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Title VII: Sex Discrimination and a New Bona Fide Occupational Qualification--How Bona Fide?

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CASE COMMENTS

TITLE VII: SEX DISCRIMINATION AND A NEW BONA FIDE OCCUPATIONAL QUALIFICATION – HOW BONA FIDE?*

Dothard v. Rawlinson, 97 S. Ct. 2720 (1977)

Plaintiff, a female applicant for the job of prison guard, brought a class action under Title VII of the Civil Rights Act of 1964[1] challenging an administrative regulation promulgated by the Alabama Board of Corrections which placed gender requirements on "contact positions" in maximum security penitentiaries.[2] The regulation stipulated[3] that guards in maximum security facilities who came into close physical proximity with inmates be of the same sex as the inmates.[4] A three-judge district court ruled in the plaintiff's favor,[5]

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1. 42 U.S.C. §§2000e to 2000e-17 (1970 & Supp. V 1975).

2. The plaintiff, Rawlinson, had applied for a position as a prison guard but was rejected because she fell five pounds below the minimum weight requirement. An Alabama statute established a minimum height of five feet, two inches and a minimum weight of 120 pounds for all law enforcement officers. ALA. CODE tit. 55, §373(109)(d) (Supp. 1973). After filing a complaint with the Equal Employment Opportunity Commission, the plaintiff brought a class action under Title VII and the fourteenth amendment challenging the height and weight requirements. While the suit was pending before the district court, the Board of Corrections established Administrative Regulation 204, set forth in note 3 *infra*, and the plaintiff amended her complaint to challenge the regulation as well as the height and weight requirements. 97 S. Ct. at 2724-25.

3. Administrative Regulation 204 provides:

"I. GENERAL

"1. The purpose of this regulation is to establish policy and procedure for identifying and designating institutional Correctional Counselor I positions which require selective certification for appointment of either male or female employees from State Personnel Department registers.

. . . .

"III. PROCEDURE

"8. Institutional Wardens and Directors will identify each institutional Correctional Counselor I position which they feel requires selective certification and will request that it be so designated in writing to the Associate Commissioner for Administration for his review, evaluaton, and submission to the Commissioner for final decision.

"9. The request will contain the exact duties and responsibilities of the position and will utilize and identify the following criteria to establish that selective certification is necessary:

"A. That the presence of the opposite sex would cause disruption of the orderly running and security of the institution.

"B. That the position would require contact with the inmates of the opposite sex without the presence of others.

"C. That the position would require patroling dormitories, restrooms, or showers while in use, frequently, during the day or night.

"D. That the position would require search of inmates of the opposite sex on a regular basis.

"E. That the position would require that the Correctional Counselor Trainee not be armed with a firearm."

4. While the regulation applied on its face to both sexes, the district court found that it was specifically designed to exclude women from positions in male penitentiaries. Mieth v.

holding that because women were employed in contact positions in other male detention centers in the state, the Board of Corrections had failed to meet its burden of proof in attempting to establish that the regulation fell under the bona fide occupational qualification exception of Title VII.[6] On appeal, the United States Supreme Court reversed and HELD, that women would be subject to sexual attack in the violence-prone environment of Alabama male maximum security penitentiaries, thus posing a substantial threat to the maintenance of prison security; the male gender requirement was therefore a bona fide occupational qualification for contact positions in these institutions.[7]

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of sex.[8] The intent of Congress in enacting the law was to

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Dothard, 418 F. Supp. 1169, 1176 (M.D. Ala. 1976). Because males far outnumbered females in the prison population, the regulation operated to bar women from approximately 75% of the jobs in the Alabama prison system. 97 S. Ct. at 2726.

5. Mieth v. Dothard, 418 F. Supp. 1169 (M.D. Ala. 1976). Rawlinson's case was consolidated with the action of another plaintiff, Mieth, who challenged the minimum height and weight requirements (five feet, nine inches; 160 pounds) promulgated by administrative regulation for the job of Alabama state trooper. The district court ruled that the requirements were contrary to the fourteenth amendment. *Id.* at 1180-82. The defendants did not appeal from this portion of the judgment. The district court also invalidated the statutory height and weight requirements challenged by Rawlinson under Title VII. See note 2 *supra*. The court found that the requirements effectively excluded over 40% of women in the population but less than 1% of men and that such requirements had not been shown to be related to job performance. 418 F. Supp. at 1179.

6. 42 U.S.C. §2000e-2(e) (1970).

7. The Supreme Court also sustained the plaintiff's challenge to the statutory height and weight requirements. See note 2 *supra*. The Court held that the plaintiff had established a prima facie case of discrimination by demonstrating that a facially neutral employment criterion, although adopted without discriminatory intent, had a disproportionate impact on women. 97 S. Ct. at 2726. The Court rejected the defendants' contention that in order to establish a prima facie case, the plaintiff should have presented data concerning the height and weight of actual applicants rather than the population at large. *Id.* at 2727. In addition, the Court affirmed the district court's finding that the defendants had failed to rebut the plaintiff's prima facie case because they did not demonstrate that the height and weight requirements were directly correlated with the quality of strength, which the defendants asserted was essential for effective performance as a prison guard. *Id.* at 2728. Justice Rehnquist, joined by Chief Justice Burger and Justice Blackmun, concurred but suggested that the height and weight requirements might have been upheld if the defendants had advanced the appearance of strength, rather than strength alone, as a necessary job qualification. *Id.* at 2731-32. Justice White dissented, contending that there was no convincing reason for believing that a large proportion of actual or serious potential applicants would fail to meet the minimum height and weight requirements and that the plaintiff had therefore failed to establish a prima facie case. *Id.* at 2749.

8. 42 U.S.C. §2000e-2(a) (1970 & Supp. V 1975) provides:
"(a) Employer practices. It shall be an unlawful employment practice for an employer—
"(1) to fail to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's 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."

eliminate arbitrary barriers to job opportunity that measure employees on the basis of alleged group attributes rather than individual capacity.[9] However, the Act creates an exception for employment criteria explicitly based on sex in those instances where sex "is a bona fide occupational qualification [bfoq] reasonably necessary to the normal operation of that particular business or enterprise."[10] When an employment standard that is applied exclusively to members of one sex is challenged as discriminatory, the bfoq exception is available to the employer as a defense.[11] Because it has been held that the burden of proving an exception to a remedial statute falls on the party asserting it,[12] the bfoq clause operates to cast the burden of proof on the employer to demonstrate that the criterion under challenge is reasonably necessary to the functioning of its business.[13]

The bfoq clause was added to Title VII by amendment[14] and was passed without committee hearings; there is consequently little evidence concerning

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The Act was amended in 1972 to extend to public as well as private employers. 42 U.S.C. §2000e(b) (Supp. V 1975).

9. *Equal Employment Opportunity: Hearings on H.R. 405 and Similar Bills Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 88th Cong., 1st Sess. *passim* (1963); H.R. REP. NO. 570, 88th Cong., 1st Sess. 2-3 (1963); 110 CONG. REC. 7246-47 (1964). *See* Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971).

10. 42 U.S.C. §2000e-2(e) (1970) provides:

"(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his 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. . . ."

11. *See, e.g.*, Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 232 (5th Cir. 1969). *See generally* Oldham, *Questions of Exclusion and Exception Under Title VII—"Sex-Plus" and the BFOQ*, 23 HASTINGS L.J. 55 (1971); Note, *Sex Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964*, 1968 DUKE L.J. 671; *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1176-86 (1971) [hereinafter cited as Developments].

12. A. H. Phillips, Inc. v. Walling, 324 U.S. 490 (1945) (exemptions from the Fair Labor Standards Act must be narrowly construed because of the humanitarian remedial character of the legislation).

13. The defense is analogous to that of business need, which was first articulated in Griggs v. Duke Power Co., 401 U.S. 424 (1971). *See* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); *see generally* Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 81-89 (1972). A neutral employment criterion which is fair in form but discriminatory in impact will be upheld if the employer demonstrates that the criterion has a manifest relationship to business necessity. Unlike the business need defense, the bfoq exception is invoked to justify a procedure which is discriminatory on its face. However, the bfoq exception is not available for employment policies that discriminate on the basis of race. See Oldham, *supra* note 11, at 72 n.84; Note, *Height Standards in Police Employment and the Question of Sex Discrimination: The Availability of Two Defenses for a Neutral Employment Policy Found Discriminatory Under Title VII*, 47 S. CAL. L. REV. 585, 602-05, 622-30 (1974).

14. The bfoq exception as originally proposed applied only to religion and nationality. 110 CONG. REC. 2577 (1964). For a discussion of the legislative history of Title VII's ban on sex discrimination, see Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 879-85 (1967).

the degree of proof thought necessary by Congress to sustain the exception.[15] An early district court decision held that the employer's burden was sustained by a showing of good faith.[16] The court ruled that a position reserved for women and handicapped men fell within the bfoq exception because the employer had acted reasonably and with honest purpose in drawing up the job designation.[17] Another district court held that a bfoq had been established for a job requiring the lifting of heavy objects by a showing that attempts to select qualified women would create a risk of danger and inefficiency.[18] In another early district court decision concerning weight lifting restrictions for women, the court adopted the rationality test utilized in scrutinizing legislation under the equal protection clause,[19] holding that there was a reasonable basis, both because of business need and of danger to the women involved, for barring females from jobs requiring the lifting of more than 35 pounds.[20]

Subsequent decisions rejected the assertion that good faith efforts, speculative fears about job safety, or an arguably rational purpose could serve as the basis for a bfoq exception.[21] The most stringent test was adopted by the Ninth Circuit Court of Appeals in *Rosenfeld v. Southern Pacific Co.*[22] The court affirmed a summary judgment for a female plaintiff who had been denied a position on the ground that it involved long hours and arduous activity, including the occasional lifting of more than 50 pounds. The court held that the

15. The example of a legitimate gender specific job offered when the amendment was proposed was that of a female nurse attending an elderly woman patient, 110 CONG. REC. 2718 (1964). An interpretive memorandum written by floor managers of the bill also listed the position of a player on an all male baseball team as an example of the exception. *Id* at 7213.

16. Ward v. Firestone Tire & Rubber Co., 260 F. Supp. 579 (W.D. Tenn. 1966).

17. *Id* at 581.

18. Gudbrandson v. Genuine Parts Co., 297 F. Supp. 134 (D. Minn. 1968). The court held that being male was a bfoq for a warehouse job which involved lifting objects weighing more than 40 pounds, noting that while some women might be capable of performing the job satisfactorily, the selection of an unqualified applicant would pose a safety risk to the woman and her co-workers and would reduce the efficiency of the business. *Id.* at 136. The court was swayed by the defendant's argument that if an employer were required to test each female applicant individually, there would be no reason for the bfoq defense. *Id.* In addition, the court noted that weight lifting restrictions for women had been upheld by many state statutes. *Id.* at 135-36. *But see* cases cited note 37 *infra* for a discussion of subsequent invalidation of state protective legislation.

19. *See* Note, *Classification on the Basis of Sex and the 1964 Civil Rights Act*, 50 IOWA L. REV. 778, 783-88 (1965).

20. Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332 (S.D. Ind. 1967), *rev'd*, 416 F.2d 711 (7th Cir. 1969). The decision was reversed on appeal on the ground that there was no general agreement concerning the maximum weight lifting capacity of women. The court held that applicants had to be considered on the basis of individual capacity.

21. These decisions have made it apparent that the bfoq clause is to be narrowly construed; courts have rarely found that an employment practice falls within the exception. See cases cited notes 37-39 *infra*.

22. 444 F.2d 1219 (9th Cir. 1971). This decision postdated the *Weeks* decision, which articulated the most widely adopted bfoq test. See notes 26-32 *infra* and accompanying text. In *Rosenfeld*, the court distinguished *Weeks* on the ground that it addressed evidentiary matters rather than the question of whether as a matter of law traits generally attributed to one sex could serve as the basis of a bfoq exception. 444 F.2d at 1224. The Ninth Circuit arrived at a narrower test than that formulated in *Weeks*. *Id.* at 1227.

bfoq defense was available for sexual characteristics which are necessary for the performance of a job but not for attributes which merely tend to be correlated with sex. Under this test, the bfoq exception could be utilized for a position, such as that of a wet nurse, which requires characteristics that are an inherent attribute of one sex, or for a position, such as that of an actress, which demands authenticity, but it could not be utilized to justify hiring decisions based on generalized statements about the abilities of one sex.[23] Another court interpreted this test to mean that if one woman was capable of doing the job, the employer could not impose a blanket rule denying consideration of women applicants as a class.[24] Many commentators have rejected this standard as too stringent, arguing that it causes the exception to amount to very little because positions requiring inherent sexual characteristics do not make up a substantial portion of the job market and employment decisions in this area are not likely to be challenged.[25]

The most widely adopted bfoq test was articulated by the Fifth Circuit in *Weeks v. Southern Bell Telephone & Telegraph Co.*[26] The appellate court reversed the district court's determination that a bfoq had been established for a switchman's job which the employer regarded as too strenuous for women.[27] The court held that labelling a job strenuous and excluding females on the basis of stereotypes concerning their lack of strength was insufficient to establish a bfoq.[28] In order for the exception not to swallow the rule, the employer is subject to the burden of proving that he has "a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."[29] Under this test, the employer must provide factual evidence, not assumptions or stereotypes, from which it can be

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23. Such characterizations might be mere stereotypes or generalizations applicable to a substantial number of individual members of the group, but in either case they cannot be relied on in the hiring process because equal opportunity of employment can be achieved only if men and women are denied positions soley upon a showing of individual incapacity. 444 F.2d at 1224-25.

24. Wetzel v. Liberty Mut. Ins. Co., 372 F. Supp. 1146, 1161 (W.D. Pa.), *aff'd*, 511 F.2d 199 (3d Cir. 1974).

25. *See, e.g.*, Oldham, *supra* note 11, at 89. In Oldham's view, the *Rosenfeld* test has rewritten the bfoq clause to encompass those characteristics "absolutely" rather than "reasonably" necessary for the conduct of a business and does not conform to the exceptions originally envisioned by Congress. *Id.* See note 15 *supra*.

26. 408 F.2d 228 (5th Cir. 1969).

27. A female plaintiff applied for a promotion to the position of telephone switchman, but the job was given contrary to company rules to a man with less seniority. *Id.* at 231. The district court held that the employer had sustained its burden of proof under the bfoq exception by showing that the job required the regular lifting of objects weighing more than 30 pounds, being on call 24 hours a day, and working alone during the middle of the night. Weeks v. Southern Bell Tel. & Tel. Co., 277 F. Supp. 117 (S.D. Ga. 1967).

28. The court also noted that labeling a job dangerous could not serve as the basis for excluding women. Title VII gave women the right to choose hazardous occupations if they wished. 408 F.2d at 236. *Cf.* Cheatwood v. South Cent. Bell Tel. & Tel. Co., 303 F. Supp. 754, 758 (M.D. Ala. 1969) (existence of on-the-job danger could not serve as the basis for a bfoq because the danger was not functionally related to sex).

29. 408 F.2d at 235.

inferred that sex is a necessary job qualification.[30] Such evidence must establish that all or substantially all members of the same sex[31] will not be able to perform the job adequately.[32] Applying this standard in a subsequent case, the Fifth Circuit held that testimony based on the subjective doubts of male co-workers about the ability of women to perform the job was insufficient as a matter of law to establish a bfoq.[33] The *Weeks* test requires objectives evidence; although subjective doubts might eventually be born out by objective data, until then they cannot serve as the basis for a bfoq.[34]

Utilizing the *Weeks* standard of proof, the federal courts have rarely sustained a bfoq defense.[35] In most cases, the defense has been disallowed be-

30. The court noted that the employer had relied on the assumption that all or substantially all women were incapable of safely lifting 30 pounds rather than introducing factual evidence concerning the actual lifting abilities of women. *Id.* at 235-36.

31. In contrast to the *Rosenfeld* test, if the employer could show that a characteristic correlated with sex would keep substantially all members of one sex from performing the job adequately, a bfoq could be established. See text accompanying notes 22-23 *supra*. The *Weeks* court allowed the employer to present factual evidence concerning the abilities of the members of one sex. Under *Rosenfeld*, evidence concerning attributes correlated with sex was barred as a matter of law. *See* Note, *supra* note 13, at 624. In terms of actual results, however, the *Weeks* test did not make it substantially more likely that a bfoq would be established. See notes 36-39 *infra* and accompanying text.

The Fifth Circuit elaborated on the *Weeks* test in Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971), holding that even if all or substantially all persons of the same sex were unable to perform the requisite duties, a bfoq could be established only when an essential function of a business operation would be undermined unless one sex was hired exclusively. In reversing a lower court decision that being female was a bfoq for the position of flight cabin attendant, the court ruled that the essential function of an airline was to provide safe transportation and that any alleged inability of men to cater to the psychological needs of passengers was tangential to this function. *Id.* at 388. The court also held that customer preference could be taken into account only if it resulted from the employer's inability to perform its essential function. *Id.* at 389.

32. The court suggested in dictum that an employer could meet its burden of proof even though it had not shown that substantially all women were unqualified if it could demonstrate that dealing with women applicants on an individualized basis would be highly impracticable. 408 F.2d at 235 n.5. One commentator has criticized *Weeks* for failing to require an automatic showing that individualized testing is impossible. If substantially all members of one sex are unqualified, there are nevertheless a few who are capable of performing the job satisfactorily; these few ought to be considered for employment unless individualized testing would be too costly. *Developments*, *supra* note 11, at 1179-80.

33. Long v. Sapp, 502 F.2d 34, 40 (5th Cir. 1974). In this case, male co-workers testified that they doubted a woman could perform a warehouse job which involved lifting, but no objective evidence was presented concerning the physical abilities of women. *Id.* Although suit was brought under the Civil Rights Act of 1871, the court stated that the bfoq defense would nevertheless apply because sex discrimination was involved. *Id.* at 39 n.2.

34. *Id.* at 40.

35. While customer preference has ordinarily not been regarded as a justification for the bfoq exception, the courts have indicated that they would be willing to allow the defense when customers object to infringements on personal privacy or intimacy. *E.g.*, Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719, 727 (5th Cir. 1970) (dictum that customer preference in assigning male orderlies to male patients is allowable under the bfoq exception). However, one district court has held that privacy concerns will not automatically lead to the establishment of a bfoq because it must be weighed against the countervailing interest in equal opportunity of employment in the light of the particular facts of the case. Fesel v. Mason Home

cause of the employer's failure to present any empirical evidence[36] demonstrating that a sex restriction is job related.[37] In other instances, employers have come forward with objective data but the exception has been held inapplicable because the evidence failed to establish that all or substantially all members of the same sex would be incapable of adequately performing the job.[38] In

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of Del., Inc., 428 F. Supp. 573 (D. Del. 1977) (male nurse applied for a position tending elderly women patients; summary judgment for the employer denied). Privacy can often be insured without denying employment opportunities to one sex by the use of selective work responsibilities when only some of the duties would involve infringement on personal privacy. Reynolds v. Wise, 375 F. Supp. 145 (N.D. Tex. 1973) (women prison guards can be excluded from conducting body searches of male inmates). *See also Developments, supra* note 11, at 1183-85.

The bfoq defense has been upheld for a grooming code requiring short hair for male employees on the ground that it has a demonstrable relevance to customer preference and hence to job performance. Boyce v. Safeway Stores, Inc., 351 F. Supp. 402 (D.D.C. 1972). This rationale runs counter of the *Diaz* test, which recognizes customer preference as a factor only when it relates to the inability of a business to perform its essential function. See note 31 *supra*. Subsequent decisions upholding grooming codes for men have done so on the basis that hair length is not an immutable characteristic and hence does not fall within the scope of Title VII. *E.g.*, Baker v. California Land Title Co., 507 F.2d 895 (9th Cir. 1974); Dodge v. Giant Food, Inc., 488 F.2d 1333 (5th Cir. 1973). *See generally* Katz, *Personal Appearance Regulations in Public Contract Jobs Under Title VII of the Civil Rights Act of 1964*, 1976 ARIZ. ST. L.J. 1, 6-7, 11-13.

The guidelines of the Equal Employment Opportunity Commission regard sex as a bfoq for jobs which require authenticity, such as that of an actor. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. §1604.2 (1976).

36. In many instances, employers have relied on nothing more than stereotypes, speculative assumptions, or make weights. For example, one employer claimed that a job which involved rural canvassing could not be filled by women because the position might require changing tires and necessitated travel in areas where access to restrooms would be limited. Cheatwood v. South Cent. Bell Tel. & Tel. Co., 303 F. Supp. 754, 758 (M.D. Ala. 1969).

37. Failure of the employer to come forward with empirical evidence has served as the basis for disallowing the bfoq defense with respect to such factors as mandatory maternity leave (Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199 (3d Cir. 1974); Newmon v. Delta Air Lines, Inc., 374 F. Supp. 238 (N.D. Ga. 1973); Schattman v. Texas Employment Comm'n, 330 F. Supp. 328 (W.D. Tex. 1971), *rev'd on other grounds*, 459 F.2d 32 (5th Cir. 1972)); unwed pregnancy (Doe v. Osteopathic Hosp. of Wichita, Inc., 333 F. Supp. 1357 (D. Kan. 1971)); and marital status (Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971)). *But see* Cooper v. Delta Air Lines, Inc., 274 F. Supp. 781 (E.D. La. 1967) (no discriminatory effect in a policy that was directed to a specified group within one sex). This approach was first rejected by the Supreme Court in Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971), and then approved in General Elec. Corp. v. Gilbert, 429 U.S. 125 (1976). See note 40 *infra*.

Likewise, state protective legislation limiting women's hours or setting weight lifting restrictions has been struck down for lack of empirical evidence concerning job relatedness. *See, e.g.*, Vogel v. Trans World Airlines, 346 F. Supp. 805 (W.D. Mo. 1971); LeBlanc v. Southern Bell Tel. & Tel. Co., 333 F. Supp. 602 (E.D. La. 1971), *aff'd*, 460 F.2d 1228 (5th Cir. 1972); Ridinger v. General Motors Corp., 325 F. Supp. 1089 (S.D. Ohio 1971), *rev'd on other grounds*, 474 F.2d 949 (6th Cir. 1972); Kober v. Westinghouse Elec. Corp., 325 F. Supp. 467 (W.D. Pa. 1971), *aff'd*, 480 F.2d 240 (3d Cir. 1973); Local 246, Util. Workers Union v. Southern Cal. Edison Co., 320 F. Supp. 1262 (C.D. Cal. 1970); Richards v. Griffith Rubber Mills, 300 F. Supp. 338 (D. Ore. 1969). *See generally* Oldham, *Sex Discrimination and State Protective Laws*, 44 DEN. L.J. 344 (1967).

38. *E.g.*, Cheatwood v. South Central Bell Tel. & Tel. Co., 303 F. Supp. 754 (M.D. Ala. 1969). The job for which the employer sought to establish a bfoq involved lifting objects

limiting the application of the bfoq defense, the courts have stressed that, under the mandate of Title VII, applicants may be rejected only upon a showing of individual incapacity.[39]

Although the lower courts have rarely upheld the bfoq defense, the instant case constitutes an exception. In what marks the first Supreme Court ruling on the matter, the majority adopted the *Weeks* test and went on to find that under the circumstances of the case a bfoq had been established.[40] Quoting *Weeks*, the Court stated that the bfoq clause was intended to be a very narrow exception which could not be invoked by stereotyped characterizations, but held that under the specific facts of the instant case the district court had erred in ruling that the employer had failed to sustain its burden of proof under the exception.[41] The majority based its decision on the brutal atmosphere which characterized male maximum security prisons in Alabama.[42] The record showed that these institutions, the "jungle atmosphere" of which had been the subject of a successful constitutional challenge in a lower federal court,[43] were marked by inordinate violence and an inadequate staff.[44] Sex

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weighing an average of 60 pounds. Medical experts testified that physiological differences between men and women rendered men somewhat more efficient at performing the work. However, the plaintiff's expert witness testified that 25-50% of women were capable of performing satisfactorily, and the court ruled that the defendant had failed to show that all or substantially all women were unqualified. *Id.* at 758-59.

39. *E.g.*, Gillin v. Federal Paper Board Co., 479 F.2d 97, 102 (2d Cir. 1973), *citing* Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1225 (9th Cir. 1971); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).

40. The Supreme Court appeared to affirm the *Weeks* test in Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971), although it did not actually rule on the bfoq exception. The Court reversed a lower court finding that an employer's policy of not hiring women with preschool children failed to constitute sex discrimination, but it stated that a demonstrable showing that family obligations affected the job performance of women could serve as the basis for a bfoq. *Id.* at 544. Justice Marshall concurred in the decision but appeared to adopt the *Rosenfeld* test, stating that a bfoq could be established only for physical differences possessed by one sex, not for differences in performance correlated with sex. *Id.* at 545-47. The Fifth Circuit had affirmed the district court's judgment in favor of the employer, but it had not applied the *Weeks* test because the employer relied on the argument, which the Supreme Court rejected, that no illegal discrimination had occurred. The Fifth Circuit held that Title VII had not been violated because only women with small children, not women in general, suffered discrimination. Phillips v. Martin Marietta Corp., 411 F.2d 1, 2-4 (5th Cir. 1969). *See generally* Note, *The Mandate of Title VII of the Civil Rights Act of 1964: To Treat Women as Individuals*, 59 GEO. L.J. 211 (1970).

41. 97 S. Ct. at 2729.

42. The district court had ruled that the defendant's use of women in contact positions in other correctional institutions in the state belied the contention that women could not serve satisfactorily in such positions in maximum security facilities. Mieth v. Dothard, 418 F. Supp. 1169, 1184 (M.D. Ala. 1976). In the view of the Supreme Court, the district court had erred in failing to distinguish between conditions in minimum and maximum security facilities.

43. Pugh v. Locke, 406 F. Supp. 318, 325 (M.D. Ala. 1976). Inmates brought class actions on behalf of all prisoners in the Alabama correctional system seeking a declaratory judgment and injunctive relief on the ground that conditions in the state penitentiaries violated the eighth and fourteenth amendments. The court sustained the challenge, holding that the penitentiaries were overcrowded, violent, unsanitary, and lacking in rehabilitative or recreational facilities. Inmates lived in constant fear of violence, with physical and psychological

offenders, who constituted approximately 20 percent of the prison population,[45] were housed with other inmates, and the open dormitory living arrangements facilitated inmate access to prison guards.[46] Under these conditions, the majority believed that female guards would be subject to sexual attack because of their gender. The Court emphasized that this conclusion rested on the testimony of expert witnesses from both sides who attested to the increased risk to females posed by this kind of environment.[47] The existence of risk was corroborated in the majority's view by evidence that attacks on women had occurred in the Alabama prison system.[48]

In a dissenting opinion, Justice Marshall criticized the majority for focusing on a speculative threat to prison security ostensibly posed by the gender of female guards.[49] Justice Marshall asserted that the majority had failed to present evidence to support its conclusion that women guards would be more subject to assault due to their sex.[50] He noted that the two incidents of violence cited by the majority involved a clerical worker and a student visitor rather than trained female guards experienced in handling inmate disturbances.[51] The dissent pointed out that the very nature of employment within a prison subjects all quards, regardless of their sex, to the risk of inmate attack.[52] In addition, the dissent rejected the majority's reliance on the unique conditions of Alabama's penitentiaries as the basis for excluding women from contact positions.[53] If male guards were unable to maintain control in this environment, the dissent failed to see how the presence of female guards would create a condition that did not already exist.[54] In Justice Marshall's view, the ma-

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deterioration a virtually inevitable consequence. The court issued a series of orders to reduce the overcrowding, upgrade the facilities, and implement a classification system to segregate the violent and the mentally disturbed.

44. 97 S. Ct. at 2730.

45. *Id.* at 2729.

46. *Id.* at 2730.

47. *Id.*

48. The majority sought to eschew the notion that it acted from a paternalistic desire to shield women from hazardous occupations. Ordinarily, the majority noted, Title VII mandated that women be allowed to decide for themselves whether to accept the risks inherent in dangerous occupations. See note 28 *supra*. In the instant case, however, more was involved than the safety of individual female employees. The vulnerability of female guards to sexual attack would have an adverse impact on their ability to maintain prison security, which is the very essence of the occupation. 97 S. Ct. at 2729-30.

49. 97 S. Ct. at 2733.

50. *Id.* at 2735.

51. *Id.* at 2734 n.3.

52. Because guards are generally unarmed and are greatly outnumbered by the inmates they supervise, they have to rely primarily on psychological resources such as common sense, fairness, and emotional stability in order to meet the dangers inherent in their work. Such qualities, the dissent noted, were not unique to one sex. *Id.* at 2733-34.

53. *Id.* at 2734. The dissent also objected to the court's treatment of constitutionally intolerable conditions in Alabama penitentiaries as "normal operation" under the bfoq clause and the resulting justification for sex discrimination because it was reasonably necessary to such a normal operation. *Id.* at 2733.

54. The dissent's solution to attacks on prison guards was not to limit the employment opportunities of the individuals who were assaulted but to punish the offending inmates with severity and dispatch. *Id.* at 2735.

jority's finding that women would be particularly vulnerable to sexual assault in this environment both derived from and served to perpetuate the stereotype "that women, wittingly or not, are seductive sexual objects."[55]

While the instant case affirmed the *Weeks* standard regarding the burden of proof necessary to sustain the bfoq exception, the majority ignored an important aspect of that standard. Because female guards were held to be more vulnerable to assault due to their sex, the majority opinion observed the requirement that all or substantially all women, not simply a large majority, had to be shown incapable of effectively performing the duties of the job.[56] However, the Court failed to abide by the criterion that the establishment of a bfoq requires the presentation of factual evidence rather than the invocation of assumptions or stereotypes.[57]

The defendants' only evidence was testimony from its own employees, all male, that female guards would be vulnerable to sexual assault.[58] As the dissent pointed out, the two actual incidents cited in support of this proposition each involved women who were not trained as guards.[59] While the majority noted that the plaintiff's expert witnesses also expressed doubts about sending women into the kind of environment which characterized Alabama's maximum security penitentiaries, that testimony likewise rested on inference rather than hard data.[60] No empirical studies were offered into evidence concerning the per-

55. *Id.* at 2734. The dissent also noted that the Board of Corrections had expressed concern for the privacy of inmates. That concern was lame, in the dissent's view, because female guards were already allowed inside minimum security prisons. The dissent noted the irony of the Board of Corrections assertion of the right to privacy of maximum security inmates whose personal freedom was more highly infringed upon than any other inmates in the Alabama correctional system. Moreover, even if such a concern for privacy were made in good faith, the dissent suggested that it could be dealt with by rearranging work assignments rather than by denying women equal opportunity of employment. *Id.* at 2735 n.5. See note 35 *supra.*

56. All women were disqualified because of the alleged physical attributes of their sex, thus meeting even the *Rosenfeld* requirement that a bfoq be based on inherent physiological characteristics. See text accompanying notes 22 & 23 *supra.* The Court held that the sex of female guards would affect their ability to carry out the essence of their occupation, which was the maintenance of prison security. 97 S. Ct. at 2729-30. Under the test articulated in *Diaz,* had the threat of sexual attack undermined a woman's ability to perform duties that were tangential to the essense of the business operation, no bfoq could be sustained. See note 31 *supra.*

57. The lack of factual data was reflected in the language of the opinion. At one point the majority stated "A woman's relative ability to maintain order in a male, maximum security, unclassified penitentiary of the type Alabama now runs *could be* directly reduced by her womanhood." 97 S. Ct. at 2730 (emphasis added).

58. The Fifth Circuit has held that this kind of speculative testimony from co-workers is insufficient as a matter of law to establish a bfoq. See text accompanying notes 33 & 34 *supra.* The testimony of the defendants' witnesses was replete with stereotypes concerning the weakness of women, their lack of authority as mother figures, and their inability to carry their own weight on the job. *E.g.,* Record at 111, 263, 296, 301.

59. 97 S. Ct. at 2734 n.3.

60. One of the plaintiff's expert witnesses testified that the risk of sexual assault would be negligible and that there was no reason why women could not be utilized effectively in contact positions in Alabama penitentiaries. Record at 84. Another expert witness testified that he would have serious doubts about placing women in a penitentiary marked by a general breakdown of security. *Id.* at 189, 195-97. However, he also stated that given his lack of

formance of female guards in conditions similar to those existing in Alabama's male maximum security facilities.[61] In the absence of such data, the Court nonetheless found that a bfoq had been established, although lower court decisions applying the *Weeks* test had refused to do so in the face of a similar lack of empirical evidence.[62] In effect, the instant decision lowered the burden of proof required of the employer to qualify for a bfoq exception.[63]

In reducing the burden of proof in this manner, the majority may have been influenced by an approach developed in several lower court decisions dealing with the establishment of employment qualifications for positions involving a high risk of harm to the public.[64] In a race discrimination case instituted by an applicant for the position of airline pilot,[65] the Tenth Circuit ruled that if a job demanded a high degree of skill, and filling the position with an unqualified applicant would expose the public to great risk of harm, the employer would be held to a lower burden of proof[66] in establishing that an employment standard was related to business need.[67] Similarly, in an age discrimination case[68] challenging age limits for applicants for positions as bus

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familiarity with the Alabama penal system, he was unable to prescribe policies the state should adopt. *Id.* at 224.

61. Judge Johnson, who found the conditions in Alabama penitentiaries constitutionally intolerable and issued the court order requiring their reform (Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976); see note 43 *supra*), was one of the three judges sitting on the bench of the district court which held that no bfoq had been established in the instant case. Mieth v. Dothard, 418 F. Supp. 1169 (M.D. Ala. 1976) (per curiam). Judge Johnson, intimately familiar with the situation in Alabama penitentiaries, concluded that women could perform satisfactorily in this environment. *Id.* at 1185.

62. See cases cited notes 37 & 38 *supra.*

63. In effect, the burden of providing empirical evidence concerning women's qualifications generally for the job was thrust upon the plaintiff. However, once a prima facie case of discrimination was established, it was the employer's burden to provide a factual showing that all or substantially all women would not be qualified. See notes 28-29 *supra* and accompanying text.

64. Harm to the public is to be distinguished from harm to the individual employee. The courts have held that applicants cannot be rejected because a job would expose them to danger; the decision to accept hazardous employment rests with the individual. See note 28 *supra.*

65. Spurlock v. United States Air Lines, Inc., 475 F.2d 216 (10th Cir. 1973). The defense involved business need rather than the bfoq exception. See note 13 *supra.*

66. The court sustained the employer's requirement of a college diploma and 500 hours of accumulated flight time, noting that the business involved piloting airplanes valued at $20 million with a passenger capacity of 300. Spurlock v. United Air Lines, Inc., 475 F.2d 216, 219 (10th Cir. 1973).

67. A subsequent sex discrimination case concerning height requirements for pilots followed the standard set forth in *Spurlock* and held that the employer's reduced burden of proof could be met with expert testimony rather than empirical validation studies. Boyd v. Ozark Air Lines, Inc., 419 F. Supp. 1061, 1065 (E.D. Mo. 1976). *But see* Hodgson v. Greyhound Lines, Inc., 499 F.2d 859, 863 (7th Cir. 1974), *cert. denied,* 419 U.S. 1122 (1975) (expert testimony alone not sufficient to establish a bfoq). See note 72 *supra.*

68. The Age Discrimination in Employment Act, 29 U.S.C. §631 (1970), contains a bfoq clause similar to that of Title VII. Cases brought under the Act frequently cite the *Weeks* test. *See, e.g.,* Houghton v. McDonnell Douglas Corp., 553 F.2d 561 (8th Cir.), *cert. denied,* 98 S. Ct. 164 (1977) (age of 50 is not a bfoq for the job of test pilot; lower court's finding of a bfoq was contrary to the factual evidence); Usery v. Tamiami Trail Tours, Inc.,

drivers,[69] the Seventh Circuit held that because the safety of numerous persons depended on the qualifications of the employee, the employer needed only to show that it had a rational basis in fact[70] for believing that abandonment of its hiring policies would lead to an increase, however slight, in the likelihood of injury to its customers.[71] Although the court required a factual basis for the establishment of a bfoq,[72] it held that the employer could not be expected to experiment with the lives of its customers in order to generate statistical evidence concerning the job performance of applicants currently barred from consideration.[73]

Applying this approach to the instant case, the employer could be held to a lesser burden of proof in establishing a bfoq because the safety of inmates, prison employees, and the public was involved.[74] The Court believed that while all prison guards were subject to attack by the fact of being guards, the possibility of sexual attack on female guards in particular constituted an additional risk that was not worth taking under the circumstances.[75]

The Court might also have been motivated by the belief that any increased risk of danger was not worth sustaining because of the relatively small number of jobs involved.[76] The very existence of the bfoq defense implies a balancing of interests: equal opportunity of employment is to be implemented while the employer and consumer interest in efficient job performance is to be preserved.[77] Applying such a balancing test, one commentator has suggested that if an employment criterion has a particularly severe impact on a group protected by Title VII, the courts should demand the employer meet a more rigorous burden of proof to sustain a defense.[78] The Court seems to have in-

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531 F.2d 224 (5th Cir. 1976) (age under 40 is a bfoq for the job of bus driver; no practicable way of identifying qualified applicants on an individual basis).

69. Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975).

70. The court rejected the *Weeks* criterion that all or substantially all drivers beyond the age of 40 had to be shown incapable of safely performing the duties of the job. It would be sufficient if the employer demonstrated that raising its maximum age for applicants would increase the possibility of hiring unqualified employees. *Id.* at 863.

71. A showing that the life of one more person might be jeopardized would be sufficient. *Id.*

72. The court held that expert testimony from transportation officials as well as from the defendant's own employees was not sufficient to establish a bfoq. More compelling, in the court's view, was evidence concerning the strenuous work assignments required of new employees by the company's seniority system, medical testimony concerning degenerative changes that were linked with driving ability, and statistical evidence showing that the percentage of accidents increased among drivers over the age of 45. *Id.* at 863-65.

73. *Id.* at 865.

74. The majority noted the existence of danger to inmates and employees. 97 S. Ct. at 2730.

75. See note 48 *supra.*

76. The decision was limited to contact positions in male maximum security penitentiaries in Alabama as they were then constituted. At the time of the decision, a maximum of 336 positions was involved. 97 S. Ct. at 2762.

77. Note, *supra* note 11, at 696-97. *See Developments, supra* note 11, at 1111-19.

78. *Developments, supra* note 11, at 1122-23. This comment was made in connection with the defense of business need, but it is applicable to the bfoq exception as well.

verted this proposition in the instant case, however, allowing the burden of proof to be lowered because relatively few positions were involved.[79]

In the final analysis, however, the Court fell prey to the stereotyping which it cautioned against in discussing the bfoq exception. While the burden of proof might be lowered given a showing that harm to others would result from the hiring of an unqualified applicant, the risk of danger had to be documented by factual proof.[80] If the possibility of sexual attack was purely conjectural, there would have been no factual basis for believing that an increased risk of danger would be created by the hiring of female guards. The Court relied on the testimony of the plaintiff's own expert witnesses, who stressed the desirability of segregating sex offenders from the rest of the prison population.[81] Testimony concerning sex offenders, particularly coming from the plaintiff's own witnesses, arguably went beyond mere speculation about the vulnerability of women.[82] However, the Court also spoke in broader terms of the risk of attack by regular inmates deprived of normal heterosexual outlets.[83] This language clearly invoked the stereotype of women as sex objects and revealed a paternalistic desire to shield women from the possibility of assault.[84]

In the absence of convincing factual evidence that substantially all women would be incapable of performing the job, lower court decisions have refused to allow the bfoq defense. The Supreme Court, relying on stereotypes of female vulnerability, has departed from that standard. Unless the instant decision is confined to the peculiar circumstances existing in the Alabama Prison System,[85] it will serve as an unfortunate precedent to widen what has been a very narrow exception.

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79. Under a balancing approach, interests are to be weighed, not ignored. The fact that a large number of persons might be affected should increase the employer's burden of proof, but the fact that only a small number might be affected should not operate to reduce the burden below the minimum standard articulated in *Weeks*. Title VII bans discrimination against individuals; it does not simply address discrimination against large numbers. See note 8 *supra*.

It should also be pointed out that Title VII does not justify excluding women from jobs on the ground that the jobs are ostensibly undersirable. As the Seventh Circuit pointed out in *Weeks*, the Act "vests individual women with the power to decide whether or not to take on unromantic tasks." 408 F.2d at 236.

80. Age discrimination cases have emphasized the necessity of a factual showing of increased risk. *See, e.g.*, Aaron v. Davis, 414 F. Supp. 453 (E.D. Ark. 1976); Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975). See also note 72 *supra*.

81. 97 S. Ct. at 2730.

82. One witness testified of the importance of identifying inmates convicted of sex crimes who posed an actual risk to women, but he noted that not all sex offenders would pose such a risk. Record at 203-04.

83. 97 S. Ct. at 2730.

84. The speculative nature of the threat of assault was also revaled by the fact that the district court which declared conditions in Alabama's penitentiaries to be unconstitutional had found that guards rarely entered the cell blocks and dormitories, where attacks would be most likely to occur. *See* Pugh v. Locke, 406 F. Supp. 318, 325 (M.D. Ala. 1976).

85. The Court failed to emphasize that Alabama penitentiaries were under court order to normalize their operations and that if the present brutal conditions justified the exclusion of women, the conditions were only temporary. See note 43 *supra* and accompanying text.