ValpoScholar Valparaiso University Law Review

Volume 14
Number 3 *Spring 1980*

*pp.*577-599

Spring 1980

Sex Discrimination Justified Under Title VII: Privacy Rights in Nursing Homes

Kenneth W. Kingma

COMMENT

SEX DISCRIMINATION JUSTIFIED UNDER TITLE VII: PRIVACY RIGHTS IN NURSING HOMES

Title VII of the Civil Rights Act of 1964[1] was enacted by Congress to remove arbitrary and unnecessary barriers to employment which operate invidiously to discriminate on the basis of racial or other impermissible classifications.[2] Title VII's prohibition against sex-based discrimination in employment, however, is not absolute. Discrimination in employment based on sex is justified and allowed under the narrowly construed strictures of Section 703(e) of Title VII.[3] This provision allows for an exception termed a "bona fide occupational qualification" (BFOQ). Such an exception is applied to businesses only if the sex-based employment practice is reasonably necessary to the normal operation of a particular business or enterprise.[4] A BFOQ exception was granted to a residential retirement

1. 42 U.S.C. §§ 2000e to 2000e-15 (1976).

2. Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971). *Accord* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800-01 (1973).

3. 42 U.S.C. § 2000e-2(a) (1976), provides:

> It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise 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.

4. 42 U.S.C. § 2000e-2(e) (1976) provides, in part:

> 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 . . . 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.

As held in *Diaz v. Pan American World Airways, Inc.*:

> [C]learly stated, the purpose of the Act was to provide a foundation in the law for the principle of nondiscrimination. Construing the statute as embodying such a principle is based on the assumption that Congress sought a formula that would not only achieve the optimum use of our labor resources but, and more importantly, would enable individuals to develop as individuals. Attainment of this goal, however, is . . . *limited* by the bona fide occupational qualification exception in section 703(e). In construing this provision, we feel, . . . that it would be totally anomalous to do so

home in *Fesel v. Masonic Home of Delaware, Inc.*[5]

In *Fesel*, a male nurse's aide instituted a civil rights action alleging sex discrimination when he was denied employment at the defendant-retirement home. A BFOQ was granted the retirement home based upon the privacy interests of its female guests and the work responsibilities of its employees. This comment examines how the holding in *Fesel* reflects upon the application of Title VII in sex discrimination cases and the importance of personal privacy interests with respect to facially discriminatory circumstances.

THE FACTS

The defendant, Masonic Home of Delaware, Inc. (the Home), was a non-profit corporation which rendered services as a residential retirement home.[6] The plaintiff, Frederick Fesel, was a registered nurse.[7] In November, 1973, the Home advertised in two local newspapers for a nurse's aide[8] to serve on the midnight shift and for a nurse's aide to serve on the afternoon shift. Plaintiff, having read the ad, called the Home on November 5, 1973, stating that he desired to apply for the nurse's aide positions.[9] The Director of Nursing Services at the Home stated that the Home's policy was to hire only female nurse's aides[10] and on that basis refused to hire Fesel.[11]

---

in a manner that would, in effect, permit the exception to swallow the rule.

442 F.2d 385, 386-87 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971) (emphasis added).

5. Fesel v. Masonic Home of Del., Inc., 447 F. Supp. 1346 (D. Del. 1978), *aff'd mem.*, 591 F.2d 1334 (3d Cir. 1979).

6. The Home provided twenty-four hour supervision and care for elderly Masons and their spouses. *Id.* at 1347-48.

7. In June of 1976, Fesel received his Bachelor of Science degree in Nursing from the University of Delaware. *Id.* at 1348.

8. According to *Fesel*:

> The duties of a nurse's aide at the Home in 1973 included the providing of services involving intimate personal care of both male and female guests including dressing, bathing, changing of geriatric pads for incontinent patients, tending to patients with catheters, and assisting in the use of toilets and bed pans. Nurse's aides . . . provide other functions, however, which did not involve such personal care including the making of beds, foot care, reading of mail, feeding, cleaning spills, maintenance of wheel chairs and the escorting of patients on visits to doctors.

Id. at 1352-53.

9. At the time plaintiff called the Home, he was a third year nursing student at the University of Delaware. *Id.* at 1348.

10. When plaintiff applied at the Home, there were twenty-two female guests and eight male guests residing there. *Id.* at 1352.

11. *Id.* at 1348, 1352. After November 5, 1973, the Home filled the two advertised positions, and even a part-time position, with female nurse's aides. *Id.* at 1348.

Plaintiff then contacted a female friend and had her call the Home to apply for a nurse's aide position. She did so, reciting the same qualifications which Fesel possessed. This woman was immediately urged to visit the Home and complete an application.[12] Shortly after this incident with the Home, Fesel responded to a similar ad for a nurse's aide position at the Methodist Country House. Fesel was likewise denied a nurse's aide position there due to his sex.[13]

Fesel filed charges of discrimination[14] with the Equal Employment Opportunity Commission (EEOC) against both the Methodist Country House and the Home on November 5, 1973. After receiving a right to sue letter from the EEOC, Fesel brought suit against the Home for reinstatement,[15] but abandoned this request and eventually sought "a declaratory judgment and an injunction directing that the Home cease its alleged discriminatory policy."[16] The District Court of Delaware assumed jurisdiction pursuant to Section 706 of Title VII.[17]

The district court denied the Home's motion for summary judgment and held that Fesel had complied with all jurisdictional requirements of Title VII, and required a trial to determine whether a BFOQ exemption could be granted the Home under the circumstances.[18] At trial, the court entered judgment against Fesel,

---

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 1349. Plaintiff never filed a lawsuit against the Methodist Country House because he and the House reached a settlement agreement in 1976 for $750. *Id.* at 1348.

16. *Id.* at 1349.

17. 42 U.S.C. § 2000e-5(f)(3) (1976) provides in part:

> Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office . . . .

18. Fesel v. Masonic Home of Del., Inc., 447 F. Supp. 1346, 1347-48 (1971), citing its previous ruling in Fesel v. Masonic Home of Del., Inc., 428 F. Supp. 573 (D. Del. 1977) (this case was the forerunner of the one discussed in this comment, and held, *inter alia*, that the Home was not a private membership club for purposes of exemp-

concluding that the Home had successfully established a BFOQ defense based upon the privacy interests of its female guests and its employees' work reponsibilities. *Fesel* was affirmed without opinion by the Third Circuit in 1979.

LEGAL ANALYSIS OF TITLE VII IN *FESEL*

The courts have indicated that the intent and purpose of Congress in enacting Title VII[19] was multi-faceted.[20] The prevention of

---

tion from the Civil Rights Act). In preparation for trial, the Director of Nursing Services at the Home approached nine female guests concerning the affidavit below:

> I, _____ , have been a guest of the Masonic Home of Delaware for _____ years. I object most strenuously to the employment by the Home of male nurses or male nurses aides, if they are to attend to my nursing needs and, if one such is employed to attend to me, I shall do everything in my power to remove myself from the Home.

Id. at 1352.

All nine female guests who were approached by the Director of Nursing Services filled in and signed the affidavit. At trial, eight of the female guests at the Home testified that they would not consent to the presence of a male nurse's aide, and objected to being cared for by a male. Seven of the eight who testified had signed the affidavit. Testimony revealed that two of the guest's children were considering removing their parents if a male nurse's aide was employed by the Home, and one guest's daughter testified she would definitely remove her mother from the Home under such circumstances. *Id.*

19. The Legislative History of the Civil Rights Act is set forth in [1964] U.S. CODE CONG. & AD. NEWS 287, 2355-2519, but makes no reference to the inclusion of "sex" as a criterion for discrimination. The word "sex" was added to the bill only at the last moment; therefore, no helpful discussion is present from which to glean the intent of Congress. Rosen v. Public Serv. Elec. and Gas Co., 328 F. Supp. 454, 462-63 (D.N.J. 1971). According to *Rosen*:

> The word "sex" was not part of the Civil Rights Bill when it left the House Rules Committee on January 30, 1964. The actual amendment was offered by Congressman Smith (D. Va.), a critic of the Bill, and commentators generally agree that the addition was designed to sabotage the Bill. See: Sex Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964. 1968 Duke L.J. 671 at 676; Vaas, Francis J., Title VII: Legislative History, 7 Boston College Ind. and Commerce L. Rev. 431; Comment, 50 Iowa L.R. 778 at 789 et seq. (1965). Hearings were never held on the amendment and the failure to do so was noted with alarm by the Chairman of the House Judiciary Committee, Mr. Celler (D.N.Y.), 110 Cong. Record 2485 (February 8, 1964). Indeed, in the House the amendment was opposed by the Administration and many supporters of the whole bill. 1968 Duke L.J. *supra*, at 677-678; 7 B.C. Ind. & Comm. L. Rev. *supra*, at 441-42 . . . The word "sex" was adopted by a vote of 168 to 133 and attempts to qualify the clear word "sex" by amendments were rebuffed. *Id.* at 678. In the Senate, the bill, as amended, received both more favorable treatment and Administration support through Senators Humphrey; Mansfield, Kuchel and Dirksen, 7 B.C. Ind. & Comm. Law Rev. *supra*, at 445. Nevertheless, hearings were never held

disparate treatment of employees (particularly women), the equalization of the sexes regarding employment opportunities,[21] and the rejection of "romantic paternalism" towards women,[22] were major abstract legislative policy concerns behind the enactment of Title VII. The primary intent of Congress in Title VII was to provide *equal* access to the job market for both men and women[23] by prohibiting employment standards based on stereotypic characterizations of a person's sex.[24] Furthermore, from an economic standpoint, Congress through Title VII endeavored to prohibit wage discrimination between employees on the basis of sex,[25] and sought to eliminate frictions, tensions and financial inequalities of sex discrimination in order to benefit and improve the free flow of commerce between states.[26]

---

and debate concentrated largely on the racial provisions of the bill. The Senate did broaden the provisions in what is now § 2000e-2 to cover all agencies as well as private employers.

Id. at 445 n.4.

20. *See* Annot., 12 A.L.R. Fed. 15 (1972).

21. Sprogis v. United Airlines, Inc., 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971). (*Sprogis* considered the discharge of a female airline hostess for getting married and also held that the intent of Congress was to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes).

22. Rosen v. Public Serv. Elec. and Gas Co., 328 F. Supp. 454, 464 (D.C.N.J. 1970). *See also* Frontiero v. Richardson, 411 U.S. 677, 684 (1973); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 236 (5th Cir. 1969).

23. Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 386 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971). The court held that since the amendment adding the word "sex" to "race, color, religion and national origin," was adopted one day before the House passed the bill, it was reasonable to assume that one of Congress' main goals was to provide equal access to the job market for both men and women as well as to provide a foundation in the law for the principle of nondiscrimination.

24. Ridinger v. General Motors Corp., 325 F. Supp. 1089 (D.C. Ohio 1971).

25. The Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1976), must be considered in conjunction with Title VII in determining wage discrimination cases. Rosen v. Public Serv. Elec. and Gas Co., 328 F. Supp. 454, 463 (D.C.N.J. 1970).

> The EEOC, in its sex discrimination guidelines in 29 CFR § 1604.8 dealing with the relationship between Title VII and the Equal Pay Act, provides that (a) the employee coverage of the prohibitions against discrimination based on sex contained in Title VII is coextensive with that of the other prohibitions contained in Title VII and is not limited by 42 USCS § 2000e-2(h) to those employees covered by the Fair Labor Standards Act that (b) by virtue of § 2000e-2(h), a defense based on the Equal Pay Act may be raised in a proceeding under Title VII, and that (c) where such a defense is raised, the Commission will give appropriate consideration to the interpretations of the Administrator, Wage and Hour Division, Department of Labor, but will not be bound thereby.

Annot., 12 A.L.R. Fed., *supra* note 20, at 33.

26. Mengelkoch v. Industrial Welfare Comm'n, 284 F. Supp. 956 (D.C. Cal.), *cert. denied*, 393 U.S. 993 (1968).

Discrimination based on sex is permitted, however, under Title VII by the application of BFOQ exemptions in narrowly construed circumstances.[27] In full recognition of the narrow circumstances where BFOQ exemptions can be applied, the court in *Fesel* held:

> [W]hen an employer defends a sex discrimination action by raising the privacy interests of its customers as the basis for a BFOQ defense, the employer must prove not only that it had a factual basis for believing that the hiring of any members of one sex would directly undermine the essence of the job involved or the employer's business, but also that it could not assign job responsibilities selectively in such a way that there would be minimal clash between the privacy interests of the customers and the non-discrimination principle of Title VII.[28]

Relying on this analysis the court in *Fesel* held that it was not feasible for the Home to hire a male nurse's aide. The court found that the Home had shown a factual basis for believing that the employment of a male nurse's aide would directly undermine the essence of the Home's business operation, because many female guests objected to intimate personal care by males. Moreover, due to its size, the Home could not employ a large staff. Because of the nature of employee scheduling, the Home could not employ a male nurse's aide for any available work shift where there would be at least one female on duty to attend to the personal care needs of the female guests who objected to male care.[29] Therefore, the court held that a BFOQ defense based upon the privacy interests of the Home's guests and the infeasibility of selective job responsibilities among employees was proper under these narrow circumstances.[30]

---

27. *See* notes 48 and 49 *infra*. A BFOQ has been defined as discrimination which is accomplished by establishing a job qualification that eliminates only members of one sex, or which is capable of fulfillment only by members of one sex. Note, *Sex Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964*, 1968 DUKE L.J. 671, 688. BFOQ exemptions have not always been granted however. In Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388-89 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971). The court held that being a female was not a BFOQ for the job of flight cabin attendant, and the employer's refusal to hire plaintiff solely because of his sex constituted violation of the 1964 Civil Rights Acts. In Dothard v. Rawlinson, 433 U.S. 321 (1977), however, the court granted a BFOQ exemption to the Alabama Board of Corrections when it appeared that women guards in contact positions in maximum security male penetentiaries posed a substantial security problem. *Id.*

28. 447 F. Supp. at 1351.

29. *Id.* at 1354.

30. *Id.*

BFOQ LITIGATION REQUIREMENTS

In Title VII litigation, the plaintiff has the initial burden of showing a prima facie case of discrimination. After a prima facie case of discrimination is made, the employer has the burden of proving that any alleged discriminatory employment practices justify the application of a BFOQ exemption. In *Fesel*, the Home overcame plaintiff's prima facie case of discrimination when the court held that the Home's hiring practices and employee scheduling problems justified the application of a BFOQ exemption.

Requirement That Plaintiff Show Prima Facie Case

In order to establish a prima facie case of discrimination, Fesel had to comply with the standard enunciated by the Supreme Court in *Dothard v. Rawlinson*.[31] *Dothard* was a Title VII sex discrimination case where a female applicant for a correctional counselor position in the Alabama state penitentiary system was rejected because she failed to meet the minimum height-weight requirements under Alabama law. The female applicant challenged the statutory height-weight requirements as violative of Title VII. Regarding the requirement that a plaintiff show a prima facie case, the Supreme Court in *Dothard* held: "To establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern."[32] This requirement grew out of earlier Supreme Court decisions[33] which held that Title VII was not concerned with an employer's absence of discriminatory intent, since "Congress directed the thrust of the act to the *consequences* of employment practices, not simply the motivation."[34] The plaintiff need only show that hiring standards on their face conspicuously

31. 433 U.S. 321 (1977).

32. *Id.* at 329.

33. Albemarle Paper Co. v. Moody, 422 U.S. 405, 422 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 439 (1971).

34. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). *See also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 423 (1975). As stated in *Albemarle*:

> Title VII itself recognizes a complete, but very narrow, immunity for employer conduct shown to have been undertaken "in good faith, in conformity with, and in reliance on any written interpretation or opinion of the [Equal Employment Opportunity] Commission." 42 U.S.C. § 2000e-12(b). It is not for the courts to upset this legislative choice to recognize only a narrowly defined "good faith" defense.

Id. at 423 n.17.

demonstrate a job requirement's significantly discriminatory impact.[35]

To determine whether a complainant has satisfactorily shown that an employer selected job applicants in a significantly discriminatory pattern, the Supreme Court in *McDonnell Douglas Corp. v. Green*[36] provided an intricate test. The complainant, according to *McDonnell Douglas*, must show that he belongs to a minority and that he applied and was qualified for a job for which the employer was seeking applicants. Furthermore, he must prove that he was rejected despite his qualifications and that the position remained open after his rejection. Finally, the complainant must show that after his rejection, the employer continued to seek applicants from persons of complainant's qualifications.[37] In the *Fesel* case, the applicant demonstrated that men were in the minority in the nurse's aide profession. He also demonstrated his credentials as a qualified nurse's aide and that he was nevertheless rejected because of his sex. Following his rejection, the position he applied for remained open and the Home continued seeking applicants.[38] Therefore, under both *Dothard* and *McDonnell Douglas*, Fesel fulfilled the requirements in establishing a prima facie case of sex discrimination.

Employer Has Burden of Proof

Shifting the burden of proof to the party claiming the benefits of the BFOQ exemption has been long established as the rule in BFOQ sex discrimination cases.[39] Yet, the burden of proof shifts *only* when a Title VII plaintiff has demonstrated a prima facie case that

35. Dothard v. Rawlinson, 433 U.S. 321, 331 (1977). The defendant-employer though is free to adduce countervailing evidence of his own if the employer discerns falacies or deficiencies in the evidence offered by the plaintiff. *Id.*

36. 411 U.S. 792 (1973).

37. *Id.* at 802. It is important to note that the test quoted above was specifically applied in *McDonnell Douglas* to establish a prima facie case of *racial* discrimination. However, the Supreme Court in *McDonnell Douglas* noted its application to other discrimination actions, but stated:

> The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.

Id. at 802 n.13. *See* East v. Romine, Inc., 518 F.2d 332, 337 (5th Cir. 1975) where the court applied the *McDonnell-Douglas* test in a sex discrimination case.

38. 447 F. Supp. at 1349.

39. The court in Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 232 (5th Cir. 1969) held: "[W]hen dealing with a humanitarian remedial statute which serves an important public purpose, it has been the practice to cast the burden of proving an exception to the general policy of the statute upon the person claiming it."

an employer's hiring standards are discriminatory.[40] Once established, the burden shifts to the employer to prove that any discriminatory hiring practice which he uses has a "manifest relationship to the employment in question."[41] If an employer meets the burden of proving that his hiring standards are "job related" BFOQ exemptions, the plaintiff may then show that other standards or selection devices serve the "employer's legitimate interest in efficient and trustworthy workmanship"[42] without discriminatory effects.[43]

Fesel established a prima facie case,[44] and therefore the burden of proof shifted to the Home "to articulate some legitimate, non-discriminatory reason for, or a statutory defense to, plaintiff's rejection" as a nurse's aide at the Home.[45] Accordingly, the court thus properly required the Home to show that its hiring practices were acceptable as a BFOQ exemption. However, if an employer does not prove preponderantly that his discriminatory employment standards justify a BFOQ exemption, then the plaintiff is entitled to varied forms of relief.

Remedies Applicable in BFOQ Cases

Title VII, Section 706(g),[46] as amended by the Equal Employment Opportunity Act of 1972, provides that if a court finds that an employer has engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the defendant-employer from engaging in such unlawful employment practice(s), and may order such affirmative action as may be appropriate—such as reinstatement or hiring of employees, with or without back pay. According to Section 706(g), Fesel's request for an

40. Albemarle Paper Co. v. Moody, 422 U.S. 405, 426 (1975).

41. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). *Accord* Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 426 (1975); Long v. Sapp, 502 F.2d 34, 39 (5th Cir. 1974).

42. Albemarle Paper Co. v. Moody, 422 U.S. 405, 426 (1975), (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973)). *Accord* Dothard v. Rawlinson, 433 U.S. 321, 329 (1977).

43. One writer has posited the idea that the burden of proving a BFOQ exemption should properly be on a defendant-employer, since he is in a better position than the plaintiff to know whether the particular facts of his operation justify the use of sex as a BFOQ. Note, *Developments, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1169 (1971).

44. *See* text accompanying notes 36-38 *supra*.

45. 447 F. Supp. at 1349. Judge Stapleton's view here is an almost verbatim quote from McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

46. 42 U.S.C. § 2000e-5(g) (1976).

injunction directing the Home to cease its alleged discriminatory hiring policy was proper.[47] After Fesel established a prima facie discrimination case, the court proceeded to apply the substantive aspect of Title VII to the facts.

APPLICATION OF TITLE VII IN *FESEL*

BFOQ Cases Are Narrowly Construed

In applying Section 703(e) of Title VII, the *Fesel* court adhered to both the EEOC guidelines[48] and recent case law[49] and held that BFOQ cases must be narrowly construed exceptions to the general prohibition against sex discrimination. The district court in *Fesel*, in applying the BFOQ exemption, relied on the virtually uniform view of the federal courts that Section 703(e) provides only the most narrow exceptions to the general view requiring equality of employment opportunities.[50] However, the courts have had some difficulty in agreeing upon the meaning of the term "narrowly construed." The Fifth Circuit Court of Appeals in *Diaz v. Pan American World Airways, Inc.*,[51] held that sex-based discrimination under Section 703(e) is valid when the essence of a business operation would be undermined by not hiring members of one sex exclusively.[52] On the other hand, in *Kober v. Westinghouse Electric Corp.*,[53] it was held that a BFOQ exemption may exist in the narrow circumstance where an employee proves that he had reasonable cause for believing that

47. 447 F. Supp. at 1349. Another BFOQ nursing profession case is Wilson v. Sibley Memorial Hospital, 340 F. Supp. 686 (D.D.C. 1972), *rev'd on other grounds*, 488 F.2d 1338 (D.C. Cir. 1973). The court there held that both injunctive and back pay relief are available under § 706(g), and such relief is applicable even though plaintiff will not directly benefit from such relief. Such was the case in *Fesel*. Fesel would not directly have benefited from a decision in his favor since he was employed by the Air Force during the trial. 447 F. Supp. at 1348.

48. 29 C.F.R. § 1604.2 (1977) states in part:

> (a) The Commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. . . .

49. *See* Dothard v. Rawlinson, 433 U.S. 321, 334 (1977); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279-80 (1976); Long v. Sapp, 502 F.2d 34 (5th Cir. 1974); Mitchell v. Board of Trustees, 380 F. Supp. 197 (D.C.S.C. 1973).

50. Dothard v. Rawlinson, 433 U.S. 321, 333 (1977).

51. 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971). Another formulation of this view is given in Rosen v. Public Service & Gas Co., 328 F. Supp. 454, 462 (D.C.N.J. 1970). The court directed that sex is a BFOQ exception only if it is "reasonably necessary to the normal operation of that particular business."

52. Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

53. 325 F. Supp. 467 (D.C. Pa. 1971). *Accord* Phillips v. Martin Marietta, 400 U.S. 542 (1971); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969).

substantially all persons of one sex (women) would be unable to perform safely and efficiently the duties of the job involved.[54] Whatever the verbal formulation, the federal courts, as well as the Supreme Court, have agreed that "it is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes . . . ."[55]

The court in *Fesel* held that rejection of Frederick Fesel for the nurse's aide position at the Home was based on just such stereotypic assumptions.[56] However, the court reasoned that personal privacy interests of the Home's female guests were also implicated in the case. It held that these privacy interests must be protected by law and recognized by the employer while running his business.[57] To support this conclusion, the court held that in some instances personal privacy interests[58] justify sex-based employment discrimination by an employer.[59] Thus, personal privacy interests in *Fesel* qualified as a narrow exception to the general prohibition of discrimination on the basis of sex.

Selective Work Responsibilities Are Required If Possible

Despite this narrow exception, when the BFOQ defense is based on privacy interests there must be an additional showing by the employer that it would not be feasible to assign job responsibili-

54. Kober v. Westinghouse Electric Corp., 325 F. Supp. 467, 469 (D.C. Pa. 1971).

55. Dothard v. Rawlinson, 433 U.S. 321, 333 (1977).

56. 447 F. Supp. at 1352.

57. *Id.*

58. Judge Stapleton declared in *Fesel* that there were two types of cases which deal with the BFOQ defense: (1) discrimination of an employer due to his perception of the physical capabilities of a certain sex; and (2) discrimination due to an employer's perception of the privacy interests of his clients or customers. 447 F. Supp. at 1350. This declaration is not altogether accurate. For instance, an employer's perception may be discriminatory due to: (1) religious differences between applicants, *see generally* 42 U.S.C. § 2000e-2 (1976); (2) national origin of applicants, *see generally* 42 U.S.C. § 2000e-2 (1976), under § 2000e-2, the term "national origin" on its face refers to the country where a person was born, or more broadly, the country from which his or her ancestors came and was not intended to embrace the requirement of United States citizenship, Long v. California State Personnel Bd., 41 Cal. App. 3d 1000, 116 Cal. Rptr. 562 (1974); (3) social stereotyping or customer preference, *see generally* 29 C.F.R. § 1604.2(1) (ii)-(iii) (1977); (4) "business necessity." Practices which are not intentionally discriminatory or neutral but perpetuate consequences of past discrimination may be permitted because of their overriding business necessity. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974). *Accord* Head v. Limken Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973).

59. 447 F. Supp. at 1351.

ties.[60] In *Meith v. Dothard*,[61] the court was convinced that selective work responsibilities should be used in BFOQ-privacy interest cases to alleviate much of the legitimate concern regarding privacy rights without denying job opportunities to members of one sex.[62] After a detailed discussion regarding selectivity of job responsibilities,[63] the court in *Fesel* held that any configuration of selective work schedules presented opportunities where it would be necessary for Fesel to perform intimate personal care for non-consenting female guests without female assistance. The court then held that selective work possibilities implemented to minimize sex discrimination must give way to the right of privacy demanded by female guests.[64] Selective job assignment was not feasible (due to Masonic's small staff) since a female "swing person" would have to have been hired as an aide during those hours which Fesel would have been alone on duty. Any duty of the Home to accommodate the rights of prospective male employees did not require the employment of additional personnel.[65]

Because injunctive relief was held to be inappropriate in *Fesel*, the court declined to consider the possibility of selective job assignment during the 1 p.m. - 9 p.m. shift. Since positions at the Home were held open occasionally to accommodate future employees, Fesel's application could have been retained for the 1 p.m. - 9 p.m. shift when an opening would become available. Working on the 1 p.m. - 9 p.m. shift, moreover, would never have left Fesel alone with the Home's guests.[66]

---

60. *Id.*

61. 418 F. Supp. 1169, 1185 (M.D. Ala. 1976), *aff'd in part rev'd in part sub nom.*, Dothard v. Rawlinson, 433 U.S. 321 (1977) (reversed part not pertinent here).

62. *Id* at 1185. *See also* Dothard v. Rawlinson, 433 U.S. 321, 346 (1977), (Marshall, J., dissenting); Reynolds v. Wise, 375 F. Supp. 145, 151 (N.D. Tex. 1974).

63. 447 F. Supp. at 1353. The court determined that the best selective work schedule for plaintiff—the 3 p.m. to 11 p.m. shift Monday to Friday—required that plaintiff be alone with non-consenting female guests for only two hours a day for two days a week. Because of the unpredictability of intimate care requiring bodily contact, the court believed the period of time plaintiff would have been alone with complaining female guests was still too long. However, the two hour time period in which Fesel would have been alone with the Home's guests was minimized as an extended period of individual male care since (1) many guests could take care of their personal needs and (2) only thirty percent of a nurse's aide's time was spent attending personal needs of guests. *See* 447 F. Supp. at 1353 nn.7 & 8.

64. *Id.* at 1353.

65. *Id.* at 1354. *Cf.* Trans World Airlines v. Hardison, 432 U.S. 63 (1977), which was a religious discrimination case under Section 701(J) of Title VII. There the Supreme Court held that in accommodating the religious needs of employees, an employer need not bear more than *de minimus* expenses.

66. 447 F. Supp. at 1354 n.13. *See also* Plaintiff's Opening Post-Trial Brief, pp. 12-13.

FESEL — PROTECTOR OF FACIALLY DISCRIMINATORY SETTINGS

The setting in *Fesel* clearly reveals facially discriminatory practices by the Home. Such circumstances have been described, however, as "unalterable conditions,"[67] since sexual or personal privacy rights are held by society in high esteem. By honoring the individual privacy interest of the Home's female guests, the court in *Fesel* indirectly attacked the integrity of the medical profession, undermined the EEOC guidelines on sex discrimination, and yielded to existing social prejudices which Title VII intended to eliminate. Even more alarmingly, it overlooked the fact that cross-sexual care already existed at the Home, and expanded without warrant the constitutional right to privacy.

The Effect of Fesel on the Medical Profession

The ruling in *Fesel* attacked the integrity of the medical profession. The medical profession trains its doctors and nurses to treat both sexes, but *Fesel* limits the stance taken by the medical profession by not permitting male nurse's aides to care for all retirement home guests. To be sure, the intimacy and dignity of the Home's guests must be sincerely respected,[68] but the court failed to recognize that both male and female nurse's aides can offer competent and professional personal care. The court received no evidence that men were incapable of providing adequate care or could not respect a woman's privacy.[69]

---

67. *See* Note, 84 HARV. L. REV., *supra* note 43, at 1185-86 based on 110 Cong. Rec. 2918 (1964)). As stated in the Note, Representative Goodell offered on the floor in Congress the example of an elderly woman who desires a female nurse as a situation where a BFOQ exemption should be granted. Such a setting was considered an "unalterable condition" sanctioning discriminatory hiring practices. Representative Goodell's remark, however, was not made in the course of any debate or exchange as to the meaning of any term. Nor was the remark made or introduced for the purposes of legislative history. *See* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 318 (1896) (Debates in Congress are generally not appropriate sources of information because it is impossible to determine with certainty what construction was put upon an act by the members of Congress). *Accord* United States v. Kung Chen Fur Corp., 188 F.2d 577, 584 (Cust. & Pat. App. 1951).

68. *See* LeBlang, *Invasion of Privacy: Medical Practice and the Tort of Intrusion*, 18 WASHBURN L. REV. 205 (1979).

69. Contra to the ruling in *Fesel*, it has been reported that nursing gender matters little to the patient receiving proper care, and mutual respect between males and females in the nursing profession is certain to eliminate any role-reversal conflicts. It is also foreseen that more men will enter occupational health nursing, and that male nurses or nurse's aides will have a great deal to contribute to the protection of the health and safety of our country's work force. Associated Press, *Males are Drawn to Industrial Nursing*, The Grand Rapids Press, Aug. 3, 1978, at 2-C col. 1.

It would not have been unreasonable for the court to have assumed in *Fesel* that female guests would have engendered the same respect for male nurse's aides as male guests had for female aides. Professional demeanor by male nurse's aides should engender the same respect which women display for male obstetrician-gynecologists. Such respect should occur even though society expects nurses or nurse's aides to be female and its doctors to be male.

Ironically, the female guests in *Fesel* who had complained about care by a male nurse's aide had been individually treated by a male gynecologist.[70] The female guests considered medical treatment by a male gynecologist not to be an intrusion of their privacy interests. It is unclear why they found proposed treatment by a male nurse's aide to be such an invasion. Respect existed for the male gynecologist but not for a male nurse's aide.

The court followed the female guests prejudice instead of the anti-discriminatory purposes of Title VII. The suggestion implicit in the privacy argument in *Fesel* was that female guests could not respect male nurse's aides, and that male aides were less professional than their female counterparts.[71] This was an unfair indictment of the professionalism of male nurse's aides. In making such an indictment it perpetuated the prejudiced view toward male aides, and failed to carry out the forward-looking purposes of Title VII, namely, to prohibit unfair and stereotyped employment practices. In addition, the court failed to take into account the capacity of the female guests to eventually adjust to and respect male nurse's aides. Thus, the privacy argument in *Fesel* screened out other important considerations.

Fesel Undermines the EEOC Guidelines on Sex Discrimination

Besides underestimating the professionalism of nurse's aides and the capacity for change in the opinions of retirement home guests, the *Fesel* court did not properly implement the EEOC guidelines on sex discrimination.[72] One guideline on sex discrimination requires that individual job applicants be given an opportunity

70. Fesel v. Masonic Home of Del. Inc., 428 F. Supp. 573, 579 n.19 (D. Del. 1977). *See* note 18 *supra.*

71. *See generally* Dothard v. Rawlinson, 433 U.S. 321, 346 n.5 (1977) (Marshall, J., dissenting). Justice Marshall applied this view to restrictions regarding the employment of women in Alabama penetentiaries.

72. 447 F. Supp. at 1349-50.

to demonstrate his or her capacity for a job.[73] This guideline was violated by the Home when Fesel was not given an opportunity to be considered on the basis of his own individual capacities. In *Rosenfeld v. Southern Pacific Co.*,[74] the Ninth Circuit held that the purpose of Title VII was to put men and women on equal footing in the job market.[75] In deference to the EEOC guidelines and Title VII, the *Rosenfeld* court held that equality of footing among men and women in the employment process is established only upon a showing of individual capacity for a job.[76] Demonstration of individual capacity for a job is in accord with Congressional purpose under Title VII.[77]

Furthermore, *Fesel* dealt a blow to the EEOC guideline denying an employer a BFOQ exemption when an employer refuses to hire an individual because of the preferences of its customers.[78]

---

73. As stated in 29 C.F.R. § 1604.2(a)(1) (1977):

> The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification . . . .
>
> . . . .
>
> (ii) The refusal to hire an individual based on stereotyped characterizations of the sexes . . . . The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

Therefore, each individual applicant must have an opportunity to demonstrate his or her capacity for the job. Jurinko v. Wiegand Co., 477 F.2d 1038, 1044 (3rd Cir. 1973); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 718 (7th Cir. 1969).

74. 444 F.2d 1219 (9th Cir. 1971).

75. *Id.* at 1224-25.

76. *Id.*

77. *Id.*

78. 29 C.F.R. § 1604.2(a)(1) (1977) also states:

> The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification . . . .
>
> . . . .
>
> (iii) The refusal to hire an individual because of the *preferences* of co-workers, the employer's clients or *customers* (emphasis added).

The guidelines were enacted by the EEOC to keep the BFOQ exception regarding sex discrimination as narrow as possible. *See* note 48 *supra*. Section 1604.2 of the EEOC guidelines is still in effect. 29 C.F.R. § 1604.2 (1979).

Clearly, customer preference alone will not justify the granting of a BFOQ exemption. In Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1199 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971), the Seventh Circuit held that passenger or customer preference for single stewardesses was violative of the EEOC guidelines, and was an invalid reason for the application of a BFOQ exemption. Furthermore, in Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971), the Fifth Circuit specifically affirmed the EEOC guideline against discrimination based on customer preference, despite the fact that Pan Am's passengers preferred female stewardesses over male stewards. *Id.* at 387. The *Diaz* court upheld this guide-

Fesel debilitated the mandatory guideline when it permitted the Home to refuse to hire a male nurse's aide because of the preferences of its female guests. In effect, *Fesel* provided a privacy interest exception to the guideline.[79]

The Supreme Court in *Dothard v. Rawlinson*[80] has stated that the EEOC guidelines pertaining to sex discrimination and the BFOQ exemption can be accorded weight by the courts since the EEOC has consistently adhered to the principle that the BFOQ as to sex should be interpreted narrowly.[81] *Fesel*, however, glossed over these guidelines.[82]

---

line even though the trial court found, based on expert testimony of a psychiatrist, that passenger psychological needs were better attended to by females in the unique environment of an airplane cabin. *Id.* The court stressed that "discrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively." *Id.* at 388. The gender of attendants on the airline did not go to the essence of the airline's business, thus, the court found discrimination under Title VII. *Id.* Regarding customer preference as to the gender of attendants, the *Diaz* court stated:

> While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices . . . [Title VII] was meant to overcome. Thus, we feel that customer preference may be taken into account only when it is based on the company's inability to perform the primary function or service it offers.

Id. at 389. Therefore, sex based discrimination must be founded on business necessity, not on business convenience or general public expectations. *Id.* at 388-89.

The court in *Fesel* endeavored to satisfy the "business necessity" requirement by holding that the employment of male nurse's aides would directly have undermined the Home's business and its ability to perform the services it offered. 447 F. Supp. at 1353. Whether the sex of nurse's aides at the Home was crucial to successful job performance and to the essence of the Home's operation, *see* note 82, *infra*.

79. 447 F. Supp. at 1352.

80. 433 U.S. 321, 334 (1977).

81. *Id. Fesel* asserts that the Supreme Court in *Dothard* only approved Section 1604.2(a) of the guidelines regarding the EEOC's stand toward the narrowness of the BFOQ exception. 447 F. Supp. at 1349-50. *See* note 48 *supra*. Contrariwise, the import of the dicta in *Dothard* promotes the conclusion that the construction of Title VII by the EEOC in its guidelines can be accorded weight by the courts *because* the EEOC has consistently adhered to the principle that the BFOQ exception was meant to be an extremely narrow one. Dothard v. Rawlinson, 433 U.S. 321, 334 n.19 (1977). One court has held that EEOC guidelines on sex discrimination are entitled to considerable weight. Weeks v. Southern Bell Tel. & Tel. Co., 442 F.2d 228, 235 (5th Cir. 1969).

82. Furthermore, 29 C.F.R. § 1604.2(a)(2) (1979) of the guidelines states:

> Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g. an actor or actress.

In interpreting Section 1604.2(a)(2) the court in Rosenfeld v. Southern Pac.

The Court Yielded to Social Prejudices Which Title VII Was Designed to Eliminate

In addition to underestimating the professionalism of male nurse's aides and undermining the EEOC guidelines, the court in *Fesel* bowed to discriminatory social prejudices which Title VII was designed to eliminate.[83] The continuance of society's prejudices has ultimately deprived men of job opportunities, has stymied male nurse's aides from obtaining equality in the nursing profession, and has weakened the regulatory power and purpose of the Civil Rights Act. The proper solution in *Fesel* should not have been the limitation of employment opportunities of men (or women) who desired to contribute to their community as nurse's aides, but the eradication of existing social preferences and occupational stereotypes by requiring the timely and careful selection of competent male and female nurse's aides who are understanding of human intimacy and dignity.[84] In Title VII actions, courts must strive to eliminate discrimination in employment practices when justification for such practices rests ultimately on societal preferences. Requiring the timely and careful selection of competent male and female nurse's aides will ultimately improve society by upholding the professionalism of nurse's aides and the dignity of those receiving the care. The thrust of the *Fesel* holding indicates the judicial favoritism of inconsistent "customer preference" by the female guests regarding medical treatment from men, over the objectives of Title VII.

Co., 444 F.2d 1219, 1224-25 (9th Cir. 1971), stated that a BFOQ under the EEOC guidelines would be granted only if the inherent sexual characteristics of an employee are crucial to the successful performance of a job. Since the medical profession consists of both men and women, and because it trains its doctors and nurses to treat both sexes, the sexual characteristics of medical professionals, especially nurse's aides, are not an essential factor for successful job performance (with the exception of a wet nurse). Neither are the intrinsic attributes of one sex a necessary qualification in becoming a nurse's aide. *See* Note, 84 HARV. L. REV., *supra* note 43, at 1178-79. The Note writer contended that sex itself, rather than abilities which are roughly correlated with it, should be the guidepost in determining whether sex is an essential component of job function. This view was followed in *Rosenfeld* and is contrary to the interpretation of "successful job performance" posited in *Fesel.* 447 F. Supp. at 1353. *Fesel* adverted that successful job performance hinged on whether the female guests at the Home would accept care by a male nurse's aide. *Id.* However, whether or not a person consents to treatment or care from a medical professional has no bearing on whether the medical professional can, in the first place, adequately treat that person in a dignified and respectable manner. Thus, the BFOQ was improperly granted in *Fesel* according to the EEOC guidelines and case law interpreting them.

83. *See* text accompanying notes 19-26 *supra.*

84. Timely and careful selection based on individually demonstrated capacities.

Concern for Privacy Interests: An Excuse for Discrimination

The *Fesel* court upheld the female guests' preference for a female nurse's aide because it felt compelled to protect their privacy interests. However, the *Fesel* decision seems to use the privacy interest rationale as an effective discriminatory device. The danger in this context is that the court and the Home used prevailing prejudices and Section 703(e) to mask persisting discriminatory attitudes and justify the court's granting of a BFOQ exemption. The court's discussion seemingly turned upon our society's acceptance of legally indefensible occupational stereotypes. Although male Home guests did not complain of privacy invasion by female nurse's aides,[85] the court made no mention of the fact that male Home guests received daily care exclusively from female nurse's aides. Such cross-sexual nursing care actually existed at the Home, yet this fact was overlooked. The court's professed concern for the privacy interests of the nonconsenting female guests appears a convenient excuse for discrimination.[86]

The Constitutional Right to Privacy Was Expanded Without Warrant in Fesel

The objectives of Title VII were abandoned in *Fesel* in favor of the complaining female guests' alleged privacy interests,[87] and the Home's hiring practice which accommodated its guests' preference for female aides was deemed a BFOQ exemption under Title VII.[88] The expansion of the right to privacy in *Fesel* to include the Home's customer-guest preferences was legally unwarranted.[89] The court in *Fesel* cited two federal district court cases,[90] one Pennsylvania state

85. 447 F. Supp. at 1353 n.5. The preferences of the male guests were not explored at trial since none of the male guests objected to care by female nurse's aides.

86. *See* note 71 *supra*. One possible reason why the issue of male subjection to exclusive female nursing care was never questioned or why testimony by male Home guests was not taken at trial, is that both litigant parties were ingrained with social mores that nurse's aides should be female. Albeit, the possibility exists that male Home guests were just overlooked as a potential issue group or testimonial source.

87. The court interchangeably used "privacy interests" and "right to privacy" in its discussion. 447 F. Supp. at 1350-51.

88. *Id.*

89. *See* text accompanying notes 99-113.

90. Meith v. Dothard, 418 F. Supp. 1169, 1185 (M.D. Ala. 1976), *aff'd in part rev'd in part sub nom.* Dothard v. Rawlinson, 433 U.S. 321 (1977); Reynolds v. Wise, 375 F. Supp. 145, 151 (N.D. Tex. 1974). In *Meith* and *Reynolds*, the courts permitted by BFOQ exception the exclusion of women from employment in correctional officer positions in penetentiaries when selective work responsibilities did not insure the privacy of inmates during strip searches and frisks. When the Supreme Court reviewed *Meith*, it did not reach the privacy issue.

court case,[91] and an EEOC decision[92] to support its conclusion that the Home's assertion of its guests' right to privacy was permissible as a BFOQ exemption in sex discrimination cases.[93] All cases cited in *Fesel* were sex discrimination cases containing discussions on privacy relating to BFOQ exemptions, but dealing with strip searches and inspections in disciplinary facilities of adult prison inmates or children. Each case held that the privacy interests of the detainees during strip inspections were to be zealously protected, although the adult prisoners or children, to some extent, had compromised their constitutionally guaranteed rights for the purpose of discipline and supervision. Yet, only one of the cases cited in *Fesel* actually endeavored to define the privacy right involved. In *City of Philadelphia v. Pennsylvania Human Relations Commission*,[94] the issue was whether children in a youth home should be subject to strip inspections by members of the opposite sex. The proposed strip inspections by youth home supervisors were held to abuse the penumbral guarantees emanating from the Bill of Rights[95] as declared in *Griswold v. Connecticut*.[96] Having the children's bodies subjected to inspections by members of the opposite sex appeared to abridge their right of privacy. Thus, the *City of Philadelphia* court required inspection during strip searches only by supervisory personnel of the same sex as the children inspected.[97]

The quintessence of the privacy interest cases cited in *Fesel* appears to be the promotion of the fourth amendment privacy right of people to secure their persons from unreasonable searches.[98] The reliance by the *Fesel* court on cases impliedly emanating a fourth amendment privacy right posture, in order to advocate the privacy rights of female guests over the objectives of Title VII, was unjustified under the definition of privacy enunciated by the Supreme Court in *Whalen v. Roe*.[99]

91. City of Philadelphia v. Pennsylvania Human Relations Comm'n, 7 Pa. Commw. Ct. 500, 300 A.2d 97 (1973). In *City of Philadelphia*, a BFOQ exemption was granted to a city Youth Study Center housing children with emotional problems, in order that supervision of children while they disrobed and were searched for contraband would be done by supervisors of the same sex.

92. EEOC Decision, 71-2410, 4 F.E.P. 17 (1971).

93. 447 F. Supp. at 1354.

94. 7 Pa. Cmwlth. 500, 300 A.2d 97, 103 (1973).

95. *Id.* at 103 n.8.

96. 381 U.S. 479 (1965).

97. 7 Pa. Cmwlth. 500, 300 A.2d 97, 103 (1973).

98. Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965).

99. 429 U.S. 589 (1977). Professor Tribe of Harvard has stated *Whalen* to be the Supreme Court's most comprehensive attempt thus far to define the constitutional right of privacy. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-1 (1978).

The controversy in *Whalen* stemmed from a New York statute requiring that the state be provided with a copy of every prescription for certain dangerous legitimate drugs and invoked security measures for protecting such information while in the state's possession. The Court held that disclosure of private medical information to representatives of the state did not automatically amount to an impermissible invasion of privacy.[100] The Court also expressed that the right of privacy, "implicit in the concept of ordered liberty," was applicable to the states through the fourteenth amendment.[101] In attempting to characterize the parameters of the constitutional right to privacy, Justice Stevens in *Whalen* quoted Professor Kurland, who stated:

> The concept of a constitutional right of privacy still remains largely undefined. There are at least three facets that have been partially revealed, but their form and shape remain to be fully ascertained. The first is the right of the individual to be free in his private affairs from governmental surveillance and intrusion. The second is the right of an individual not to have his private affairs made public by the government. The third is the right of an individual to be free in action, thought, experience, and belief from governmental compulsion.[102]

The first of the facets, stated Justice Stevens, was directly protected by the fourth amendment.[103] The second facet embraced "the individual interest in avoiding disclosure of personal matters."[104] The third facet involved one's distinct "interest in independence in making certain kinds of important decisions."[105] Therefore, the right of privacy, although subject to mutation by the Supreme Court, is presently delineated into three facets.

Ultimately, the Home's BFOQ revolved around the third facet of Professor Kurland's definition stated in *Whalen*. The *Fesel* court essentially held that the preference of the Home's female guests in demanding medical care by female nurse's aides concerned their right to independently make "certain kinds of important decisions." However, the expansion of the third facet of the privacy definition in *Whalen* to cover the Home's female guests' preference, exceeded

100. 429 U.S. 589, 602 (1977).
101. *Id.* at 598 n.23.
102. *Id.* at 599 n.24.
103. *Id.*
104. *Id.* at 500.
105. *Id.* at 599-600.

the types of important, personal decisions one can make under the right to privacy construct. The Title VII privacy right cases which *Fesel* cited dealt with "searches" encompassed by the *first* facet of the privacy definition in *Whalen*, and were directly protected by the fourth amendment.[106] *Fesel*, however, was not a search case. To the contrary, the privacy issue in *Fesel* actually pertained to the *third* facet of the *Whalen* definition, and was controlled by *Roe v. Wade*,[107] *Paul v. Davis*,[108] and *Whalen* itself[109]—cases specifically alluding to the third facet of the privacy definition. *Whalen*, the most recent of the three, reiterated the Supreme Court's position that a person's privacy right to independently make important decisions referred *only* to "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. In these areas, it has been held that there are limitations on the States' power to substantively regulate conduct."[110] *Whalen*, *Roe*, and *Paul* therefore confine a person's constitutional privacy right in making certain important decisions to marital and familial relations.[111]

Thus, when *Fesel* was decided, no constitutionally protected privacy right existed under the holdings of the Supreme Court as to personal decisions outside marital and familial relations, especially with respect to choosing the gender of nurse's aides in a retirement home. Furthermore, case authority would even controvert a claim that the female guests in *Fesel* had an unlimited right to do with their bodies as they pleased. As Justice Blackmun noted in his majority opinion in *Roe v. Wade*,[112] the right to privacy has not been expanded to contain an absolute, unlimited right to do with one's body as one pleases.[113] Overall, the female guests' preference in

106. *See also* Sutton v. National Distillers Products Co., 445 F. Supp. 1319, 1327 (S.D. Ohio 1978), which was a Title VII sex discrimination case upholding privacy interests of male employees regarding pat-down searches by female security guard at plant exit.

107. 410 U.S. 113, 152-53 (1973).

108. 424 U.S. 693, 713 (1976).

109. 429 U.S. 589, 600 n.26 (1977).

110. *Id.*, (quoting Paul v. Davis, 424 U.S. 693, 713 (1976)).

111. *See* Gerety, *Redefining Privacy*, 12 HARV. CIV. RTS. CIV. LIB. L. REV. 233, 273 n.144 (1977).

112. 410 U.S. 113, 154 (1973).

113. *Id. See also* Gerety, 12 HARV. CIV. RTS. CIV. LIB. L. REV., *supra* note 110, at 274-75 n.153.

As stated in note 8, *supra*, one of the duties of a nurse's aide was to bathe the Home's guests. Although the female guests did not have an absolute right to demand female nurse's aides for their bodily care under the right of privacy, the commentator is nevertheless concerned that bathing of the female guests by male nurse's aides would have been too "disruptive" of their personal intimacy. *See* Note, 84 HARV. L.

Fesel for a female nurse's aide was not an interest constitutionally protected by the right of privacy as the court held it to be.[114]

CONCLUSION

In *Fesel* the court examined the BFOQ exemption with respect to sex discrimination cases as defined under Title VII. *Fesel* broadened the applicability of the BFOQ exemption to encompass the circumstance where a male nurse's aide would have cared for female retirement home guests. The court's holding was an unfair indictment of the professionalism of male nurse's aides and an unfair assessment of the capacity for change in the sex-based prejudices of retirement home guests. The holding also undermined EEOC guidelines which demand that Fesel should have been given an opportunity to demonstrate his capacity for the position, and that customer preference be eliminated from BFOQ consideration. Moreover, cross-sexual care existed at the Home between female nurse's aides and male guests; thus, the concern for the privacy rights of the female guests appears a convenient excuse for discrimination. *Fesel* also perpetuated existing social prejudices which Title VII was designed to eliminate by holding, under an unwarranted assumption, that the female guests had a constitutional right of privacy which required protection. Under Title VII, the Home should have been required to hire a male nurse's aide.

REV., *supra* note 43, at 1185-86. However, bathing of the complaining female guests could have been scheduled when female nurse's aides were on duty, and most likely the Home would not have incurred additional expenses.

114. *Fesel* must be considered as a case decided on constitutional grounds, although the court bypassingly stated that the privacy interests of the Home's guests were protected by tort and criminal law. 477 F. Supp. at 1353. The court gave no case authority backing this claim and the cases it did use in its effort to establish that a privacy right existed for the female guests were not tort or criminal cases, but Title VII sex discrimination actions. Since Fesel never worked at the Home he never had the opportunity to tortiously intrude upon or criminally violate the privacy rights of the female guests. Unless a person violates a criminal statute or commits a tortious act, there is no standing by the state or anyone else against that person because no case or controversy exists. Thus, the privacy interests of the female guests at the Home were not subject to relief under tort or criminal law because no controversy materialized between them and Fesel. *See generally* LeBlang, 18 WASHBURN L. REV., *supra* note 68. The only privacy right the female guests had standing to allege would be encroached upon by the employment of Fesel was the constitutionally guaranteed right of privacy. Only the constitutionally based right of privacy could have been balanced against the non-discrimination principle of Title VII in determining whether the hiring of a male nurse's aide undermined the essence of the Home's operation. Even if Fesel was employed at the Home and personal care contact occurred with the non-consenting female guests, it would be up to a jury, not the court, to determine the fact whether the guests needed the protection of tort or criminal law remedies. *See* F. JAMES & G. HAZARD, CIVIL PROCEDURE § 7.10 (2d ed. 1977).

Courts must take a more firm stand in favor of non-discriminatory employment practices promoted under Title VII. Only then will Title VII violations be remedied and discriminatory injustices like those perpetuated in *Fesel* be extinguished. When an employer seeks a BFOQ exemption in a Title VII action, his remonstration countering alleged discriminatory employment practices must undergo keen judicial analysis in order to upend and dispel subtle stereotypic motives and beliefs pervading social mores.

Kenneth W. Kingma