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Sex Discrimination: Theories and Defenses under Title VII and Burwell v. Eastern Airlines, Inc.

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SEX DISCRIMINATION: THEORIES AND DEFENSES UNDER TITLE VII AND *BURWELL v. EASTERN AIRLINES, INC.*

Following the enactment of Title VII of the Civil Rights Act in 1964[1] dealing with equal opportunity and employment discrimination, there arose a large body of case-law litigating Title VII issues and a large body of articles dissecting the cases and issues.[2] Within this area, different methods for proving Title VII violations and different types of defenses developed. Almost inevitably, confusion arose concerning the applicability of specific defenses to specific types of Title VII violations.[3] The Fourth Circuit Court of Appeals attempted to resolve some of this confusion in a sex discrimination case captioned *Burwell v. Eastern Airlines, Inc.*[4]

In *Burwell*, female flight attendants brought an action under section 703(a) of Title VII[5] claiming that various aspects of Eastern's employment practices were discriminatory on the basis of sex. The two issues that survived for appellate review[6] were

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

[2] No attempt will be made to cite all the articles or cases. One need only glance through the Index to Legal Periodicals after 1964 to get an idea of the number of articles written upon this subject.

[3] *See* text accompanying notes 61-68 *infra*.

[4] 633 F.2d 361 (4th Cir. 1980).

[5] 42 U.S.C. § 2000e-2(c) (1976) provides as follows:

> 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 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.

[6] In the district court five aspects of Eastern's employment policy with respect to pregnancy were at issue. These issues included:

> (a) the separate treatment of pregnancy under Eastern's Group Comprehensive Medical Insurance; (b) the exclusion of pregnancy from

Eastern's practice of divesting pregnant female flight attendants of accumulated seniority when they transferred to ground positions, and Eastern's policy requiring female flight attendants to take maternity leave immediately upon learning of their pregnancy.

At Eastern, all temporarily disabled flight attendants could transfer to ground positions and continue to accumulate seniority. In practice, though, pregnant flight attendants who transferred to ground positions lost all rights to retain accumulated seniority. Eastern implemented this practice because it did not consider pregnancy a "disability" within the terms of its general transfer policy.[7] The stewardesses charged that this transfer policy, although facially neutral, discriminatorily impacted upon them. The other relevant policy of Eastern required all female flight attendants to begin an unpaid maternity leave immediately upon knowledge of their pregnancy.[8] All pregnant attendants were required to leave regardless of individual ability to continue working.[9] The stewardesses claimed that this practice also discriminated against females.[10]

With respect to the transfer policy and the requirement to take maternity leave before the twenty-eighth week of pregnan-

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Eastern's paid sick-leave policy and the impact of such exclusion on other conditions of employment; (c) the policy that pregnant flight attendants lose all accumulated seniority if they transfer to ground positions rather than take maternity leave; (d) the time limits placed on guaranteed rights to reinstatement of flight attendants taking maternity leave; and (e) the requirement that flight attendants must commence maternity leave upon knowledge of pregnancy.

See 458 F. Supp. 474, 477 (E.D. Va. 1978). The district court upheld Eastern's medical insurance and sick-leave plans, invalidated the seniority transfer policy and the reinstatement limitations, and modified the mandatory maternity leave requirement.

[7] 633 F.2d 361, 364 (4th Cir. 1980).

[8] 458 F. Supp. 474, 483 (E.D. Va. 1978).

[9] The district court noted that "[p]regnancy is the only physical condition which automatically precludes a flight attendant from flying." *Id.*

[10] It is unclear from the language in the district court and later in the circuit court whether the plaintiffs claimed the mandatory maternity leave policy adversely impacted upon them or whether the policy was discriminatory on its face. This lack of distinction between the possible types of claims is relevant in the discussion about the disparate treatment and disparate impact theories and their appropriate defenses. *See* note 92 *infra* and accompanying text.

cy, the district court held the plaintiffs had made out a prima facie case of sex discrimination which Eastern could not justify as a business necessity or a bona fide occupational qualification (BFOQ). The district court did hold, however, that being *less* than twenty-eight weeks pregnant was a BFOQ for which Eastern could require flight attendants to cease flight duties.[11]

Eastern appealed this decision to the Fourth Circuit Court of Appeals. Based upon the Supreme Court decision in *Nashville Gas Co. v. Satty*,[12] a unanimous court affirmed the district court's holding on the transfer policy issue.[13] The circuit court divided on the mandatory maternity leave issue. Following the district court's separation of this issue into the three trimesters of pregnancy,[14] the justices divided as follows: (1) a majority affirmed the district court's invalidation of Eastern's mandatory leave during the first thirteen weeks of pregnancy and three justices dissented; (2) a majority reversed the district court's invalidation of the maternity leave policy during the thirteenth through twenty-eighth weeks of pregnancy, with four dissenters; and (3) a unanimous court affirmed the district court's upholding of the mandatory leave after the twenty-eighth week of pregnancy.[15]

In reaching its decision, the circuit court in *Burwell* noted

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[11] 458 F. Supp. 474, 494-95, 499 (E.D. Va. 1978). The terms "business necessity" and "bona fide occupational qualification" are defined and discussed in detail. *See* text accompanying notes 38-60 *infra*.

[12] 434 U.S. 136 (1977). One claim in *Satty* involved a seniority policy similar to Eastern's. Nashville employees returning from a forced maternity leave were divested of previously accumulated seniority. The Court ruled that Nashville's seniority policy imposed a substantial burden upon female employees which adversely affected their employment opportunities at Nashville. In the absence of any justification, Nashville's policy was held to be violative of Title VII.

[13] 633 F.2d 361, 364-65 (4th Cir. 1980).

[14] The district court found that by implementing a more narrowly drawn practice, Eastern could achieve the same busines objectives with a lesser disparate impact. Pursuant to this, the district court issued interim orders relative to the three trimesters of pregnancy. The orders provided that during the first trimester of pregnancy the decision of whether to work or not would rest with the individual and her doctor. In the second trimester Eastern could require monthly, and later weekly, permission from the flight attendant's doctor. Finally, after the twenty-eighth week, Eastern could require the attendants to cease work altogether. 458 F. Supp. 474, 504-05 (E.D. Va. 1978).

[15] 633 F.2d 361, 362 (4th Cir. 1980).

the confusion about which of two possible defenses—the bona fide occupational qualification (BFOQ) or the business necessity—should apply in a sex discrimination case.[16] Focusing upon the type of theory used to prove the Title VII violation, the circuit court ruled: "In sex discrimination cases a clear disparate impact discrimination will be tested by business necessity and a clear disparate treatment discrimination will be tested by a BFOQ."[17] The court then analyzed the issues before it in terms of disparate impact and the business necessity defense. Although the district court had also applied the business necessity defense, the circuit court differed in its application of the defense to the facts.

This Comment will discuss the rule propounded in *Burwell* by analyzing the two theories for establishing Title VII discrimination and their respective defenses. As the discussion will show, this rule is generally adhered to by courts and has been assumed to be true by most commentators. In addition, this Comment takes the position that both the district court and the circuit court in *Burwell* failed to view Eastern's mandatory maternity leave policy within the terms of the proper legal theory. Instead of viewing the policy as a disparate impact issue, a disparate treatment analysis should have been used. Then, following its own rule, a BFOQ would be the allowable defense in *Burwell*. Under the BFOQ it is likely the circuit court would not have overturned the district court's holding on this issue.

Finally, the district court's and the circuit court's applications of the business necessity defense will be examined. Both courts applied this defense but reached different results. The circuit court's method differed from the district court's method in two ways. The circuit court did not want to substitute a judicial judgment for business judgment in the area of risk management and passenger safety; deference was extended to Eastern's business judgment. In addition, the discriminatory impact upon the flight attendants was characterized as a loss of fifteen weeks of employment.[18] Thus, Eastern's business purpose

[16] 458 F. Supp. 474, 495 (E.D. Va. 1978). *See also* note 64 *infra* and accompanying text.

[17] 633 F.2d 361, 370 (4th Cir. 1980).

[18] *Id.* at 371-72.

of enhancing passenger safety was found sufficiently compelling to override this impact discrimination.

I. THEORIES AND DEFENSES UNDER TITLE VII

A. *Disparate Treatment and Disparate Impact*

There are two theories for establishing prima facie discriminatory employment practices under Section 703(a) of Title VII.[19] These are termed disparate treatment discrimination and disparate impact discrimination. Disparate treatment is the most obvious type of discrimination. In such a case, the employer openly engages in practices prohibited with respect to those classes protected under Title VII.[20] For example, an employer may have a facially discriminatory policy of refusing to hire females because the job involves lifting more than fifty pounds, the hours are long, and the labor is "arduous."[21] To establish a prima facie case of disparate treatment, the plaintiff must show that the employer's actions were based upon a discriminatory motive. Intent to discriminate is an element of the prima facie case. In some cases, however, discriminatory motive can be inferred from the mere differences in treatment because "experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations."[22]

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[19] 42 U.S.C. § 2000e-2(a) (1976).

[20] 42 U.S.C. § 2000e-2(c) (1976).

[21] *See* Rosenfield v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971). Southern Pacific would not hire females for the position of agent-telegrapher because of these job requirements. Southern Pacific assumed men could meet these requirements but women could not.

See also Diaz v. Pan American World Airways, 442 F.2d 385 (5th Cir.) *cert. denied*, 404 U.S. 950 (1971), where Pan Am refused to hire male flight attendants, believing that males did not possess the characteristics necessary for calming and soothing anxious passengers; Weeks v. Southern Bell Telephone and Telegraph Co., 408 F.2d 228 (5th Cir. 1969), where Southern Bell justified its refusal to hire women because the job required lifting 30 pounds.

[22] Furnco Constr. Corp. v. Waters, 438 U.S. 567, 580 (1978). This was a race discrimination case in which the Court examined the process whereby a plaintiff establishes a Title VII violation based upon an inference of discriminatory intent. Here, Waters charged that Furnco's practice of hiring bricklayers by reputation and personal recommendation discriminated against Blacks. In this situation, the Court held the employer must be given the opportunity to rebut the inference of discrimination by showing a non-discriminatory reason for his ac-

After the passage of Title VII, intentional racial discrimination was illegal. An employer simply could not justify these types of employment practices.[23] Therefore, intentional race discrimination quickly disappeared,[24] but many "less-than intentional" types of race discriination persisted. It is contended that the disparate impact discrimination theory developed in this context in order to combat this more subtle form of race discrimination.[25] Thus, a great number of race discrimination cases have been disparate impact cases. Yet, the majority of sex discrimination cases in the past have been intentional, disparate treatment cases.[26] Some authors suggest intentional sex discrimination persisted because the Title VII prohibition against using sex as an employment criterion was never taken seriously by employers.[27] After the passage of Title VII, "sex discrimination was treated with a frivolous sense of curiosity."[28] So it is that the development and defining of disparate impact discrimination must be discussed in relation to race discrimination.

In the race discrimination cases, courts began accepting the argument that equal treatment did not necessarily indicate the absence of discrimination. The principle emerged that the inquiry into possible race discrimination should include historical considerations.[29] Employer practices that were facially neutral

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tions. The plaintiff must then show that the employer's reason is a mere pretext. If the plaintiff fails to show the employer's reason as pretextual, the prima facie case fails and there is no Title VII discriminaton. (Thus, the matter of affirmative defenses is never reached).

See also International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Wright v. National Archives & Records Service, 609 F.2d 702 (4th Cir. 1979).

[23] The statutory exception for Title VII discrimination, the bona fide occupational qualification, is not available to justify race discriminaton. *See* notes 38 and 39 *infra*.

[24] *See* B. BABCOCK, A. FREEDMAN, E. NORTON, & S. ROSS, SEX DISCRIMINATION AND THE LAW 331 (1975) [hereinafter cited as BABCOCK].

[25] *Id.*

[26] *Id.*

[27] Edwards, *Sex Discrimination Under Title VII: Some Unresolved Issues*, 24 LAB. L.J. 411, 412 (1973). *See also* BABCOCK, *supra* note 24, at 331.

[28] Edwards, *supra* note 27, at 412. It is noted here that the prohibition against sex was an amendment to Title VII, and thus imparted the flavor of a mere "afterthought."

[29] *See* EQUAL EMPLOYMENT OPPORTUNITY—RESPONSIBILITIES, RIGHTS,

could, in some instances, perpetuate the present effects of past intentional employer discrimination. Courts began holding that this type of situation amounted to a violation of Title VII,[30] and this concept came to be known as the neutral rule doctrine. Then, in 1971, the Supreme Court in *Griggs v. Duke Power Co.*[31] expanded the neutral rule doctrine beyond systems that merely perpetuated the effects of past discrimination.[32] The Court found that intelligence tests administered by the company along with a high school education requirement had the effect of substantially disqualifying a greater number of Blacks than Whites from initial employment or later transfers.[33] Even though *Duke Power* did not intend to discriminate now or in the past, this was not dispositive of the issue. The Court said intent did not necessarily "redeem" employment practices.[34] Rather, "[c]ongress directed the thrust of the Act [Title VII] to the *consequences* of employment practices, not simply motivation."[35] Thus, *Griggs* not only upheld the perpetuation of the past discrimination doctrine, but also recognized that neutral practices could have an adverse impact because of general societal or cultural conditions.[36]

REMEDIES 76 (J. Pemberton ed. 1975) [hereinafter cited as EQUAL EMPLOYMENT OPPORTUNITY].

[30] *See, e.g.*, Quarles v. Philip Morris, Inc., 270 F. Supp. 505 (E.D. Va. 1968). Here, the court found that Philip Morris' advancement, transfer, and seniority policies, although facially neutral, did discriminate against those employees hired under pre-Title VII discriminatory policies. "It is apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act [Title VII]." 270 F. Supp. at 516. A year later, Local 189, United Papermark & Paperwork v. United States, 416 F.2d 980, 995-96 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970), also ruled that a present neutral seniority system which perpetuated past effects of racial discrimination was in violation of Title VII.

Recently, however, the Supreme Court has carved out an exception to the present perpetuation doctrine. If a seniority system is not intended to discriminate, then even if it has a discriminatory effect, it will be immune from attack. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

[31] 401 U.S. 424 (1971).

[32] *See* BABCOCK, *supra* note 24, at 343-44.

[33] The *Griggs* court noted that Blacks had long received segregated and thus inferior educations. 401 U.S. 424, 430 (1971).

[34] *Id.* at 432.

[35] *Id.*

[36] See BABCOCK, *supra* note 24, at 343-44 and EQUAL EMPLOYMENT OPPORTUNITY, *supra* note 29.

Today, the *Griggs* rationale has extended to "pure effect" or impact situations where a neutral employment practice can be challenged if it is shown that the practice substantially impacts upon a class protected under Title VII. In sex discrimination cases a type of disparate impact often alleged is the neutral height or weight standard. A requirement that an employee be at least 5'7" has the effect of disqualifying 95% of the female population from employment.[37] This is an example of pure disparate impact.

B. *The Bona Fide Occupational Qualification and the Business Necessity Defense*

The two affirmative defenses recognized in Title VII actions are the bona fide occupational qualification (BFOQ) and the business necessity justification. The BFOQ is an express exception to employment practices prohibited by Title VII.[38] It is not, however, available in a race discrimination case.[39] Sex as a BFOQ has been narrowly interpreted by the Equal Employment Opportunity Commission (EEOC),[40] and this interpretation has been noted with approval by the Supreme Court.[41] The relevant portion of the EEOC Guidelines states that the Commission will not allow the BFOQ in certain situations. These situations include:

(i) the refusal to hire a woman because of her sex based

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[37] *See* Note, *Height and Weight Standards in Police Employment and the Question of Sex Discrimination: The Availability of Two Defenses for a Neutral Employment Policy Found Discriminatory Under Title VII*, 47 So. CAL. L. REV. 585 (1974). *See also* Dothard v. Rawlinson, 433 U.S. 321 (1977) (minimum height and weight standards for correctional officers); Blake v. City of Los Angeles, 435 F. Supp. 55 (C.D. Cal. 1977) (physical ability test to determine strength for police officers).

[38] 42 U.S.C. § 2000e-2(d) (1976) provides:

> Notwithstanding any other provision of the subchapter (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business . . . .

[39] Note the language of the code section omits race as a basis for an employment practice which can be justified. *Id.*

[40] *See* 29 C.F.R. § 1604.2 (1979).

[41] Dothard v. Rawlinson, 433 U.S. 321, 334 (1977).

> on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.
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> (ii) the refusal to hire an individual based on stereotype characterizations of the sexes . . . .
>
> (iii) the refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers . . . .[42]

However, sex may be considered a bona fide occupational qualification in circumstances "where it is necessary for . . . authenticity or genuineness."[43]

An employer often will attempt to justify sex discrimination as a BFOQ by claiming that the female (or male) cannot perform the job. The BFOQ has been construed many times in this type of situation and a two-prong test has emerged. Generally, the employer must show that (1) all or substantially all women would not be able to perform the required duties, and (2) that such duties are essential to the business. The two decisions which best set forth the present standards of the bona fide occupational qualification are *Weeks v. Southern Bell Telephone and Telegraph Co.*[44] and *Diaz v. Pan American World Airways.*[45]

In *Weeks* the phone company contended that women were unable to lift thirty pounds; therefore, it was justifiable to refuse to hire women as switchmen. The court said the phone company was asking the court to "assume" that women could not meet this lifting requirement.[46] The employer was in fact using a class stereotype—that women are weak—as a basis for denying employment. Without proof that all, or substantially all, women would be unable to safely and efficiently perform the required duties, the court concluded the phone company's employment practice violated Title VII.[47] The *Weeks* court also indicated that a showing in the abstract of the inability of women

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[42] 29 C.F.R. § 1604.2(a) (1979).

[43] *Id.* An example is actor or actress. Also, in personal privacy situations an employer can usually raise a valid BFOQ. *See* Sirota, *Sex Discrimination: Title VII and Bona Fide Occupational Qualification*, 55 TEX. L. REV. 1025, 1059-72 (1977).

[44] 408 F.2d 228 (5th Cir. 1969).

[45] 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

[46] 408 F.2d 228, 235-36 (5th Cir. 1969).

[47] *Id.*

to perform the particular job may not be sufficient. The employer should also evaluate the employee individually to determine whether a particular individual can safely and efficiently perform the job in question.[48]

The same court two years later[49] in *Diaz v. Pan American World Airways*[50] emphasized the essential relation of the performance requirement to the business. Under this standard, the airline was not able to justify its practice of refusing to hire males as flight attendants. Pan Am had presented psychological data showing that males were not as capable as females in calming and soothing anxious passengers. Following the *Weeks* test, Pan Am might have succeeded in its BFOQ. But the court ruled that the essence of an airline's business was to provide safe transportation.[51] In this context, the ability to provide emotional assurance for passengers was tangential, and the policy of hiring only females, then, was not aimed at the essence of the business.[52] Thus, Pan Am failed to establish a valid bona fide occupational qualification for flight attendants based on sex.

The business necessity defense is a court-created justification which developed simultaneously with the disparate impact theory in race discrimination cases.[53] Not only is *Griggs v. Duke Power Co.*[54] important for recognizing disparate impact violations of Title VII, but also for acknowledging that there may be circumstances where an employer's neutral practice is justifiable even though it has an adverse impact. If an employment practice is shown to be manifestly related to job performance, then it is not prohibited.[55] In the Court's words: "the touchstone is business necessity."[56] Needless to say, these standards,

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[48] *Id.*

[49] The Court of Appeals for the Fifth Circuit.

[50] 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

[51] *Id.* at 388.

[52] *Id.*

[53] *See, e.g.*, Local 189, United Papermark & Paperwork v. United States, 416 F.2d 980, 989 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970), where the court indicated the employer's neutral practice may be valid if there is an "overriding legitimate, non-racial business purpose."

[54] 401 U.S. 424 (1971).

[55] *Id.* at 432.

[56] *Id.* at 431.

"manifest relationship" and "business necessity," required further definition to become workable and fairly predictable. As these standards developed, they came to be known as the business necessity defense.

The best formulation to date of the business necessity defense is found in *Robinson v. Lorillard Corp.*[57] The defense as formulated in *Lorillard* has been described as a balance between business interests in safety and efficiency and the discriminatory impact of the challenged business practice.[58] In *Lorillard* the test for a business necessity is described as "whether there exists an overriding business purpose such that the practice is necessary to the safe and efficient operation of the business."[59] Included within the scope of the *Lorillard* test are four elements. First, the challenged practice must be a necessity; it must be necessary to the safe and efficient operation of the business. Second, the business purpose must be sufficiently compelling to override any discriminatory impact. Third, the practice in question must effectively carry out the business purpose it is alleged to serve. Finally, there must not be available any alternative practice which could accomplish the business purpose equally well but with a lesser differential impact.[60]

II. DETERMINING THE AVAILABILITY DEFENSE IN A DISPARATE IMPACT SEX DISCRIMINATION CASE

A. *The Confusion and the "Burwell" Rule*

The development of the theories for proving Title VII violations and the development of the proper justifications for these theories has not been a clear, well-defined process. A central problem in this area is determining when a particular defense is available and what distinctions, if any, should be made between

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[57] 444 F.2d 791 (4th Cir.), *cert. dismissed*, 407 U.S. 1006 (1971). Here, another neutral seniority system was at issue. The employer failed to prove the challenged practice was necessary for the safe and efficient operation of the transportation business.

[58] *See, e.g.*, Note, *Fair Employment Practices: The Concept of Business Necessity*, 3 MEM. ST. L. REV. 76, 83 (1972); Note, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98, 99 (1974).

[59] 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 407 U.S. 1006 (1971).

[60] *Id.*

the defenses. This was one of the problems faced in the sex discrimination case of *Burwell v. Eastern Airlines, Inc.*[61]

Believing that Eastern's mandatory maternity leave policy was a disparate impact issue,[62] the district court in *Burwell*[63] was uncertain about which defense to allow. The court resolved the problem by allowing both defenses.[64] The Fourth Circuit, however, corrected the district court, saying that only a business necessity defense should have been applied.[65] Furthermore, in an attempt to clear the confusion of applicable defenses in the future, the circuit court announced: "In sex discrimination cases . . . clear disparate impact discrimination will be tested by business necessity and a clear disparate treatment discrimination will be tested by a BFOQ defense."[66]

The district court's dilemma is understandable, though. If the court in the interest of uniformity followed other districts and circuits deciding similar flight attendant cases, then a bona fide occupational qualification might be the proper defense.[67] But if the district court emphasized the broader issue of maternity leaves as they impact upon other conditions of employment, then following the Supreme Court, a business necessity defense

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[61] 633 F.2d 361 (4th Cir. 1980).

[62] It is arguable whether this policy is truly a disparate impact discrimination. *See* note 92 *infra* and accompanying text where it is contended this is really facial, disparate treatment discrimination.

[63] 458 F. Supp. 474 (E.D. Va. 1978).

[64] *Id.* at 495. The court cautioned against confusing the bona fide occupational qualification and the business necessity defense. In a footnote the court expressed its opinion that there was no real difference between the defenses. But the court concluded that if Eastern should fail the business necessity defense, the discriminatory charge could still be overcome if Eastern came within the terms of the BFOQ. *Id.* at 495-96 n.11.

[65] 633 F.2d 361, 369 (4th Cir. 1980).

[66] *Id.* at 370.

[67] *See* Condit v. United Airlines, 558 F.2d 1176 (4th Cir. 1977), *aff'd on rehearing*, 631 F.2d 1136 (4th Cir. 1980) (policy requiring mandatory maternity leave is valid BFOQ); Harris v. Pan American World Airways, Inc., 437 F. Supp. 413 (N.D. Cal. 1977) (a BFOQ/business necessity test validates mandatory maternity leave); *In re* National Airlines, 434 F. Supp. 249 (S.D. Fla. 1977) (BFOQ invalidates mandatory maternity leave); EEOC v. Delta Airlines, Inc., 441 F. Supp. 626 (S.D. Tex. 1977), *rev'd without formal opinion*, 619 F.2d 81 (5th Cir. 1980) (BFOQ validates mandatory maternity leave); Newmon v. Delta Airlines, Inc., 374 F. Supp. 238 (N.D. Cal. 1973) (BFOQ invalidates mandatory maternity leave).

might apply.[68] Rather than attempt to distinguish or reconcile the defenses applied to specific kinds of issues, the Fourth Circuit looked instead to the type of theory used to prove the Title VII violation.

B. *The Validity of the "Burwell" Rule and Distinguishing the Defenses*

The approach in *Burwell* applying a business necessity defense in a disparate impact case and a bona fide occupational qualification in a disparate treatment case has generally been endorsed by most commentators.[69] Most courts in the past have also tended to follow this approach, although it probably developed more by accident than by intention.

As discussed earlier, the business necessity defense developed along with the disparate impact theory.[70] Courts following the *Griggs v. Duke Power Co.*[71] decision in recognizing "present effect" discrimination also cited the business necessity as the proper defense.[72] When the *Griggs* principle expanded to include "pure effects" of neutral systems, the business necessity defense also advanced as the employer's method to justify his business practice.[73] Until employer practices were challenged on the grounds of pure adverse effect, most disparate impact cases were race discrimination cases.[74] Since the BFOQ is specifically not available to employers in a race discrimination suit,[75] the

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[68] 458 F. Supp. 474, 496 (E.D. Va. 1978). The court was referring to Nashville Gas Co. v. Satty, 434 U.S. 136 (1977). "*Satty* indicates that a court analyzing a maternity leave policy should first apply the business necessity defense." 458 F. Supp. at 496.

[69] *See, e.g.*, Oldham, *Questions of Exclusion and Exception Under Title VII—"Sex Plus" and the BFOQ*, 23 HASTINGS L.J. 55, 72 (1971). *See generally* B. SCHLEI & P. GROSSMAN, EMPLOYER DISCRIMINATION LAW 292 (1976) [hereinafter cited as SCHLEI & GROSSMAN].

[70] *See* note 53 *supra* and accompanying text.

[71] 401 U.S. 424 (1971).

[72] *See, e.g.*, United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971); Robinson v. Lorillard, 444 F.2d 791 (4th Cir.), *cert. dismissed*, 407 U.S. 1006 (1971).

[73] *See generally* BABCOCK, *supra* note 24, at 343-44; SCHLEI & GROSSMAN, *supra* note 69, at 134.

[74] *See* BABCOCK, *supra* note 24, and accompanying text.

[75] *Supra* notes 38 & 39.

only available defense was the business necessity defense. On the other hand, most sex discrimination cases in the past were disparate treatment violations of Title VII and the BFOQ automatically applied.[76] Thus, the original distinction between the theories and their appropriate defenses may have been based in part upon different practices with respect to race and sex discrimination cases. Then, when women began bringing disparate impact cases to court, the early decisions followed the *Griggs* line of cases and held the employers must demonstrate a business necessity to justify their practices.[77] Finally, the Supreme Court also seems to have adopted this approach. In a sex discrimination case, *Dothard v. Rawlinson*,[78] the Court applied the BFOQ to Rawlinson's disparate treatment claim and the business necessity defense to her disparate impact claim.

By formulating these general practices into a rule for sex discrimination cases, the Fourth Circuit in *Burwell* was implicity distinguishing the defenses. At first glance, however, the tests for a BFOQ and a business necessity are almost indistinguishable. A valid bona fide occupational qualification will be found when the discrimination based on sex is related to the essence of the business and the employer can show that substantially all women would be unable to safely and efficiently perform the required duties.[79] A business practice may be held a valid necessity when the practice is manifestly related to job performance and where there is an overriding business purpose such that the practice is necessary for the safe and efficient operation of the business.[80] Both defenses are concerned with factors of safety, efficiency, and performace and have an element of "relatedness." But close examination of these defenses reveals their distinctive characteristics.

There are at least four differences between the defenses. Perhaps the most crucial distinction is that the BFOQ focuses upon the discrimination, the sex standard itself, as essential for employment in a particular position. Sex must affect ability and

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[76] BABCOCK, *supra* note 24, and accompanying text.

[77] *See, e.g.*, Blake v. City of Los Angeles, 435 F. Supp. 55 (C.D. Cal. 1977); Officers for Justice v. Civil Service, 395 F. Supp. 378 (N.D. Cal. 1975).

[78] 433 U.S. 321 (1977).

[79] *Supra* notes 44 & 45 and accompanying text.

[80] *Supra* note 57 and accompanying text.

the ability it affects must be essential to the job. Thus, being female or male must be shown to affect an employee's ability to safely and efficiently perform.[81] A business necessity, on the other hand, focuses upon the employer's particular business policy.[82] There must be a showing that the business policy works in fact to select those best able to perform the job and that such a policy is necessary to insure the safe and efficient operation of the business. Almost by definition, then, a BFOQ is concerned with facial, disparate treatment discrimination, and a business necessity concerns neutral employment practices with disparate impact. Secondly, it must be remembered an employer can never justify intentional race discrimination; the BFOQ is not available in this situation. But a business necessity defense is available to justify an employment practice which disparately impacts upon particular races. Thirdly, a business necessity defense has been described as a determination of whether there is a legal discrimination.[83] That is, a business practice will not be held discriminatory under Title VII where there exist valid nondiscriminatory reasons for the practice. A BFOQ, though, is an express exception to Title VII violations.[84] An employer may discriminate if such discrimination is a bona fide occupational qualification. Finally, it has been suggested that since the business necessity defense has developed as a balancing test, this allows the employer more opportunity to succeed.[85] The BFOQ, however, has been held to a narrow, rather inflexible interpretation.[86]

The rule in *Burwell v. Eastern Airlines, Inc.* that in a disparate treatment discrimination a BFOQ will apply and in a

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[81] *See generally* Note, *Height Standards in Police Employment and the Question of Sex Discrimination: The Availability of Two Defenses for a Neutral Employment Policy Found Discriminatory Under Title VII*, 47 So. CAL. L. REV. 585, 627 (1974) [hereinafter cited as *Two Defenses*].

[82] For example, his seniority policy, transfer policy, or height and weight standards for hiring. *Id.*

[83] *See* Oldham, *Questions of Exclusion and Exception Under Title VII—"Sex Plus" and the BFOQ*, 23 HASTINGS L.J. 55, 71 (1971).

[84] *Id.*

[85] *See* BABCOCK, *supra* note 24, at 348. The employer may have more opportunity to introduce factors such as cost as weighing on the side of business efficiency. *See also* note 54 *supra* and accompanying text.

[86] *Supra* note 38 and accompanying text.

disparate impact discrimination a business necessity defense will apply is generally supportable by past practices in Title VII adjudication. Moreover, the implicit distinction the rule makes between the defenses appears to be valid.[87] Perhaps in the final analysis the *Burwell* rule contains an element of policy. Where an employer intentionally discriminates or where his intention can be inferred, the employer should be held to the stricter BFOQ justification. But where there is no intention to discriminate, the employer should be allowed the opportunity to show that the discrimination is really an unfortunate result of a valid and necessary business practice.

III. ANALYSIS OF THE *BURWELL V. EASTERN AIRLINES, INC.* DECISION

The *Burwell* rule that in a clear disparate treatment case a BFOQ will apply and in a clear disparate impact case a business necessity defense will apply not only implies that it is important not to confuse the defenses, but this rule also implies that it is important not to confuse the theories proving the prima facie violations of Title VII. Although the Fourth Circuit did state: "[t]o say . . . that the two defenses are mutually exclusive, and each confined to a separate theory of liability would be overreaching,"[88] the court also said its rule was applicable in sex discrimination cases.[89] Since it has been shown there are important differences between the defenses which may affect the outcome of cases, courts should be careful in their characterizations of an issue as either disparate treatment or disparate impact. Con-

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[87] There are those who see no meaningful distinctions between the defenses, however. One author includes the business necessity defense as a "miscellaneous" subcategory of the BFOQ and describes it as substantially similar to the BFOQ. *See* Ragsdale, *Defenses to Sex Discrimination Suits*, 5 URBAN LAWYER 359, 366-67 (1973).

Another author includes the business necessity defense as an element of the BFOQ. *See* Comment, *"Dothard v. Rawlinson": Misapplication of the Bona Fide Occupational Qualification Defense*, 22 ST. LOUIS U. L.J. 197, 201-02 (1978).

Still another writer suggests that both defenses be allowable in some disparate impact cases despite the differences between the defenses. *See Two Defenses, supra* note 81.

Finally, the district court in *Burwell* also thought both defenses should be applied. *See* note 64 *supra*.

[88] 633 F.2d 361, 370 (4th Cir. 1980).

[89] *Id.*

ceding that there may be circumstances when it is unclear whether an issue is one of disparate impact or disparate treatment, the court called for judicial flexibility. In these circumstances, either theory or defense should apply.[90] At any rate a court should at least make the initial determination that it is unclear which type of Title VII discrimination is appropriate.

Both the district court and the circuit court in *Burwell* failed to properly characterize the mandatory maternity leave issue as one of disparate treatment. Because of this failure, the original confusion as to the proper defense arose in the district court. Also because of this failure, the wrong defense was applied in the circuit court.

In addition, the circuit court's application of the business necessity defense included two factors that may prove troubling in future sex discrimination cases. First, the court's refusal to intervene in an area of business denoted as crucial and complex may in the future insulate employers even when their policies may be based upon stereotypical assumptions concerning ability. Secondly, the characterization of the discriminatory impact as a loss of fifteen weeks of employment may set the ground for measuring impact discrimination quantitatively rather than in terms of all the immeasurables included in the concept of employment opportunity.

A. *The Mandatory Maternity Leave Policy is Disparate Treatment Discrimination*

In *Burwell v. Eastern Airlines, Inc.* the female flight attendants originally challenged five aspects of Eastern's employment practices. These practices included Eastern's insurance coverage, sick-leave policy, seniority policy, reinstatement rights after maternity leave, and the requirement that maternity leave must begin immediately upon knowledge of pregnancy.[91] Although some of these practices are facially neutral, it is at least arguable that two of them are not. It is not clear that reinstatement rights after maternity leave or the mandatory maternity

[90] *Id.* at 370 n.16. Presumably, the court meant that even in these unclear situations only one defense should apply and not both. But which one?

[91] 458 F. Supp. 474, 477 (E.D. Va. 1978).

leave policies are facially neutral. But the district court appears to have assumed all the policies were neutral.[92] The court resolved four of the issues, however, without really analyzing them within the terms of disparate impact. Ruling that the Supreme Court decisions in *General Electric Co. v. Gilbert*[93] and *Nashville Gas Co. v. Satty*[94] controlled, the district court upheld Eastern's insurance plan and sick-leave policy but invalidated Eastern's reinstatement policy and seniority policy.[95]

Upon reaching the mandatory maternity leave issue, the district court, still assuming it was dealing with a facially neutral policy, applied both the business necessity and the bona fide occupational qualification defenses. Cautioning against confusing the defenses, the court proceeded to consider the defenses separately.[96] In a footnote the court revealed that it was really confused about which defense to apply.[97] The court con-

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[92] In discussing how to prove prima facie violations of Title VII, the court talked about disparate impact discrimination. Recognizing that proof of intent to discriminate is not always necessary, the court said the specific issues involved would be viewed within this "general framework." *Id.* at 490-91.

[93] 429 U.S. 126 (1976).

[94] 434 U.S. 136 (1977).

[95] In General Electric Co. v. Gilbert, 429 U.S. 126 (1976), the Supreme Court held that an employer's failure to include benefits for pregnancy-related disabilities was not discriminatory. Thus, the district court in *Burwell* held Eastern was under no obligation to provide greater benefits for women because of pregnancy; therefore, Eastern's insurance plan was upheld.

In Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), the company's paid sick-leave policy which excluded women on maternity leave was upheld on the basis of *Gilbert*. It was said in *Satty* that the paid sick-leave policy was a benefits type policy "legally indistinguishable from the disability program upheld in *Gilbert*." 434 U.S. at 143. Based on these cases, then, the district court in *Burwell* held Eastern's sick-leave policy was non-discriminatory.

Also at issue in *Satty* was a seniority policy similar to the one at issue in *Burwell*. Women returning to work at Nashville after a maternity leave were divested of all accumulated seniority. It was held in *Satty* that those practices which imposed substantial burdens upon women were discriminatory. Relying upon this rationale, the district court in *Burwell* found Eastern's seniority policy and reinstatement policy to be a Title VII discrimination that Eastern had failed to justify as a business necessity. *See* Burwell v. Eastern Airlines, Inc., 458 F. Supp. 474, 491-94 (E.D. Va. 1978).

[96] Burwell v. Eastern Airlines, Inc., 458 F. Supp. 474, 495 (E.D. Va. 1978).

[97] "[I]t is not entirely clear whether Eastern's maternity leave policy should be tested under the business necessity test or the BFOQ test, or both." *Id.* at 495 n.11.

cluded that even if an employer is found to be in violation of Title VII by failure to establish a valid business necessity, the employer could still justify its practice as a BFOQ. Since a BFOQ is an express exception to Title VII, the court reasoned this defense would always be available whenever an employer is in violation of Title VII.[98] Finally, the court held that Eastern was not justified by a business necessity in requiring flight attendants to cease flight duties upon learning of their pregnancy. But Eastern could require as a valid bona fide occupational qualification that flight attendants be fewer than twenty-eight weeks pregnant.[99]

When the Fourth Circuit Court of Appeals considered the mandatory maternity leave issue, it too assumed it was dealing with a facially neutral policy.[100] Although there was discussion of the different methods of proving Title VII violations, there was no discussion of whether the mandatory maternity leave was in fact a neutral policy. But, assuming the maternity leave requirement was facially neutral with a disparate impact upon women, the circuit court ruled only the business necessity defense would apply in a disparate impact sex discrimination case. Furthermore, in a clear disparate treatment sex discrimination, only a BFOQ would apply.[101] The court then applied its version of the business necessity defense to the facts and held that Eastern was justified in requiring flight attendants to cease flight duties after the thirteenth week of pregnancy.[102]

It is this writer's contention, however, that Eastern's mandatory maternity leave policy was actually facially discriminatory. Eastern's practice was not a neutral policy. Eastern's practice of requiring women to immediately take leave upon knowledge of pregnancy affected no other class of employees. Similarly, there was no requirement for employees to immediately take leave for any other health-related condition that might impair job performance.[103] Instead, individuals who developed "non-pregnancy related health problems" were indi-

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[98] *Id.*
[99] 458 F. Supp. 474, 494-95, 499 (E.D. Va. 1978).
[100] 633 F.2d 361, 369 (4th Cir. 1980).
[101] *Id.* at 369, 370.
[102] *Id.* at 370-72, 373.
[103] *Id.* at 365.

vidually evaluated to determine their continued ability to perform.[104] This, then, was not a neutral disability policy which in its "effects" discriminated against women. Rather, Eastern openly treated differently those employees who became pregnant.

But implicit in the *Burwell* decision is the view that differences because of pregnancy do not necessarily amount to differences based on sex. Although neither the district court nor the majority in the circuit court indicate this, their view is probably based upon the Supreme Court decision in *General Electric Co. v. Gilbert*.[105] Holding that General Electric's insurance plan did not discriminate against pregnant women, the Court in *Gilbert* said, "[w]hile it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . . ."[106] But "pregnancy" and "maternity leave" are not neutral terms. Pregnancy is an identifying characteristic of women; only women become pregnant. Yet *Burwell* (and *Gilbert*) seem to say that although different treatment based on sex is prima facie violation of Title VII excepted only by a BFOQ, different treatment because of pregnancy may not even amount to discrimination. In other words, the underlying rationale seems to be that while it may be illegal to treat women differently because of their sex, surely this prohibition is not meant to extend to pregnant women.

This view of pregnancy as not necessarily related to sex discrimination may reflect a subtle vestige of romantic paternalism. That is, the pregnant woman, in her delicate condition, needs protection; she should not be out working. This view may also reflect the stereotypical role assigned to women. Several writers have commented upon the pervasiveness of this assump-

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[104] *Id. See also id.* at 376 where it is noted that flight attendants with controlled diabetes or epilepsy are allowed to fly.

[105] 429 U.S. 126 (1976). However, Justice Murnaghan in his concurrence and dissent in Burwell v. Eastern Airlines, Inc., 633 F.2d 361 (4th Cir. 1980), did discuss *Gilbert* with respect to the issue of whether the plaintiffs had established prima facie discrimination. The issue framed by Justice Murnaghan was whether pregnancy as an identifying characteristic of sex is a difference which should be allowed to make a difference. 633 F.2d at 377-79.

[106] 429 U.S. 126, 134 (1976).

tion by courts in general,[107] and by the Supreme Court in *Gilbert* in particular.[108] One author has termed this undercurrent the "pregnancy myth."[109] This myth is based on the belief that motherhood, not paid worker, is a woman's role. This author further argues that "to view the pregnant worker as uniquely situated [which is what *Gilbert* said] is clearly stereotyping; it locks woman into the biological role of temporary or second-class worker, primary mother, and society's womb."[110]

However, *Gilbert* was practically limited to its facts by the decision one year later in *Nashville Gas Co. v. Satty*.[111] *Satty* distinguished between benefits and burdens. An employer may not be obliged to include pregnancy as an insurance benefit, but policies that place substantial burdens upon women because of pregnancy may be discriminatory. But *Gilbert* was even further limited by the enactment of the Pregnancy Discrimination Act in 1978.[112] This amendment to Title VII expressly sets forth that differing treatment because of pregnancy is a difference based on sex. Thus, employment practices based on pregnancy may be construed as facially discriminatory on the basis of sex. Furthermore, the Pregnancy Discrimination Act can be viewed as an attempt to exorcise those subtle assumptions concerning the pregnant woman's role in the labor market.

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[107] *See, e.g.*, Edwards, *Sex Discrimination Under Title VII: Some Unresolved Issues*, 24 LAB. L.J. 411 (1973); BABCOCK, *supra* note 24, at 316-17.

[108] *See, e.g.*, Comment, *Differential Treatment of Pregnancy in Employment: The Impact of "General Electric Co. v. Gilbert" and "Nashville Gas Co. v. Satty,"* 13 HARV. C.R.-C.L. L. REV 717 (1978) [hereinafter cited as *Differential Treatment*], and Comment, *"General Electric Co. v. Gilbert": A Lesson in Sex Education and Discrimination—The Relationship Between Pregnancy and Gender and the Vitality of Disproportionate Impact Analysis*, 1977 UTAH L. REV. 119.

[109] *See Differential Treatment, supra* note 108, at 724.

[110] *Id.* at 725.

[111] 434 U.S. 136 (1977).

[112] Pub. L. No. 95-555, 92 Stat. 2076 (1978). The pertinent portion of the Act provides:

> 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 conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment related purposes, including receipt of benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .

Although *Burwell* was decided in the district court before the Pregnancy Discrimination Act was enacted, this should not have precluded the court from considering differences based on pregnancy as facially discriminatory. Even *Gilbert* did not represent that differences based on pregnancy would never be facially discriminatory. *Gilbert* only pointed out that not every classification based on pregnancy would be a sex-based classification.[113] Moreover, the language of the majority in the circuit court in *Burwell* seems to belie its analysis of the mandatory maternity leave issue as one of disparate impact. The court concedes that Eastern's mandatory maternity leave was the only practice related to health requiring immediate leave. Persons with other health-related conditions were individually evaluated.[114] In addition, the court framed the issue as "a case . . . involving an employer prohibiting outright a woman from working because of her pregnancy."[115] Thus, it seems there was a tendency to view the differences based on pregnancy as facial discriminations based on sex. But because the court assumed it was dealing with a neutral disability practice, it never came to terms with pregnancy as it related to sex discrimination.

Had the circuit court found Eastern's maternity leave requirement to be facially discriminatory, then under its own rule a BFOQ defense would have applied.[116] Because the bona fide occupational qualification has been interpreted narrowly by EEOC Guidelines[117] and case-law,[118] it is doubtful Eastern would have come within this Title VII exception. The EEOC Guidelines prohibit stereotypical assumptions as a basis for difference in treatment.[119] In *Burwell* there may be an argument that Eastern's

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[113] General Electric Co. v. Gilbert, 429 U.S. 126, 134 (1976).

Other airline cases prior to *Burwell*, however, did find that *Gilbert* foreclosed considering employment practices related to pregnancy as disparate treatment discrimination. *See, e.g.*, Harris v. Pan American World Airways, Inc., 437 F. Supp. 413 (N.D. Cal. 1977); *In re* Nat'l Airlines, 434 F. Supp. 249 (S.D. Fla. 1977).

[114] Burwell v. Eastern Airlines, Inc., 633 F.2d 361, 365 (4th Cir. 1980).

[115] *Id.* at 368.

[116] "In sex discrimination cases . . . clear disparate impact discrimination will be tested by business necessity and clear disparate treatment discrimination will be tested by a BFOQ." *Id.* at 370.

[117] *See* note 40 *supra* and accompanying text.

[118] *See* note 41 *supra* and accompanying text.

[119] 29 C.F.R. § 1604.2(a) (1979).

mandatory maternity leave was based on the assumption pregnant women are weaker and more prone to sickness and thus unable to perform their duties.[120] Under the *Diaz/Weeks* test[121] Eastern must show that substantially all pregnant women could not perform their flight duties. *Weeks* also indicates that there must be an individual evaluation regarding ability to perform. Further, *Diaz* requires Eastern to show that the characteristic of sex upon which it relies relates to the essence of the business. Eastern must show that non-pregnancy is essential for safe transportation. It is doubtful Eastern could have met this burden. The circuit court even doubted Eastern would succeed under a BFOQ justification.[122]

B. *The Application of the Business Necessity Defense in "Burwell"*

The district court and the circuit court in *Burwell v. Eastern Airlines, Inc.*[123] both applied the business necessity defense to the same set of facts, but they arrived at different conclusions. These differences resulted from using different approaches in the weighing of the elements of the business necessity defense. The district court weighed the availability of alternative practices more heavily, thereby holding Eastern's mandatory maternity leave policy was unjustified when alternative practices were available.[124] The circuit court's approach was to weigh fifteen lost weeks of employment against the complex area of risk management and passenger safety. As a result of this approach, Eastern was held justified in requiring pregnant flight attendants to cease flying after the thirteenth week

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[120] The parties in *Burwell* did enter medical evidence relating to a pregnant flight attendant's ability to perform. The district court resolved these issues of fact under the business necessity defense in favor of the plaintiffs. The district court did find, however, that the medical evidence showed Eastern was justified in requiring a flight attendant to be less than twenty-eight weeks pregnant. *See* Burwell v. Eastern Airlines, Inc., 458 F. Supp. 474 (E.D. Va. 1978).

[121] *See* notes 44 & 45 *supra* and accompanying text.

[122] Burwell v. Eastern Airlines, Inc., 633 F.2d 361, 370 n.15 (4th Cir. 1980).

[123] 458 F. Supp. 474 (E.D. Va. 1978), *aff'd in part and rev'd in part*, 633 F.2d 361 (4th Cir. 1980).

[124] The district court did find that under the BFOQ Eastern may require a flight attendant to be less than 28 weeks pregnant. 458 F. Supp. 474, 499 (E.D. Va. 1978).

of pregnancy.[125] It is somewhat troubling, however, that the circuit court characterized the discriminatory impact as only a loss of fifteen weeks of employment and refused to intervene in an area of decision-making termed "crucial" and "complex." This seems to suggest deference to any stereotypical assumptions concerning the ability of pregnant women that may have been made by Eastern when it designed its mandatory maternity leave policy.

The business necessity defense as developed in *Robinson v. Lorillard*[126] is "whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business."[127] There are four elements included within the scope of this test. First, the challenged business practice must be necessary to the safe and efficient operation of the business. Second, the business purpose must be sufficiently compelling to override any discriminatory impact. Third, the practice must effectively carry out the business purpose it is alleged to serve. Finally, there must not be available any alternative business practice which could accomplish the business purpose equally well but with a lesser differential impact.[128]

Both the district court and the circuit court in *Burwell* used the *Lorillard* test for business necessity. Conceding that passenger safety was an overriding legitimate business purpose, the district court further reasoned that Eastern could accomplish this purpose equally well with less disparate impact. Instead of requiring immediate leave upon knowledge of pregnancy, Eastern could simply set a later date for maternity leave and condition further employment upon a doctor's permission.[129] In this manner, the discriminatory impact upon the flight attendants would be less. Four concurring justices in the circuit court agreed with this approach. To them, the critical issue was whether there were any suitable alternatives available to the

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[125] 633 F.2d 361, 371-72 (4th Cir. 1980).

[126] 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

[127] *Id.* at 798.

[128] *Id.*

[129] Burwell v. Eastern Airlines, Inc., 458 F. Supp. 474, 496 (E.D. Va. 1978).

challenged business practice.[130] The emphasis was on the fourth element of the *Lorillard* test.

Analyzing the first element of the *Lorillard* test, the circuit court found that Eastern's mandatory maternity leave policy was necessary for the safety of the passengers. Moreover, the court thought the medical testimony relating pregnancy to job performance was subjective.[131] Because of this subjectivity and because the area of risk management for passenger safety is crucial and complex, the court extended deference to Eastern's business judgment.[132] Inquiring into the second *Lorillard* element, the court balanced the extent of the discriminatory impact against the value of the business purpose. The discriminatory impact upon the flight attendants was characterized as only a loss of fifteen weeks of employment. Thus, the business purpose of passenger safety was found to be sufficiently compelling to override this impact.[133] Next, the court had no doubt that Eastern's maternity leave policy effectively carried out its passenger safety business purpose. In this manner the third *Lorillard* element was disposed of. Finally, the court found little merit in the district court's proposed alternative. It was rejected on the basis of insufficient evidence.[134] Based upon this application of the business necessity defense, the court held Eastern's policy of requiring maternity leave after the thirteenth week of pregnancy was justified. But, Eastern's requirement of maternity leave upon knowledge of pregnancy and until the thirteenth week was not a valid business necessity.

An underlying concern for the circuit court was the possibility of an air disaster. The court did not want to "require unreasonable experimentation with business."[135] In the court's view, an integral aspect of the airline's function was to eliminate the potentials for disaster. This function required the airline to

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[130] Burwell v. Eastern Airlines, Inc., 633 F.2d 361, 374 (4th Cir. 1980).

[131] *Id.* at 371.

[132] "The ultimate chore of managing risks to passengers . . . falls to the airline, and in deference to the complexity of the task a court should not facilely substitute a judicial judgment that the resultant leave policy is unnecessary to the safe and efficient transportation of the passengers." *Id.*

[133] *Id.* at 371-72.

[134] *Id.* at 372.

[135] *Id.* at 373.

consider more than just objective, computerized factors in determining its business policies. Thus, Eastern's business policy would be legitimate if it was reasonably based upon all the information available to Eastern at the time it made its policy.[136] Furthermore, there was no evidence that Eastern had not based its mandatory maternity leave policy on medical evidence known to it at the time.[137] According to the court, the *Lorillard* business necessity test did not require each underlying assumption in Eastern's business practice to be proven.[138]

One underlying assumption the circuit court felt Eastern didn't need to prove was the inability of pregnant women to safely perform their jobs. Rather, if Eastern thought pregnancy could affect passenger safety, then this would be a legitimate consideration in determining its business policies. This indicates that if Eastern's policy seemed to be reasonably based, then it could not be challenged even if it was in part based upon stereotypical assumptions concerning physical ability. Indeed, the district court heard the conflicting medical testimony concerning the ability of pregnant flight attendants and held that until the twenty-eighth week of pregnancy it was not conclusive that all pregnant women were physically impaired. Notwithstanding this, the circuit court called the medical evidence largely subjective.[139] To the circuit court, all that was necessary was for Eastern to make a reasonable business judgment based upon information known to them at the time. This implies that a business practice may be held a valid business necessity regardless of medical evidence that may later develop and regardless of contrary evidence concerning the performance abilities of those employees affected.

Finally, the circuit court measured the extent of the impact upon the flight attendants as a loss of fifteen weeks of employment. Thus, Eastern's concern for passenger safety was found

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[136] *Id.*

[137] *Id.* at 372.

[138] This part of the court's discussion related to whether Eastern's business practice was a pretext for discrimination. While the issue of pretext is technically part of the employer's defense in rebutting the inference of discriminatory motive, *see* note 22 *supra*, here, the court was considering whether Eastern's practice was legitimately designed for passenger safety. *Id.*

[139] *Id.* at 371.

sufficiently compelling to override this adverse impact.[140] The circuit court did not cite, nor does there appear to be, any precedent for this approach of measuring the extent of the impact in applying the business necessity defense. It would seem if Eastern's business purpose was sufficiently compelling it would override any adverse impact; the amount of time lost on the job should actually be irrelevant. Instead, the court is suggesting that if the flight attendants had lost *more* than fifteen weeks of employment, Eastern's business purpose may not have been compelling enough. Further, this approach may result in forcing employees to show other adverse impacts besides the loss of their jobs. Yet, it would seem the loss of a job is impact enough upon employment opportunity, regardless of the amount of time involved.

IV. CONCLUSION

The rule stated in *Burwell v. Eastern Airlines, Inc.* that in Title VII sex discrimination cases a clear disparate treatment discrimination will be tested by a bona fide occupational qualification and a clear disparate impact discrimination will be tested by a business necessity defense has been shown to be supported by general practices of the courts. Also, the rule appears to be in line with the development of Title VII theories and defenses. Furthermore, this rule makes a valid distinction between the defenses. The BFOQ is a narrow statutory exception which relates to ability, while the business necessity defense is a balancing test which focuses upon a neutral business practice. The difference in the result of these defenses can be observed in the different outcomes of the district court and circuit court in *Burwell.* The district court found the majority of Eastern's mandatory maternity leave policy unjustifiable on the basis of a BFOQ. The circuit court, however, included other considerations such as the complexity of the business decision and the extent of the discriminatory impact as factors in the balancing of the business necessity defense.

The circuit court qualifies the *Burwell* rule by saying it should apply when "clear" disparate treatment or "clear" disparate impact is shown. But at the least, the *Burwell* rule im-

[140] *Id.* at 371-72.

plies an initial inquiry into the type of theory involved in proving the Title VII discrimination. Both the district court and the circuit court failed to make this initial inquiry. Both courts assumed Eastern's mandatory maternity leave policy was a neutral policy with disparate impact. It is arguable, however, that this policy is in fact disparate treatment discrimination. If so, then according to the *Burwell* rule a BFOQ would be the proper defense. Despite the circuit court's observation that disparate treatment of disparate impact may be presented as alternative grounds for relief,[141] as the circumstances in *Burwell* demonstrate, the type of theory used will make a difference in the available defense. The defense used may then make a difference in the outcome.

Finally, the circuit court differed in its application of the business necessity defense. While the district court emphasized the availability of alternative practices, the circuit court added two more factors to the *Lorillard* balancing test. First, the court found the area of risk management to be complex and did not want to substitute a judicial judgment for a business judgement. Second, the court measured the extent of the impact upon the flight attendants. Since they only lost fifteen weeks of employment, the business purpose of providing for passenger safety was held compelling enough to override this impact discrimination. It remains to be seen whether these two factors will be further expanded or limited in future sex discrimination cases.[142]

Debra G. Archer

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[141] *Id.* at 369 n.9.

[142] The plaintiffs in *Burwell* petitioned the Supreme Court for review. Their questions presented included: (1) whether the plaintiffs must also prove that Eastern failed to act reasonably at the time of adopting the discrimination policy when they have already shown prima facie discriminatory impact and rebutted Eastern's defense by demonstrating alternative policies, (2) whether a reasonableness standard may be substituted for a business necessity standard, and (3) whether the Fourth Circuit Court of Appeals is permitted by FED. R. CIV. P. 52 to ignore findings of fact made by the district court without holding that the findings were clearly erroneous. *See* 49 U.S.L.W. 3549-50 (1981).

Eastern also petitioned for review. It questioned the holding that its mandatory maternity leave policy for the *first thirteen* weeks of pregnancy was in violation of section 703(a) of Title VII. 42 U.S.C. §§ 2000e-2000e-17 (1976). *See* 49 U.S.L.W. 3581-82 (1981).

Both Burwell and Eastern were denied review. 49 U.S.L.W. 3636 (1981).