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Marital Status Discrimination: A Survey of Federal Caselaw

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Student Notes

MARITAL STATUS DISCRIMINATION: A SURVEY OF FEDERAL CASELAW

I. INTRODUCTION

Historically, employers have regarded an individual's marital status to be an important factor in their employment decisions. The fact that a job applicant, for example, is married to a present employee of the company will, in most cases, exclude the person from consideration, even though he or she may be otherwise fully qualified. Similarly, an individual who experiments outside the traditional marriage relationship often times finds prospective and present employers very unforgiving, to the point of actually discharging the offending employee.

In both these instances, the employer is looking past job skills into matters which can be best described as the private domain of the individual. The employer has suddenly become more than a businessman, engaged in a commercial enterprise; he has become a type of judge; with the ability to reward or penalize those who run afoul of his standards of conduct. To the person who feels the sting of the employer's judgment, the results can be as disruptive and unfair as other, more visible forms of employment discrimination.

Anytime employers make decisions based on factors unrelated to job capabilities, one class of individuals is bound to suffer more than others. Marital discrimination is no exception. The group which is most often victimized by the "marital status" factor is women. But, unfortunately, there is no federal legislation specifically banning discrimination based on marital status. An individual seeking relief from such discrimination must therefore tailor her complaint to fit within existing law, such as the sex discrimination provisions of the Civil Rights Act of 1964;[1] the various constitutional provisions which protect privacy;[2] or one of the recently enacted state statutes outlawing marital status discrimination.[3] The result of this creative tailoring is a large body of case law with little or no predictability — a body of law that is further confused because of the Supreme Court's refusal to recognize this as a discrete form of employment discrimination.[4]

An issue related to the marital status factor is discrimination based on a person's sexual activity outside the scope of marriage. Employers frequently

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[1] 42 U.S.C. §§ 2000e to 2000e-17 (1981).
[2] *See, e.g.*, U.S. CONST. amend. XIV, § 1.
[3] *See infra* note 124.
[4] *See infra* text accompanying notes 74-81.

have codes of morality by which they assess an employee's fitness for the job. Challenges to these codes have resulted in a body of case law which usually upholds the employer's actions because the particular employee's conduct is not sanctioned by the majority of society. Here, too, the Supreme Court has been unwilling to concede that this intrusion is a deprivation of one's rights guaranteed by the Constitution.[5]

The first part of this paper will deal with marital status discrimination under Title VII. It will cover the components of the plaintiff's suit and the alternative defenses of the employer. It will survey the case law on marital status discrimination, including explicit employer marital requirements, as well as "neutral" no spouse policies. The second part of the paper will deal with discrimination against persons based on their sexual conduct defined by marital status. It will attempt to explore the constitutional issues implicit in this area by surveying cases which have dealt with discrimination against unwed mothers, cohabitating couples, and persons engaged in extramarital affairs.

II. Marital Status Discrimination Under Title VII

A. *Statutory Provisions*

Title VII of the Civil Rights Act of 1964[6] does not specifically address itself to an employer's use of marital status as a factor in employment decisions. Section 2000e-2a(2) of the Act provides that it is unlawful for an employer "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."[7] Undaunted by the omission of marital status from this list, most litigators have attacked the problem as a form of sex discrimination.

The conventional view is that sex was added as a protected class to the Civil Rights Act for the purpose of making the Act unacceptable to a majority of the male-dominated Congress.[8] In short, sex was added as a ploy to defeat the total Civil Rights Act. Nevertheless, the amendment adding sex was proposed and approved on February 8, 1964,[9] and the House passed the Civil Rights Act only two days later.[10]

The approved legislation established the Equal Employment Opportunity

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[5] *See infra* text accompanying notes 182-95.

[6] *See supra* note 1.

[7] 42 U.S.C. § 2000e-2(a)(2) (1981).

[8] Schlei, Foreward to B. Schlei & P. Grossman, Employment Discrimination Law at xi-xii (1976). *But see* Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth*, 19 Duq. L. Rev. 453 (1981).

[9] U.S. EEOC Legislative History of Title VII & Title XI of the Civil Rights Act of 1964, at 3213-28 (1964).

[10] *See generally* Note, *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1169 (1971); Note, *Classification on the Basis of Sex and the 1964 Civil Rights Act*, 50 Iowa L. Rev. 778, 791-92 (1965).

Commission (EEOC)[11] as the federal agency with the primary duty of administering the provisions of Title VII. To discharge this duty, the EEOC has formulated regulations to interpret and implement the mandate of Title VII. In the EEOC *Guidelines on Discrimination Because of Sex,*[12] the employer's use of distinctions based on marital status has been recognized as a form of sex discrimination. Under these guidelines, restrictions on married women with no comparable restrictions on married men violates Title VII,[13] unless the distinctions are justified under the Bona Fide Occupational Qualification[14] defense.

The courts are not bound to adhere to EEOC guidelines and have bluntly refused to do so in the past.[15] The courts' rationale is that the guidelines are merely interpretative.[16] There is authority, however, supporting deference to EEOC guidelines.[17] For example, *Griggs v. Duke Power Co.*[18] represents the view that the guidelines promulgated by the EEOC, as the enforcement agency for Title VII, are entitled to great weight.[19] The Supreme Court, there, after noting that the guidelines were entitled to great deference, stated that the guidelines should be treated as "expressing the will of Congress" where they are supported by Title VII and legislative history.[20]

B. Procedural and Jurisdictional Requirements for a Title VII Suit

In order to bring a suit on the basis of marital status discrimination under Title VII, certain procedural and jurisdictional requirements must be met. A plaintiff must file a timely charge of sex discrimination with the EEOC.[21] The EEOC will then refer the charge to the appropriate state or local agency in order to provide that agency with an opportunity to resolve the dispute between the employer and employee before the federal agency intervenes.[22] The Commission will allow the state sixty days to affect settlement before the Commission actively takes a role. Next, the EEOC will issue a "right to sue" notice.[23] The plaintiff must institute his or her suit within ninety days of the receipt of the notice.[24]

If the individual complies with these procedural prerequisites within the specified time frame, the federal court is vested with jurisdiction. Even if the

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[11] 42 U.S.C. § 2000e-4, e-5 (1981).
[12] 29 C.F.R. § 1604.1 to 1604.11 (1981).
[13] 29 C.F.R. § 1604.4(a) (1981).
[14] 29 C.F.R. § 1604.4(b) (1981).
[15] General Electric Co. v. Gilbert, 429 U.S. 125, 140-45 (1976); Espinoza v. Farah Mfg. Co., 414 U.S. 86, 92-95 (1973).
[16] 429 U.S. at 145.
[17] Griggs v. Duke Power Co., 401 U.S. 424 (1971); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).
[18] 401 U.S. 424 (1971).
[19] *Id.* at 433-34.
[20] *Id.* at 434.
[21] 42 U.S.C. § 2000e-5(e) (1981).
[22] 42 U.S.C. § 2000e-5(c) (1981).
[23] 42 U.S.C. § 2000e-5(f)(1) (1981).
[24] *Id.*

EEOC has determined that no reasonable cause for the suit exists,[25] the federal court may still entertain the employment discrimination suit. The United States Supreme Court has decided that the EEOC's "absence of reasonable cause" determination does not provide the employer immunity from similar charges in a federal court.[26]

C. *Plaintiff's Theory of the Case*

A plaintiff in a marital status discrimination case under Title VII may base his or her claim on two alternative theories — disparate treatment or disparate impact.

In disparate treatment cases, the employer's treatment of one individual (or group) is different from another because of that person's sex.[27] The plaintiff must carry the initial burden of establishing a prima facie case of discrimination by showing that she belonged to a protected class under Title VII; that she applied and was qualified and was subsequently rejected; and that the employer was still looking for an employee or the job was given to a member of an unprotected class.[28] If the plaintiff meets her burden, the burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for its actions. If the employer meets its burden, then the plaintiff must be afforded a fair opportunity to show that the employer's stated reasons were in fact pretextual.[29]

In "disparate impact" cases, employment practices are facially neutral in their treatment of different groups but have a more severe impact on one protected group. This is also a Title VII violation unless the employer can prove that the practice is justified under the business necessity defense.[30] Broad principles and guidelines for making this judgment were set forth in the landmark case of *Griggs v. Duke Power Co.*[31] In order 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. Once it is shown that the practice is discriminatory in effect, the employer must meet the burden of showing that any given requirement has a manifest relation to the employment in question.

Unlike "discriminatory treatment" cases and constitutional equal protection cases,[32] a party may rely solely upon the disparate impact theory of dis-

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[25] 29 C.F.R. § 1601.30 (1981).

[26] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[27] MODJESKA, HANDLING EMPLOYMENT DISCRIMINATION CASES, (1980) [hereinafter cited as MODJESKA].

[28] 411 U.S. at 802. The shifting burden of proof in Title VII cases was made applicable to sex discrimination cases in Peltier v. Fargo, 396 F. Supp. 710 (D.N.D. 1975), *rev'd on other grounds*, 533 F.2d 374 (8th Cir. 1975).

[29] *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); Board of Trustees v. Sweeney, 439 U.S. 24 (1978).

[30] MODJESKA, *supra* note 27.

[31] 401 U.S. 424. Although the subject matter of this case was race discrimination, its principles were extended to cases of sex discrimination in Dothard v. Rawlinson, 433 U.S. 321, 329 (1977).

[32] The Supreme Court has not applied the statutory disproportionate standard of *Griggs* to

crimination and need not establish an intent to discriminate to make out a cause of action.[33]

The use of statistics is often indispensable in making out a prima facie case of unintentional discrimination.[34] For example, in a leading case on marital status discrimination, *Yuhas v. Libby Owens-Ford Co.*,[35] the court looked to the statistical evidence which showed that seventy-three female and only three male job applicants were denied employment to determine that the women had proven a prima facie case of sex discrimination under Title VII.[36] Another court, however, held that mere evidence of what happened to other couples who experienced the impact of an employer's no-spouse policy was irrelevant to a plaintiff's burden of proof in a Title VII case.[37] Both cases make it clear, however, that it is essential for the plaintiffs in marital status cases to establish a nexus between the discriminatory policy and the alleged injury.[38]

D. Employer Defenses

Employers opposing a claim that marital distinctions in employment constitute sex discrimination have two possible defenses. One defense asserted by employers is the Bona Fide Occupational Qualification (BFOQ)[39] exception. Under this defense theory employers claim that the offensive policy is reasonably necessary to the normal operation of their business, legitimately entitling them to discriminate.[40] Although "Bona Fide Occupational Qualification" is not specifically defined in Title VII, the EEOC, in its interpretive regulations, has defined BFOQ narrowly. EEOC states that it will consider sex to be a BFOQ only where it is necessary for the purpose of authenticity or genuineness.[41]

The United States Supreme Court has also interpreted the BFOQ defense to be an extremely narrow exception to the general prohibition against dis-

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constitutional equal protection issues. In Washington v. Davis, 426 U.S. 229 (1976), the Supreme Court reversed the lower court, holding that disproportionate impact standing alone was sufficient to establish a constitutional violation. The Supreme Court embraced the standard that a discriminatory purpose must be shown.

[33] Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981).

[34] Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal*, 89 HARV. L. REV. 387 (1975-76).

[35] 562 F.2d 496 (7th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978).

[36] In *Yuhas*, the trial court felt that the statistical imbalance was evidence of a prima facie violation of Title VII, shifting as in *Griggs* the burden of proof to the defendant to establish business need for the rule. 562 F.2d at 497.

[37] The court in Meier v. Evansville-Vanderburgh School Corp., 416 F. Supp. 748 (S.D. Ind. 1975), *aff'd mem.*, 539 F.2d 713 (7th Cir. 1976), declared that the instant case was not a class action and that evidence of what happened to other possible plaintiffs did not meet the present plaintiff's burden of proof. 416 F. Supp. at 751.

[38] 42 U.S.C. § 2000e-2(a)(1) (1982). In Gerstle v. Continental Airlines, Inc., 358 F. Supp. 545 (D. Colo. 1973), the court denied relief to two airline stewardesses because they did not show the necessary nexus between the employer policy and their discharge.

[39] 42 U.S.C. § 2000e-2(e)(1) (1982).

[40] *Id.*

[41] 29 C.F.R. § 1604.2(2) (1982).

crimination on the basis of sex.[42] The test must be one of business necessity, not merely business convenience.[43] The burden of proof is placed upon the employer who relies on it. The employer must not only assert that hiring employees would undermine the essence of its business operation, but that it has a factual basis for holding this belief.[44] Discriminatory employment criteria based upon stereotyped classifications, generalizations, and assumptions do not rise to the level of BFOQs.[45]

As previously mentioned, another possible defense for an employer charged with sex discrimination is found in the doctrine of "business necessity" adopted in *Griggs*.[46] It has been asserted that subsequent to *Griggs* the business necessity doctrine has been broadened far beyond the original narrow holding that employer practices must be related to job performance.[47] At least one court has held that the employer's burden is very slight in defending his marital distinction policy on the grounds of business necessity.[48]

E. Forms of Discrimination

1. Explicit Marital Requirements: Sex Plus Marital Status

"Sex plus" employment policies are those which impose on persons of one sex conditions of employment not imposed on persons of the other sex.[49] In the landmark decision, *Phillips v. Martin Marietta*,[50] the Supreme Court held that "sex plus" employment policies were indeed sex discrimination and thus violative of Title VII. Applying this standard to marital status discrimination, the correct methodology is to cancel out the common characteristics of the two classes being compared (married women and married men). If the canceled element is marital status and sex remains the only operative factor,[51] then a case of unlawful discrimination is proved.

Historically, the airline industry[52] has imposed different marriage policies

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[42] Dothard v. Rawlinson, 433 U.S. 321 (1977).

[43] Modjeska, *supra* note 27.

[44] Fesel v. Masonic Home, 447 F. Supp. 1346 (D. Del. 1978), *aff'd*, 591 F.2d 1334 (3d Cir. 1979).

[45] Modjeska, *supra* note 27, at 42.

[46] 401 U.S. 424 (1971).

[47] Note, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No Alternative Approach*, 84 Yale L.J. 98, 98 (1974-1975) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971)).

[48] In *Yuhas v. Libby Owens-Ford*, 562 F.2d 496, 499 (7th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978), a sufficient defense was made out because "plausible" reasons support the assumption that it is generally a bad idea to have both partners in a marriage working together.

[49] Note, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971); *see also* LARSON, *Employment Discrimination* (1982) [hereinafter cited as LARSON].

[50] 400 U.S. 542 (1971). The Supreme Court held that a company's policy against hiring women with pre-school age children, while hiring men with such children, violated 42 U.S.C. § 2000e-2(a).

[51] *See* Sprogis v. United Air Lines, 444 F.2d 1194 (7th Cir. 1971), *cert. denied*, 404 U.S. 991 (1971); Inda v. United Airlines, 565 F.2d 554 (9th Cir. 1977), *cert. denied*, 435 U.S. 1007 (1978).

[52] Courts have also struck down "no-marriage" policies in various other industries. *See generally* EEOC Decision Case No. 70-38 (1969) EEOC Dec. (CCH) ¶ 6042 (busing industry); Jurinko v.

on its employees depending on their sex. The majority of the courts and the EEOC have found that an airline's no-marriage rule for stewardesses resulted in sex discrimination. The no-marriage policies were implemented through pre-hiring agreements,[53] collective bargaining agreements,[54] or union policies.[55] The courts struck down these policies on the ground that the restriction on stewardesses was not justified under the BFOQ exception, which specifically requires a correlation between a condition of employment and satisfactory performance of the employee's occupational duties.[56] The marital status of stewardesses could not be said to affect the individual woman's ability to create the proper psychological climate of comfort, safety, and security for passengers.[57] One airline attempted to circumvent the no-marriage rule by a modified marital restriction whereby a stewardess could return to active service if she had been terminated because of marriage and had filed a valid grievance in protest or had filed a valid complaint with EEOC or a state agency.[58] The Court held that this modification carried forward the consequences of its past discriminatory policy.[59]

One court completely misapplied the rule. In *Cooper v. Delta Air Lines,*[60] an airline had a policy banning employment of stewardesses who were married, but allowed male stewards to marry and retain their jobs. The district court held this to be nondiscriminatory, because it was a case of discrimination against married persons, not against women, and Congress had not intended marital status to be included within Title VII coverage.[61]

A minority of courts rejected claims of certain airline stewardesses that their transfers, terminations or forced resignations after marriage were based upon sex discrimination in violation of Title VII. One court[62] found no sex

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Edwin L. Weigland Co., 477 F.2d 1038 (3d Cir. 1973), *vacated on other grounds,* 414 U.S. 970 (1973) (manufacturing industry); Vuyanich v. Republic Nat'l Bank, 409 F. Supp. 1083 (N.D. Tex. 1976) (banking).

[53] In EEOC Decision Case No. 6-8-6975 (1968) EEOC Dec. (CCH) ¶ 6003, the Commission held Title VII was violated when an airline required female applicants for employment as stewardesses to sign a pre-employment agreement to terminate employment upon marriage. *See also* EEOC Decision Case No. YSF 9-060 (1969) EEOC Dec. (CCH) ¶ 6011.

[54] The court in Sangster v. United Air Lines, 438 F. Supp. 1221 (N.D. Cal. 1977), *aff'd,* 633 F.2d 864 (1980), *cert. denied,* 451 U.S. 971 (1981), held that the collective bargaining agreement between the employer and union was in violation of Title VII because it barred married stewardess supervisors from transferring to stewardess positions while not imposing the same requirement on single women or similarly situated men. *See also* EEOC Decision Case No. 6-6-5759 (1968) EEOC Dec. (CCH) ¶ 6002.

[55] In Landsdale v. Air Line Pilots Assoc. Int'l, 430 F.2d 1341 (5th Cir. 1970), the court held that a union which caused an airline employer to permit male stewards to marry while denying the same privilege to stewardesses was in violation of 42 U.S.C. § 2000e-2(a) and (c).

[56] Sprogis v. United Air Lines, 444 F.2d 1194, 1199, *cert. denied,* 404 U.S. 991 (1971).

[57] *Id.*

[58] Inda v. United Air Lines, 565 F.2d 554 (9th Cir. 1977), *cert. denied,* 435 U.S. 1007 (1978).

[59] *Id.* at 562.

[60] 274 F. Supp. 781 (E.D. La. 1967).

[61] *Id.* at 783. *See also* Landsdale v. United Air Lines, 2 F.E.P. 462, 62 Lab. Cas. (CCH) ¶ 9417 (S.D. Fla. 1964).

[62] Stroud v. Delta Air Lines, Inc., 544 F.2d 892 (5th Cir.), *cert. denied,* 434 U.S. 844 (1977). *See* E.E.O.C. v. Delta Air Lines, Inc., 578 F.2d 115 (5th Cir. 1978).

discrimination merely because the airlines did not employ male stewards in the first place. Another court[63] denied recovery to two stewardesses because they did not establish the necessary nexus between the no-marriage policy and their resignations.

Marriage policies[64] have also been found to violate Title VII under the sex-plus marital status classifications. The EEOC had held, for example, that an employer who has a policy requiring female truck drivers but not male truck drivers to be married is in violation of Title VII.[65] In that ruling, the Commission said that the employer failed to prove a BFOQ defense when it attempted to show that hiring single females as truck drivers would jeopardize both safety and the efficient transportation of goods.[66]

Today, the cases of sex-plus marital status are much more subtle than the "no-marriage" rules of yesterday. For example, in one EEOC case,[67] the common characteristics were marriage and family responsibility. A female with fifteen years of sales experience was passed over in favor of a male employee with only six years experience for a position on the company's traveling sales staff. The employer advanced the reason that the female employee's husband had been ill on and off for several years, and that it preferred someone for the traveling job who would not have family considerations that might interfere with getting on the road early.[68] The company did not say it would similarly pass over a male whose wife had been ill. In the Commission's view, the company's preference was based on stereotypical notions about the family responsibilities of males and females; thus the differentiation was based on sex.[69]

Another variant of the sex plus marital status classifications involves mandatory name change policies for married women. In *Allen v. Lovejoy*,[70] a county government had suspended a married female employee for her refusal to comply with its policy which required married women to use their husband's surnames on personnel forms. The court of appeals held that this was sex discrimination, reversing the district court which determined that this kind of discrimination was not proscribed by Title VII.[71]

2. "Neutral" Marital Requirements: No-Spouse Rules

No-Spouse rules are a fairly common employment policy. The policy is classified as a neutral factor because it is facially sex-neutral in almost all instances,[72] and because it is generally conceded that the rules have been

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[63] Gerstle v. Continental Air Lines, Inc., 358 F. Supp. 545 (D. Colo. 1973).
[64] G. DOUTHWAITE, *Unmarried Couples* (1979) [hereinafter cited as G. DOUTHWAITE].
[65] EEOC Decision Case No. 71-2048 (1971) EEOC Dec. (CCH) ¶ 6244.
[66] *Id.*
[67] EEOC Decision Case No. 71-2613 (1973).
[68] *Id.*
[69] *Id.*
[70] 553 F.2d 522 (6th Cir. 1977).
[71] *Id.* at 524.
[72] McArthur v. Southern Airways, Inc., 404 F. Supp. 508 (D. Ga. 1975), *vacated*, 556 F.2d 298 (5th Cir. 1977), *dismissed*, 569 F.2d 276 (5th Cir. 1978), is the only reported case in which the

adopted for nondiscriminatory reasons.[73] However, discrimination has frequently been found because the no-spouse rule works disproportionate damage on the employment opportunities of one sex. Most cases begin with an attempt to establish the proposition that it is most often the wife who is terminated under the rule.

In the leading case, *Yuhas v. Libby Owens-Ford Co.*,[74] the Seventh Circuit upheld the defendant's policy prohibiting employment of the spouse of a currently employed hourly worker.[75] The plaintiff introduced statistics of the female/male ratio that had been affected by the plant's rule. Both the district court and the circuit court concluded that the impressive statistics made out a prima facie case[76] of sex discrimination. However, the defendant put forth plausible reasons to support the assumption that it is generally a bad idea to have both partners in a marriage working together. These reasons included:

> [I]nterference with job performance caused by intense emotions generated in the marital relationship that cannot be temporarily put aside by leaving home to go to work when one's spouse works at the same place; the expectation that spouses would side together in a grievance; problems of conflict of interest if one spouse were promoted to a supervisory position over the other; and undue influence in the hiring process.[77]

Although the defendant never put forth any evidence that the rule increases production, the argument that the no-spouse rule improves the workplace was convincing to the court, meriting summary judgment.[78]

The Seventh Circuit's adoption of the employer's rationale has serious implications in the area of marital status discrimination. First of all, it marks a retreat from the stringent, *Griggs*,[79] job-related requirement test, because it has the effect of condoning stereotypical beliefs that a working environment where some of the employees are married to one another is somehow unsafe or inefficient. Thus, many qualified persons will continue to be foreclosed from employment opportunities because of the mere identity and occupation of their spouse. Another repercussion of *Yuhas* is that plaintiffs may no longer be able to rely solely on convincing statistical evidence to prove disparate impact. Evidence of an employer's intent to discriminate[80] may be necessary to strengthen the plaintiff's prima facie case. Thirdly, because sex discrimination is difficult to discern from neutral policies in the first place, the minimal "business necessity" justification accepted by the Seventh Circuit may prompt other

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regulation was discriminatory on its face because the rule forbade only the employment of wives of male employees.

[73] LARSON, *supra* note 49.

[74] 562 F.2d 496 (7th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978).

[75] *Id.* It is interesting to note that the rule does not require discharging either spouse of couples already married and does not require terminating an employee who marries a fellow employee. Furthermore, the rule does not extend to executives.

[76] Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

[77] Yuhas v. Libby Owens-Ford, 562 F.2d at 499.

[78] *Id.*

[79] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[80] *See supra* notes 27-33.

employers to continue past discriminatory practices under the mask of any ostensibly neutral policy. Some evidence of this can be found in subsequent marital status discrimination cases which have cited *Yuhas* with approval.[81]

The opposite result, however, was reached by the EEOC[82] in a case factually similar to *Yuhas*. The Commission concluded that the fact that the employer had rejected sixty-five female applicants and only one male applicant because of the no spouse rule strongly inferred sex discrimination.[83] Unlike the result reached in *Yuhas*, the Commission ruled that the defendant did not present documentary or testimonial evidence supporting the contention that the rule was occasioned by problems of jealousy and absenteeism, and thus had not met its burden of proof.

Several variations to the "traditional" no-spouse rule have emerged, placing specific restrictions on married couples working together.

A few employers do not absolutely prohibit the employment of spouses, preferring instead to limit the employment of a spouse to jobs over which a member of that person's immediate family does not exercise supervisory authority.[84] Courts have uniformly held that this is neither discriminatory in its application, nor in conflict with EEOC guidelines.[85] One court, however, in dicta, stated that even this less restrictive no-spouse rule placed an indirect burden on the employed couple to marry based on position.[86]

Several employers have rules both banning the employment of a spouse in the same department and allowing the couple to decide, upon marriage, which one will leave.[87] This rule has met with outrage from women's organizations based on the argument that the end result is a discriminatory impact on the female partner who is usually the one to quit.[88] As the cases illustrate, their attacks have met with modest success in the courts.

In the leading case on this point, *Harper v. Trans World Airlines*,[89] the

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[81] *See infra* text accompanying notes 112-116.

[82] EEOC Decision Case No. 75-239 (1976) EEOC Dec. (CCH) ¶ 6492.

[83] *Id.* The Commission concluded that the impact of the no-spouse rule was additional evidence of the fact that the employer generally did not hire female applicants.

[84] Southwestern Community v. Community Services, 462 F. Supp. 289 (S.D. W. Va. 1978); *see also*, McSpadden v. Millins, 456 F.2d 428 (8th Cir. 1972).

[85] Smith v. Mutual Benefit Life Insurance Co., 11 EMPL. PRAC. DEC. (CCH) ¶ 10876 (D.N.J. 1976).

[86] In Satterfield v. Greenville, 395 F. Supp. 698 (D. Tex. 1975), *modified*, 549 F.2d 347 (5th Cir.), *modified on reh'g*, 557 F.2d 414 (5th Cir. 1977), the court held that a municipal employer who refused to hire a female applicant as its airport manager in order to avoid violating a provision of its city charter relating to conflicts of interest because the husband was a prime user of the airport was not sex discrimination under Title VII. Similarly, in Emory v. Georgia Hospital Service Ass'n, 446 F.2d 897 (5th Cir. 1971), the court found no sex discrimination where an insurance company terminated a female employee pursuant to a policy of not employing or retaining in employment any person whose spouse was employed by an insurance company in active competition.

[87] Harper v. Trans World Airlines, Inc., 525 F.2d 409 (8th Cir. 1975); Tuck v. McGraw-Hill, Inc., 421 F. Supp. 39 (S.D.N.Y. 1976); Hess v. Oregon Employment Div., 29 Or. App. 229, 562 P.2d 1232 (1977).

[88] G. DOUTHWAITE, *supra* note 64.

[89] 525 F.2d 409 (8th Cir. 1975).

airline had a rule that prohibited spouses from working together and gave the couple thirty days after the marriage to determine which spouse would leave.[90] If the couple could not agree, the less senior employee was forced to resign. In this case, the wife, who had lesser seniority, was discharged and brought suit on the ground that the rule had a disparate impact on women.[91] The court concluded that the married former employee failed to prove by statistics[92] or other probative evidence[93] that the airline rule adversely affected women.

In another instance, a court[94] denied recovery to a female reporter who was terminated based on a publishing company's "close relative rule," which prevented her from transferring to the company's New York office.[95] The court ruled that the woman failed to prove her case on the sex plus marital status argument, as well as her disparate impact argument. The court rejected the argument that the rule operated to perpetuate past discrimination and applauded the employer's concern in offering to help the reporter find other employment.[96]

In still another instance, a woman quit her job as a result of being transferred pursuant to a company policy prohibiting married couples from working in the same department.[97] When she sued for unemployment compensation, the court held that leaving work under the policy was not good cause within the meaning of the statute. The court concluded that the employer's business reasons — that the department would be shorthanded if a couple wished to transfer simultaneously, go on vacation, or take days off — were valid.[98]

What may be inferred from the courts' rationale in these cases is that, if the onus is placed upon the couple to decide, the employer is relieved of any liability stemming from his policy which disparately impacts on women. These cases also ignore the settled distinction between business necessity and business convenience under the traditional Title VII analysis.

The same types of issues often arise in the public sector context. School boards, in particular, often have a policy of not permitting spouses to teach in the same school.[99] Plaintiffs have challenged these types of rules from a Title

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[90] *Id.*

[91] *Id.* at 410. The plaintiff asserted that although the rule gives the couple the right to decide which one will be released, more women than men will voluntarily terminate. Since the wife usually earns less than the man, the family would be harmed less if she were to quit. It was further alleged that because of the discrimination against women in hirings and promotions in the market place, there is less incentive for the woman to retain employment.

[92] *Id.* at 412. The Court held that even though in four out of five cases where the problem arose, the woman left, the number was not statistically significant.

[93] *Id.* at 413. The Court found no evidence to support the proposition that women are not in the upper jobs or that women were foreclosed upward mobility. There was also no evidence that the defendant engaged in discriminatory hiring or promotion.

[94] Tuck v. McGraw-Hill, Inc., 421 F. Supp. 39 (S.D.N.Y. 1976).

[95] *Id.* at 40.

[96] *Id.* at 42.

[97] Hess v. Oregon Employment Div., 29 Or. App. 229, 562 P.2d 1232 (1977).

[98] *Id.* at 232, 562 P.2d at 1234.

[99] G. DOUTHWAITE, *supra* note 64.

VII standpoint[100] and a constitutional standpoint[101] and have met with little success on both fronts, despite the lack of job-related evidence put forth by the employers.

In the leading case on nepotism rules in educational institutions, *Meier v. Evansville-Vanderburgh School Corp.*,[102] a female schoolteacher was transferred to another school following her marriage to a teacher employed at the same school pursuant to the school's *unwritten* policy. The court concluded that the teacher failed to prove her prima facie case of sex discrimination based on the fact that the couple was aware of the long-standing policy of their employer prohibiting spouses from teaching in the same school.[103] The court declared:

> While Congress clearly intended for that legislation [Civil Rights Act] to eliminate the stereotype station in life which had hindered women's social, economic, and political progress, it cannot be said Congress intended to permit a woman to use the Act as a 'whipsaw' to sue her employer for alleged discriminatory acts created by a marital decision which made certain the very conduct she seeks to redress.[104]

In institutions of higher education, the problem becomes intensified if the couple's expertise is in the same area. A university stated that it did not hire a female applicant as a chemistry professor because, among other things, her research expertise was essentially identical to that of her husband, a member of the chemistry department.[105] Thus, the court held that factors unrelated to sex caused rejection of the female applicant.

One court,[106] however, found that a university's nepotism rule was discriminatory, unnecessary and served no job-related purpose.[107] The facts of the case showed that in twenty-seven nepotism cases involving husbands and wives at the university, none of the husbands were required to accept temporary appointment, while the wife was either given temporary appointment or had the nepotism rule waived when the school wanted to attract a star professor.[108] The plaintiff in this case was a "temporary" appointee and sought reinstatement because she was a term appointee *before* her marriage and *before* she obtained her doctorate.[109]

Perhaps this area best exemplifies the inadequacy of existing remedies to combat marital status discrimination. The effect of antinepotism rules, espe-

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[100] Meier v. Evansville-Vanderburgh School Corp., 416 F. Supp. 748 (S.D. Ind. 1975), *aff'd mem.*, 539 F.2d 713 (7th Cir. 1976); Sime v. Trustees of State University, 526 F.2d 1112 (9th Cir. 1975).

[101] Lewis v. Spencer, 468 F.2d 553 (5th Cir. 1972).

[102] 416 F. Supp. 748 (S.D. Ind. 1975), *aff'd mem.*, 539 F.2d 713 (7th Cir. 1976).

[103] *Id.* at 751.

[104] *Id.*

[105] Sime v. Trustees of State University, 526 F.2d at 1114.

[106] Sanbonmatsu v. Boyer, 45 A.D.2d 249, 357 N.Y.S.2d 245 (1974), *appeal dismissed*, 36 N.Y.2d 871, 331 N.E.2d 701, 370 N.Y.S.2d 926 (1974).

[107] *Id.* at 253, 357 N.Y.S.2d at 249.

[108] *Id.* at 252, 357 N.Y.S.2d at 248.

[109] *Id.* at 250-51, 357 N.Y.S.2d at 247.

cially in higher education, has been to systematically exclude women from the profession. "One would expect that nepotism rules which circumscribe practices on [marital status] would require a powerful rationale to justify its existence."[110]

The no-spouse rule has also been applied to unmarried couples.[111] In *Espinoza v. Thoma,*[112] Karen Espinoza was denied employment with Metro Area Transit (MAT) of Omaha[113] pursuant to MAT's no-spouse policy because she was cohabitating with another bus driver. She challenged her denial because she was a single woman and had no claim to status as a common law wife under Nebraska law.[114] Initially, the Eighth Circuit considered whether the no-spouse policy was unconstitutional under the equal protection clause of the fourteenth amendment[115] and affirmed the district court's assessment that:

> [P]reclusion of spouses bears a fair and substantial relation to the objectives of the policy to eliminate the potential for serious conflicts that might affect job performance; that the classification is neither arbitrary nor capricious; and that there was no evidence which would indicate that all persons similarly circumstanced as Espinoza would not be treated alike.[116]

Next, the court addressed the additional question of whether the word 'spouse' should be interpreted to include persons who are not legally married but who are living together. The court concluded that, in view of the stated purpose of the no-spouse rule, "the interpretation of the word 'spouse' to include a person who lives in an espoused relationship is valid and logical."[117]

This case demonstrates the difficulty of challenging a no-spouse rule on equal protection grounds because of the minimal scrutiny afforded in the analysis of the classification. When a classification involves no suspect class, is not based on the immutable characteristics of gender, and does not restrict the exercise of a fundamental constitutional right, the court will usually defer to

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[110] *Id.* at 252, 357 N.Y.S.2d at 248.

[111] Smith v. Mutual Benefit Life Ins., 11 Empl. Prac. Dec. (CCH) ¶ 10,876 (D. N.J. 1976). The claimant challenged the employer's policy forbidding a spouse from supervising his or her spouse. The court held it was applied uniformly without regard to sex and was applied to unmarried couples, thus avoiding any sexual stereotypes.

[112] 580 F.2d 346 (8th Cir. 1978).

[113] *Id.* at 347. It is interesting to note that Ms. Espinoza applied for the job in 1974 and was told she was too small to handle large buses. At this point she filed a Title VII action, alleging that MAT's height and weight requirements were unlawful. Subsequently, Espinoza and MAT entered into a conciliation agreement stating that MAT would hire her if she met other qualifications. She took the physical examination in July, 1974, and was informed that since she was three months pregnant she was unable to meet the physical strength requirement. She was informed that she could try again after delivery. Ms. Espinoza returned in February, 1975, and reapplied. She passed the physical and arrived early in June, 1975, to begin training when she was informed that she would not be hired because of MAT's no-spouse policy.

[114] *Id.* at 348. Nebraska does not recognize common law marriage.

[115] U.S. CONST. amend. XIV § 1.

[116] Espinoza v. Thoma, 580 F.2d at 347.

[117] *Id.* at 349. It is curious to speculate whether the outcome would have been different if Ms. Espinoza would have challenged MAT's policy under the Title VII, *McDonald Douglas* criteria where evidence of pretext to discriminate would comprise an essential element of the case.

other governmental branches through the use of the rational basis test.[118] Thus, the court in *Espinoza* was willing to accept any conceivable basis for an employment classification based on a no-spouse rule.

The no-spouse rule is also vulnerable to constitutional challenge on the ground that it infringes on the fundamental right to marry[119] — a right which courts have inferred from the text of the United States Constitution.[120] In most cases the right has been asserted in conjunction with other claims of a non-constitutional nature. But, unfortunately, these challenges are usually unsuccessful. Most courts generally find a way to uphold the no-spouse policy by focusing upon the employer's justifications, without ever addressing the plaintiff's fundamental right to marry.[121] One exception is the Nebraska Supreme Court's decision in *Volchahoske v. City of Grand Island.*[122] There the court reversed a lower ruling that the City had a reasonable basis for the ordinance which prohibited the employment of both husband and wife. The court stated that the right to marry was a fundamental right protected under the first, fifth, ninth and fourteenth amendments.[123] Therefore, the court reasoned, the City must show a 'compelling interest' in enforcement of the challenged ordinance to justify an intrusion on the right to marry.

4. State Attempts to Eliminate Marital Status Discrimination

The most recent development in the area of marital status discrimination law is the enactment of state antidiscrimination statutes to specifically include "marital status" discrimination in the list of unlawful employer practices. To date, nineteen states[124] have included such provisions.

It is apparent that this new category of proscribed employer conduct was enacted by states to provide victims of marital status discrimination a more effective remedy than is presently available under suits based on either Title

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[118] *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 524-25 (1978); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1012, 1052-53 (1978).

[119] *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 629-30 (1978).

[120] The Court has attached the label of "fundamental" only to those rights viewed as essential to the concept of individual liberty. *See* Zablocki v. Redhail, 434 U.S. 374 (1978). A regulation that significantly interferes with the exercise of a fundamental right requires rigorous scrutiny and *must* be supported by a compelling state interest and be closely tailored to effectuate only that interest.

[121] *See* Hasenbein v. Seibert, 83 A.D.2d 875, 442 N.Y.S.2d 102 (1981), *aff'd*, 56 N.Y.2d 853, 438 N.E.2d 877, 453 N.Y.S.2d 171 (1982).

[122] 10 Empl. Prac. Dec. (CCH) ¶ 10,247 (Neb. 1975).

[123] In Loving v. Virginia, 388 U.S. 1 (1967), the Supreme Court made it abundantly clear that the right to marry underlies the purposes of the Constitution, although not mentioned therein, and is a fundamental right afforded protection by the first, fifth, ninth, and fourteenth amendments of the United States Constitution. Griswold v. Connecticut, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring). "The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected."

[124] Alaska, California, Colorado, Connecticut, District of Columbia, Florida, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New York, Oregon, and Washington.

VII[125] or the United States Constitution.[126] However, these statutes have not fully achieved this purpose. Instead, they have created a new controversy because "marital status" is not defined anywhere in these statutes. Does 'marital status' denote the particular relation an individual bears to the marital state, i.e., that phase of his or her personal lifestyle which is classifiable as "single," "married," "separated," "divorced," or "widowed"? Or does "marital status" look beyond the conjugal state to embrace the identity or situation of the individual's spouse?[127]

Courts faced with these questions have attempted to define their respective legislatures' specific intent in including marital status on the list of unlawful employer practices. For example, the Supreme Court of Montana, in *Thompson v. Board of Trustees*,[128] concluded that marital status included the identity and occupation of one's spouse, and found for the plaintiffs as a matter of law. The court stated: " '[M]arital status' is not defined anywhere in the statutes relating to antidiscriminatory employment practices," so we are required to interpret liberally "with a view to effect their objects and to promote justice."[129] Furthermore, the court remarked that the statute is a strongly worded directive from the legislature prohibiting employment discrimination and encouraging the hiring, promotion, and dismissal solely on one's merit.[130] Similarly, in *Washington Water Power Co. v. Washington State Human Rights Commission*,[131] the Supreme Court of Washington reversed the trial court's decision and reinstated the Human Rights Commission determination that marital status includes the identity and occupation of his or her spouse. The court held that the Commission was justified in its interpretation because it was given broad policy formulation and rule-making powers.[132] Thus, the court concluded that an antinepotism employment policy was prohibited under the statute, making it an unfair practice to refuse to hire any person because of marital status.[133]

On the other side of the coin are the courts that argue that, absent a statutory definition, words must be given their "ordinary, everyday meaning."[134] The New York Court of Appeals in *Manhattan Pizza Hut v. New York*,[135] for example, ruled that "marital status" is a social condition enjoyed by an individual by reason of his or her having participated or failing to participate in

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[125] *See supra* text accompanying notes 74-81.

[126] *See supra* note 24.

[127] Manhattan Pizza Hut v. New York, 72 A.D.2d 556, 420 N.Y.S.2d 761, 415 N.E.2d 950, *rev'd*, 51 N.Y.2d 506, 415 N.E.2d 950, 434 N.Y.S.2d 961 (1980).

[128] 627 P.2d 1229 (Mont. 1981).

[129] *Id.* at 1231.

[130] *Id.*; *see also* Kraft, Inc. v. State, 284 N.W.2d 386 (Minn. 1979).

[131] 91 Wash.2d 62, 586 P.2d 1149 (1978). In this case, employees announced their intention to marry and resist discharge under employer's no-spouse rule, and respondents brought this suit to test the validity of the regulation.

[132] *Id.* at 67, 586 P.2d at 1152.

[133] *Id.* at 69, 586 P.2d at 1154.

[134] *Id.* at 71, 586 P.2d at 1155 (Hicks, J., dissenting).

[135] 72 A.D.2d 556, 420 N.Y.S.2d 761 (N.Y. App. 1979), *rev'd*, 51 N.Y.2d 506, 415 N.E.2d 950, 434 N.Y.S.2d 961 (1980).

marriage.[136] The majority stated that, "[h]ad the legislature desired to enlarge the scope of its proscription to prohibit discrimination based on an individual's marital relationships — rather than simply on an individual's marital status — surely it would have said so."[137]

Similarly, a district court in Michigan,[138] citing *Manhattan Pizza Hut,* concluded that a no-spouse rule does not come into play by virtue of a person getting married and assuming the status of a married person but, rather, comes into play by virtue of *whom* you select as a spouse.[139] This, the court reasoned, is a significant distinction in evaluating discrimination based on marital status. The court cited the Superior Court of New Jersey in *Thompson v. Sanborn's Motor Express, Inc.*[140] for the proposition that identity and occupation of a spouse is a far cry from the fact of his or her existence.[141]

The phrase "marital status" in the various statutes may have *intentionally* been undefined by state legislatures. These cases demonstrate that discrimination based on marital status can be discrimination based both on one's conjugal state *and* on the identity and occupation of one's spouse. The court's role is to fill in the holes, depending upon the factual setting, to achieve the optimum social policy. No-spouse rules prevent a person from remaining in present employment or obtaining future employment. It would appear that the optimum social policy is to insure that individuals be judged solely on their own merit. Thus, it seems evident that courts faced with a no-spouse rule challenge must construe marital status to be defined as the identity and occupation of one's spouse. If future no-spouse cases do not analyze "marital status" in this fashion, these state statutes must be relegated to the list of inadequate remedies.

III. Discrimination Based on Conduct Defined By Marital Status

There is a large body of case law in which private employers, as well as government agencies, have attempted to regulate the private lives of their employees by prescribing what constitutes an acceptable marriage relationship. In the majority of cases, employers enforce their peculiar brand of acceptable conduct by terminating nonconforming employees on the ground of immorality. The victims of these decisions have begun to challenge their discharges, alleging deprivations of constitutionally or statutorily guaranteed rights. This section will survey the growing body of law to determine how these challenges have fared.

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[136] 51 N.Y.2d at 511, 415 N.E.2d at 953, 434 N.Y.S.2d at 964.

[137] *Id.* at 512, 415 N.E.2d at 953, 434 N.Y.S.2d at 964.

[138] Klanseck v. Prudential Ins. Co. of America, 509 F. Supp. 13 (E.D. Mich. 1980). In this case employer had a policy requiring one of its district agents upon marriage to each other to resign or be transferred to the sales staff or to the home office.

[139] *Id.* at 18.

[140] 154 N.J. Super. 555, 382 A.2d 53 (1977). In this case the issue was whether the employer's policy prohibiting the contemporaneous full-time employment of relatives was in violation of New Jersey statute, "Law Against Discrimination."

[141] 509 F. Supp. at 18.

A. *Unwed Mothers*

There have been myriad attempts by employers to discriminate against single women because of their temporary status as an unwed mother.

School boards have vigorously attempted to dictate the conduct of female teachers by implementation of a written or unwritten[142] "unwed mother" policy. The school boards have offered various rationales through which they assert that their rule furthers the creation of a proper moral and scholastic environment. For example, they have asserted that unwed parenthood is prima facie proof of immorality;[143] that unwed mothers are improper communal role models after whom students may pattern their lives;[144] and that employment of an unwed mother in a scholastic environment materially contributes to the problem of schoolgirl pregnancy.[145]

1. Teacher Cases

Unmarried female teachers who have been discharged because of pregnancy have challenged these school board policies on constitutional grounds.

Discharged teachers have alleged a violation of their fundamental right to privacy[146] when the state has interfered in their personal choice to bear a child.[147] Most cases advancing this theory have argued that the state must justify intrusions on personal privacy under the 'compelling state interest' test.[148] In some cases this argument has succeeded. For example, in *Drake v. Board of Education,*[149] a three judge court ruled that the cancellation of an unmarried, pregnant teacher's contract was a violation of her constitutional right to privacy, because the school board obtained the information about her condition from the teacher's physician. To the court, the school board's invasion into the teacher's privacy could not be justified under a 'compelling state interest' test, because her pregnancy had nothing to do with her in-class performance.[150]

In another case[151] the dismissal of an unwed teacher was challenged under the equal protection clause. The Fifth Circuit stated that a school board policy of firing unwed, pregnant teachers was "fraught with invidious discrimination"

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[142] Cochran v. Chidester School Dist., 456 F. Supp. 390 (W.D. Ark. 1978). In this case there was no objective standard governing the employment, assignment or dismissal of teachers, either written or orally announced.

[143] Andrews v. Drew Mun. Separate School Dist., 507 F.2d 611 (5th Cir. 1975).

[144] Brown v. Bathke, 416 F. Supp. 1194 (D. Neb. 1976), *rev'd,* 566 F.2d 588 (8th Cir. 1977).

[145] Reinhardt v. Board of Educ., 19 Ill. App. 3d 481, 311 N.E.2d 710 (1974), *vacated,* 61 Ill. 2d 101, 329 N.E.2d 218 (1975).

[146] *See generally* Roe v. Wade, 410 U.S. 113 (1973) (right to privacy is not pervasive; it extends only to fundamental rights and rights implicit in the concept of ordered liberty); Griswold v. Connecticut, 381 U.S. 479 (1965) (there is a constitutional right to privacy independent of the right to due process); Eisenstadt v. Baird, 405 U.S. 438 (1972).

[147] Roe v. Wade, 410 U.S. 113 (1973).

[148] *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 684-85 (1977); Roe v. Wade, 410 U.S. 113, 152 (1973).

[149] 371 F. Supp. 974 (D. Ala. 1974).

[150] *Id.* at 979.

[151] Andrews v. Drew Mun. Separate School Dist., 507 F.2d 611 (5th Cir. 1975).

and bore "no rational relationship to the objectives ostensibly sought to be achieved by school officials."[152] "Anyway," the court continued, "a policy of firing unwed mothers is irrefutably presumed to violate the equal protection clause"[153] because of the element of sex discrimination resulting from the impossibility of applying an equal standard to unwed fathers.[154]

Several cases have determined that a discharge pursuant to a school policy is unconstitutional because there was a deprivation of procedural due process. A teacher who is not under contract is afforded the least protection because she can usually be terminated without cause. However, courts have stated that the termination may not be based on constitutionally impermissible grounds.[155] When a teacher is under a contract of employment, a property interest[156] is created, entitling her to substantive and procedural due process rights,[157] including a pre-termination hearing.[158] A tenured teacher who becomes pregnant, then, is afforded the most protection because evidence of injury to students, faculty, or the school is necessary before there is sufficient cause for dismissal.[159]

2. Statutory Challenges In Private Sector

In the private sector, pregnant female employees who have been discharged pursuant to a company policy have brought suit under the sex discrimination provisions of Title VII.[160] The EEOC, the agency responsible for Title VII enforcement, has ruled that a company policy of refusing to hire unwed mothers constitutes sex discrimination,[161] unless the rule also applies to unmarried fathers.[162]

The Sixth Circuit agreed with this determination in *Jacobs v. Martin Sweets Co.*[163] In that case, the defendant had demoted a pregnant, unmarried employee from her position as executive secretary because of her immoral con-

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[152] *Id.* at 613 (quoting Andrews v. Drew Mun. Separate School Dist., 317 F. Supp. 27, 35 (N.D. Miss. 1973)).

[153] *Id.* at 614.

[154] *Id.* at 613.

[155] Brown v. Bathke, 566 F.2d 588 (8th Cir. 1977).

[156] Board of Regents v. Roth, 408 U.S. 564, 578 (1972); *see also* Perry v. Sinderman, 408 U.S. 593 (1972).

[157] The court in Cochran v. Chidester School Dist., 456 F. Supp. 390, 395 (W.D. Ark. 1978) (citing Cato v. Collins, 539 F.2d 656, 659 (8th Cir. 1976)), stated, "A right to procedural due process is also triggered by the imposition of a stigma which might result in an adverse effect upon the teacher's future employment opportunities or standing and associations in the community."

[158] *Id.* Here, the court found that under Arkansas statute, which purported to establish a post-termination hearing to teachers upon their request only, did not meet due process standards.

[159] Reinhardt v. Board of Educ., 19 Ill. App. 3d 481, 311 N.E.2d 710 (1974), *vacated*, 61 Ill. 2d 101, 329 N.E.2d 218 (1975).

[160] 42 U.S.C. §§ 2000e to 2000e-17 (1981).

[161] EEOC Decision Case No. 71-332 (1973), EEOC Dec. (CCH) ¶ 6164 (September 8, 1970).

[162] *Cf.* Omaha Public Schools v. Brown, 13 F.E.P. (BNA) 767 (D. Neb. 1976). This court found that it was not sex discrimination to fire an unwed, pregnant female teacher, although no single male had ever been fired. The court justified the Board's decision because the students had "noticed the woman's condition."

[163] 550 F.2d 364 (6th Cir. 1977), *cert. denied*, 431 U.S. 917 (1977).

duct.[164] In a later Title VII action challenging the demotion, the defendant argued that the female employee had failed to prove that she would have been treated differently if she had been an unmarried father.[165] Without such proof, the employer asserted, there could be no finding of sex discrimination. But the Sixth Circuit Court of Appeals disagreed. Pregnancy is a condition unique to women, the court reasoned.[166] To adopt the position that men and women must be treated differently to prove a Title VII case, the court further explained, would exclude pregnancy from protection in all discrimination cases — a result clearly contrary to the purposes of Title VII.[167]

The Seventh Circuit, however, rejected the *Jacob's* court's analysis in a factually similar case. The court in *Grayson v. Wickes Corp.*[168] ruled that requiring the plaintiff to show that unmarried male employees who fathered out-of-wedlock children would be treated differently than females was the proper standard.[169]

The dissent in *Grayson* stated that the majority's standard was an erroneous burden of proof and one which would be impossible for a plaintiff to meet: "It is totally unrealistic to think that evidence about an employer's treatment of unwed males who had fathered a child would be available to a Title VII plaintiff."[170]

As the dissent states, the court is requiring the plaintiff to establish that the employer has not discriminated against pregnant, unmarried men. This, of course, is not the question because plaintiff's condition of being visibly pregnant, and in this case unwed, was a condition peculiar to the female physiology alone. The majority's standard leaves the plaintiff without evidence to establish a prima facie case and relieves the employer of the burden of proving that plaintiff's marital state or her pregnancy had any relationship at all to the performance of her duties. Discrimination is not to be tolerated under the guise of physical properties possessed by one sex.[171]

Finally, some employers have even attempted to defend their "unwed mother" policies under the BFOQ exception[172] — but with little success. Wisely, courts have found the discharges to be in violation of Title VII, because the employer's defense appeared to relate more to religious or moral qualifications than sexual ones.[173]

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[164] *Id.* at 369.

[165] *Id.* at 370.

[166] *Id.*

[167] *Id.*

[168] 607 F.2d 1194 (7th Cir. 1979).

[169] *Id.* at 1197.

[170] *Id.* at 1198.

[171] Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1198 (7th Cir.), *cert. denied,* 404 U.S. 991 (1971).

[172] 42 U.S.C. § 2000e-2(e) (1976).

[173] Dolter v. Wahlert High School, 483 F. Supp. 266 (N.D. Iowa 1980). *See also* Doe v. Osteopathic Hosp. of Wichita, Inc., 333 F. Supp. 1357 (D. Kan. 1971).

B. Unwed Couples

Employers have also discharged single employees who are living with someone in an extramarital relationship. Employers assert that this "immoral conduct" renders the employee unfit for the job.[174] School boards, for example, have attempted to fire teachers who are involved in a cohabitating relationship. The boards argue that this activity comes within the proscription of state statutory provisions allowing for dismissal due to immoral conduct.[175]

The major problem with these statutes is that they rarely define what exactly constitutes immoral conduct. Courts, in turn, have developed various constructions. One court,[176] for example, summarily affirmed a school board's dismissal of a teacher who was living with her boyfriend. The court stated that this action was justified under a South Dakota statute which provided that a teacher could be terminated for gross immorality.[177] Other courts have attempted to second guess what the legislature meant by "immoral conduct" and have enumerated factors[178] to be considered in determining if a teacher's immoral conduct renders her unfit to teach. Finally, one court[179] found that this type of statute was unconstitutionally vague because "a statute so broad makes those charged with its enforcement the arbiters of morality for the entire community."[180]

Whatever the statutory construction, courts that have considered the issue have been in agreement that a school board must show a nexus between the educational process and the plaintiff's conduct before suspending the plaintiff.[181]

The United States Supreme Court has denied certiorari in a case which, to date, best exemplifies the constitutional issues involved when a couple is discriminated against because of their living arrangement. In *Hollenbaugh v. Carnegie Free Library*,[182] the plaintiffs brought a civil rights action[183] against the

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[174] Fisher v. Snyder, 346 F. Supp. 396 (D. Neb. 1972), *aff'd*, 476 F.2d 375 (8th Cir. 1973).

[175] *Id.* at 397.

[176] Sullivan v. Meade County Indep. School Dist., 387 F. Supp. 1237 (D.S.D. 1975), *aff'd*, 530 F.2d 799 (8th Cir. 1976).

[177] *Id.* at 1248.

[178] The factors include: age and maturity of the students of the teacher involved; likelihood that the teacher's conduct will have an adverse effect on students or other teachers; the degree of anticipated adversity; the proximity or remoteness in time of the conduct; extenuating or aggravating circumstances surrounding the conduct; likelihood the conduct may be repeated; motives underlying the conduct; whether conduct will have a chilling effect on rights of teachers involved or other teachers. Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969); *see* Pettit v. State Bd. of Educ., 10 Cal. 3d 29, 513 P.2d 889, 109 Cal. Rptr. 665 (1973).

[179] Burton v. Cascade School Dist. Union High School No. 5, 353 F. Supp. 254 (D. Ore. 1973), *aff'd*, 512 F.2d 850 (9th Cir.), *cert. denied*, 423 U.S. 839 (1975).

[180] *Id.* at 255.

[181] Thompson v. Southwest School Dist., 483 F. Supp. 1170 (W.D. Mo. 1980). *See also* Mindal v. United States Civil Serv. Comm'n, 312 F. Supp. 485 (N.D. Cal. 1970). In this case, the court held that even if a clerk's conduct in living with a woman could be characterized as "immoral", he could not constitutionally be terminated from government service on this ground absent a rational nexus between this conduct and his duties as a postal clerk.

[182] 436 F. Supp. 1328 (W.D. Pa. 1977), *aff'd*, 578 F.2d 1374 (3d Cir.), *cert. denied*, 439 U.S.

Board of Trustees of Carnegie Library because of an alleged deprivation of their constitutional rights. The plaintiffs had been employees of the library for eleven years and had no significant problems until the discharge. The library administrators discovered that the plaintiffs were living together and asked them to cease. When they refused to alter their living arrangement, the Board voted to terminate their employment because they were living together in "open adultery."[184] The defendant's reasons for the discharge were threefold: (1) that living together affected the ability of Ms. Hollenbaugh to perform her librarian function; (2) that retaining them adversely affected the library's ability to perform its function in the community; and (3) that the plaintiffs stated their intention to continue living together.[185] It was plaintiffs' contention that these reasons were not rationally related to the legitimate government interest.

The district court held otherwise, and the Third Circuit affirmed. They concluded that any rights the plaintiffs had to live together must be balanced against the state's interest, as represented by the library, in being able to properly perform its function in the community.[186] The court held under the minimum rationality test that there was *no* violation of the equal protection clause because the dismissal was not arbitrary, unreasonable or capricious.[187] Finally, the court found no fundamental privacy right for two persons, one of whom is married, to live together under the circumstances in this case.[188]

Justice Marshall wrote a separate dissenting opinion[189] from the denial of certiorari in which he outlined the serious constitutional implications in permitting the lower court decision to stand. The major thrust of his argument was that the district court used only minimal scrutiny in analyzing the library's justifications for the dismissals: "Such administrative intermeddling of important personal rights merits more than minimal scrutiny."[190] Several rights were implicated by the discharge, stated Justice Marshall. Those rights include the right of the individual to engage in any of the common occupations of life;[191] the right to be free except in limited circumstances from unwarranted governmental intrusion into one's privacy;[192] the freedom of personal choice in matters of marriage and family life;[193] and the freedom of association.[194]

As Justice Marshall's dissent clearly indicates, individual choices in matters of private life deserve more than minimal protection. In other decisions

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1052 (1978).

[183] 42 U.S.C. § 1983 (1976).

[184] 436 F. Supp. at 1331.

[185] *Id.* at 1332.

[186] *Id.* at 1333.

[187] *Id.*

[188] *Id.* at 1334.

[189] Hollenbaugh v. Carnegie Free Library, 439 U.S. 1052 (1978) (Marshall, J., dissenting from denial of certiorari).

[190] *Id.* at 1054-55.

[191] *Id.* at 1055.

[192] *Id.*

[193] *Id.* at 1056.

[194] *Id.*

where private choice has been an issue, such as the issue of contraception in *Griswold v. Connecticut*,[195] the Court used the highest scrutiny to determine that, if the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted government intrusion.

C. *Extramarital Affairs*

The rights of persons engaged in extramarital affairs is also an unevenly evolving area of the law. Courts are divided on the issue of whether one may be fired for engaging in an extramarital affair or whether the fundamental right of privacy extends to this activity.

Several illustrative cases have arisen in the law enforcement context, involving policemen who are discharged for engaging in extramarital affairs in violation of a department code of morality. One court[196] that has analyzed the issue under equal protection analysis used minimal scrutiny to uphold the dismissal of a police officer because the firing was not irrational, unreasonable, or arbitrary. To this court, the rule was clearly designed to further the department's interest in its morale, discipline, effectiveness, and reputation in the community.[197] Another court[198] found a similar statute to be unnecessarily vague and overbroad and ordered the police officer to be reinstated. Still another court[199] found that police officers' private lives are beyond the scope of any reasonable police investigation by the department because of the tenuous relationship between such activity and an officer's performance of the job.[200]

The most recent case addressing the issue of whether one can be fired for having an extramarital affair answered in the affirmative. In *Johnson v. San Jacinto*,[201] a university registrar was demoted because he was having an affair with the librarian and subsequently brought suit, contending that the action invaded his constitutional right of privacy. The district court in Texas postulated that the privacy cases are divided into three distinct classes of protectable interests.[202] The first class is the right of marital privacy which extends to physical and emotional intimacies between husbands and wives.[203] The second class is the right of family and home privacy which encompasses not only decisions concerning raising children but also choices concerning family living arrangements.[204] The third category is the right of individual privacy which en-

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[195] 381 U.S. 479 (1965).

[196] Wilson v. Swing, 463 F. Supp. 555 (D.N.C. 1978).

[197] *Id.* at 563-64.

[198] Smith v. Price, 446 F. Supp. 828 (D. Ga. 1977), *rev'd*, 616 F.2d 1371 (5th Cir. 1980).

[199] Shuman v. City of Philadelphia, 470 F. Supp. 449 (E.D. Pa. 1979); *see* Major v. Hampton, 413 F. Supp. 66 (E.D. La. 1976).

[200] *Shuman*, 470 F. Supp. at 459.

[201] 498 F. Supp. 555 (S.D. Tex. 1980).

[202] *Id.* at 574.

[203] *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965).

[204] *See, e.g.*, Moore v. City of E. Cleveland, 431 U.S. 494 (1977); *cf.* Stanley v. Georgia, 394 U.S. 557 (1969).

compasses decisions concerning the integrity and autonomy of one's body.[205]

The court noted that, although there was some judicial support for plaintiff's assertion,[206] it was going to adopt the approach taken in *Hollenbaugh v. Carnegie Free Library*.[207] Thus, the court concluded that the plaintiff's extramarital relationship was not protected under the constitutional right to privacy, because the right is "grounded on the marriage relationship, and the right of a single or married individual to do with his or her body as he/she pleases encompasses aspects incident to sexual intimacy, but currently does not protect sexual relations themselves."[208]

IV. Conclusion

One's career choice should be unhampered by rules making marital status a critical factor in employment decisions. But, unfortunately, employers continue to apply such rules, often with the unwitting approval of courts which refuse to fully enforce the promises of the United States Constitution and Title VII. In this period of retrenchment from the strict enforcement of antidiscrimination laws, the prospects for eliminating marital status as a factor in job decisions appear bleak.

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[205] *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Roe v. Wade, 410 U.S. 113 (1973); Skinner v. Oklahoma, 316 U.S. 532 (1942).

[206] 498 F. Supp. at 595 (citing Krzyzewski v. Metropolitan Gov't of Nashville, 14 Empl. Prac. Dec. (CCH) ¶ 7726 (D. Tenn. 1976)).

[207] 498 F. Supp. at 575.

[208] *Id.*