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Title VII: Are Exceptions Swallowing the Rule

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TITLE VII: ARE EXCEPTIONS SWALLOWING THE RULE?

INTRODUCTION

Title VII,[1] heralded as the key to guaranteeing long-awaited sexual equality in employment practices, is failing in that promise. Many of the same stereotypical notions regarding a "woman's place," which Title VII was designed to overcome, are rearing their heads in judicial determinations of actual Title VII challenges.

This article will examine the approach of the United States Supreme Court to pregnancy exclusion and bona fide occupational qualification[2] as exceptions to compliance with Title VII. Because of the Court's seeming inconsistencies of analysis, treatment of lower court fact finding, and apparent disregard of Equal Employment Opportunity Commission guidelines, the express goals of Title VII are being thwarted. Because sex stereotypes are so deeply ingrained, sex discrimination is not being addressed by the Court as forthrightly under Title VII as is race discrimination. The unfortunate result is the undermining of women's attempts to achieve the law's guarantee of equality of treatment in employment.

Title VII of the 1964 Civil Rights Act[3] was intended to eradicate all forms of discriminatory employment practices based upon race, religion, national origin, or sex.[4] Although the sex discrimination clause may have been a congressional "afterthought," introduced by southern

1. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-718, 78 Stat. 253 (current version codified at 42 U.S.C. §§ 2000e to 2000e-17 (1970 & Supp. V 1975)).

2. 42 U.S.C. § 2000e-2(e) addresses the exception of the bona fide occupational qualification: "(1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his . . . sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . ."

3. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-708, 78 Stat. 253 (current version codified at 42 U.S.C. §§ 2000e-15 to 2000e-17 (1970 & Supp. V 1975)).

4. 42 U.S.C. § 2000e-2(a) (1970), provides in part:

> [I]t shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin . . . .

opponents of the Act in an effort to sabotage it,[5] Congress nevertheless enacted the bill, including the ban on sex discrimination. Whatever may have been the real congressional intent, the promise of Title VII was to prohibit the inequalities of employment opportunity burdening women in the work force.

Equal protection under section one of the fourteenth amendment[6] served as a basis for attacks on sex-based discrimination before the enactment of Title VII.[7] Because equal protection analysis does not accord sex-based classifications the same strict scrutiny as those based on race,[8] sex discrimination has been allowed to flourish in situations where race discrimination would not.[9] Title VII, however, purported to put race and sex on an equal footing[10] with regard to prohibitions against discrimination. Protection against sex discrimination, so elusive and illusory under the Constitution, was to be granted by statute. Also, because Title VII applied to private employers, litigants would no longer be required to show state action in acts of discrimination.[11] The great hope of Title VII was that it would eradicate all forms of sex discrimination in employment:[12]

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5. *See* 110 CONG. REC. 2489 (1964) (remarks of Representative Green). Binder, *Pregnancy, Maternity Leave and Title VII*, 1 OHIO N. L. REV. 31 (1973). *See generally* Note, *Classification of the Basis of Sex and the 1964 Civil Rights Act*, 50 IOWA L. REV. 778, 791 (1965); Note, *Sex Discrimination in Employment Under Title VII of the Civil Rights Act of 1964*, 21 VAND. L. REV. 484, 491 (1968); Comment, *Sex Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964*, 1968 DUKE L.J. 671.

6. U.S. CONST. amend. XIV, § 1.

7. Comment, *Civil Rights: Private Employer's Denial of Disability Benefits for Pregnancy Leave Survives a Title VII Challenge*, 16 WASHBURN L.J. 745, 746 (1977).

8. Kahn v. Shevin, 416 U.S. 351 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973). *See generally* Gunther, *The Supreme Court 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8-48 (1972).

9. *Compare* Brown v. Board of Education, 347 U.S. 483 (1954) *with* Vorcheimer v. School District of Philadelphia, 97 S. Ct. 1671 (1977) (segregation in education); *Compare* American Communications Ass'n v. NLRB, 339 U.S. 382 (1950) *with* Goesaert v. Cleary, 335 U.S. 464 (1948) (employment); *Compare* Patton v. Mississippi, 332 U.S. 463 (1947) *with* Hoyt v. Florida, 368 U.S. 57 (1961) (jury service).

10. The text of the Act itself applies the same prohibitions against sex discrimination as it does against race discrimination. *See* note 4 *supra*. Although the bfoq (bona fide occupational qualification) exception applies only to sex classification and not to race, it is to be applied narrowly (*see* notes 122-31 *infra* and accompanying text), and it is the only feature which differentiates sex from race in Title VII protection.

11. The equal protection clause of the fourteenth amendment is applicable only to state action, and a nexus with state action has been required to show unconstitutional discrimination. State action may range from obvious legislative denial of equal protection to misuse of power under color of state law. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948); Civil Rights Cases, 109 U.S. 3 (1883).

12. Comment, *Sex Discrimination in Employment: What Has Title VII Accomplished for the Female?*, 9 U. RICH. L. REV. 149, 157 (1974).

> If Title VII continues to succeed, it may conceivably surpass the results envisioned by the supporters of the proposed Equal Rights Amendment. This is because the ERA, while seemingly broad, fails to proscribe sex discrimination where it most frequently occurs, in the private sector. Title VII should, therefore, remain the single most effective means to attack sex discrimination in employment, regardless of ratification of the ERA.[13]

Title VII was believed to mark the ascendance of the philosophy stressing equality of the sexes, a creed which rejects the necessity for nineteenth century "protective legislation."[14] It was reasonable therefore, to assume that women at last could escape the stigma of limiting stereotypes and be regarded as individuals by employers evaluating their qualifications and capabilities for employment. No longer would women be denied equal treatment by their employers because of notions of a "woman's place," that is, primarily as a wife and mother rather than as an important member of the working force.

Such visions have been shattered, however, as the United States Supreme Court has succumbed to the very stereotypes which Title VII sought to overcome. In its treatment of pregnancy classification[15] and bona fide occupational qualification (bfoq) exceptions to proscriptions against discriminatory sex practices,[16] the Court has resorted to reliance on sex-role stereotypes of women as weak and vulnerable because of their reproductive functions and sexuality.[17]

In addition, the concept of "sex-plus"[18] classification, believed to

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13. *Id.* at 158 (footnotes omitted). The proposed twenty-seventh amendment (Equal Rights Amendment) reads as follows:

> Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> Section 3. This amendment shall take effect two years after the date of ratification.

14. Comment, *Sex Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964*, 1968 DUKE L.J. 671, at 671-73.

15. General Electric Co. v. Gilbert, 429 U.S. 125 (1976).

16. Dothard v. Rawlinson, 97 S. Ct. 2720 (1977). *See* notes 69, 101-11 *infra* and accompanying text.

17. *See, e.g.*, Dothard v. Rawlinson, *id.*, and General Electric Co. v. Gilbert, 429 U.S. 125 (1976). For further discussion of this proposition, *see* Erickson, *Women and the Supreme Court: Anatomy is Destiny*, 41 BROOKLYN L. REV. 209 (1974) [hereinafter cited as Erickson].

18. Chief Judge Brown coined this phrase in his dissent from the Fifth Circuit's denial of a rehearing in Phillips v. Martin Marietta Corp., 416 F.2d 1257, 1260 (1969). This was the only Title VII case concerning sex discrimination to reach the Supreme Court prior to General Electric Co. v. Gilbert, 429 U.S. 125 (1976).

have been laid to rest by the Court in *Phillips v. Martin Marietta Corp.*,[19] is alive and well in the double standards allowed to survive Title VII challenges in *General Electric Co. v. Gilbert*[20] and *Dothard v. Rawlinson.*[21] Plaintiff in *Phillips* challenged, under Title VII, the practice of an employer who, while routinely hiring men with preschool age children, refused to hire similarly situated women. The Court of Appeals for the Fifth Circuit, in affirming the district court's granting of summary judgment for the defendant corporation,[22] stated:

> A per se violation of the Act can only be discrimination based solely on one of the categories, i.e., in the case of sex; women vis-a-vis men. When another criterion of employment is added to one of the classifications listed in the Act, there is no longer apparent discrimination based solely on race, color, religion, sex or national origin. . . .
>
> The discrimination [in the case at bar] was based on a two-pronged qualification, i.e., a woman with pre-school age children. Ida Phillips was not refused employment because she was a woman nor because she had pre-school children. It is the coalescence of these two elements that denied her the position she desired.[23]

Dissenting from the Fifth Circuit's denial of a rehearing,[24] Chief Judge Brown labeled the majority's "coalescence" theory as "sex-plus" and predicted that, if it were upheld, Title VII would be dead.[25]

On certiorari to the United States Supreme Court, *Phillips* was vacated and remanded in a per curiam opinion.[26] Although the employer's policy did not indicate a bias against women as such, the Court held that Title VII did not permit one hiring policy for women and another for men. Men and women cannot be judged by different standards for job-related purposes. The "sex-plus" theory, used by the Fifth Circuit to justify disparate treatment of women was, in effect, struck down.[27]

In *Gilbert*,[28] however, the Court was dealing with a pregnancy

19. 400 U.S. 542 (1971).
20. 429 U.S. 125 (1976).
21. 97 S. Ct. 2720 (1977).
22. Phillips v. Martin Marietta Corp., 58 Lab. Cas. 9152 (M.D. Fla. 1968).
23. Phillips v. Martin Marietta Corp., 411 F.2d 1, 3-4 (5th Cir. 1969).
24. Phillips v. Martin Marietta Corp., 416 F.2d 1257, 1258 (5th Cir. 1969).
25. *Id.* at 1260.
26. Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).
27. For a more detailed examination of "sex-plus", *see generally* Bartlett, *Pregnancy and the Constitution: The Uniqueness Trap*, 62 CAL. L. REV. 1532 (1974); Note, *Title VII, Pregnancy and Disability Payments: Women and Children Last*, 44 GEO. WASH. L. REV. 381 (1976); Erickson, *supra* note 17, at 281-82.
28. 429 U.S. 125 (1976).

classification, and the double standard survived a Title VII challenge. Plaintiffs[29] charged that General Electric's exclusion of benefits for pregnancy-related disabilities constituted unlawful sex discrimination. In allowing the exclusion to stand, the majority pointed out that the General Electric Plan[30] covers exactly the same categories of risk, and is facially non-discriminatory in the sense that " '[t]here is no risk from which men are protected and women are not. Likewise there is no risk from which women are protected and men are not.' "[31] However, the fact that only pregnancy is excluded from coverage under the plan, and that only women are affected by that exclusion, indicates that one standard of disability is being applied to men and another to women.

The economic hardship imposed by pregnancy may be no less than that resulting from illness or injury.[32] Although protection against such hardship is the goal of the Plan, denial of pregnancy coverage imposes a burden on women which is not imposed on disabled males. Disqualification of pregnancy coverage on the basis of its "voluntariness" is inconsistent with inclusion of coverage of such "voluntary" male surgery as vasectomy. To allow coverage under the Plan for virtually all disa-

29. The suit was brought as a class action. In addition to Martha Gilbert, there were six other original named plaintiffs, all of whom were in the employ of General Electric, who became pregnant during 1971 and were denied disability benefits under General Electric's insurance plan. They were joined by the International Union of Electrical, Radio, and Machine Workers, and that union's local affiliate. 429 U.S. at 129 n.4.

30. The Court characterized the coverage as follows:

> As part of its total compensation package, General Electric provides nonoccupational sickness and accident benefits to all employees under its Weekly Sickness and Accident Insurance Plan (the Plan) in an amount equal to 60% of an employee's normal straight-time weekly earnings. These payments are paid to employees who become totally disabled as a result of a nonoccupational sickness or accident. Benefit payments normally start with the eighth day of an employee's total disability (although if an employee is earlier confined to a hospital as a bed patient, benefit payments will start immediately), and continue up to a maximum of 26 weeks for any one continuous period of disability or successive periods of disability due to the same or related causes.

429 U.S. at 128 (footnote omitted).

The Court then further described the plan in a footnote:

> Additionally, benefit payment coverage under the Plan for all disabilities, whether or not related to pregnancy, terminates "on the date you cease active work because of total disability or pregnancy, except that if you are entitled to Weekly Benefits for a disability existing on such date of cessation" benefit payments will be continued in accordance with the provisions of the Plan. In cases of personal leave, layoff, or strike, however, the coverage for future nonoccupational sickness or accident disability is continued for 31 days.

Id. at 129 n.4.

31. 429 U.S. at 135 (quoting from Geduldig v. Aiello, 417 U.S. 484, 496-97, decided under the fourteenth amendment) (citation omitted).

32. *See* Note, *Title VII, Pregnancy and Disability Payments: Women and Children Last*, 44 GEO. WASH. L. REV. 381, 393-94 n.24.

bilities men may encounter while excluding only that "disability" exclusively affecting women is to apply separate standards of disability to men and women. According to *Phillips*, such a double standard violates Title VII.[33]

In *Dothard v. Rawlinson*[34] the Court's acceptance of the presumably prohibited double standard of "sex-plus" was manifested by its agreement with the defendant state's characterization of a facially discriminatory regulation as a bona fide occupational qualification.[35] Plaintiff Rawlinson[36] was refused employment as a correctional counselor trainee in the Alabama state penitentiary system because she failed to meet the minimum 120-pound weight requirement established by an Alabama statute.[37] In challenging the state's height and weight requirements, she also challenged Administration Regulation 204,[38]

33. 400 U.S. at 544; *see also* note 32 *supra*, at 394.

34. 97 S. Ct. 2720 (1977).

35. 42 U.S.C. § 2000e-2(e) (1970 & Supp. II 1972). The bfoq applies if an employer is able to demonstrate that the position in question requires a particular sex for its successful performance. If the bfoq exception is deemed applicable, the employer will not have violated Title VII, even though he hires male employees exclusively. *See* notes 123-31 *infra* and accompanying text.

36. A second plaintiff named in the case was Brenda Mieth, who, on behalf of herself and others similarly situated, challenged the height and weight requirements for the position of Alabama state trooper. 97 S. Ct. at 2724 n.4.

37. ALA. CODE tit. 55, § 373(109) (Supp. 1973). *See* 97 S. Ct. at 2724.

38. Adopted by the Alabama Board of Corrections while the suit was pending, Administrative Regulation 204 provides in pertinent part:

> I. GENERAL
>
> 1. The purpose of this regulation is to establish policy and procedure for identifying and designating institutional Correctional Counselor I positions which require selective certification for appointment of either male or female employees from State Personnel Department registers.
>
> . . . .
>
> II. POLICY
>
> 4. All Correctional Counselor I positions will be evaluated to identify and designate those which require selective certification for appointment of either male or female employee. Such positions must fall within a bona fide occupational qualification stated in Title 45-2000c of the United States Code.
>
> . . .
>
> 5. Selective certification from the Correctional Counselor Trainee register will be requested of the State Personnel Department whenever a position is being filled which has been designated for either a male or female employee only.
>
> . . . .
>
> III. PROCEDURE
>
> 8. Institutional Wardens and Directors will identify each institutional Correctional Counselor I position which they feel requires selective certification. . . .
>
> 9. The request will contain the exact duties and responsibilities of the position and will utilize and identify the following criteria to establish that selective certification is necessary;
>
> A. That the presence of the opposite sex would cause disruption of the orderly running and security of the institution. . . . . .
>
> B. That the position would require contact with the inmates of the op-

which had the effect of preventing women from being considered for approximately 75% of the correctional counselor positions available in the Alabama prison system.[39] A three-judge federal district court decided in her favor on both issues.[40] On appeal to the United States Supreme Court the judgment was affirmed regarding the height and weight requirements and reversed regarding Regulation 204.[41] The restriction against women serving as correctional counselors in "contact positions" was upheld as a bfoq because "[a] woman's relative ability to maintain order in a male, maximimum security, unclassified penitentiary of the type Alabama now runs could be directly reduced by her womanhood."[42] In other words, male applicants for correctional counselors are to be evaluated according to their capabilities, and females may be judged in terms of their sexuality. As Justice Marshall pointed out in a forceful dissent, "[i]t appears that the real disqualifying factor in the Court's view is '[t]he employee's very womanhood.' "[43] The Court failed to discuss the generally high incidence of homosexuality prevalent in the Alabama prisons[44] or to speculate on the relative vulnerability of male guards to homosexual attack by prisoners. Though the Court noted that the inmates are "deprived of a *normal heterosexual* envoronment,"[45] it is speculated that they "would assault women guards *because they were women.*"[46] In the eyes of the Court, women guards are viewed primarily in terms of their sexuality rather than as

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posite sex without the presence of others.

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

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

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

10. All institutional Correctional Counselor I positions which are not approved for selective certification will be filled from Correctional Counselor Trainee registers without regard to sex.

ALA. ADMIN. REG. No. 204 (1975). The Court noted:

Although Regulation 204 is not limited on its face to contact positions in maximum security institutions, the District Court found that it did not "preclud[e women] from serving in contact positions in the all-male institutions other than the penitentiaries. 418 F. Supp. at 1176. Petitioners similarly defended the regulation as applying only to maximum security facilities.

97 S. Ct. at 2724-25 n.6.

39. 97 S. Ct. at 2728 n.16.
40. Mieth v. Dothard, 418 F. Supp. 1169 (M.D. Ala. 1976).
41. 97 S. Ct. at 2730.
42. *Id.*
43. *Id.* at 2734 (quoting from the majority opinion, 97 S. Ct. at 2730).
44. *See* Pugh v. Locke, 406 F. Supp. 318, 324 (M.D. Ala. 1976).
45. 97 S. Ct. at 2730 (emphasis added).
46. *Id.* (emphasis added).

the trained, disciplined professionals their male counterparts are perceived to be. It would appear that the "sex-plus" double standard has prevailed again to undermine the promise of Title VII.

I. TITLE VII ANALYSIS: ABANDONED IN *Gilbert* AND *Dothard*

The model for Title VII analysis, as developed by the United States Supreme Court in *Griggs v. Duke Power Co.*[47] and *Albermarle Paper Co. v. Moody*[48] (both race discrimination challenges) involves basically a three-step approach. First, facially neutral standards shown to have a discriminatory effect may establish a prima facie case of discrimination. This triggers the second step in which the burden is shifted to the employer to show that the requirement has a "manifest"[49] relation to the employment. If the employer proves the challenged requirements are job related, step three allows the plaintiff to show that other, less discriminatory selection devices would "serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' "[50] Such analysis, unfortunately, was not applied to the Title VII challenge in *Gilbert*. Instead the Court short-circuited its analysis to the usual equal protection model, via a definitional substitution, which allowed the same result to be reached as in *Geduldig v. Aiello*.[51]

In *Aiello*, female employees brought a constitutional challenge to California's state administered disability insurance fund.[52] The fund did not compensate women who became continuously disabled as a result of normal pregnancy.[53] By characterizing the case as involving a social welfare program,[54] rather than the fundamental right of procrea-

47. 401 U.S. 424 (1971).
48. 422 U.S. 405 (1975).
49. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).
50. Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (quoting from McDonnel Douglas Corp. v. Green, 411 U.S. 792 (1973)).
51. 417 U.S. 484 (1974).
52. CAL. UNEMP. INS. CODE §§ 1-4751 (West 1972).
53. The program excluded "any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter." *Id.*, § 2626 (1972). Prior to Geduldig v. Aiello, 417 U.S. 484 (1974), a California state court had limited the pregnancy exclusion to normal pregnancies. Rentzer v. California Unemployment Ins. Appeals Bd., 32 Cal. App. 3d 604, 108 Cal. Rptr. 336 (1973). The California legislature then amended § 2626 accordingly to limit the exclusion. 417 U.S. at 490 & nn.14 & 15.
54. The standard of review in the equal protection model varies according to the nature of the classification and the group or rights affected. *See* note 55 *infra*. A classification drawn along economic or social policy lines satisfies the equal protection requirement when the state advances a merely rational basis for the classification. *See, e.g.*, Dandridge v. Williams, 397 U.S. 502 (1934).

tion,[55] the Court was able to find a rational basis for the pregnancy exclusion and thus uphold it. In determining that the statute did not discriminate on the basis of sex, the Court utilized insurance terminology which reinforced its characterization of the program as mere economic and social welfare legislation: "There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program."[56]

The Court reserved for a footnote its attempt to explain how a pregnancy classification is not necessarily sex-based:

> The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed, supra,* and *Frontiero, supra.* Normal pregnancy is an objectively identifiable physical condition with unique characteristics.[57]

In considering the relevance of the *Aiello* footnote to Gilbert's Title VII challenge, Judge Russell, writing for the majority of the Fourth Circuit Court of Appeals, interpreted it as being applicable to an equal protection challenge, but not to Title VII analysis. Although the California insurance fund in *Aiello* withstood the equal protection challenge because the classification was "rationally supportable"[58] and did not amount to "invidious discrimination,"[59] those were not the

55. A challenged regulation which classifies on the basis of inherently suspect criteria, such as race, *see, e.g.,* Korematsu v. United States, 323 U.S. 214 (1944), or which involves an alleged infringement of a fundamental right, such as procreation, *see, e.g.,* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942), is given strict scrutiny, and the state must show that a compelling interest is served by the classification if the statute is to survive a constitutional challenge. Generally, great deference is given to legislation under the "rational basis" test, in keeping with the general presumption of constitutionality of state statutes, while almost nothing can survive "strict scrutiny." *Compare* Jefferson v. Hackney, 406 U.S. 535 (1972) *with* Kramer v. Union Free School District, 395 U.S. 621 (1969).

56. 417 U.S. at 496 (footnote omitted).

57. *Id.* n.20. (References are to Reed v. Reed, 404 U.S. 71 (1971), and Frontiero v. Richardson, 411 U.S. 677 (1973)). Justice Brennan's dissent claimed these cases should control because the classification was based on gender, to which a stricter standard of scrutiny—though not the strict scrutiny afforded "suspect classifications"—is applied. 417 U.S. at 504-05.

58. Gilbert v. General Electric Co., 519 F.2d 661, 667 (1975). *See also* Wetzel v. Liberty Mutual Insurance Co., 511 F.2d 199, 207-08 (3d Cir. 1975).

59. 519 F.2d at 669.

issues at hand in *Gilbert*. The issue was " 'one of statutory interpretation rather than one of constitutional analysis.' "[60]

The Court in *Washington v. Davis*[61] had noted the different standards to be applied to constitutional and Title VII analysis,[62] yet in *Gilbert*, the Court determined that equal protection concepts of discrimination were a "useful starting place" for defining the term "discrimination," which "Congress has nowhere in Title VII defined . . ."[63] The additional finding that the California disability plan in *Aiello* was "strikingly similar"[64] to the plan provided by General Electric, made *Aiello* "quite relevant in determining whether or not the pregnancy exclusion did discriminate on the basis of sex."[65]

Because the *Aiello* concepts prevailed, the Court found no discrimination to trigger the further stages of Title VII analysis. Unlike conventional Title VII recognition of a discriminatory pattern, which places the burden of proof on the employer to justify his classification, *Gilbert* defined the pregnancy classification as *not* being discriminatory to begin with, and thus precluded consideration of whether it was a job-related necessity and, then, whether less discriminatory devices existed.[66]

Justice Stevens' dissent contended the issue was simply one of statutory construction and maintained that the constitutional holding in *Aiello* did not control. Citing *Washington v. Davis*,[67] he observed that the plaintiff's burden of proving a prima facie constitutional violation is "significantly heavier than the burden of proving a prima facie viola-

60. *Id.* at 667.

61. 426 U.S. 229 (1976).

62. In Washington v. Davis, *id.*, the Supreme Court reversed the Court of Appeals for the District of Columbia for erroneously applying Title VII standards to a due process discrimination claim. *Id.* at 238. *See generally The Supreme Court, 1975 Term*, 90 HARV. L. REV. 1, 120-21 (1976); Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977).

63. 429 U.S. at 133.

64. Actually, General Electric's Plan was more restrictive than California's because it excluded coverage of *all* pregnancy-related disabilities, whereas California's excluded only disabilities resulting from normal pregnancy (*see* note 42 *supra*). As Brennan, J. noted in General Electric Co. v. Gilbert:

> The experience of one of the class plaintiffs is instructive of the reach of the pregnancy exclusion. On April 5, 1972, she took a pregnancy leave, delivering a stillborn baby some 9 days later. Upon her return home, she suffered a blood clot in the lung, a condition unrelated to her pregnancy, and was rehospitalized. The company declined her claim for disability payments on the ground that pregnancy severed her eligibility under the plan. . . . Had she been separated from work for any other reason—for example, during a work stoppage—the plan would have fully covered the embolism.

Id. at 151-52 n.4, (Brennan, J., dissenting).

65. *Id.* at 133.

66. See notes 62-65 *supra*, 67-71 *infra* and accompanying text.

67. 426 U.S. 229, 238-48 (1976).

tion of a statutory prohibition against discrimination."[68] Applying conventional Title VII analysis, he concluded the statute plainly required affirmation of the Fourth Circuit's judgment.

The Court in *Dothard* purported to apply the three-step Title VII analysis, and actually did so regarding the facially neutral height and weight requirements. However, in considering the state's justification for the blanket exclusion of women from "contact" positions in the prisons as a bfoq,[69] the Court failed to implement step three—the search for a less discriminatory selection device.

Writing for the majority, Justice Stewart described the three-step process for Title VII analysis and proceeded to apply that process to the fact situation. Because the height and weight requirements excluded 41.3% of the female population while excluding less than one percent of the male population, the Court agreed that the plaintiffs had established a prima facie case of discrimination.[70] As the state had produced no evidence correlating these requirements with the requisite amount of strength thought essential to job performance, they had failed to justify the standards as bona fide job requirements. Even if the state had shown strength to be a bona fide job-related quality, a less discriminatory test which measured strength directly would have served their purpose.

Without discussing, for the present, the merits of the Court's reasoning in accepting Regulation 204 "within the narrow ambit of the bfoq exception,"[71] it is significant that the majority did not complete the analysis and consider the availability of less discriminatory devices.

As Justice Marshall pointed out in dissent, the successful experiences of the states of California and Washington in allowing women to serve as guards in maximum security institutions, "confirm that absolute disqualification of women is not, in the words of Title VII, 'reasonably necessary to the normal operation' of a maximum security prison."[72] The Court's acceptance of the "barbaric and inhumane" conditions in Alabama prisons[73] as justification for otherwise unlawful discrimination against women "sounds distressingly like saying two

68. 429 U.S. at 160 (footnote omitted).
69. *See* note 2 *supra.*
70. 97 S. Ct. at 2727.
71. *Id.* at 2729. For an analysis of the Court's reasoning on the point, see notes 91-107 *infra* and accompanying text.
72. *Id.* at 2733.
73. *See* James v. Wallace, 406 F. Supp. 318, 329-31 (M.D. Ala. 1976).

wrongs make a right."[74] Justice Marshall emphasized that the unconstitutional conditions ordered corrected in *James v. Wallace*[75] cannot be accepted as "normal operation" contemplated by the statute:[76]

> A prison system operating in blatant violation of the Eighth Amendment is an exception that should be remedied with all possible speed, as Judge Johnson's comprehensive order in *James v. Wallace* . . . is designed to do. In the meantime, the existence of such violations should not be legitimatized by calling them "normal." Nor should the Court accept them as justifying conduct that would otherwise violate a statute intended to remedy age-old discrimination.[77]

An extension of the Court's analysis to the third step in Title VII analysis (consideration of the less discriminatory alternative of altering the prison system to conform to constitutional standards) would have had the effect either of disallowing the bfoq exception entirely or of limiting its application to a time period consistent with that allotted for compliance with constitutional requirements. As the decision stands, however, females may be excluded from 75% of correction positions indefinitely.[78]

II. Findings of Fact

As noted earlier, the standards of review for Title VII and equal protection challenges are different.[79] Title VII analysis is stricter because discriminatory purpose need not be proven to establish a prima facie case of discrimination. A disproportionate impact on one class or a discriminatory pattern is enough to shift the burden to the imployer to justify the classification.[80] Constitutional challenges, however, require a showing of purposeful discrimination to trigger judicial scrutiny, although intent may be inferred from a discriminatory pattern.[81] Though the difference between the standards may appear to be more semantic than substantial, presumably the Court would have greater flexibility under the constitutional standard. It is, after all, strictly a matter of judgment whether a pattern of discrimination is significant

74. 97 S. Ct. at 2733.
75. 406 F. Supp. 318 (1976).
76. 97 S. Ct. at 2733.
77. *Id.*
78. *See* notes 38 & 39 *supra* and accompanying text.
79. *See* notes 58-62, 67-68 *supra* and accompanying text.
80. *See* notes 47-50 *supra* and accompanying text.
81. Washington v. Davis, 426 U.S. 229, 241 (1976).

enough to imply intent. Furthermore, the mere "inference" of intent is not necessarily sufficient to show purposeful discrimination.

The district court in *Gilbert*, employing the Title VII standard of analysis, refused to consider the issue of intent. Because discriminatory effect alone was enough to violate Title VII, the district court failed to rule on evidence which could have borne on the issue of purpose: "Plaintiffs have introduced much evidence in an effort to demonstrate that G.E.'s past history is dominated by a strain of male chauvinism. The Court deems that line of inquiry legally irrelevant and makes no findings with respect to this contention."[82] The court of appeals also saw the issue as one of effect rather than of motive: "It is of no moment that an employer may not have deliberately intended sex-related discrimination; the statute looks to 'consequences,' not intent."[83]

The Supreme Court, however, viewed the effect of G.E.'s plan in light of *Aiello*: because a pregnancy exclusion is not sex discrimination, there has been no discriminatory effect.

> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes.[84]

As Justice Brennan noted in his *Gilbert* dissent, however, *Aiello's* "outcome was qualified by the explicit reservation of a case where it could be demonstrated that a pregnancy-centered differentiation is used as a 'mere pretext . . . designed to effect an invidious discrimination against the members of one sex . . . .' "[85] Further, the inquiry into "pretext" in *Aiello* was conducted with the normal presumption favoring the constitutionality of *legislative* action that is not applicable to the broad social objectives promoted by Title VII.[86] "Moreover, the Court studiously ignores the undisturbed conclusion of the District Court that General Electric's 'discriminatory attitude' toward women

82. Gilbert v. General Electric Co., 375 F. Supp. 367, 380 (E.D. Va. 1974).
83. Gilbert v. General Electric Co., 519 F.2d 661, 664 (4th Cir. 1975) (citing Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).
84. Geduldig v. Aiello, 417 U.S. 484, 497 n.20 (1974).
85. 429 U.S. at 149 (quoting Geduldig v. Ailello, 417 U.S. 484, 497 n.20 (1974)).
86. 429 U.S. at 149. *See also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 415 (1819) for further discussion of "pretext".

as a motivating factor in its policy, . . . 'and that the pregnancy exclusion was neutral [neither] on its face' nor 'in its intent.' "[87]

Some of the evidence referred to by the district court as legally irrelevant would be relevant indeed in uncovering a possible "pretext." Justice Brennan summarized such pertinent evidence from the record in a footnote:

> General Electric's disability program was developed in an earlier era when women openly were presumed to play only a minor and temporary role in the labor force. As originally conceived in 1926, General Electric offered no benefit plan to its female employees because " 'women did not recognize the responsibilities of life, for they probably were hoping to get married soon and leave the Company.' " App. 958, excerpted from D. Loth, Swope of G.E.: Story of Gerald Swope and General Electric in American Business (1958). It was not until the 1930's and 1940's that the company made female employees eligible to participate in the disability program. In common with general business practice, however, General Electric continued to pursue a policy of taking pregnancy and other factors into account in order to scale women's wages at ⅔ the level of men's. *Id.*, at 1002. More recent company policies reflect common stereotypes concerning the potentialities of pregnant women, see *e.g.*, *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 644 (1974), and have coupled forced maternity leave with the nonpayment of disability payments. Thus, the District Court found, "In certain instances it appears that the pregnant employee was required to take leave of her position three months prior to birth and not permitted to return until six weeks after the birth. In other instances the periods varied. . . . In short, of all the employees it is only pregnant women who have been required to cease work regardless of their desire and physical ability to work and only they have been required to remain off their job for an arbitrary period after the birth of their child." 375 F.Supp. 367, 385. In February 1973, approximately coinciding with commencement of this suit, the company abandoned its forced-maternity-leave policy by formal directive.[88]

Without any reference whatsoever to this evidence, the majority concluded that there was no more showing than in *Aiello* that exclusion of pregnancy benefits was a pretext.[89]

87. 429 U.S. at 149-50 (quoting the district court's opinion, 375 F. Supp. at 382-83).
88. *Id.* at 149-50 n.1.
89. *Id.* at 136.

Whether such evidence was sufficient to show purposeful discrimination should have been a question of fact to be determined by the district court on remand. If such evidence is simply ignored, it is difficult to predict what sort of evidence the Court would find persuasive or indeed what standard of proof will be required to find the elusive "pretext."

The Court also failed to take certain evidence into account in considering the "effect" of G.E.'s pregnancy exclusion. As Justice Brennan noted in his dissent:

> General Electric's disability program has three divisible sets of effects. First, the plan covers all disabilities that mutually inflict both sexes . . . . Second, the plan insures against all disabilities that are male-specific or have a predominant impact on males. Finally, all female-specific and female-impacted disabilities are covered, except for the most prevalent, pregnancy. The Court focuses on the first factor —the equal inclusion of mutual risks—and therefore understandably can identify no discriminatory effect arising from the plan.[90]

Such selective consideration of one innocuous effect, while ignoring the adverse impact on women of effects two and three, allowed the Court to accept a discriminatory pattern forbidden by Title VII.

Objectivity fared little better in the Court's consideration of the factual pattern in *Dothard*. Although the Court upheld the admissibility of the plaintiff's statistics regarding the effect of height and weight requirements, Justice Rehnquist's concurring opinion provided a blueprint for future defendants to use in justifying similar discriminatory impact. Furthermore, the evidence which persuaded the three judge panel below to find Regulation 204 unlawful was disregarded altogether, in favor of that introduced by the defendant state.[91]

Appellant corrections officials challenged the use of statistics drawn from a nationwide data base to show the disproportionate impact of height and weight requirements on women. They pointed out plaintiff Rawlinson's "failure to adduce comparative statistics concerning actual applicants for correctional counselor positions in Alabama."[92] Noting the deterrent effect such minimum physical requirements could have had on potential applicants, the majority concluded that "reliance

90. *Id.* at 155.
91. 97 S. Ct. at 2730, 2734-35.
92. *Id.* at 2727.

on general population demographic data was not misplaced where there was no reason to suppose that physical height and weight characteristics of Alabama men and women differ markedly from those of the national population."[93] Because the employer had failed to discredit the state's evidence or to present countervailing evidence of his own, the district court's finding of discriminatory impact was allowed to stand.[94]

It is instructive, however, to examine Justice Rehnquist's concurring opinion in which he described (perhaps for the benefit of future defendant employers) the tactics with which to rebut similar charges. In this transparent effort to limit the Court's holding to the narrow facts of the case at bar, Justice Rehnquist grudgingly conceded the defense here had not been adequate, but then proceeded to outline the circumstances under which height and weight restrictions could withstand a Title VII challenge:

> Appellants, in order to rebut the prima facie case under the statute, had the burden placed on them to advance job-related reasons for the qualification. *McDonnel Douglas Corp. v. Green*, 411 U.S. 792, at 802 . . . (1973). This burden could be shouldered by offering evidence or by making legal arguments not dependent on any new evidence. The District Court was confronted, however, with only one suggested job-related reason for the qualification—that of strength. Appellants argued only the job-relatedness of actual physical strength; they did not urge that an equally job-related qualification for prison guards is the *appearance* of strength. As the Court notes, the primary job of correctional counselor in Alabama prisons "is to maintain security and control of the inmates . . ," *ante*, at 2725, a function that I at least would imagine is aided by the psychological impact on prisoners of the presence of tall and heavy guards. If the appearance of strength had been urged upon the District Court here as a reason for the height and weight minima, I think that the District Court would surely have been entitled to reach a different result than it did. For, even if not perfectly correlated, I would think that Title VII would not preclude a State from saying that anyone under 5'2" or 120 pounds, no matter how strong in fact, does not have a sufficient appearance of strength to be a prison guard.[95]

93. *Id.*
94. *Id.* at 2727-30.
95. *Id.* at 2732 (emphasis in original) (joining in the opinion were Chief Justice Burger and Justice Blackmun).

In overturning the district court, which had rejected the state's contention that Regulation 204 (excluding women from contact positions in all-male penitentiaries) fell within the bfoq exception, the majority took great liberties with the district court's findings of fact.

The majority concluded that there was great danger of assault on women guards, based on evidence contained in the record of "*an* attack on a female clerical worker in an Alabama prison, and of *an* incident involving a woman student who was taken hostage during a visit to one of the maximum security institutions."[96] That same record, however, includes testimony by Judson Locke, Commissioner for the Board of Corrections of Alabama and the author of Regulation 204, regarding a high incidence of violence generally in the prisons.[97] As Justice Marshall noted in dissent, "There is simply no evidence in the record to show that women guards would create any danger to security in Alabama prisons significantly greater than already exists."[98]

While the majority purported to rely on expert testimony for its conclusions regarding a woman's relative ability to function as a prison guard, their rationale reflected the biased attitude of the witness who may have qualified as an expert on prisons but who had no credentials as a sociologist or psychologist. In testifying on the relative ability of a woman and a man of the same height and weight to perform the job of correctional counselor in an all-male institution, Commissioner Locke concluded that a man could perform the job but a woman could not. He justified his "expert" conclusion with psychological double-talk:

> The innate intention [*sic*] between a male and a female. The physical capabilities, the emotions that go into the psychic make-up of a female vs. the psychic make-up of a male. The attitude of the rural type inmate we have vs. that of a woman [*sic*]. The superior feeling that a man has, historically, over that of a female [*sic*]."[99]

Whatever merit such sentiments may have, they hardly qualify as expert psychological testimony. The alleged sexist prejudices of rural southern convicted felons can hardly be considered an adequate basis to justify discrimination against women. Certainly Title VII was not designed to cater to prisoners' biases, but rather to protect the victims of such bias against discrimination.

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96. *Id.* at 2730 n.22 (emphasis added).
97. *Id.* at 2733-34.
98. 97 S. Ct. at 2733.
99. *Id.* at 2734 n.2.

By adopting such questionable logic as Locke's, the Court found that a woman guard would pose a threat "to the basic control of the penitentiary and protection of its inmates and the other security personnel. The employee's very womanhood would thus directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility."[100]

However, the record reveals conflicting expert testimony which indicated that the presence of female guards had actually had a beneficial effect on prison inmates. William R. Nelson, Warden of the Metropolitan Correctional Center in Chicago, testified that male inmates behave *better* in the presence of female guards and that the presence of women is a very strong normalizing influence. This view was shared by another expert witness, Ray Nelson, who said the presence of women has an advantageous psychological effect upon the prisoners. C. Robert Sarver, former Commissioner of the Arkansas Department of Corrections and former Director of the Department of Corrections for West Virginia, testified that there was no reason why women should not be hired and assigned as prison guards on an equal basis with men.[101]

The district court had discussed the reason propounded by the prison administrators for Regulation 204—that women could not perform adequately and safely within the setting of an all-male penitentiary. They found the state's purpose and rationale seemingly defeated, however, by the employment of females in contact positions at all-male institutions other than the large penitentiaries, where their duties are identical to those of male officers.[102]

Acknowledging the variance of opinions in the corrections community concerning the presence of women in all-male institutions and the consequent effect on inmates' privacy, the district court cited a policy statement by the Federal Bureau of Prisons stating that: "The Bureau of Prisons is committed to the goal of normalization as a part of improving the correctional facilities. This integration of staff of both sexes into all institutions will promote this development."[103] On the basis of the evidence presented, the district court found Regulation 204

100. *Id.* at 2730.
101. Mieth v. Dothard, 418 F. Supp. 1169, 1184-85 (M.D. Ala. 1976).
102. *Id.* at 1184.
103. *Id.* (quoting FEDERAL PRISON SYSTEM, POLICY STATEMENT No. 3713.7 of January 7, 1976).

violated Title VII, "insofar as it denies women jobs as prison guards in all-male prisons."[104]

In its review of that decision, the Supreme Court pointed to "substantial testimony from experts on both sides of this litigation that the use of women as guards in 'contact' positions under the existing conditions in Alabama maximum security male penitentiaries would pose a substantial security problem, directly linked to the sex of the prison guard."[105] Such evidence was the basis for the conclusion that the district court erred "in ruling that being male is not a bona fide occupational qualification for the job of correctional counselor in a 'contact' position in an Alabama male maximum security penitentiary."[106]

The majority dismissed as irrelevant evidence of women's satisfactory performance as guards in other Alabama institutions:

> The record shows by contrast, that Alabama's minimum security facilities, such as work-release centers, are recognized by their inmates as privileged confinement situations not to be lightly jeopardized by disobeying applicable rules of conduct. Inmates assigned to these institutions are thought to be the "cream of the crop" of the Alabama prison population.[107]

Without discrediting the opposing testimony or finding an absence of adequate evidence to support the district court's decision, the majority reversed on the basis of its own evaluation of the evidence. Inasmuch as it is not the function of the Supreme Court to reevaluate the facts found below, but rather to reverse findings of fact only when there is insufficient evidence to support them,[108] it is apparent that the Court's appraisal of the record was decidedly unbalanced.

III. EEOC GUIDELINES AND THE LAW

The Equal Employment Opportunity Commission (EEOC) was created by Title VII and is the agency charged with interpreting and enforcing its provisions.[109] EEOC guidelines, however, do not have

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104. *Id.* at 1185. The District Court also held that Regulation 204 violated the equal protection clause of the fourteenth amendment. *Id.*

105. 97 S. Ct. at 2730.

106. *Id.* (footnote omitted).

107. *Id.* at 2730 n.24.

108. Commissioner v. Duberstein, 363 U.S. 278, 291 (1959) (standard for review of facts tried to the court below is "clearly erroneous" standard). *See also* FED. R. CIV. P. 52(a). *See generally* cases cited in Annot., 11 A.L.R. 742 (1937).

109. Civil Rights Act of 1964, § 705(a), 42 U.S.C. § 2000e-5 (Supp. IV 1974).

the force of law[110] and their application by the Supreme Court in sex discrimination cases has been inconsistent.[111] Close adherence to EEOC guidelines in *Gilbert* and *Dothard* would have resulted in a different outcome for both cases. Instead, the guidelines were followed only to the extent that they conformed to the result the Court wished to reach.

In *Gilbert* the majority repudiated the EEOC guidelines which mandate disability benefits for pregnancy.[112] Noting that the guidelines flatly contradicted an earlier position of the EEOC, the Court also found them in conflict with a similar regulation issued under the Fair Labor Standards Act,[113] which has been incorporated by amendment into Title VII.[114]

Justice Brennan observed in dissent that prior Title VII decisions had consistently acknowledged "the unique persuasiveness of EEOC interpretations" in the area of economic and social inquiry.[115] Noting that prior decisions[116] had also accorded "great deference" to EEOC interpretations, the dissent condemned the Court's rejection of the Commission's 1972 guideline providing, that "[d]isabilities caused or

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110. 429 U.S. at 141.

111. *See, e.g.*, cases cited in note 116 *infra.*

112. 29 C.F.R. § 1604.10(b) (1975) (EEOC Guidelines on Discrimination Because of Sex). The Commission's authority to issue guidelines is derived from § 713(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-12(a) (1970), which authorizes the Commission to issue, amend, or rescind procedural regulations to carry out the provisions of Title VII.

113. 29 U.S.C. §§ 201-206 (1970).

114. In 1972, Congress amended 42 U.S.C. § 2000e-2(h) (1970) by adding this following sentence to the Title VII provision:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

An Act amending 42 U.S.C. § 2000e-2(h) (1970), Pub. L. No. 92-261, § 8(b), 86 Stat. 109 (codified at 42 U.S.C. § 2000e-2(h) (Supp. II 1972)).

In General Electric Co. v. Gilbert, 429 U.S. 125 (1976), the majority construed the legislative intent behind this addition as follows:

> This sentence was proposed as the Bennett Amendment to the Senate Bill, 110 Cong. Rec. 13647 (1964), and Senator Humphrey, the floor manager of the bill, stated that the purpose of the amendment was to make it "unmistakably clear" that differences of treatment in industrial benefit plans, including earlier retirement options for women, may continue in operation under this bill, if it becomes law . . . ." [110 CONG. REC.] 13663-64 [1964].

General Electric Co. v. Gilbert, 429 U.S. at 144.

115. General Electric Co. v. Gilbert, 429 U.S. at 155-56.

116. Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971); Phillips v. Martin Marietta Corp., 400 U.S. 542, 544-47 (1971) (Marshall, J., concurring).

contributed to by pregnancy . . . are, for all job-related purposes, temporary disabilities . . . [under] any health or temporary disability insurance or sick leave plan . . . ."[117]

The dissent traced the research of the EEOC and its effort to develop a policy reflecting well-informed consideration, during the seven year interim between Title VII's enactment and promulgation of the 1972 guideline. During this period the EEOC had refused to impose liability on employers during the decision-making stages:

> It is bitter irony that the care that preceded promulgation of the 1972 guideline is today condemned by the Court as tardy indecisiveness, its unwillingness irresponsibly to challenge employers' practices during the formative period is labeled as evidence of inconsistency, and this indecisiveness and inconsistency are bootstrapped into reasons for denying the Commission's interpretation its due deference.[118]

Pointing to the pregnancy-inclusive rules adopted by Congress under the Railroad Unemployment Insurance Act[119] and Title IX of the Education Amendments of 1972,[120] among others, the dissent concluded that "the EEOC's guideline merely settled upon a solution now accepted by every other Western industrial country."[121] The disregard shown by the Court for the EEOC guidelines appears to have been based more on their content than on their actual merit. Because the guidelines supported a conclusion the Court was not prepared to accept, they were discredited and ignored.

EEOC guidelines were also relevant in *Dothard* in determining the appropriateness of granting the bfoq exception to Alabama's administrative regulation. The majority purported to follow the EEOC interpretation which indicates that the exception was meant to be extremely narrow.[122] Presumably to distinguish their adherence to EEOC's recommendation in *Dothard* from their rejection of the guideline in *Gilbert*, the Court explained in footnote that the EEOC construction of the statute could be given weight because "[i]t has adhered to that

117. 429 U.S. at 156 (quoting 29 C.F.R. 1604.10(b) (1975)).
118. *Id.* at 157.
119. 45 U.S.C. §§ 351-366 (1970). The specific pregnancy-inclusive language is found at 45 U.S.C. § 351(k)(2) (Supp. II 1972).
120. 20 U.S.C. § 1681(a) (Supp. II 1972). *See* 45 C.F.R. § 86.57(c) (1976).
121. 429 U.S. at 158 (citing U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, SOCIAL SECURITY PROGRAMS THROUGHOUT THE WORLD at ix, xviii, xix (Research Report No. 40) (1971)).
122. *See* 29 C.F.R. § 1604.2(a) (1975).

principle consistently."[123] Although referring to a series of cases which applied the bfoq exception narrowly, and thereby essentially rejected it,[124] the Court concluded that the factual circumstances justified accepting Regulation 204 "within the narrow ambit of the bfoq exception."[125]

Justice Marshall appeared to have anticipated such abuse of the bfoq exception in his concurring opinion in *Phillips v. Martin Marietta*:[126] "The exception for a 'bona fide occupational qualification' was not intended to swallow the rule."[127] Justice Marshall also pointed out that the majority's justification of exclusion of women from positions as prison guards "relies on precisely the type of generalized bias against women that the Court agrees Title VII was intended to outlaw."[128]

Justice Marshall's opinion in *Dothard* emphasized the irrelevance of considering the danger involved in a guard's occupation and some women's inability to protect themselves. Referring to the majority's own language, he reiterated that the purpose of Title VII is "to allow the individual woman to make that choice for herself."[129]

As one commentator has uregd, sex may establish a bfoq "only if all members of the particular class are innately incapable of performing the requisite function of a job."[130] In other words, any bfoq based on sex creates an internal contradiction within Title VII because it "allows persons to be evaluated according to their class status rather than their individual capabilities."[131] By adopting broad stereotypical notions of women's general vulnerability to male prisoners as a justification for the bfoq exception, the Court has buttressed the notion that men's fears and prejudices about women may be used to define women's employment boundaries, without regard to the capabilities of the individual. As Justice Marshall noted in his concurring opinion:

In short, the fundamental justification for the decision is that

123. 97 S. Ct. at 2729 n.19.

124. *See, e.g.*, Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969).

125. 97 S. Ct. at 2729.

126. 400 U.S. 542 (1971).

127. *Id.* at 545. Justice Marshall concurred with the majority holding but strongly disagreed with the suggestion that "[t]he existence of . . . family obligations, if demonstrably more relevant to job performance for a woman than for a man" could, even if proven, establish a bfoq. *Id.* at 544.

128. 97 S. Ct. at 2734.

129. *Id.* at 2733 (Marshall, J., concurring in part and dissenting in part).

130. Shaman, *Toward Defining and Abolishing the Bona Fide Occupational Qualification Based on Class Status*, 22 LAB. L.J. 332, 333 (1971).

131. *Id.*

> women as guards will generate sexual assaults. With all respect, this rationale regrettably perpetuates one of the old myths about women—that women, wittingly or not, are seductive sexual objects. The effect of the decision, made I am sure with the best of intentions, is to punish women because their very presence might provoke sexual assaults. It is women who are made to pay the price in lost job opportunities for the threat of depraved conduct by prison inmates. Once again, "[t]he pedestal upon which women have been placed has . . ., upon closer inspection, been revealed as a cage." It is particularly ironic that the cage is erected here in response to feared misbehavior by imprisoned criminals.
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> . . . .
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> To deprive women of job opportunities because of the threatened behavior of convicted criminals is to turn our social priorities upside down.[132]

CONCLUSION

Presumably the stereotypes connected with a woman's sexuality are so deeply ingrained as to be unrecognizable as such. Although great strides have been made in overcoming long-held stereotypical notions about the inherent inferiority of racial minorities, moves toward eliminating sex discrimination have lagged far behind.

A sensitivity to sex stereotypes as great as one to racial stereotypes would have precluded the results reached in *Gilbert* and *Dothard.* A disability plan excluding only sickle cell anemia from coverage surely would have been condemned as racially discriminatory at the outset, with no possible attempt to justify such an exclusion on a cost basis. By the same token, a regulation excluding blacks from positions as guards in Alabama's prisons, based on the notion that the white prisoners' racial hatred creates too great a danger for black guards, would have been viewed as transparent and blatant racial discrimination.

Until the Court is prepared to dispel sexist stereotypes with the same vigor and determination which it has directed against racist stereotypes, Title VII's strength will be sapped in combating sex discrimination, and bfoq exceptions will be permitted to chip away its substance until it is no longer recognizable as the powerful force it was originally believed to be.

It remains to be seen what the impact of *Gilbert* and *Dothard* will

132. 97 S. Ct. at 2734-35 (quoting from Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 20, 485 P.2d 529, 541, 95 Cal. Rptr. 329, 341 (1971)).

be.[133] Because the Court refused to find sex discrimination in *Gilbert*, it is conceivable that no discrimination based on pregnancy will be found to violate Title VII. *Dothard* has opened the door to broad discretion on the part of the judiciary to determine what constitutes a bfoq exception to Title VII prohibitions against sex discrimination. Subse-

133. The Supreme Court recently heard arguments on two cases involving Title VII sex discrimination charges against employers' maternity leave policies. Certiorari was granted in both cases within a month after General Electric Co. v. Gilbert, 429 U.S. 125 (1976), was handed down. Berg v. Richmond Unified School District, 528 F.2d 1208 (9th Cir. 1975), *cert. granted*, 97 S. Ct. 806 (1977) (No. 75-1069); Satty v. Nashville Gas Co., 522 F.2d 850 (6th Cir. 1975), *cert. granted*, 97 S. Ct. 806 (1977) (No. 75-536).

One plaintiff, Nora Satty, returned to work after her maternity leave to discover that her job had been abolished and that she had lost her seniority rights to bid for another job. Satty did not receive sick leave benefits during her maternityy leave because company policy excluded pregnancy from the coverage of their sick pay plan. 522 F.2d at 852.

Another plaintiff, Sonja Lynn Berg, is challenging the right of school board authorities to tell her at what stage in her pregnancy she will no longer be able to work as a teacher. The school board policy also denied sick leave pay during pregnancy absence. 528 F.2d at 1209-10.

The employers' policies in both cases were found by the circuit courts of appeals to violate Title VII. 522 F.2d at 854; 528 F.2d at 1210. If the Supreme Court continues to except discrimination based on pregnancy from Title VII's proscriptions against sex discrimination, reversals are likely in both cases.

Lower courts deciding similar cases following *Gilbert* have reached varying results. One case, Jacobs v. Martin Sweets Co., Inc. 550 F.2d 364 (6th Cir. 1977), decided two months after *Gilbert*, dealt with a Title VII challenge to the constructive termination of employment of an unmarried pregnant woman. The court found for the plaintiff, holding that the claim was closer to that presented in Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), a constitutional challenge of mandatory maternity leave policy, than that in *Gilbert*. Presumably the United States Supreme Court has utilized a stricter standard for employment itself than for "benefits" associated with employment:

> The recent holding of the Supreme Court in General Electric Co. v. Gilbert, 429 U.S. 125, 97 S. Ct. 401, 50 L.Ed. 2d 343 (1976), that exclusion of pregnancy from the risks covered by an employer's disability *benefits* plan does not violate Title VII, can hardly be regarded as precedent for excluding pregnancy from protection against *invidious* employment termination.

550 F.2d at 370 n.12 (emphasis in original).

On motion for rehearing in Mitchell v. Board of Trustees, 46 U.S.L.W. 2112 (D.S.C. 1977), the employer's failure to renew the plaintiff teacher's contract because of her pregnancy was held not to violate Title VII. Earlier, the same court, following the reasoning of the Court of Appeals for the Fourth Circuit in *Gilbert* (before the Supreme Court's reversal), had found the school board practice violative of Title VII. 415 F. Supp. 512, 519 (D.S.C. 1976). Seven months after the Supreme Court ruling in *Gilbert*, the district court on rehearing found that, "[i]n light of *Gilbert* and the statutory language it construed, the school board's unwritten policy of the nonrenewal of teacher contracts where a predicted period of absence is indicated, has not been shown to constitute gender-based discrimination or to be gender-based in effect." 46 U.S.L.W. 2112 (D.S.C. 1977).

Responding to plaintiff's contention that *LaFleur* rather than *Gilbert* should control on the issue of constitutional analysis, the district court found non-renewal of the teacher's contract distinguishable from the mandatory maternity leave policy of *LaFleur*.

quent Title VII cases will reveal whether the Court will continue to fall "into the trap of assuming that the Act permits ancient canards about the proper role of women to be a basis for discrimination."[134]

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Unlike the impermissably broad irrebuttable presumption of inability to work after reaching a given stage of pregnancy, inherent in the mandatory leave policy, the policy at hand was held not to create an irrebuttable presumption. Rather the court stated that it was a policy "designed to insure the continuity of the instructional process without regard to the reason for the absence and without setting up a presumption of unfitness for any purpose." 46 U.S.L.W. at 2113.

The confusion may be resolved by congressional amendment of Title VII to prohibit discrimination on the basis of pregnancy. Such a bill was approved recently by the Senate, S. 995, 95th Cong., 1st Sess. (1977), and is now before the House of Representatives. S.995 provides in pertinent part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of 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 702(h) of this title shall be interpreted to permit otherwise. 123 CONG. REC. 15059.

123 CONG. REC. 15059 (daily ed. Sept. 16, 1977).

134. 400 U.S. at 542.