or forced to take leave after an employer learned that they were pregnant establishes a discriminatory policy against pregnant women. Jacob v. Martin Sweets Co., 550 F.2d 364 (6th Cir. 1977) (citing 29 C.F.R. \(\S\) 1640.10(a)), cert. denied, 431 U.S. 917 (1977); Halthaus v. Compton & Sons, 514 F.2d 651, 653-54 (8th Cir. 1975). See generally Comment, Maternity Leave and Employment: Compliance with Title VII Mandates, 33 BAYLOR L. REV. 181 (1981).

The plaintiff does not have to show that the employer’s discrimination against pregnant women is consistent and frequent enough so as to constitute an employment policy. Rather, because Title VII prohibits discrimination against individuals, the employer may be guilty of sex discrimination even though he has discriminated against only one employee. Barnes v. Costle, 561 F.2d 983, 992-95 (D.C. Cir. 1977) (a single instance of sex discrimination may form the basis of a private suit); Doe v. Osteopathic Hosp., 333 F. Supp. 1357, 1362 (D. Kan. 1971) (defendant’s act of discharging an unwed, pregnant employee violated Title VII even though no other known females were discharged due to unwed pregnancy within five years preceding plaintiff’s termination).

76. E.g., Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 253 (1980); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 232 (5th Cir. 1969).

77. Disparate treatment is discriminatory on its face. It is express and blatant discrimination. An employer treats people disparately and less favorably than others when he or she refuses to hire a person solely and expressly on the basis of those characteristics which define one of Title VII’s protected classes of race, color, religion, sex or national origin.

For example, in Dothard v. Rawlinson, 433 U.S. 321 (1977), plaintiff contended that the refusal to hire her for the position of guard in a maximum security prison for men because she is a woman violates Title VII because the refusal is explicitly based on sex. Using a disparate impact theory, the plaintiff argued that 1) a statutory minimum height and weight requirement for prison guards constituted sex discrimination because it eliminated a disproportional number of women from the job and 2) Alabama’s outright refusal to hire women as prison guards constituted sex discrimination.

The Supreme Court upheld the district court’s finding that the application of statutory height and weight requirements did constitute impermissible sex discrimination. Id. at 327-32. In justifying Alabama’s outright refusal to hire women as prison guards, however, the Court noted that the essence of the job was to maintain prison security. A woman’s ability to maintain security in a male penitentiary, housing sex offenders and other male inmates deprived of a normal heterosexual environment was undermined, according to the Court, by her “womanhood.” The Court thereby concluded that being male was a BFOQ, see infra note 82 and accompanying text, for “contact positions” in a maximum security prison. 433 U.S. at 335. For a critical discussion of Dothard, see generally Comment, Title VII: Sex Discrimination and a New Bona Fide Occupational Qualification—How Bona Fide? 30 U. FLA. L. REV. 466 (1978).

78. Before the passage of the PDA, the Supreme Court’s refusal to define pregnancy discrimination as sex discrimination necessitated the use of the disparate impact theory to
Pregnancy Discrimination

ination is that sex is a bona fide occupational qualification (BFOQ) reasonably necessary for the normal operation of the particular business or enterprise.79

The BFOQ is an express Title VII exemption. This defense allows employers to justify the dissimilar treatment accorded to pregnant employees and to openly discriminate on the basis of sex without violating Title VII.80 To establish a BFOQ defense, the employer must persuade the court that all or substantially all members of the disfavored class cannot perform their job duties establish a prima facie case of sex discrimination. See supra note 23. The plaintiff had the burden of putting enough statistical evidence into the record to show that the pregnancy employment practice operated invidiously against women.


[I]t shall not be an unlawful employment practice for an employer to hire and employ employees, . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .


The discussion in this text adheres to the distinction that the statutory bona fide occupational qualification defense applies to disparate treatment cases and that the business necessity defense applies to disparate impact cases.

80. An employer’s BFOQ claim simultaneously admits sex discrimination and attempts to justify it. Although Congress and some courts refer to the provision as the BFOQ “exception,” since it is an exception to Title VII’s general prohibition of sex discrimination, the BFOQ is more accurately described as a “justification” for sex discrimination. Thus, Title VII analysis requires a two-step process: (1) a finding of sex discrimination and (2) if discrimination is found, an inquiry into whether it is justified because the position requires the possession of unique sexual characteristics for successful job performance. If a complainant fails to prove the existence of sex discrimination, then it is unnecessary to inquire further whether a BFOQ exists.

Sirota, Sex Discrimination: Title VII and the Bona Fide Occupational Qualification, 55 TEX. L. REV. 1025, 1026 (1977) [hereinafter cited as Sirota]. Accord 1 A. LARSON, supra note 62,
If the employer succeeds in establishing that the discriminatory policy is a BFOQ exception, then the burden shifts to the plaintiff who must prove that the employer's factual basis justifying the discriminatory policy is merely a pretext for discrimination.  

Most federal courts have interpreted the BFOQ defense narrowly. In attempting to reconcile Title VII’s principle of non-discrimination with the statutory exemption permitting discrimination, courts have required that each person be assessed on the basis of individual capacities, not on stereotyped characterizations generally attributable to a group. Courts have scrutinized...
employers who ostensibly seek to protect women, and particularly pregnant women, from traditionally male tasks for which women are presumed to be physically unfit. 86

In construing the defense, courts have required the employer to prove that only one sex can successfully perform the job. The employer must show that successful job performance requires characteristics belonging to one sex or to the other. 87 Moreover, (5th Cir. 1969) (Title VII requires that individuals be measured for the job on the basis of individual capabilities and not on the basis of characteristics generally attributable to the class).

The Fifth Circuit recognized, however, that an employer may sustain the burden of justifying the discriminatory employment practice by demonstrating the impracticability of an individualized assessment of an employee’s ability to perform the job. Usey v. Tamiami Trail Tours, Inc., 531 F.2d 224, 227-28 (5th Cir. 1976) (citing Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 n.5 (5th Cir. 1969)).

The EEOC guidelines cite the following as examples of stereotyped characterizations: men are less capable of assembling intricate equipment and women of aggressive salesmanship, and a higher turnover rate exists among women than among men. 29 C.F.R. § 1604.2 (1981). But see Dothard v. Rawlinson, 433 U.S. 321 (1977) (a woman’s ability to maintain prison security is directly reduced by her womanhood).

Such stereotyping is sufficiently in the public domain so as not to require any documentation. The following are definitive works discussing the subject. S. Brownmiller, Against Their Will: Men, Women and Rape (1975); S. De Beauvoir, The Second Sex (1952); B. Friedan, The Feminine Mystique (1963); K. Millett, Sexual Politics (1969-1970).

86. The typical fact pattern is the employer’s assertion that women are unable to perform job duties because the duties involve strenuous physical labor and/or long and inconvenient work hours. E.g., Long v. Sapp, 502 F.2d 34, 38-40 (5th Cir. 1974) (the court remanded the case because the evidence, which consisted of the subjective doubts of male co-workers that any woman was capable of performing the work involved, was insufficient as a matter of law to support the finding that the male sex was a BFOQ); Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1224 (9th Cir. 1971) (court rejected defendant’s argument that the job’s strenuous physical demands both as to work hours and the required physical activity rendered the male sex a BFOQ); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 717-18 (7th Cir. 1969) (state laws imposing restrictions on the amount of weight women may lift on the job are in conflict with Title VII where the effect of the law is not to protect but, rather, to subject women to discrimination); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 232-35 (5th Cir. 1969) (privately imposed weight limitations for women are not within the BFOQ exception); Local 246 Util. Workers Union v. Southern Cal. Edison Co., 320 F. Supp. 1262, 1264-66 (C.D. Cal. 1970) (weight lifting restrictions applicable only to women are not permissible under Title VII). See also Powers, The Shifting Parameters of Affirmative Action: “Pragmatic” Paternalism in Sex-Based Employment Discrimination Cases, 26 Wayne L. Rev. 1281, 1292-1301 (1980).

87. E.g., Long v. Sapp, 502 F.2d 34, 39-40 (5th Cir. 1974) (defendants failed to establish that the male sex was a BFOQ for the position of warehouseman because they did not offer objective evidence of the female plaintiff’s physical inability to perform the job’s duties); Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1224-26 (9th Cir. 1971) (defendant failed to establish that the job’s strenuous physical demands render the male sex a BFOQ); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388 (5th Cir. 1971) (defendant failed to establish that the female sex was a BFOQ for the position of airline stewardess), cert. denied, 404 U.S. 950 (1972); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 715-18 (7th Cir. 1969) (defendant’s
courts have said that the statutory language “reasonably necessary” is a business necessity test, not a business convenience test; there must be a correlation between the job description and the essence of the business operation.

The business necessity test focuses on whether the essence of the particular business is undercut by hiring members of both sexes. Thus, the job qualifications cited by the employer as a justification for discrimination must be reasonably necessary for the successful performance of the job. The job qualifications must also be reasonably necessary for the successful operation of the business.

adherence to state guidelines imposing weight limits on the maximum permissible weight to be lifted by women in the course of their employment violated Title VII’s prohibition against the use of broad class stereotypes based on sex and did not constitute a BFOQ; Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 232-35 (5th Cir. 1969) (court rejected contention that women could not muster the strenuous exertion and weight lifting ability required by the job of switchman); Wilson v. Southwest Airlines Co., 517 F. Supp. 292, 302 (N.D. Tex. 1981) (female sex appeal is not a BFOQ for the jobs of flight attendant and airline ticket agent). See also discussion of Dothard, supra note 77. See generally Sirota, supra note 80.

88. Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir.), cert. denied, 404 U.S. 950 (1971) is the seminal case. Because Pan Am. had refused to hire male flight attendants, the issue became whether being female was a BFOQ reasonably necessary to the airline’s normal operations. The court concluded that the essence of the airline’s business was to safely transport passengers, not to perform non-mechanical aspects of the job, e.g., providing reassurance to anxious passengers, giving personalized service and making flights as pleasurable as possible. Id. at 387-88. Therefore, Pan Am. could not exclude all males merely because most males could not perform these non-mechanical aspects as adequately as most women. Id. at 388. Accordingly, the trial court’s finding, that abolishing the airline’s sex qualification would eliminate the airline’s best tool for screening out unsatisfactory applicants, did not pass Title VII muster. Id. at 387. The essence of the business was not undermined by hiring members of both sexes. Pan Am. remained free to evaluate a job applicant’s ability to perform the non-mechanical functions on an individualized basis. Id. at 388.

The Diaz BFOQ business necessity test is not to be confused with the judge-made business necessity defense which operates in cases of disparate impact. See infra notes 23, 64.

89. Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 235 n.27 (5th Cir. 1976). 90. Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 387 (5th Cir.), cert. denied, 404 U.S. 950 (1971), the case which first articulated the business necessity/essence test, required a determination of what constitutes the essence of the particular business. Diaz focused on the employer’s total business operation and not on the particular employment position in question. Another frequently used formulation of the BFOQ exception is the Weeks “all or substantially all” test. See supra note 81; Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 235 & n.27 (5th Cir. 1976) (the court of appeals considered the Diaz essence test to be a judicial refinement of the Weeks test).

One court, relying on Usery, construed the BFOQ defense to be a two-step process: “(1) does the particular job under consideration require that the worker be of one sex only; and if so, (2) is that requirement reasonably necessary to the ‘essence’ of the employer’s business.”
In effectuating Congress' goal to provide both sexes with equal access to the job market, courts have not allowed the prejudices and preferences of co-workers, employers, and customers to justify sex discrimination. The contrary position would undermine Title VII's purpose to overcome stereotyped assumptions about the abilities of the sexes to perform a particular job.

THE ISSUE

The Finding of Sex Discrimination

The PDA's redefinition of sex discrimination now makes pregnancy-based employment practices prima facie violations of Title VII. The Act, however, also raises a question: will the BFOQ defense relieve the employer of Title VII's prohibitions against sex


91. Diaz v. Pan Am. World Airlines, Inc., 442 F.2d 385, 389 (5th Cir. 1971), cert. denied, 404 U.S. 950 (1971). In Diaz, the airline had put into evidence an independent survey indicating that 79% of its passengers preferred female flight attendants. The court held that customer preference could be taken into account only when the preference is based on the business' inability to perform its primary service or function. Id. at 389. See also 1 A. Larson, supra note 62, § 15.40, at 4-29 to 4-32. Larson maintains that the reason why customer preference does not constitute a BFOQ derives from the defense's race discrimination counterpart. In the days of racial segregation, restaurant proprietors often said they themselves would like to serve blacks but would lose most of their white clientele if they did so. See generally Sirota, supra note 80, at 1027-33, 1055-56.

For a thorough discussion of congressional debates, case law, and the position of the Equal Employment Opportunity Commission on the issue of customer preference, see Wilson v. Southwest Airlines Co., 517 F. Supp. 292, 296-302 (N.D. Tex. 1981). The Wilson court recognized that the Diaz court's limited recognition of customer preference applies only where sex or sex appeal itself is the dominant service provided. 517 F. Supp. at 301. Another instance where customer preference may constitute a BFOQ is where the customer desires sexual privacy, e.g., disrobing, sleeping, performing bodily functions in the presence of the opposite sex. 517 F. Supp. at 301 n.23 and cases cited herein. But see 1 A. Larson, supra note 62, § 14.30, at 4-7 (customer preference is to be distinguished from the individual sensitivities and rights of privacy stemming from notions of morality, decency and privacy).

Customer and employee preference is taken into consideration in "hair" or grooming cases. The courts have found that discrimination on the basis of hair length and facial hair does not constitute sex discrimination under Title VII. Accordingly, absent the existence of sex discrimination, courts do not have to inquire into the existence of a BFOQ. See Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084, 1088 (5th Cir. 1975) (the applicability of the BFOQ exception will not be considered until a prima facie case of discrimination based on sex has been established). In Willingham, the court found an
discrimination because the female employee's physical, and particularly her sexual, attractiveness is so integral to her job?

This question cannot be resolved without recognizing the more fundamental issue which underlies the airline attendant cases and, oddly enough, the "pregnant teacher" cases. Unspoken and perhaps unacknowledged in both these kinds of cases is the extent to which society condones the commercial exploitation of human sexuality. The exploitation, in varying degrees and forms, of this


92. The kind of physical and sexual attractiveness in issue is that based on the immutable characteristic of sex. It is captured by terms such as "sexiness" and "sex appeal." This attractiveness does not include employer-imposed dress and grooming codes. Dissimilar grooming standards imposed on male and female employees, such as the requirement of shorter hair length for men than for women or that men shave off beards, do not constitute sex discrimination. Dissimilar application of employment policies on the basis of some characteristic other than immutable or protected characteristics fall outside Title VII's proscription. Willingham v. Macom Tel. Publishing Co., 507 F.2d 1084, 1088 (5th Cir. 1975) (refusal to hire male because of long hair length); Thomas v. Firestone Tire & Rubber Co., 392 F. Supp. 373, 374 (N.D. Tex. 1975) (termination of male employees for refusal to trim hair and sideburns and to shave off moustaches); Morris v. Texas & Pac. Ry., 387 F. Supp. 1232, 1234 (M.D. La. 1975) (male employee discharged for wearing hair in "ponytail"); Bujel v. Borman Food Stores, Inc., 384 F. Supp. 141, 145 (E.D. Mich. 1974) (male employee discharged for refusing to cut long hair); Rafford v. Randle E. Ambulance Serv., Inc., 348 F. Supp. 316, 317-18 (S.D. Fla. 1972) (male employees discharged for refusal to remove beards and moustaches). See supra note 91.

93. See 1 A. LARSON, supra note 62, §§ 15.00, 15.30, at 4-17, 4-23.


A close reading of some of the opinions indicates that school boards were often concerned that school children would perceive the pregnant teacher as a sexual being. The premise from which the Boards operated seemed to be that sex and pregnancy are "dirty."

The records in these cases suggest that the maternity leave regulations may have originally been inspired by other, less weighty, considerations....[T]he rule had been adopted in part to save pregnant teachers from embarrassment at the hands of giggling schoolchildren; the cutoff date at the end of the fourth month was chosen because this was when the teacher "began to show." Similarly, a mandatory leave rule was justified in order to insulate schoolchildren from the
“infusion of sex”\textsuperscript{95} is a common means of realizing a profit. Physical and sexual attractiveness often is a “partial ingredient” of the “distinctive product” offered by business or enterprise.\textsuperscript{96}

The extent to which this sexual component is promoted varies. One extreme is sex-as-sex, exemplified by prostitution\textsuperscript{97} and by other forms of outright sexual gratification. At the other extreme is concealed sexuality.\textsuperscript{98} Between these two extremes is found the employee whose job it is to purvey vicarious or “attenuated” sex\textsuperscript{99} to consumers.

sight of conspicuously pregnant women. One member of the school board thought that it was “not good for the school system” for students to view pregnant teachers, “because some of the kids say, my teacher swallowed a water melon, things like that.”

The school boards have not contended in this Court that these considerations can serve as a legitimate basis for a rule requiring pregnant women to leave work; we thus note the comments only to illustrate the possible role of outmoded taboos in the adoption of the rules.

Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 640 n.9 (1974). Cf. Green v. Waterford Bd. of Educ., 473 F.2d 629, 635 (2d Cir. 1973) (the court characterized the state’s asserted interest of “avoiding classroom distractions” caused by the sight of a pregnant teacher as “almost too trivial to mention. . . . Whatever may have been the reaction in Queen Victoria’s time, pregnancy is no longer a dirty word.”).

95. 1 A. LARSON, supra note 62, § 15.00, at 4-17. For a scholarly discussion of the high societal costs exacted by the commercial exploitation of sex, refer to S. BROWNMILLER, supra note 85.

96. 1 A. LARSON, supra note 62, § 15.10, at 4-19.

97. Id. at 4-3, 4-4.

98. See supra note 94.

99. 1 A. LARSON, supra note 62, §§ 15.00-15.31. Traditionally and until recently, the product of vicarious or “attenuated” sex in this culture has taken the form of sexual exploitation and display of the female body. Id. at 4-19. See also Playboy Club Int’l, Inc. v. Hotel & Restaurant Employees’ & Bartenders’ Int’l Union, 321 F. Supp. 704 (S.D.N.Y. 1971) (on deciding whether the Playboy Bunnies were discharged for their union activities or loss of their “Bunny Image,” the issue of sex discrimination was not even raised); State Div. of Human Rights ex rel. Chamberlain v. Indian Valley Realty Corp., No CS-21209-70 (1970), aff’d per curiam, (New York State Human Rights Appeal Bd.) 38 A.D.2d 890 (1972), reprinted in K. DAVIDSON, R. GINSBURG, H. KAY, TEXT, SEX-BASED DISCRIMINATION 634 (1974) (the board found that the plaintiff’s discharge was due to not fulfilling a condition of her employment; properly wearing her “abbreviated” Little Fox cocktail waitress uniform. The plaintiff had alleged that she was discharged for being flat-chested, and that this constituted sex discrimination); St. Cross v. Playboy Club, App. No. 773 (1971) (New York State Human Rights Appeal Bd.) at 2, reported in Sirota, supra note 80, at 104 & n.102 (plaintiff was discharged for loss of “Bunny Image” when her youthful and fresh appearance matured into a womanly look); Playboy Club Int’l, Inc. v. Hotel & Restaurant Employees’ & Bartenders’, Int’l, Local 1, 74-2 Lab Arb. Awards, 5063 (1974) (Turkus, Arb.) (Playboy Bunnies terminated for loss of “Bunny Image”). Contra Guardian Capital Corp. v. New York State Div. of Human Rights, 46 A.D.2d 832, 360 N.Y.S. 937 (1974) (restaurant owner not allowed to fire waiter in order to hire waitresses and attire them in “alluring” costumes in the belief that the restaurant’s food sales volume would increase), appeal
Physical and sexual attractiveness is a partial factor in any number of jobs. Positions as a waitress, hostess, receptionist, or airline stewardess are obvious examples. Where the employee’s duties involve contact with the public, physical and sexual attractiveness is often either an express or—in most instances—an implied prerequisite for obtaining and continuing to hold a job.

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The Equal Employment Opportunity Commission has used Playboy Bunnies, strippers, and chorus girls as examples of sex as a BFOQ without apparently questioning its "stereotyped characterization" that the purveying of diluted sex means the exploitation of the female body. 1 A. Larson, supra note 62, § 15.10, at 4-18 to 4-19. At least one court has recognized that requiring a female employee, as a condition of her employment, to wear a sexually provocative and revealing uniform is sex discrimination. The employee would not have been required to wear the uniform but for her sex. EEOC v. Sage Realty Corp., 507 F. Supp. 599, 607-08 (S.D.N.Y. 1981).


100. A more extreme example is the cocktail waitress in revealing and sexually provocative clothing. Although variations on the theme exist, e.g., the “Little Fox” cocktail waitress, see supra note 99, the prototype is undoubtedly the Playboy Bunny, described by one court as follows:

[Playboy Clubs International, Inc. (“PCI”) hires many] employees, including young women called “Bunnies,” a term frequently applied to rabbits.* The maintenance in Bunny personnel of an elusive quality known as “the Bunny image” . . . apparently depends upon the physique, attractiveness and beauty of the girl-employee who wears on the job a rabbit-like costume of scanty dimensions, quite unlike the fulsome attire (white gloves and formal dress) worn by the White Rabbit in Lewis Carroll’s Alice in Wonderland. A particular employee’s “Bunny image” has been rated by PCI on a numerical scale as follows: (1) “a flawless beauty;” (2) “exceptionally pretty, perhaps some minor flaw;” (3) “ marginal or having some correctible deficiency, which might be weight [or] a cosmetic problem; something that is not of a more lasting, enduring, permanent nature;” (4) “loss of or the absence of the image requirements to be employed as a bunny” . . .

* "Bunny" is derived from “Bun,” a Scotch word signifying “tail.” The Scots say of a hare that she “cocks her bun.” The word bunny is the diminutive, meaning little or short tail and in this sense is particularly applicable to the rabbit.


101. Larson refers to these jobs as purveying diluted or attenuated sex as opposed to purveying sex-as-sex (prostitution). In the former, the sex element is only a partial ingredient in the product marketed by the particular business, whereas a prostitute markets sex itself. 1 A. Larson supra note 62, § 15.00-15.20, at 4-17 to 4-18.

These examples do not involve the issue of authenticity as, for example, in the theater. The authenticity consideration is triggered when identification with one of the sexes is the
In some instances the purpose of the employee's attractiveness is merely to enhance the business environment. Her presence has "obvious cosmetic effect." In other instances, an aspect of the employee's job is explicitly to procure customers by her attractiveness. Despite these differences in degree, a partial component of the employee's job is sex-linked. Both situations illustrate what could have been acknowledged in the airline-pregnancy and teacher-pregnancy cases: sexuality may be either explicitly recognized or explicitly avoided.

That the gravamen of the employer's concern in some instances is the procurement of customers by the physical, and particularly the sexual, attractiveness of female employees is demonstrated by the fact that the employee is terminated or forced to take a leave of absence once she becomes visibly pregnant. The airline-pregnancy cases illustrate this point. Underlying the various legal and safety arguments is a concern that customers would not find pregnant stewardesses physically and sexually attractive. job's essential requirement. Accordingly, a play producer may insist on a man to play Hamlet and a woman to play his mother. Id. § 15.10, at 4-17 to 4-18. The EEOC considers sex a BFOQ where it is necessary for the purpose of authenticity. 29 C.F.R. § 1604.2(a)(2) (1981).

Larson maintains that a house of prostitution could readily establish that the female sex of its employees is a BFOQ reasonably necessary to the "normal" operation of the business. In this instance, a physical feature unique to one sex is essential to the job's performance. 1 A. LARSON, supra note 62, § 15.30, at 4-24 to 4-26.

These jobs thus require sex-linked and sex-neutral abilities. The aspect of physical attractiveness is sex-linked. Other job aspects, e.g., waiting on tables and serving food and drink are sex-neutral. The requirement of both abilities distinguishes these kinds of jobs from those requiring sex-as-sex. See 1 A. LARSON, supra note 62, at 4-3 to 4-4.

The airlines were always able to avoid framing the issue in these terms by focusing, inter alia, on the high degree of care the carrier owes to passengers. Burwell v. Eastern Airlines, Inc., 633 F.2d 361, 371-72 (4th Cir. 1980), cert. denied, 450 U.S. 965 (1981); Condit v. United Air Lines, Inc., 558 F.2d 1176 (4th Cir. 1977), cert. denied, 436 U.S. 934 (1978); McLenna v. American Airlines, Inc., 440 F. Supp. 466, 472 (E.D. 1977); Harris v. Pan Am. World Airways, Inc., 437 F. Supp. 413, 434-35 (N.D. Cal. 1977), modified, 649 F.2d 670, 676-77 (1980). That the physical and sexual attractiveness of its flight attendants is really the issue at hand is seen perhaps most clearly in Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388-89 (5th Cir.), cert. denied, 404 U.S. 950 (1971), where the airline sought to establish that the female sex was a BFOQ for the position of flight attendant. See 1 A. LARSON, supra note 62, § 15.30, at 4-24 to 4-26. Only recently has an airline come forward and frankly argued...
Because the gist of the employer’s concern is the employee’s perceived loss of physical and sexual attractiveness, not the mere fact of pregnancy, it must first be determined whether the employment requirement of physical, and particularly sexual, attractiveness is discrimination. This employment condition does not constitute sex discrimination so long as it is imposed on both men and women. It becomes discrimination only when it is imposed on some people because of their race, color, religion, sex, or national origin. The discrimination, then, stems not from the innocuous fact that the employer is demanding his employees to be physically and even sexually attractive. Rather, the discrimination results from the imposition of the employment requirement on a class of employees whose salient characteristic brings them within the protective ambit of Title VII. Accordingly, an employer’s requiring physical and sexual attractiveness of women but not of men or vice-versa constitutes sex discrimination because the requirement is attached to the immutable characteristic of sex.


107. When the employment condition is not based upon a characteristic which forms one of Title VII’s classes, the type of discrimination is contingent upon on which class of people the employer imposes the employment condition. Here, the employment condition, physical and sexual attractiveness, is not one of the characteristics protected by Title VII. Accordingly, the employer may require all employees to be attractive without violating Title VII. However, the employment condition is racially discriminatory when it is imposed upon blacks but not upon white employees or upon white but not upon black employees. Similarly, the employment condition is sexually discriminatory when it is imposed upon female but not male employees or, conversely, upon male but not female employees. E.g., Barnes v. Costle, 561 F.2d 983, 989 (D.C. Cir. 1977) (male supervisor’s demand that female employee submit to his sexual advances is not per se sex discrimination but constitutes sex discrimination once it is a condition of employment which he would not have exacted from a male employee); Slack v. Havens, 522 F.2d 1091 (9th Cir. 1975) (defendant’s demand that black employees perform cleaning chores constituted race discrimination because the same work was not required of plaintiffs’ white co-workers); EEOC v. Sage Realty Co., 507 F. Supp. 599, 607-08 (1981) (employer’s job condition that female plaintiff wear a revealing and sexually provocative costume constitutes sex discrimination because this condition would not have been imposed but for her sex). See also Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (Supreme Court vacated and remanded case to determine if family obligations are more relevant to a woman’s job performance than to a man’s). See also supra note 31. An employment condition of physical and sexual attractiveness can also become discriminatory when the employer requires employees to possess only certain kinds of physical features. For example, an employer could require all employees to have blond hair and blue eyes. This requirement is facially neutral because it does not expressly single out any particular class of persons for dissimilar treatment. The employment condition probably constitutes race discrimination, however, under a disparate impact theory, because it operates disproportionately to exclude blacks from eligibility for employment. E.g., Griggs v.
By redefining sex discrimination to include discrimination based on pregnancy, the PDA expanded the application and scope of Title VII. Consequently, employers presumptively violate Title VII on the basis of sex when they impose the additional requirement of freedom from pregnancy onto the requirement of physical and sexual attractiveness. The next step, then, is to determine whether the sex discrimination can be justified as a BFOQ exception.

The BFOQ Defense Against Sex Discrimination

Whether the employer can successfully establish that the employee's physical, and particularly her sexual, attractiveness is a BFOQ exception to sex discrimination is contingent upon the degree to which her physical and sexual attractiveness is integral to her job. Once the employer establishes that the employee’s physical and sexual attractiveness is a BFOQ, the employer can legally terminate her employment or demand her leave of absence once she becomes visibly pregnant unless the employer’s BFOQ exception is shown to be a pretext for discrimination.

Where physical and sexual attractiveness is not an aspect of her job, such as in the teaching profession, the employee cannot be discharged or forced to take a leave of absence from her job once she becomes visibly pregnant as long as she is able to perform her job duties safely and efficiently. Where part of the employee's job is to purvey vicarious or “attenuated” sex, this aspect of the job must be the essence of the business operation in order to constitute a BFOQ exception. The employee’s physical and sexual attractiveness must be reasonably necessary for the successful performance of the job and the successful operation of the business. The employee’s physical and sexual attractiveness, therefore, does not constitute a BFOQ exception where the sexual component of the job is relatively mild in both degree and intensity—merely cosmetic.

Where, however, the dominant purpose of the employee’s job is unabashedly to procure customers by her physical and sexual attractiveness, the employee's physical and sexual attractiveness may be reasonably necessary for the business operation. It is not mere cosmetic discrimination because it is an integral aspect of a business operation. For example, a beauty parlor may reasonably require employees to have physical and sexual attractiveness as part of their job. However, a public library does not have such a requirement, because a library is not in the business of procuring customers.


108. See supra note 82.
110. 1 A. LARSON, supra note 62, § 15.31, at 4-26.
attractiveness, the sexual component of the job is aggressive and outright in both degree and intensity. Here, the sex-linked aspects of the job predominate over the job's sex-neutral aspects. The employee's physical, and particularly her sexual, attractiveness is "reasonably necessary" to the normal operation of the particular business.\(^1\) The employer need only demonstrate that substantially all pregnant women cannot perform the dominant job duty\(^2\) and that only non-pregnant women possess the requisite physical and, in particular, the sexual attractiveness which allows them to procure customers successfully.\(^3\) The employer has thus established that physical and particularly sexual attractiveness, defined as freedom from pregnancy, is a BFOQ. Accordingly, the employer may legally discharge or demand the employee's leave of absence from the job once she becomes visibly pregnant unless the employee can demonstrate that the employer's articulated reasons for the employment requirement are a pretext for discrimination.\(^4\)

**The Anomalous Result**

The application of the BFOQ exception to the employer's requirement that female employees be physically, and particularly sexually, attractive because this characteristic, defined as freedom from pregnancy, is essential to her job brings about a curious result, one which sharply conflicts with Title VII's goal of providing and maintaining equal employment opportunities for women.\(^5\) Congress created the BFOQ defense to be an exception to Title VII's prohibition against sex discrimination. It therefore allows dissimilar employment practices based on sex solely in those instances where one sex and not the other can successfully perform

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111. See Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388 (5th Cir.) (the female sex is not a BFOQ for the position of flight attendant because the non-mechanical, i.e., sex-linked functions were tangential to the essence of the business), cert. denied, 404 U.S. 950 (1971); Wilson v. Southwest Airlines Co., 517 F. Supp. 292 (N.D. Tex. 1981) (in order to recognize sex appeal as a BFOQ for jobs requiring both sex-linked and sex-neutral aspects, the sex-linked aspects of the job must predominate).

112. See 1 A. Larson, supra note 62, §§ 15.10-15.20, at 4-17 to 4-22.

113. See supra note 81. Examples of these types of jobs are the cocktail waitress, the Playboy Bunny, the burlesque dancer, and any other kind of job where the EEOC has recognized sex as a BFOQ. They reach their quintessence in the prostitute. See supra note 99.

114. See supra note 82.

the job, because the characteristics necessary for the job’s performance are possessed uniquely by members of that sex. The BFOQ exception, however, is applied exclusively to women when the employer asserts that the female employee’s physical and sexual attractiveness is so integral to the job that her employment can legally be terminated once she becomes visibly pregnant. Courts are thus being asked to justify discriminatory treatment of pregnant women on the basis that their pregnancy renders them less physically and sexually attractive than other women.

The effect of applying the BFOQ exception to this situation is to disenfranchise women of jobs when they exercise their right to bear children. Courts will thus perpetuate the subtle, unintended, and often residual discrimination which flows from “stereotyped characterizations” which operate to “‘freeze’ the status quo of prior discriminatory practices” by condoning attitudes which continue to view women as marginal workers whose jobs can be divested once they become pregnant. Courts will additionally frustrate Congress’ intent to remove all “artificial, arbitrary and unnecessary [employment] barriers” which discriminate on the basis of sex.

Given this result, courts should scrutinize the effect of terminating women’s jobs once they become visibly pregnant to determine whether it accords with Congress’ intent “to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotyping.” Because treating women as a means of purveying varying degrees of sexual gratification is sex stereotyping, the employer’s asserted justification for the dissimilar

116. See supra notes 88-92 and accompanying text.
119. Id. at 431. Congress has directed the thrust of Title VII to the consequences of employment practices in order to determine whether they operate invidiously on impermissible classifications. Id. Bujel v. Borman Food Stores, Inc., 384 F. Supp. 141, 145 (E.D. Mich. 1974) (“the courts... must be specially vigilant in examining all forms of employer-made rules and regulations that tend to make it more difficult for a woman to get, enjoy or keep a job.”).
treatment of pregnant women should be seen for what it is: a pretext for discrimination. That the ostensibly neutral job requirement of physical and sexual attractiveness divests of jobs a disproportionate number of women—all those visibly pregnant—shows this requirement to be a pretext for discrimination.

Finally, the employer's asserted justification for his dissimilar treatment of pregnant and non-pregnant women is an attempt to establish employer and customer preferences as a BFOQ exception. By asserting that the female employee's physical and sexual attractiveness is vitiated by her pregnancy, the employer is in effect asking the courts to allow customer preferences to determine when women should be forced from their jobs. To disenfranchise women of jobs because employers and customers believe that pregnancy renders them physically and sexually unattractive hardly accords with Title VII's mandate that sex discrimination not be tolerated under the guise of physical properties possessed by one sex.122

CONCLUSION

Congress amended Title VII by passing the Pregnancy Discrimination Act expressly to redefine sex discrimination to include pregnancy discrimination. The PDA clarified and reaffirmed Congress' original intent to protect working women against all forms of sex discrimination, including those based on pregnancy.

Congress left untouched, however, an express Title VII exemption to sex discrimination. This BFOQ defense allows employers to justify their dissimilar treatment toward pregnant employees and to discriminate openly on the basis of sex without violating Title VII. The BFOQ defense, however, was meant to apply to situations where courts had to determine whether characteristics possessed by one sex and not the other were reasonably necessary for the successful performance of the job and normal operation of the particular business. The BFOQ exception, therefore, was not created to allow employers and customers to determine at what point pregnancy should divest women of their jobs when this "objectively identifiable physical condition with unique characteristics" renders them less physically and sexually attractive than nonpregnant females.

Congress' intent in passing Title VII was to provide and maintain equal employment opportunities in the job market for both sexes. The BFOQ exception to Title VII's general mandate of equal opportunity in employment for all allows employers to discharge or demand the leave of absence from visibly pregnant employees when the dominant aspect of the employee's job and the essence of the employer's business are to provide vicarious or "attenuated" sex. Because divesting women of their jobs on the basis of pregnancy does not accord with Congress' intent, the propriety of applying the BFOQ defense to instances of sex discrimination based on pregnancy should be examined to determine whether pregnancy should be removed from this express statutory exception. Race discrimination always has been excluded from the operation of the BFOQ exception. Given that Congress has recognized many similarities between race discrimination and sex discrimination, that both skin color and pregnancy are immutable characteristics, there is legislative support for also bringing the latter outside the reach of the BFOQ exception.

JACQUELINE H. LOWER

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