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Pregnancy and Hiring Discrimination

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PREGNANCY AND HIRING DISCRIMINATION

The employer looks over the application on his desk. The applicant has the right educational requirements; her references are impressive; she has experience which would greatly benefit her in the position. She looks like a good prospect. The employer buzzes his secretary and requests that the applicant be shown to his office for an interview. As the applicant enters the room he rises to meet her. Half way out of his chair he stops. Printed on the front of the woman's shirt are the letters B-A-B-Y with an arrow pointing down to the slight bulge at the woman's stomach. Politely introducing himself, the employer tells the woman that there are no positions available for her at this time. He ushers her out the door, promising to call her if something should open up for which she is qualified.

Is this discrimination? The answer is a qualified yes.

In the past decade, the courts have been active in the area of gender-based discrimination. Using the protections afforded by the Constitution, Title VII of the Civil Rights Act of 1964[1] and other statutes, the courts have increased the number of actions considered discriminatory while limiting the acceptable reasons for not hiring women. In this context, the courts have occasionally reviewed allegations of pregnancy discrimination. However, the area has proved more troublesome to the courts[2] than non-pregnancy discrimination because pregnant women who work have traditionally been regarded as endangering their lives and the lives of their babies. Further, the uniqueness of pregnancy causes problems for the courts; pregnancy only affects women; it is a disability without being an illness; it has an aspect of voluntariness that other disabilities do not.

In some cases, the charges have been that women were fired or lost benefits because they became pregnant. In others, women claimed they were not hired solely because they were

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[1] 42 U.S.C. §§ 2000e-2000e-17 (1976).

[2] *See* Comment, *Differential Treatment of Pregnancy in Employment: The Impact of General Electric Co. v. Gilbert and Nashville Gas Co. v. Satty*, 13 HARV. CIV. RIGHTS L. REV. 717 (1978), for a discussion of the tendency of courts to use stereotypical images of women and pregnancy.

women. Only a few cases have been brought in which a woman claimed she was not hired because she was pregnant. As more and more women choose to have both a career and a family, it seems probable that "failure to hire due to pregnancy" cases will become common. This note will explore the rights of both the potential employer and the pregnant applicant.

Initially, the prohibitions against discrimination and the defenses available to the employer will be examined. Next, the cases involving pregnancy discrimination will be reviewed in depth. Although none of these cases involve the hiring of pregnant women, the courts' attitudes toward pregnancy can be determined. Finally, the holdings from these cases will be compared to holdings from hiring discrimination cases to see if some guidelines can be developed for the employer who is faced with a pregnant applicant.

I. THE PROHIBITION AGAINST SEX DISCRIMINATION

A. The Constitution

Sex discrimination is prohibited, at least to some extent, under the due process and equal protection clauses of the Fifth and Fourteenth Amendments. When examining sex discrimination cases, courts frequently use the deferential rational basis standard to review legislative determinations concerning government activity or the classification of groups.

Early sex discrimination cases were reviewed under the rational basis test and the results were often less than satisfactory.[3] The courts tended to be paternalistic in their approach

[3] For example, in Quong Wing v. Kirkendall, 223 U.S. 59 (1912), the Court upheld a laundry license statute which differentiated between steam and hand laundries and excepted women if less than two were employed. The Court stated, "If Montana deems it advisable to put a lighter burden upon women than upon men with regard to an employment that our people commonly regard as more appropriate for the former, the Fourteenth Amendment does not interfere by creating a fictituous equality where there is real difference." *Id.* at 62. And in Hoyt v. Florida, 368 U.S. 57 (1961), a case involving exemption of women from jury duty, the Court said it could not conclude the statute was not based on a reasonable classification. It further held it was not constitutionally impermissible for a state to allow a woman to be relieved of the "civic duty of jury service unless she herself determines that such service is consistent with her own special

and, because almost any statute can be found to have a rational basis and any classification can be rationally related to the purpose of the statute, little legislation was struck down.

However, in the early 1970's the courts began to scrutinize states' activities more closely, importing notions from other areas of due process and equal protection into sex cases.[4] From due process the courts imported the right of privacy as it relates to marriage and childbearing as first set forth in the landmark decisions of *Griswold v. Connecticut*[5] and *Roe v. Wade*.[6] In *Griswold*, the Court determined that the state had no interest in prohibiting a couple's decision to use contraceptives and could not prosecute those who furnished information about birth control. Similarly, in *Roe*, the Court concluded that there was no compelling state interest in protecting the life of an unborn child, at least in the first trimester of pregnancy, and the interest was limited in the second trimester. By these decisions and their progenies, the Court limited governmental interference into the areas of marriage and childbearing.

From equal protection, the United States Supreme Court borrowed the idea that certain classifications—those based on race, alienage and national origin—are suspect and as such are subjected to strict scrutiny. Although the Court has consistently declined to view sex as a suspect classification,[7] it did heighten the standard of review above mere rational basis to an intermediate "substantial relationship" test.

Thus the courts became more active in the area of gender-

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responsibilities," pointing out the woman is still regarded as the "center of home and family." *Id.* at 61.

[4] *See* Molere v. Southeastern Louisiana College, 304 F. Supp. 826 (E.D. La. 1969); Seidenberg v. McSorley's Old Ale House, 317 F. Supp. 593 (S.D.N.Y. 1970); Kirstein v. Rector and Visitors of the University of Virginia, 309 F. Supp. 184 (E.D. Va. 1970).

[5] 381 U.S. 479 (1965).

[6] 410 U.S. 113 (1973).

[7] In Frontiero v. Richardson, 411 U.S. 677 (1973), the court held "that classifications based on sex, like classifications based on race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny." *Id.* at 688. Despite this, the Court in subsequent cases did not elevate sex to a suspect classification and it declined to apply the strict scrutiny standard of review.

based discrimination and struck down statutes not meeting the new stricter standards.

Because educational institutions were excluded from coverage under Title VII until 1972, sex discrimination claims by school teachers were constitutionally based. The landmark case involving pregnancy and due process is *Cleveland Board of Education v. LaFleur*,[8] decided by the United States Supreme Court in 1974. There, the Court struck down Ohio and Virginia school districts' mandatory leave policies requiring teachers to quit work in the fourth and fifth months of pregnancy.

The school boards in both districts claimed the policies were necessary to preserve continuity of classroom instruction and to facilitate the finding of qualified substitutes. The school boards also pointed out that *some* teachers became incapable of performing their duties. The Court held that an arbitrary cut off date had no rational relation to a valid state interest in preserving continuity of instruction. Further, the Court noted that such a rule created an irrebutable presumption that all pregnant teachers were physically incapable of teaching after their fourth or fifth month and as such swept too broadly. The mandatory leave policies created an unjustifiable burden on the freedom of choice in matters of family life.

However, the *LaFleur* decision did not hold that any regulation of maternity leave is impermissible. In a footnote,[9] the Court hinted that it might be reasonable to require leave in the final weeks of pregnancy. Although *LaFleur* was decided on due process grounds, it was originally viewed as an equal protection case, and in fact later cases[10] have held that the due process irrebutable presumption analysis used in *LaFleur* is actually an equal protection analysis.

A case similar to *LaFleur* also involving pregnant teachers, is *Heath v. Westerville*.[11] In *Heath*, a federal district court held that classification on the basis of sex or pregnancy were not per se violative of equal protection. However, the court struck down

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[8] 414 U.S. 632 (1974).

[9] *Id.* at 647 n.13.

[10] *See* Weinberger v. Salfi, 422 U.S. 749 (1975).

[11] 345 F. Supp. 501 (S.D. Ohio 1972).

the mandatory leave policy as overinclusive because not all pregnant women were incapacitated at the time they were required to quit. The court stated, "[a]ny rule by an employer that seeks to deal with all pregnant employees in an identical fashion is dehumanizing to the individual women involved and is by its very nature arbitrary and discriminatory."[12]

A better solution, the court pointed out, would be to provide a case-by-case determination of pregnant teachers' ability to perform their duties. Using this method, a policy requiring a woman to quit when she can no longer perform adequately would be permissible.

The holding that classification on the basis of pregnancy is not per se violative of equal protection was upheld in *Geduldig v. Aiello*.[13] The Supreme Court refused to strike down a policy which ruled women ineligible for unemployment disability payments when the disability resulted from pregnancy. The Court determined that this was not sex discrimination, but rather a legislative decision to cover disabilities it considered the most acute. All risks were not covered by the plan and pregnancy was merely an unincluded risk. Although the case involves the fundamental rights of childbearing and procreation, it can also be classified as a social welfare case—an area where courts traditionally defer to legislative determinations as long as such determinations are rationally based.[14]

Thus under due process and equal protection analysis, the prohibitions against pregnancy discrimination are limited. The courts are unwilling to go the final step and declare that the government may not interfere or discourage the decision of a

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[12] *Id.* at 505.

[13] 417 U.S. 484 (1974).

[14] If *Geduldig* were brought today, the results would be quite different. In General Electric Company v. Gilbert, 429 U.S. 125 (1976), the Supreme Court upheld a case with the same facts as *Geduldig* but brought under Title VII. However, the passage of the Pregnancy Discrimination Act makes the decisions of *Geduldig* and *Gilbert* obsolete as the Act specifically prohibits discrimination in benefits. However, some argue that *Gilbert* is still valid in that it supplies "a framework for determining instances of unlawful facial discrimination under Title VII as amended." Ostrer, *General Electric Co. v. Gilbert: Defining the Equal Opportunity Rights of Pregnant Workers*, 10 COLUM. HUMAN RIGHTS L. REV. 605 (1979).

woman to bear a child or may not classify groups on the basis of pregnancy. Under *LaFleur* due process, it may be possible for regulations to be enforced against a woman in her final weeks of pregnancy if such rules are rationally supported. Under equal protection, it is permissible to totally exclude pregnancy from certain benefit plans, at least in the social welfare area. This leaves some large gaps which are filled to some degree by Title VII.

B. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 states in part:

> (a) It shall be an unlawful employment practice for an employer—
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> (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 of employment, because of such individual's race, color, religion, sex or national origin, or
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> (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.[15]

In 1978, President Carter signed into law the Pregnancy Discrimination Act[16] as an amendment to Title VII. This Act makes it clear that pregnancy discrimination is sex discrimination:

> The terms "because of sex" and "on the basis of sex" include but are not limited to because or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(b) of this title shall be interpreted to permit otherwise . . . .[17]

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[15] 42 U.S.C. § 2000e-2 (1976).

[16] Pub. L. No. 95-555, 92 Stat. 2076 (1978).

[17] *Id.*

This Act severely limits any employment practice which classifies groups into pregnant and non-pregnant employees.

Title VII also created the Equal Employment Opportunity Commission (EEOC).[18] The Commission has the power to process and investigate employment discrimination complaints and to prosecute such actions in federal courts if necessary.[19] In this capacity the EEOC has developed interpretations of Title VII and issued statements concerning employment practices published in the Code of Federal Regulations. The courts have recognized the Commission's expertise in this area and generally accord its opinion and interpretations great deference.[20]

One area in which the EEOC has developed such a policy statement is that of employment practices relating to pregnancy and childbirth. The Commission states:

> (a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of Title VII.
> (b) Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions, under any health or temporary insurance or sick leave plan available in connection with employment.[21]

The Commission further declares that practices and policies concerning leave commencement and duration and payment under any sick leave or insurance plan should be applied to pregnancy to the same extent they are applied to other temporary disabilities.[22]

It is clear that pregnancy comes within the boundaries of Title VII and that an employer may not, without justification, discharge or refuse to hire a woman because she is pregnant.

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[18] 42 U.S.C. § 2000e-4 (1976).

[19] 42 U.S.C. §§ 2000e-5, 2000e-6 (1976).

[20] *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971); Rosen v. Public Serv. Electric and Gas Co., 477 F.2d 90 (3d Cir. 1973). *But see* General Electric Company v. Gilbert, 429 U.S. 125 (1976); Washington v. Davis, 426 U.S. 229 (1976).

[21] 29 C.F.R. § 1604.10 (1980).

[22] *Id.*

Under the Pregnancy Discrimination Act amendment, pregnancy must be treated by an employer as any other temporary disability. Pregnancy may not be singled out and given special treatment. However, once a prima facie case of discrimination is made, the employer may justify his decision to discharge or not to hire a pregnant woman by raising one of the recognized defenses to sex discrimination.[23]

II. THE DEFENSES TO SEX DISCRIMINATION

A. The Bona Fide Occupational Qualification

The bona fide occupational qualification is set out in Title VII:

> it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex or national origin in those certain instances where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.[24]

The exception is interpreted narrowly by the EEOC.[25] The Commission has explained that the BFOQ exception cannot be used to exclude women from employment based on stereotypical characterizations or preferences of the employer, co-workers, clients or customers.[26]

The BFOQ defense was created to allow facial classifications if justified. The classic example of this is only hiring women to play the female role in a theatrical production.[27] The BFOQ has many formulations. For example, in *Diaz v. Pan American World Airways*[28] a BFOQ was found only where sex goes to the essence of job performance. *Weeks v. Southern Bell Telephone and Telegraph*[29] stated that a BFOQ existed where an employer

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[23] For a detailed analysis of this area of defenses see Comment, *Sex Discrimination: Theories and Defenses Under Title VII and Burwell v. Eastern Airlines, Inc.*, 83 W. VA. L. REV. xxx (1981).

[24] 42 U.S.C. § 2000e-2 (1976).

[25] 29 C.F.R. § 1604.2(a) (1980).

[26] *Id.* § 1604.2(a)(1).

[27] *Id.* § 1604.2(a)(2).

[28] 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971).

[29] 408 F.2d 228 (5th Cir. 1969).

had "a factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."[30] *Rosenfeld v. Southern Pacific Co.*[31] limited a BFOQ to where the generic sexual characteristics of the employee were crucial to successful performance of the job. Practically, there is little difference in the application of these tests.

The Supreme Court, recognizing the different standards, stated in *Dothard v. Rawlinson*,[32] "[b]ut whatever the verbal formulation, the federal courts have agreed that it is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotypical characterizations of the sexes . . . ."[33]

A type of sub-group often confused with BFOQ is the "legitimate business purpose" defense to disparate treatment cases. This defense was set out in *McDonnell Douglas v. Green*.[34] When a prima facie case is established the burden shifts to the employer to show some legitimate nondiscriminatory reason for the refusal to hire the person. Discriminatory motive must be proved, though in some cases it can be inferred.

B. The Business Necessity Defense

The business necessity defense, which applies to disparate impact, was first recognized in *Griggs v. Duke Power Co.*[35] *Griggs* defines disparate impact as those practices which are facially neutral in treatment of different groups but actually have a greater effect on one group. Motive need not be proved. To come within the business necessity exception, a discriminatory practice must bear a manifest relationship to the employment. This idea is more fully explained in *Robinson v. Lorillard*:[36]

> The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe

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[30] *Id.* at 235.
[31] 444 F.2d 1219 (4th Cir. 1971).
[32] 433 U.S. 321 (1977).
[33] *Id.* at 332.
[34] 411 U.S. 792 (1973).
[35] 401 U.S. 424 (1971).
[36] 444 F.2d 791, 798 (4th Cir. 1971), *cert. dismissed*, 407 U.S. 1006 (1971).

> and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact, the challenged practice must effectively carry out the business purpose it is alleged to serve and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advances, or accomplish it equally well with a lesser differential racial impact.

Courts also look to the relationship between the practice and successful job performance as well as the history of discriminatory practices. If the relationship is questionable or the business has a history of discrimination, the defense may be disallowed as a pretext.

These defenses are difficult for the employer to raise successfully. An employer must prove the practices are "necessary to the operation of the business," or have a "manifest relation" to the job or that "substantially all women are unable to perform the job safely and efficiently." The tests are meant to be difficult to meet in order to insure that an employer does not use the defenses as a pretext for discrimination. Whether the BFOQ or the business necessity defense is used, the practice must be vital to the business before it will be allowed.

Courts tend to blur the distinctions between the two defenses, and, indeed, it is frequently difficult to differentiate between them. For example, in *Burwell v. Eastern Air Lines, Inc.*[37] the court stated that the airlines' mandatory leave policy is facially neutral but discriminatory in impact. Thus it should be tested by the business necessity defense. However, in most of the cases involving mandatory leave problems, BFOQ was the defense raised, either accompanied by the business necessity test or alone. In many cases dealing with disparate treatment the BFOQ defense will be raised, where the proper test should be legitimate business purpose. The confusion results from the similarity of terms "necessary to the business" in BFOQ for facially discriminatory cases, business purpose for disparate treatment cases, and business necessity for disparate impact cases. Some courts have difficulty in determining whether some-

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[37] 633 F.2d 361 (4th Cir. 1980). For an in-depth discussion of this case see Comment, *supra* note 23.

thing is discriminatory in treatment or in impact. The result is that no strict rules are applied.

III. DEVELOPING CASE LAW

A large portion of the case law on pregnancy deals with employers who force women to take unpaid maternity leave at a specified date regardless of the women's desire, ability or need to work. At the forefront of this type of litigation were stewardnesses who had a strict leave policy enforced against them. Most airlines required the flight attendant to quit work upon the knowledge that she was pregnant. School teachers were also largely affected by mandatory leave policies with schools often requiring a teacher to quit in the middle of a term or refusing to renew her contract.

Because teachers and stewardnesses have actively litigated in this area, their decisions will be explored in depth to determine the courts' positions on leave policies and what the implications are for the future.

A. Airline Cases

The airline companies are notorious for their discriminatory practices. An early case involving the BFOQ defense is *Diaz v. Pan American World Airways, Inc.*[38] In *Diaz*, a male applied for the position of flight attendant and was rejected by the airline. He then filed a sex discrimination action. The lower court agreed with the airline that being female was a BFOQ for the job of flight attendant. The court held that males did not perform as well in non-mechanical jobs such as providing reassurance to anxious passengers and giving courteous personalized service. There was expert testimony adduced at trial, as follows:

> Many male passengers would subconsciously resent a male flight attendant perceived more masculine then they, but respond negatively to a male flight attendant perceived as less masculine, where as male passengers would generally feel themselves more masculine and thus more at ease *in the presence of a young female attendant.*[39]

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[38] 311 F. Supp. 559 (S.D. Fla. 1970).

[39] *Id.* at 565-66 (emphasis added).

The court concluded that few men had the aggregate personality needed for a flight attendant and that being a female was a requirement reasonably designed to improve the average performance of a flight attendant. The case was reversed on appeal,[40] the circuit court of appeals holding that discrimination is allowed only when the essence of the business would be undermined by hiring both sexes. The court added that the primary function of the airline is safe transportation and that providing a pleasant atmosphere was "tangential" to that function.

With *Diaz* as an historical backdrop, airline employees sought to attack the leave policies using some of the analyses that *Diaz* set forth. Nearly all the major airlines have been involved in this type of litigation in a variety of jurisdictions, though no dominant principle has emerged. Each court seems to draw its own conclusions from the evidence presented.

Generally the mandatory leave policy does not apply to the ground crew of an airline. However, when an airline did extend its leave policy to the ground crew it was quickly struck down. *Newmon v. Delta Air Lines, Inc.*[41] determined that a mandatory leave policy requiring ground crew members to quit work after their fifth month of pregnancy was not justified under the BFOQ exception. The airline failed to show that pregnant women were not capable of working efficiently after their fifth month or that the leave policy was reasonably necessary to the normal operation of the airline's business. In a similar decision, *In re National Airlines*,[42] the court also rejected a BFOQ defense for ground crew members, provided a woman had medical certification that she could perform her duties.

Different results have been found in the flight attendant cases. A BFOQ was found in the case of *Condit v. United Airlines*.[43] The United policy was that flight attendants were to quit work immediately upon the knowledge of pregnancy, but no medical examination was made to determine if the flight attendant was capable of doing her job. At trial, medical testimony conflicted as to whether the stewardess could indeed perform

[40] 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971).

[41] 374 F. Supp. 238 (N.D. Ga. 1973).

[42] 434 F. Supp. 249 (S.D. Fla. 1977).

[43] 13 Fair Empl. Prac. Cas. 689 (E.D. Va. 1976).

her duties, although all medical experts agreed that fatigue, fainting, morning sickness, nausea and back strain were common occurrences in pregnancy. Some evidence was presented which showed that flying neither caused nor aggravated these symtoms. Other evidence showed that flying increased the risk of spontaneous abortion during the first trimester. The court, citing the safety of passengers as the airline's major concern, concluded that United had shown the mandatory leave policy to have a "manifest relationship" to the continuing employment of pregnant flight attendants. Viewing the "total pregnancy picture" the court concluded United was justified in maintaining the policy.

The court of appeals affirmed the decision, saying the BFOQ ruling was based on finding of fact and that such a leave policy was "consistent with a common carrier's duty to exercise the highest degree of care for the safety of its passengers."[44]

Similar to *Condit* is the California case of *Harriss v. Pan American World Airways, Inc.*[45] Pan Am cited four reasons why its mandatory leave policy qualified for the BFOQ exception. The first reason was that the complications of pregnancy would hinder emergency performance. The airline cited fatigue, nausea and vomiting, and spontaneous abortion as frequent occurrences which are potentially disabling. Also increasing girth and the disturbance of balance makes performing duties more difficult. Medical testimony supported these contentions. The court concluded that on the basis of all the testimony Pan Am acted "reasonably and prudently in considering the disabling consequences of pregnancy" when it formulated the plan.

The second reason Pan Am set out was the potential conflict of interests in the pregnant flight attendant's duty to the passengers and the duty to her unborn fetus in an emergency. The court agreed there was "good reason to infer" that the attendant might be hesitant or indecisive in performing her duties.

The third reason discussed was the conflict in medical opinion regarding the advisability of employing pregnant flight attendants. Pan Am claimed that such a conflict favored a con-

[44] 558 F.2d 1176 (4th Cir. 1977).
[45] 437 F. Supp. 413 (N.D. Cal. 1977).

servative view and thus mandatory leave upon knowledge of pregnancy. The court again acknowledged that the airline acted "prudently."

Finally, Pan Am considered the availabilty of medical assistance to the flight attendant should she need it. As some of Pan Am's flights are 10 to 15 hours or longer, the court found such a policy to be reasonable. Concluding, the court found the mandatory policy was "based on judgments reached in good faith and supported by facts demonstrating the operational and safety problems that can arise from the presence of pregnant flight attendants on board an aircraft."[46]

Pan American also claimed a business necessity defense. The policy was necessary to the safe and efficient operation of the business because (1) it was a good faith effort to protect the safety of the passengers; (2) it was reasonably calculated to further safety objectives by removing a flight attendant whose condition posed an additional risk in emergencies; and (3) there was no feasible alternative of lesser adverse impact because the major complications of pregnancy are unpredictable and there is no way to project potential conflicts of interest. The court agreed, concluding that the record supported such policy.

Delta Air Lines came under attack in *EEOC v. Delta Air Lines, Inc.*[47] In a brief opinion, the court merely stated that *Condit* and *Harriss* foreclosed any claim that mandatory maternity leave was prohibited.

The airlines and the courts in the above decisions generally ignored the Federal Aviation Administration's (FAA) stand on such policies. The FAA has found that when a flight attendant is pregnant and she is in good health with no complications, the decision whether she could fly should be between the woman and her doctor.[48] One court did recognize this position. In *MacLennan v. American Airlines, Inc.*,[49] the court responded to a claim that passenger safety would be jeopardized by allowing pregnant flight attendants to remain on the job by stating, "the

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[46] *Id.* at 425.

[47] 441 F. Supp. 626 (S.D. Tex. 1977).

[48] *See* Condit v. United Airlines, 13 Fair Empl. Prac. Cas. 689 (E.D. Va. 1976).

[49] 440 F. Supp. 466 (E.D. Va. 1977).

importance of physical strength and capacity when attending to these safety functions is minimized by the lack of health and physical requirements imposed upon the flight attendants by both the government agency charged with overseeing flight safety—the Federal Aviation Administration—and the airline itself."[50]

The court considered the predictability, preventability, and likelihood of a variety of ailments relating to pregnancy and the extent to which they interfere with the ability to perform duties. The court found that while some attendants did become incapacitated, a substantial number were physically able to work. The court further found the risk of disabilities in a normal pregnancy was so remote as to be negligible, and that the ability to continue work should de determined by the flight attendant, her doctor and a medical representative of the airline, at least until the 26th week of pregnancy. Decisions should be made on a case-by-case basis and not by a generalized rule. After the 26th week, the flight attendant may be required to go on leave.

In a number of these airlines cases, medical evidence presented by the Mayo Clinic is cited. The findings of the clinic were that, during the first trimester of pregnancy, the flight attendant can perform all her duties without difficulty. During the second trimester, the ability to work varies from person to person. The clinic recommended that the flight attendant not work during the final trimester.[51] This policy was adopted by Northwestern Airlines which has avoided the deluge of litigation thus far.

The Northwestern policy was cited in *In re National Air Lines (Gardner v. National)*[52] in response to National's BFOQ argument. The airline claimed its mandatory leave policy was necessary for the safety of the passengers, the fetus and the flight attendant. The court rejected the argument concerning the latter two, stating there was no convincing evidence of danger. The evidence of an increase in spontaneous abortion was conflicting. Northwestern, whose policy allows the attendant to continue working, gave evidence that "no fetal anomolies"

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[50] *Id.* at 471.

[51] *See* Burwell v. Eastern Air Lines, Inc., 458 F. Supp. 474 (E.D. Va. 1978).

[52] 434 F. Supp. 249 (S.D. Fla. 1977).

had been observed in its employees. The court also reasoned that the decision to risk harm to the fetus is one to be determined by the mother.[53] Thus the only proper consideration of the airline is the safety of its passengers.

The court, in weighing the conflicting evidence to determine if a BFOQ existed, set out a two-step test. The first step was the test of *Diaz v. Pan American World Airways*:[54] the practice must be reasonably necessary to the essence of the business (in this case safe transportation). The greater the safety factor, measured by the likelihood of harm and the probable severity of that harm in case of an accident, the more stringent may be the job qualifications designed to insure safety.[55]

The second step was a test adapted from the *Weeks v. Southern Bell Telephone and Telegraph Co.*[56] standard: whether the airline "had reasonable cause, that is a factual basis, for believing that all or substantial all [female flight attendants who achieve certain certain stages of pregnancy] would be unable to perform safely and efficiently the duties of the job involved or whether it is impossible or impractical to deal with [such persons] on an individual basis."[57]

Using this standard, the court held that National could not require leave during the first 13 weeks; that the decision to quit during the 13th to 20th weeks was to be determined on an individual basis; and that the airline could require an attendant to go on leave after the 20th week. The court found that at the 20th week, changes in the muscle and skeletal system occurred as well as an increase in girth which would make it increasingly difficult for the attendant to work.

Recently, in *Burwell v. Eastern Airlines*,[58] the court divided the pregnancy into segments as was done in *National*. The lower court decision looked to both business necessity and a bona fide

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[53] This is an example of the influence of Roe v. Wade, 410 U.S. 113 (1973).

[54] 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971).

[55] This portion of the test comes from Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976).

[56] 408 F.2d 228 (5th Cir. 1969).

[57] *Id.* at 235.

[58] 458 F. Supp. 474 (E.D. Va. 1978), *rev'd in part, aff'd in part*, 633 F.2d 361 (4th Cir. 1980), *cert. denied* 49 U.S.L.W. 3636 (March 2, 1981).

occupational qualification. Eastern argued that business necessity required the mandatory leave policy if the airline was to meet its two objectives: protecting the health and welfare of the flight attendant and her unborn children and the safety of its passengers. As in *National*, the court ruled that the first was not a proper consideration of the airline as its business is transportation, not maternity care. The second objective, although sufficiently necessary to override discriminatory impact, was not implemented in the least restrictive manner.

The court agreed that after the 28th week of pregnancy all the requirements of a BFOQ were met: leave is reasonably necessary to the essence of business; the airline had a factual basis for believing that substantially all persons in the class would be unable to perform the job safely and efficiently; it is impossible to deal with such persons on an individualized basis. Prior to this time the following schedule applied:

> 1-12 weeks: the decision to continue to fly rests exclusively with the flight attendant and her doctor.
> 13-20 weeks: the airline may condition flying on monthly permission by the doctor.
> 20-28 weeks: the airline may condition flying on weekly permission by the doctor. If between the 13th and 28th weeks job performance is below par, the airline may take necessary action.
> after 28 weeks: the airline may require leave.

This policy was modified on appeal. In a per curiam opinion, a majority of the court approved the policy for the first 13 weeks, reversed on the 13th to 28th weeks, saying the airline could properly forbid flight on the basis of passenger safety, and affirmed for the weeks after the 28th.

The decisions in these various cases have been based on similar evidence, yet different conclusions have been drawn in nearly every case. Although they cannot be reconciled, a pattern does evolve.

Safe transportation has been the focus in all the airline cases. While the duties of a flight attendant might appear to be primarily serving food and reassuring passengers, the courts and the airlines agree that the most important function of a stewardess is passenger safety. The courts have difficulty in determining how pregnancy hinders, if at all, the performance of

these safety functions because so few air emergencies have occurred involving pregnant flight attendants. Northwestern, which had adopted the most liberal policy, can provide little helpful information. Perhaps this more than anything else explains why courts have reached such varying results when hearing virtually the same evidence in some cases. No one can be sure that a pregnant flight attendant will be able to perform emergency duties, and because the very lives of the passengers are at stake, the courts are hesitant to allow pregnant attendants to fly and put the attendants' ability to test.

B. Teacher Cases

Teachers have been similarly active in litigating pregnancy discriminaton. Suit was brought under due process and equal protection clauses of the Constitution until 1972 when Title VII was made applicable to educational institutions. The *LaFleur* case determined that broadly sweeping maternity leave policies were unconstitutional, but it left unresolved the possibility that more reasonable regulations were permissible.

DeLaurier v. San Diego School District involved just such a regulation.[59] In that case the court upheld a mandatory leave policy which required a pregnant teacher to go on leave following her eighth month of pregnancy. The court cited classroom continuity, finding qualified substitutes and the declining ability of teachers to perform their duties as reasons why such a policy was justified as a BFOQ and business necessity. The court of appeals[60] upheld the decision stating that the policy was necessary to the administrative and educational objectives of the school district. The difficulty of finding qualified substitutes if such policy were abandoned was great enough to qualify as a business necessity. The court also ruled that it could not say the trial judge erred when he concluded that the ability of the teacher to perform her duties declined as the date of delivery approached.

Another teacher case, *Mitchell v. Board of Trustees of Pickens County School District*,[61] has yet to be resolved. The

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[59] 10 Fair Empl. Prac. Cas. 361 (S.D. Cal. 1974).
[60] 588 F.2d 674 (9th Cir. 1978).
[61] 599 F.2d 582 (4th Cir. 1979).

original district court opinion held that there was a prima facie violation of Title VII and held that a BFOQ did not exist for excluding pregnant teachers from working. The court pointed out that many teachers were able to teach for the greater portion of their pregnancy. This decision was later withdrawn in light of *General Electric Company v. Gilbert*,[62] handed down by the United States Supreme Court. The *Mitchell* court found for the school board concluding that the discrimination was not gender based in treatment or in effect. The court of appeals, in reviewing the decision, found the district court's original finding of a prima facie violation of Title VII was correct. It then remanded on the issue of business necessity, stating the record was incomplete.

Two other cases, while not specifically mentioning business necessity or bona fide occupational qualifications, struck down mandatory maternity leave policies. *Singer v. Mahoning*[63] found that "when a woman is compelled to take maternity leave of absence because of pregnancy and where such person is capable of performing her job adequately, that to force maternity leave upon her is a violation of the Equal Employment Opportunities Act of 1972, and is discrmination based upon a physical condition peculiar to her sex."[64] The court in *Fabian v. Independent School District*[65] ruled that the alleged reason of "continuity of education" is "no reason at all" to require mandatory leave three months prior to delivery. Such a rule is not based on valid or reasonably necessary grounds.

Mandatory unpaid leave was also the subject of *Byrd v. Unified School District No. 1*,[66] in which the court struck down the school board's two policies. One allowed a day of paid leave to males to attend a birth or adoption. The other did not allow a female teacher to take any paid leave time while on pregnancy leave. Thus a benefit was granted to male teachers which female teachers could never enjoy, and Title VII was violated.

The attitude of the court in *Byrd* reflects the attitude em-

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[62] 429 U.S. 125 (1976).
[63] 379 F. Supp. 986 (N.D. Ohio 1974), *aff'd*, 519 F.2d 748 (6th Cir. 1975).
[64] 379 F. Supp. at 989.
[65] 409 F. Supp. 94 (W.D. Okla. 1976).
[66] 453 F. Supp. 621 (E.D. Wis. 1978).

bodied in the Pregnancy Discrimination Act. Under the act, the cases cited which upheld mandatory unpaid leave would be in violation if other temporary disabilities were treated differently. Such was the case in *Somers v. Aldine Independent School District*,[67] where the court compared temporary disability policies of males with pregnancy and concluded the act was violated as no mandatory leave was required of disabled males.

These cases show the courts are reluctant to put the decision whether to work in the hands of the pregnant woman. Although, in some instances the courts are willing, even eager, to strike down broadly sweeping policies, the narrower the policy is the more likely the courts are to uphold it. In virtually every case involving the airlines the courts agreed that at some point leave could be required. And while the court in *Fabian v. Ind. School Dist.*[68] struck down a leave after the sixth month of pregnancy, the court in *DeLaurier v. San Diego School Dist.*[69] upheld one after the eighth.

Shouldn't the mother be able to determine for herself and her baby what is best? The courts' answer is yes, generally—but not always. In the next section the courts' determination in cases of hiring discrimination will be applied in the pregnancy context. While the result seems to favor the mother, the employer still retains the right to refuse a job to her in certain areas.

IV. THE BFOQ AND BUSINESS NECESSITY DEFENSE IN FUTURE PREGNANCY HIRING CASES

The previous cases involve areas which arguably have special concerns. But what about a job without such concerns. Can an employer make the "average" employee go on leave when she wants to continue to work and her doctor has given his permission? If she knocks on the door of a prospective employer may he turn her away because she is pregnant? When can an employer claim that a bona fide occupational qualification or that a business necessity allows him to refuse to hire a pregnant woman?

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[67] 464 F. Supp. 900 (S.D. Tex. 1979).

[68] 409 F. Supp. 94 (W.D. Okla. 1976).

[69] 10 Fair Empl. Prac. Cas. 361 (S.D. Cal. 1974).

Some guidance is given in the cases that follow. For instance, an employer may not refuse to hire a woman (pregnant or not) for a position because he thinks it is too "strenuous." *Weeks v. Southern Bell Telephone and Telegraph*[70] clearly addresses this question. "Labeling a job 'strenuous' simply does not meet this burden of proving that the job is within the bona fide occupational qualification exception."[71] *Weeks* also decided that the employer's concern that a woman would be called out after midnight and exposed to danger did not justify a policy of hiring only males. "Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle."[72]

Could the employer refuse to hire a pregnant woman on the grounds that the type of work she would be required to do would be harmful to the fetus? That argument was not well received in the airline cases, nor has it been in other instances. The Supreme Court case of *Roe v. Wade* holds the Constitution's right of prvacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[73] It would therefore seem broad enough to allow her to decide what risks of harm she is willing to take during the pregnancy. In *Vick v. Texas Employment Commission*,[74] the Court directly addressed this question.

> The court reads the statute (Title VII) and its interpretive and related case authorities to at once extend to the female meaningful equality of job opportunity, to place upon the individual female in greater measure, the moral responsibility for the risks she takes in terms of vital procreation, and to balance the matter with a due consideration of the realities of the business enterprise involved.[75]

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[70] 408 F.2d 228 (5th Cir. 1969).

[71] *Id.* at 234.

[72] *Id.* at 236.

[73] 410 U.S. 113 (1973).

[74] 6 Fair Empl. Prac. Cas. 411 (S.D. Tex. 1973).

[75] *Id.* at 416.

A slightly different view is set out by Larson in his treatise on Employment Discrimination:[76]

> It is elementary that the element of risk to one's self or to others in the doing of a job is a factor bearing on a person's ability or disability in relation to that job. In workmen's compensation it is firmly established that a worker is disabled if, although he can perform his job, he can do so only at the risk of endangering his own safety or health. If the element of risk to one's own safety is so substantial a component of disability as to entitle the worker to wage-loss benefits, a fortiori it is substantial enough to establish a difference in ability to qualify for a particular job, under the bona fide occupational qualification.

Larson seems to think that if a pregnant woman could perform the job but the risk of harm is substantial so that she would be eligible for disability benefits, then the employer may raise the BFOQ defense.

When the employment position involves a risk of harm to another, sex or sex-related characteristics have been considered BFOQ's. This risk of harm was the underlying reason for mandatory leave in the airline cases. In *Dothard v. Rawlinson*[77] the United States Supreme Court addressed the question of whether being male was a BFOQ for the position of prison guard at a maximum security prison. The Court noted that "in the usual case the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself."[78] In this case, however, the Court determined the choice was not up to the woman, and that her ability to maintain order could be "directly reduced by her womanhood." The BFOQ argument was upheld.

Similarly, in *Roller v. City of San Mateo*,[79] the court in deciding another issue, noted it would be "unsafe" and "physically ill-advised" for a pregnant police officer to continue her patrol duties. Both *Dothard* and *Roller* involved cases where the primary duties of the employee were to protect others and pro-

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[76] 1 LARSON, EMPLOYMENT DISCRIMINATION § 16.20.

[77] 433 U.S. 321 (1977).

[78] *Id.* at 335.

[79] 399 F. Supp. 358 (N.D. Cal. 1975), *aff'd*, 572 F.2d 1311 (9th Cir. 1977).

mote safety—jobs which are difficult to perform effectively when one is in the vulnerable position of being pregnant.

Dothard, however, does not have blanket application. It has been distinguished in two cases: *Gunther v. Iowa State Men's Reformatory*[80] and *Manley v. Mobile County, Alabama.*[81] *Gunther* points out,

> the balancing test of *Dothard* would seem applicable to all prison contexts. However, the probabilities of sexual assaults on female correction officers at Anamosa [a medium security prison] and the potential impact on prison discipline and rehabilitation opportunities is not of the degree as would warrant an exception to Title VII's proscription. . . . In balancing the plaintiff's rights against institutional stability—an important and legitimate goal—the Supreme Court has mandated that courts and administrative bodies weigh probabilities of instability. In *Dothard* the balance tipped toward recognizing a BFOQ. In this case it tips toward recognition of plaintiff's rights.[82]

Manley, which involved a county jail, agreed and said it is a woman's choice to be employed in a dangerous environment as long as the situation did not rise to the level in *Dothard*. *Manley* also noted that a disabled man was given auxiliary duties during emergencies—an alternative which should be available to a female employee who lacked the physical ability required in some emergencies.

Even if no safety factors are involved, an employer may rightly question the physical ability of a pregnant woman to perform the job. He may require the woman to take and pass certain tests to determine her capabilities.

If he does not require testing, but refuses to hire the woman because he believes she cannot adequately perform, his refusal may be taken as evidence of his bad faith. *Pond v. Braniff Airways, Inc.*[83] addressed this question. That case involved a woman who sought a position of "Customer Service Agent" which in-

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[80] 462 F. Supp. 952 (N.D. Iowa 1979).

[81] 441 F. Supp. 1351 (S.D. Ala. 1977).

[82] Gunther v. Iowa State Men's Reformatory, 462 F. Supp. 952, 955 (N.D. Iowa 1979).

[83] 500 F.2d 161 (5th Cir. 1974).

volved the loading and unloading of baggage and cargo. The court stated:

> Where the only basis in the record for finding a male more qualified than a female are factors directly relatable to sex—the attributed capacity to lift bigger boxes—then we aren't at all certain that a fact finding of non-discrimination can stand when no objective tests were given to either applicant to determine physical abilities to perform the job in question.[84]

Long v. Sapp[85] echoed this idea in a case involving unloading of box cars. "If sex is not a BFOQ an employer must afford every applicant who desires it, a reasonable opportunity to demonstrate his or her ability to perform the tasks required of the position sought."[86] *Long* recognized the *Weeks* exception that testing would not be required where it was impossible or impractical to deal with persons on an individual basis.[87]

If the employer does agree to test, the test must be "professionally developed" and not designed or intended to discriminate because of race, color, religion or sex.[88] It cannot be a "homemade" test.[89] It must be job-related and validated.[90] If a pregnant woman cannot pass a test the employer is under no obligation to hire her. An employer may "refuse to employ a female on a particular job where under the facts of the particular case, the individual female employee lacks the necessary physical and mental capacity to safely and efficiently perform the task involved.[91] As *Rosenfeld v. Southern Pacific Co.*[92] points out, Title VII demands "equal footing" for men and women and this can be achieved by excluding a person from a job "only upon a showing of individual incapacity."

If the position is one which is not amenable to objective

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[84] *Id.* at 166.

[85] 502 F.2d 34 (5th Cir. 1974).

[86] *Id.* at 40.

[87] Weeks v. Southern Bell Telephone & Telegraph, 408 F.2d 228, 235 n.5 (5th Cir. 1969).

[88] 42 U.S.C. § 2000e-2(h) (1976).

[89] Ste Marie v. Eastern RR Ass'n, 458 F. Supp. 1147, 1162 (S.D.N.Y. 1978).

[90] United States v. Georgia Power Co., 474 F.2d 906, 912 (5th Cir. 1973).

[91] Ridinger v. General Motors Corp., 325 F. Supp. 1089, 1097 (S.D. Ohio 1971), *rev'd on other grounds*, 474 F.2d 949 (6th Cir. 1972).

[92] 444 F.2d 1219, 1225 (9th Cir. 1971).

testing, subjective standards must be used. "[T]he courts recognize that hiring decisions often cannot realistically be made on the basis of objective standards alone . . . and that a subjective reason for failure to hire a person should be given consideration in rebutting charges of discrimination."[93] These subjective criteria are considered suspect, however, as they can mask unconscious discrimination,[94] and like objective criteria must be job related.[95] If the subjective factors result in disparate treatment, good faith is no defense.[96]

An employer may also require an employee to submit to a medical exam if the exam bears a substantial relation to the adequacy of job performance.[97] As was seen in the airline cases, the employer may also require permission from the employee's doctor to continue working. However, a problem might arise if no such permission were required of other employees who were also temporarily disabled.[98]

What if the pregnant woman applies for a job which requires a training period which the employee must complete to be accepted for the position? *Spurlock v. United Airlines*[99] which involved the training of airline pilots says when the cost of a training program is high, the importance of potential employees finishing is great. In these circumstances, a business necessity may be established which would exclude persons with a likelihood of failing to complete the training program. If a woman was far enough along in her pregnancy so that she would have to leave the program before she completed it, a business necessity might be justified.

Spurlock goes on to say that courts will closely examine any pre-employment standard when the job requires a small amount of skill and the consequences of hiring someone who is unqualified are insignificant. In these cases the employer has a

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[93] Rogillio v. Diamond Shamrock Chemical Co., 446 F. Supp. 423, 430 (S.D. Tex. 1977).

[94] Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972).

[95] 458 F. Supp. at 1162.

[96] Kinsey v. First Regional Securities, Inc., 557 F.2d 830 (D.C. Cir. 1977).

[97] Dorcus v. Westvaco Corp., 345 F. Supp. 1173 (W.D. Va. 1972).

[98] 29 C.F.R. § 1604 app. question 6 (1980).

[99] 475 F.2d 216 (10th Cir. 1972).

heavy burden of showing the job-relatedness of the requirement. The burden is much less when the job requires a high degree of skill.[100] *Spurlock* has been cited in two other cases: *Kinsey v. First Regional Securities, Inc.*.[101] *and Chrapliwy v. Uniroyal, Inc.*.[102] These cases hold that cost of training alone is insufficient to justify the continuation of an historical bias. In *Kinsey* the training program was for security sales representatives. *Spurlock* did not apply, the court held, because public interest in well-trained sales representatives was not paramount as was the pilot training in *Spurlock*. Also the economic risk was not as great in *Kinsey*.

Chrapliwy agreed that "dollar cost alone is an immaterial consideration" but noted that if the cost of training was so great as to cause a cut-back in operations resulting in current employees losing their jobs, a business necessity could be sustained.

The employer must be careful in having a blanket "no hire" policy for pregnant women. If there are no special concerns the employer is most likely in violation of Title VII. If the position is for a jockey, an acrobat or an astronaut, the employer is no doubt safe in having such a policy. Each of these positions requires physical ability which a pregnant women obviously lacks. However, the line is fuzzier when the job is for veterinarian, coach or stewardess.

In short, an employer may not simply refuse to hire a pregnant woman because he believes she should stay at home or because it is inconvenient for him. There must be some element which takes the case out of an ordinary situation and gives it special considerations. Public safety, ability to adequately perform the job and extremely high cost of training are some examples. Absent some special concern a no-hire policy is forbidden.

This area is an important one in which many questions are unanswered. There is little case law for guidance. Perhaps one reason is that it is so easy for an employer to mask his reason

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[100] *Id.* at 219.

[101] 557 F.2d 830 (D.C. Cir. 1977).

[102] 458 F. Supp. 252 (N.D. Ind. 1977).

for not hiring a woman. As more cases concerning pregnancy are heard, as seems likely since the passage of the Pregnancy Discrimination Act, the courts can begin to define a woman's, as well as an employer's, rights in a variety of job situations.

V. CONCLUSION

Returning to the original question of whether the employer was guilty of sex discrimination when he turned away the woman with B-A-B-Y on her shirt, more information is needed about both the woman and the job. If the circumstances are any of those mentioned above, the employer may have a valid defense for refusing to hire the woman. If no special concerns are involved and the woman can perform the major tasks of the job, the employer has no defense. In any case, the best determination is one made on an individual basis. Whether a particular pregnant woman can do a job or whether pregnant women in general can do a particular job should be decided by weighing all the facts and determining the best solution in each situation.

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