

Michigan Law Review

Volume 84 | Issue 3

1985

Sex Discrimination in Newscasting

Leslie S. Gielow

University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Civil Rights and Discrimination Commons](#), [Communications Law Commons](#), and the [Law and Gender Commons](#)

Recommended Citation

Leslie S. Gielow, *Sex Discrimination in Newscasting*, 84 MICH. L. REV. 443 (1985).

Available at: <https://repository.law.umich.edu/mlr/vol84/iss3/8>

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

NOTES

Sex Discrimination in Newscasting

Under Title VII of the Civil Rights Act of 1964,¹ customer preference is generally not a justification for sexually discriminatory employment decisions.² According to one court, “[I]t would be totally anomalous if we were to allow the preferences and prejudices of customers to determine whether . . . sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome.”³ Thus an international corporation cannot refuse to hire a female officer, despite its claim that it will lose its South American client base.⁴ Similarly, an airline cannot refuse to hire men because its passengers prefer female stewardesses,⁵ and an armored car company cannot refuse to hire female drivers because its customers feel that only men give the aura of security.⁶

Current practice in the television industry, however, continues to incorporate public preference into employment decisions through the use of viewer surveys,⁷ which measure viewer reactions to individual

1. 42 U.S.C. §§ 2000e (1982) [hereinafter called title VII].

2. See EEOC Guidelines for Discrimination on the Basis of Sex, 29 C.F.R. § 1604.2(a)(1)(iii) (1985) (prohibiting sex discrimination based on the preferences of co-workers, clients, or customers); *Diaz v. Pan American World Airways*, 442 F.2d 385, 389 (5th Cir.) (“Customer preference may be taken into account only when it is based on the company’s inability to perform the primary function or service it offers.”), *cert. denied*, 404 U.S. 950 (1971); see also *Gerdom v. Continental Airlines*, 692 F.2d 602, 609 (9th Cir. 1982) (“[G]ender-based discrimination cannot be upheld on the basis of customer preferences unrelated to abilities to perform the job.”) (citing *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276-77 (9th Cir. 1981)), *cert. denied*, 460 U.S. 1074 (1983).

3. *Diaz v. Pan American World Airways*, 442 F.2d 385, 389 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971); see also *Edwards, Sex Discrimination Under Title VII: Some Unresolved Issues*, 24 LAB. L.J. 411, 418-19 (1973):

The . . . compelling reason [why social mores should not easily be received as justification for sex discrimination] is that societal norms cannot be presumed to be “just” merely because they exist. In the area of employment discrimination, Congress has declared that certain practices must give way to the national policy of anti-discrimination; thus, local norms and customs cannot be allowed to override this legislative judgment.

4. *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981).

5. See, e.g., *Diaz v. Pan American World Airways*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

6. EEOC Dec. No. 70-11, 1973 EEOC Dec. (CCH) ¶ 6025 (1969). *But cf. Dothard v. Rawlinson*, 433 U.S. 321, 335-36 (1977) (a state may refuse to hire a woman as a guard in its male, maximum security unclassified penitentiary because of the security risk that inmates might assault her “because she was a woman”).

7. See A. WESTIN, *NEWSWATCH* 121-26 (1982); *Craft v. Metromedia, Inc.*, 572 F. Supp. 868, 873-74 (W.D. Mo. 1983), *affd. in relevant part and revd. in part*, 766 F.2d 1205, 1209 (8th Cir. 1985) (affirming as to Craft’s title VII and Equal Pay Act claims, but reversing the trial court’s grant of a new trial on her fraud claim, holding that Craft failed to state a cause of action), *cert. denied*, 106 S. Ct. 1285 (1986).

newscasters.⁸ The public, according to many media personnel, evaluates female newscasters by different criteria from those used to judge their male counterparts.⁹ In response to perceived public expectation, networks treat them differently as well. This different treatment does not stem from the usual form of customer preference stereotype — that the public prefers men over women in the job.¹⁰ Instead, it arises from the perception of television broadcasters that the public prefers women with certain traits — for example, youth,¹¹ beauty,¹² and nonaggressive behavior¹³ — but that the public does not demand these qualities of male newscasters, or at least not to the same degree as of women.¹⁴ This type of discrimination among members of one sex¹⁵ based upon impermissible¹⁶ stereotyped expectations is called sex-plus

8. Viewer surveys can be done on paper, over the phone, or in person in "focus groups," where viewers react to videotapes of specific newscasters. These surveys are used to *predict* movements in the ratings by identifying audience preference. See *Craft*, 572 F. Supp. at 876.

Viewer surveys are to be distinguished from ratings. Two private companies, Arbitron and Nielson, measure audience size or "ratings," issuing ratings several times a year in a publication known as the "ratings book." Advertisers place ads according to the ratings in order to reach the largest share of their desired market. Consequently, small changes in the ratings translate into substantial increases or decreases in station revenue. See *Craft*, 572 F. Supp. at 876.

Like viewer surveys, ratings should not provide a means to evade the requirement that a television station not cater to sex-stereotyped customer preference in newscasting employment decisions. However, ratings present a more difficult proof problem because they do not measure responses to individual newscasters and thus tend to blur sex-role expectations.

9. See B. ROLLIN, *AM I GETTING PAID FOR THIS?* (1982); J. SAVITCH, *ANCHORWOMAN* (1982); J. WOODRUFF, *THIS IS JUDY WOODRUFF AT THE WHITE HOUSE* (1982); Henry, *Requiem for TV's Gender Gap?*, TIME, Aug. 22, 1983, at 57; N.Y. Times, Aug. 6, 1983, at 1, col. 1.

10. See, e.g., *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276 (9th Cir. 1981) (defendant maintained that South American businessmen would refuse to transact business with a woman); *Diaz v. Pan American World Airways*, 442 F.2d 385, 387 (5th Cir.) (defendant claimed that customers prefer female flight attendants), *cert. denied*, 404 U.S. 950 (1971).

11. See N.Y. Times, *supra* note 9 ("It is a fact of life that men have an easier time of it in this business in terms of aging than women do.") (quoting the president of a news consulting firm).

12. *Id.* ("[Appearance is] a heck of a lot more of a factor in hiring a woman than a man.") (quoting a news consultant); see also Bar-Tal & Saxe, *Physical Attractiveness and Its Relationship to Sex-Role Stereotyping*, 2 SEX ROLES 123 (1976).

13. See note 63 *infra* and accompanying text.

14. See N.Y. Times, *supra* note 9 (quoting testimony of a news consultant to say that women are criticized more by the audience for their appearance than are men).

15. It is questionable whether only "some" women suffer from stereotype-based employment practices that discriminate among women. Studies show that employer practices reinforce stereotypes held by society, employers, and women themselves. See Arrow, *Economic Dimensions of Occupational Segregation: Comment I*, in *WOMEN AND THE WORKPLACE* 233, 234 (M. Blaxall & B. Reagan eds. 1976); Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C. L. REV. 345, 407 (1980) (a woman forced to conform to role expectations is "doomed to play a part in reinforcing the vitality of such criteria in her own eyes, the eyes of other women, and in the eyes of her employer and co-workers").

16. Not all sex-stereotyped expectations are impermissible as the basis of employment actions under title VII. Some grooming requirements will survive title VII scrutiny. See notes 52-59 *infra* and accompanying text; *Barker v. Taft Broadcasting Co.*, 549 F.2d 400, 401 (6th Cir. 1977) ("Employer grooming codes requiring different hair lengths for men and women bear such a negligible relationship to the purposes of Title VII that we cannot conclude they were a target of the Act.").

discrimination.¹⁷ It is as much a violation of title VII as discrimination that prohibits an entire sex from performing the job.¹⁸

Basing newscaster employment decisions on public preference is potentially discriminatory. However, courts have failed to question the use of viewer surveys,¹⁹ which employers use to measure this preference.²⁰ For example, in *Craft v. Metromedia, Inc.*,²¹ Christine Craft alleged that her treatment²² while employed as co-anchor of the nightly news at KMBC-TV in Kansas City, Missouri, as well as her subsequent demotion²³ from the position, constituted sex discrimina-

17. See generally Part I *infra*.

18. See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971); notes 39-41 *infra* and accompanying text.

19. It makes no difference that the viewer preference is not speculative but is, in fact, documented in the form of a survey. In the seminal case rejecting customer preference as a defense to discrimination in employment, *Diaz v. Pan American World Airways*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971), the airline introduced a validly conducted survey that demonstrated that 79% of airline passengers preferred female flight attendants. For a discussion of the survey conducted by Pan American, see the opinion of the district court in this case at 311 F. Supp. 559, 565 (S.D. Fla. 1970).

20. See *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1216 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 285 (1986); see also *Goodman v. Washington Radio*, 29 Fair Empl. Prac. Cas. (BNA) 1843, 31 Empl. Prac. Dec. (CCH) ¶ 33,375 (D.D.C. 1982); *Haines v. Knight-Ridder Broadcasting*, 32 Fair Empl. Prac. Cas. (BNA) 1113, 25 Empl. Prac. Dec. (CCH) ¶ 31,650 (D.R.I. 1980). In *Goodman*, the court rejected the plaintiff's claim that she was dismissed because of her pregnancy and pointed to viewer survey findings that she lacked requisite on-air personality. The court in *Haines* rejected a male television anchor's claim that he was dismissed because he helped his wife in a title VII suit against the station. The court found that the station based its dismissal on the results of a viewer survey, which the court admitted was open to legitimate challenge due to its subjectivity; it refused, however, to examine whether viewer surveys could permissibly be used in employment decisions. In these cases, the finding that the employment action was based on a viewer survey effectively dispelled the inference that the employment decision was due to the particular condition or action. Nevertheless, both courts appeared to assume that viewer surveys and ratings are unconditionally legitimate employment criteria.

21. 572 F. Supp. 868 (W.D. Mo. 1983), *affd. in relevant part and revd. in part*, 766 F.2d 1205 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1285 (1986).

22. Craft contended that the appearance standards imposed upon her were more harsh than those imposed upon men. *Craft*, 766 F.2d at 1210. These requirements included extensive makeup counseling and a "clothing calendar" to insure that Craft did not wear the same outfit more often than once every three weeks. 766 F.2d at 1209, 1214; Henry, *supra* note 9, at 57; see Plaintiff's Conclusions of Law at 40, *Craft* ("Plaintiff's performance was judged exclusively or to a significant extent according to her appearance while male newscasters were judged primarily or entirely based upon their journalistic skills and abilities."). *But see* Defendant's Proposed Findings of Fact at 20, *Craft* ("There was no policy of harassment of female on-air newscasters because of their appearance. . . . Male on-air newscasters were also criticized on appearance, dress, and makeup.").

23. Craft was reassigned to the position of reporter. As well as alleging a title VII violation, she also claimed that the reassignment constituted a constructive discharge. According to the trial court, this contention was "untenable on both the law and the facts." *Craft*, 572 F. Supp. at 879. The trial court found that the evidence did not support a finding that either of the elements of constructive discharge were present. Plaintiff's working conditions did not become so intolerable that she had no choice but to leave, nor were any of defendant's actions taken with the intent to force plaintiff's resignation. 572 F. Supp. at 876, 879. The court of appeals affirmed the district court's ruling that Craft was not constructively discharged. The appellate court refused to rule that the district court was "clearly erroneous" in finding that, as a matter of fact, Craft

tion²⁴ in violation of title VII. Metromedia argued that Craft's treatment and demotion were legitimately based on viewer surveys indicating that she was negatively perceived by the Kansas City audience.²⁵ Without considering whether the surveys themselves reflected impermissible sex stereotypes, the district court found reliance on them "reasonable and appropriate"²⁶ and the resulting employment actions nondiscriminatory.²⁷ The Court of Appeals for the Eighth Circuit treated this determination as a finding of fact and upheld it as not clearly erroneous,²⁸ thus refusing to reach beyond the confines set by the district court and question the propriety of using viewer surveys to rebut a *prima facie* case of discrimination.²⁹

This Note argues that the current judicial deference³⁰ to viewer surveys used by television stations in newscasting employment decisions is unwarranted. Part I explores how different treatment of wo-

had not been subjected to illegal discrimination or that the defendant had not acted with an intent to force her to resign from her job. 766 F.2d at 1217.

24. According to Craft, she was told by the KMBC news director that she was being removed from her co-anchor position because she was "too old, too unattractive, and not deferential to men." *Craft*, 572 F. Supp. at 878. The court of appeals accepted the district court's factual conclusion that the news director "said no such thing." 766 F.2d at 1212.

Sex discrimination was only the first count in Craft's complaint. Count II alleged that defendant paid her less than similarly situated male employees in violation of the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1982). The Eighth Circuit affirmed the district court's acceptance of the jury verdict against Craft on her Equal Pay Act claim. Craft also alleged that the defendant made intentional, fraudulent misrepresentations to induce her to accept employment. The district court set aside a jury award for Craft on this claim on the ground that it was excessive, and awarded a new trial. 572 F. Supp. at 881. The court of appeals reversed, holding that Craft had failed to establish an adequate case on the fraud count. 766 F.2d at 1207-08. Finally, Craft alleged that the defendant's actions toward her, even if otherwise lawful, were intended to injure her and therefore constituted a *prima facie* tort. This count was abandoned during the trial and was not submitted to the jury. 572 F. Supp. at 870.

25. The defendant argued that the station controlled Craft's wardrobe and makeup because the reaction of "focus groups" to her appearance was "overwhelmingly negative." *Craft*, 766 F.2d at 1209. The station later reassigned Craft because a subsequent survey found her trailing her competitors. 766 F.2d at 1209.

26. 572 F. Supp. at 873.

27. 572 F. Supp. at 876. Craft alleged a claim of disparate treatment, which required her to prove discriminatory intent on the part of her employer. *See* note 66 *infra* and accompanying text. Since the court found "no evidence that the survey was designed to effect the removal of plaintiff as co-anchor because of her sex or any other reason," 572 F. Supp. at 878, Craft was unable to establish the requisite intent. The district court thus disregarded a jury recommendation that it rule for plaintiff, 572 F. Supp. at 870 (on a title VII claim the jury may sit only in an advisory capacity, FED. R. CIV. P. 39(c)), and held that Craft had no cause of action under title VII.

28. 766 F.2d at 1216.

29. 766 F.2d at 1217. *See* notes 84-91 *infra* and accompanying text.

30. *See, e.g., Craft*, 766 F.2d 1205; *Goodman v. Washington Radio*, 29 Fair Empl. Prac. Cas. (BNA) 1843, 31 Empl. Prac. Dec. (CCH) ¶ 33,375 (D.D.C. 1982) (failing to analyze validity of basing employment decisions on viewer surveys); *Haines v. Knight-Ridder Broadcasting*, 32 Fair Empl. Prac. Cas. (BNA) 1113, 1116, 25 Empl. Prac. Dec. (CCH) ¶ 31,650, at 19,764 (D.R.I. 1980) ("One might legitimately challenge the reliability of a study of this kind, especially since it is so subjective. One might also question whether popularity is the best basis for selecting newscasters. These are not my concerns.").

men newscasters constitutes sex-plus discrimination. Part II demonstrates that viewer surveys almost always reflect sexual stereotypes that are impermissible under title VII, and argues that such surveys should be presumptively inadmissible as evidence to rebut a claim of sex discrimination. Indeed, mere use of these surveys may in and of itself establish a prima facie case of sex discrimination.

Part III contends that sex discrimination in the news industry resulting from the use of viewer surveys cannot be justified under any of the recognized title VII defenses. Part IV discusses the policy considerations involved in the use and scrutiny of viewer surveys. It concludes that if courts are unwilling to prohibit the use of surveys generally as discriminatory per se, they should at least subject particular surveys that are challenged as discriminatory to judicial scrutiny.

I. SEX-PLUS DISCRIMINATION: THE PRIMA FACIE CASE

A. *Different Requirements for Male and Female News Personnel*

Sociological studies confirm that sex-role expectations pervade society.³¹ These societal stereotypes³² relate to an individual's abil-

31. See generally J. CHAFETZ, *MASCULINE/FEMININE OR HUMAN? AN OVERVIEW OF THE SOCIOLOGY OF SEX ROLES* (1974); L. DUBERMAN, *GENDER AND SEX IN SOCIETY* (1975); P. FILENE, *HIM/HER/SELF: SEX ROLES IN MODERN AMERICA* (1974); E. MACCOBY & C. JACKLIN, *THE PSYCHOLOGY OF SEX DIFFERENCES* (1974); B. YORBURG, *SEXUAL IDENTITY* (1974).

For a discussion of the nature and effects of sexual stereotyping in all areas of life, see generally S. BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975); S. DE BEAUVOIR, *THE SECOND SEX* (1952); B. FRIEDAN, *THE FEMININE MYSTIQUE* (1963); K. MILLETT, *SEXUAL POLITICS* (1970).

32. See Taub, *supra* note 15; Note, *Sex as a Bona Fide Occupational Qualification: Defining Title VII's Evolving Enigma, Related Litigation Problems, and the Judicial Vision of Womanhood after Dothard v. Rawlinson*, 5 *WOMEN'S RTS. L. REP.* 107 (1979) [hereinafter cited as Note, *Evolving Enigma*].

Sociological studies indicate a high degree of societal consensus about the expected characteristics of men and women. See Bem, *The Measurement of Psychological Androgyny*, 42 *J. CONSULTING & CLINICAL PSYCHOLOGY* 155, 157 (1974); Coser & Rokoff, *Women in the Occupational World: Social Disruption and Conflict*, 18 *SOC. PROBS.* 535, 540 (1971); see also Taub, *supra* note 15, at 413 n.317 (citing O'Leary, *Some Attitudinal Barriers to Occupational Aspirations in Women*, 81 *PSYCHOLOGICAL BULL.* 809, 812 (1974)).

Stereotyped views of proper sex roles are shared by men and women alike. In fact, women may be harsher critics of other women than men. See Goldberg, *Are Women Prejudiced Against Women?*, 5 *TRANS-ACTION*, Apr. 1968, at 28; *N.Y. Times*, *supra* note 9. However, the fact that sex-role assumptions are widely shared by members of the "victim" class does not legitimate them as employment criteria. Rather, it indicates that cultural assumptions will be more difficult to overcome because of the immense role contradictions experienced by those who do not conform. See Bem & Bem, *Case Study of A Nonconscious Ideology: Training the Woman to Know Her Place*, in *BELIEFS, ATTITUDES AND HUMAN AFFAIRS* 89-90 (D.J. Bem ed. 1970); Komarovsky, *Cultural Contradictions and Sex Roles*, 52 *AMER. J. SOC.* 184, 185 (1946); Laws, *The Bell Telephone System: A Case Study*, in *EQUAL EMPLOYMENT OPPORTUNITY AND THE AT&T CASE* 157, 163-64 (P. Wallace ed. 1976); Prather, *Why Can't Women Be More Like Men: A Summary of the Sociopsychological Factors Hindering Women's Advancement in the Professions*, 15 *AM. BEHAV. SCI.* 172 (1971); Wolman & Frank, *The Solo Woman in a Professional Peer Group*, 45 *AM. J. ORTHOPSYCHIATRY* 164, 169 (1975); see also Condry & Dyer, *Fear of Success: Attribution of Cause to the Victim*, 32 *J. SOC. ISSUES* 63, 75-79 (1976).

Typical male qualities include "competence, rationality and assertion." Valued feminine at-

ity,³³ behavior,³⁴ appearance,³⁵ and dress.³⁶ Role expectations result in negative reactions to those who do not conform³⁷ and also result in

tributes, which indicate the traditionally dependent female role, include social skills and graces, warmth, and emotional support. Taub, *supra* note 15, at 413; *see also* Powers, *The Shifting Parameters of Affirmative Action: "Pragmatic" Paternalism in Sex-Based Employment Discrimination Cases*, 26 WAYNE L. REV. 1281 (1980). The Supreme Court has mentioned the dependency stereotype in the constitutional context. *See* Califano v. Goldfarb, 430 U.S. 199, 223 (1977) (Stevens, J., concurring) (noting that statute treating widowers less favorably than widows is "the accidental by-product of a traditional way of thinking about females").

A second variation of the feminine dependency role is woman as an inherently sexual being, temptress and satisfier of desires. Her chief attribute under this model is sexual allure. *See* V. BULLOUGH & B. BULLOUGH, *THE SUBORDINATE SEX* 49 (1974); M. DALY, *BEYOND GOD THE FATHER: TOWARD A PHILOSOPHY OF WOMEN'S LIBERATION* (1973); Seidenberg, *The Myth of the "Evil" Female as Embodied in the Law*, 2 J. ENVTL. L. 218 (1971); *see also* Dothard v. Rawlinson, 433 U.S. 321, 345 (1977) (Marshall, J., dissenting) (criticizing the majority's claim that a female could be denied employment at an Alabama maximum security prison because her "very womanhood" would endanger prison security by provoking attack: "[T]his rationale regrettably perpetuates one of the most insidious of the old myths about women — that women, wittingly or not, are seductive sex objects."); C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 83-99 (1979) (noting that courts have often been unwilling or reluctant to hold that sexual harassment of female employees by male supervisors constitutes sex discrimination, viewing the incidents as "biological" or "natural"); R. POWERS, *THE NEWSCASTERS* 168 (1977) (noting the result of the view of women as sex objects in the field of newscasting: "The curious thing about women's ascendancy in television journalism is the degree of hostility they have encountered among critics as well as their male colleagues. . . . [M]any critics react as though women alone are the interlopers, as though the very presence of a woman on a newscast constitutes a sellout to show business.") (emphasis in original).

33. Two examples are the stereotypes "that men are less capable of assembling intricate equipment: that women are less capable of aggressive salesmanship." EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2(a)(1)(ii) (1985) (prohibiting employment decisions on the basis of these stereotypes).

34. *See* Orr v. Orr, 440 U.S. 268, 279 (1979) (invalidating "the State's preference for an allocation of family responsibilities under which the wife plays a dependent role").

35. *See* Willingham v. Macon Tel. Publishing Co., 352 F. Supp. 1018, 1020 (M.D. Ga. 1972) ("It is not unreasonable for an employer to expect differences in grooming between men and women . . ."), *affd. en banc*, 507 F.2d 1084 (5th Cir. 1975).

36. *See* Fountain v. Safeway Stores, Inc., 555 F.2d 753 (9th Cir. 1977) (men expected to wear a tie); Lanigan v. Bartlett & Co. Grain, 466 F. Supp. 1388 (W.D. Mo. 1979) (women prohibited from wearing pants).

37. Individuals are consistently rated as more competent in sex-appropriate capacities. *See* Deaux & Emswiller, *Explanations of Successful Performance on Sex-Linked Tasks*, 29 J. PERSONALITY & SOC. PSYCHOLOGY 80 (1974); Etaugh, Cooley & Stern, *Children's Causal Attributions of Female and Male Success and Failure*, 108 J. PSYCHOLOGY 199 (1981); Gerdes & Kelman, *Sex Discrimination: Effects of Sex-Role Incongruence, Evaluator Sex, and Stereotypes*, 2 BASIC & APPLIED SOC. PSYCHOLOGY 219 (1981).

This is true also in the employment setting. *See* Cohen & Bunker, *Subtle Effects of Sex Role Stereotypes on Recruiters' Hiring Decisions*, 60 J. APPLIED PSYCHOLOGY 566 (1975) (finding that in simulated hiring situations, male applicants are preferred over equally qualified females for traditionally male jobs while females are preferred for traditionally female positions); Rosen & Jerdee, *Effects of Applicant's Sex and Difficulty of Job on Evaluations of Candidates for Managerial Positions*, 59 J. APPLIED PSYCHOLOGY 511 (1975) (finding that in simulated hiring situations male applicants for managerial positions are rated higher and accepted more frequently than equally qualified females, particularly for more demanding positions); Rosen & Jerdee, *Influence of Sex Role Stereotypes on Personnel Decisions*, 59 J. APPLIED PSYCHOLOGY 9 (1974) (finding bank managers less likely to promote females, offer them training programs, or accept their personnel assessments).

Role expectations also affect an individual's evaluation of his or her own competence in various employment capacities. *See* Betz & Hackett, *The Relationship of Career-Related Self-Effi-*

individuals being evaluated on different criteria according to sex. For example, personality and appearance are often more important factors in evaluating women than they are in evaluating men in the same situation.³⁸

Employment decisions based on these sexual stereotypes generally violate title VII.³⁹ It is not necessary for a title VII violation that one sex be completely excluded from employment opportunity. Under the sex-plus theory,⁴⁰ an employer may not discriminate among members of one sex on the basis of sexual stereotypes, or "plus factors," which are illegal under title VII.⁴¹

cacy Expectations to Perceived Career Options in College Women and Men, 28 J. COUNSELING PSYCHOLOGY 399 (1981) (study finds that women, unlike men, rate themselves less proficient at skills required in professions in which they have been historically underrepresented); Shaw, *Differential Impact of Negative Stereotyping in Employee Selection*, 25 PERSONNEL PSYCHOLOGY 333 (1972) (finding that where information available to a decisionmaker is limited or ambiguous, sex stereotypes have a greater relative impact than other "negative" data).

38. See Cecil, Paul & Olins, *Perceived Importance of Selected Variables Used to Evaluate Male and Female Job Applicants*, 26 PERSONNEL PSYCHOLOGY 397 (1973); note 12 *supra*.

39. The statute provides that it is an unlawful employment practice for an employer "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." 42 U.S.C. § 2000e-2(a)(1) (1982). The statute has been interpreted by the Supreme Court as "intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *County of Washington v. Gunther*, 452 U.S. 161, 180 (1981) (quoting *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 705 (1978)). In *Gunther*, the Supreme Court professed to be following legislative intent: "As Congress itself has indicated, a 'broad approach' to the definition of equal employment opportunity is essential to overcoming and undoing the effect of discrimination." 452 U.S. at 178 (citing S. REP. NO. 867, 88th Cong., 2d Sess. 12 (1964)). The original legislative intent, however, is far from clear, because sex was included as a prohibited classification on the last day of debate. See H.R. REP. NO. 914, 88th Cong., 1st Sess. 1, reprinted in 1964 U.S. CODE CONG. & AD. NEWS 2391, 2401 (describing purpose as eliminating "discrimination in employment based [only] on race, color, religion, or national origin"). But see H.R. REP. NO. 948, 95th Cong., 2d Sess. 6-7, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 4749, 4754-55 (noting that bill covers policies adversely affecting pregnant workers); H.R. REP. NO. 238, 92d Cong., 1st Sess. 5, reprinted in 1972 U.S. CODE CONG. & AD. NEWS 2137, 2141 ("Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination."). See generally Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 TEXAS L. REV. 1035 (1977) (discussing legislative history and judicial interpretation of bona fide occupational qualification defense); Developments in the Law, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971) (discussing the legislative purposes of title VII).

40. The Supreme Court, in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam), established that "sex-plus" employment requirements may violate title VII.

41. Courts have interpreted impermissible "plus factors" to fall within one of the following three categories: (1) "immutable" characteristics; (2) characteristics that, while mutable, involve fundamental rights such as the right to have children or marry; and (3) characteristics that, although mutable, significantly affect the employment opportunities or the terms and conditions of employment afforded one sex. See *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599, 609 n.15 (S.D.N.Y. 1981); B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 416 (1983).

The courts that have required the plus factor to be a fundamental right or immutable characteristic have also mentioned that the determining element of an employment requirement is its effect on job opportunity. These courts found that only immutable characteristics or fundamental rights had a significant enough effect to warrant imposition of title VII liability. See, e.g.,

Cases involving airline requirements for flight attendants illustrate the difference between discriminating against an entire sex, on the one hand, and against only certain members of one sex, on the other. In terms of the former, an airline cannot hire only female flight attendants, even if it demonstrates that this practice is important to its image and that customers prefer that men not perform the job.⁴² In terms of the latter, an airline cannot require that its female employees be unmarried,⁴³ or below a certain age,⁴⁴ unless its male employees are

Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084, 1091-92 (5th Cir. 1975) (en banc) (allowing "classifications by sex . . . which do not pose distinct employment disadvantages for one sex") (quoting Dodge v. Giant Food, 488 F.2d 1333, 1336-37 (D.C. Cir. 1973) (per curiam)); Fagan v. National Cash Register Co., 481 F.2d 1115, 1123 (D.C. Cir. 1973) (quoting with approval Boyce v. Safeway Stores, Inc., 351 F. Supp. 402, 403 (D.D.C. 1972)); see also Gerdom v. Continental Airlines, 692 F.2d 602, 605-06 (9th Cir. 1982) (declaring that employment standards that affect personal appearance are permissible only if they "do not . . . deprive either sex of employment opportunities, and . . . are even-handedly applied to employees of both sexes"), *cert. denied*, 460 U.S. 1074 (1983).

Some courts, under the sex-plus theory, have required that an employee subject to a stereotype demonstrate that a similarly situated employee of the opposite sex actually received different treatment. See, e.g., Stroud v. Delta Air Lines, 544 F.2d 892 (5th Cir.), *cert. denied*, 434 U.S. 844 (1977); Jurinko v. Edwin L. Wiegand Co., 477 F.2d 1038 (3d Cir.), *vacated on other grounds*, 414 U.S. 970 (1973). Consequently, flight attendants released because of a "no-marriage" rule, *Stroud*, 544 F.2d at 893-94, or a "quit-at-32" rule, *Loper v. American Airlines*, 582 F.2d 956 (5th Cir. 1978), could not establish a title VII case, since there were, at the time of the policy, no male flight attendants. See *Loper*, 582 F.2d at 958 ("Thus, while the airline's '32' and 'no marriage' rules favored certain females, younger women and those who were unmarried, over others, plaintiffs did not receive different treatment on account of their sex; [m]en were not favored over women; they simply were not involved in the functioning of the policy.") (quoting *Stroud*, 544 F.2d at 893).

More recent cases, however, have rejected the necessity of a comparative standard. See, e.g., Gerdom v. Continental Airlines, 692 F.2d at 607-08; Allen v. Lovejoy, 553 F.2d 522, 524 (6th Cir. 1977) ("A rule which applies only to women, with no counterpart applicable to men, may not be the basis for depriving a female employee who is otherwise qualified of her right to continued employment."); Jacobs v. Martin Sweets Co., 550 F.2d 364, 370 (6th Cir.) (rejecting employer's contention that for a title VII violation "there must be men and women similarly situated who are treated in a disparate manner"), *cert. denied*, 431 U.S. 917 (1977); EEOC v. Sage Realty Corp., 507 F. Supp. at 609 n.15 (concluding that if a hypothetical male would have received different treatment, a prima facie case of sex discrimination is established: "The Court is persuaded . . . that had [the company] employed male [lobby] attendants in May 1976 defendants surely would not have required these men to wear the [sexually revealing] Bicentennial costume."); Skelton v. Balzano, 424 F. Supp. 1231, 1235 (D.D.C. 1976) (Plaintiff will prevail, despite the fact that the promotion at issue was given to another woman, if she can show that if she "had been a man she would not have been treated in the same manner . . .").

42. See, e.g., Diaz v. Pan American World Airways, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971); Wilson v. Southwest Airlines Co., 517 F. Supp. 292, 294 (N.D. Tex. 1981) (desire of airline to project image of "feminine spirit, fun, and sex appeal" does not justify hiring only women as flight attendants, whom the airline dressed in hotpants and high boots).

43. See, e.g., Sprogis v. United Air Lines, 444 F.2d 1194, 1198 (7th Cir.), *cert. denied*, 404 U.S. 99 (1971).

44. For example, an airline cannot force its female flight attendants to quit at age 32 if similarly situated males are not required to do likewise. See *Loper v. American Airlines*, 582 F.2d 956 (5th Cir. 1978) (but finding no title VII violation since there were no comparably situated male flight attendants); see also note 41 *supra* (demonstrating that a comparable standard is no longer necessary to establish a title VII violation). Furthermore, age is clearly an immutable characteristic that should qualify as an illegal plus factor even under a strict sex-plus theory. See note 41 *supra*.

subject to the same requirements. Unless uniformly applied, these two criteria constitute illegal sex-plus discrimination, i.e., discrimination against only women who possess these traits, even though not all women are disqualified by the requirements. The quintessential example of an illegal "plus factor" is a requirement that employees not be pregnant. While facially neutral because all employees are subject to it, the requirement *in fact* only disqualifies women. The requirement thus discriminates among women on the basis of a sexual characteristic that, absent a health or safety rationale,⁴⁵ cannot validly be considered.⁴⁶

Indeed, most courts have interpreted sexual stereotypes concerning ability or proper sex-role behavior to be illegal plus factors.⁴⁷ Most physical appearance requirements are also illegal under title VII. Unless a particular appearance is essential to job performance,⁴⁸ an employer cannot fire or demote an employee because she wears glasses,⁴⁹ exceeds a strict weight limit,⁵⁰ or refuses to wear a sexually provocative uniform.⁵¹

45. See, e.g., *Condit v. United Air Lines*, 558 F.2d 1176, 1176 (4th Cir. 1977) (airline's "go-when-you-know" policy, which required stewardesses to discontinue flying as soon as they were aware that they were pregnant, held consistent with the carrier's duty to exercise the highest degree of care for the passenger's safety), *cert. denied*, 435 U.S. 934 (1978); *Harriss v. Pan American World Airways*, 437 F. Supp. 413, 419-24 (N.D. Cal. 1977) ("go-when-you-know" policy held a good faith effort by the airline to ensure flight attendants' maximum emergency capabilities), *affd. in part, revd. in part*, 649 F.2d 670 (9th Cir. 1980).

46. See, e.g., *Maclennan v. American Airlines*, 440 F. Supp. 466, 470-72 (E.D. Va. 1977) (invalidating airline's "go-when-you-know" policy because although neutral on its face, the policy has an adverse effect upon women).

47. See, e.g., *Skelton v. Balzano*, 424 F. Supp. 1231, 1235 (D.D.C. 1976) (Male director cannot refuse to advance female employee because of his dislike for "pushy women." Sex discrimination may still be present even though one woman is advanced over another: "It is enough to show . . . that if plaintiff had been a man she would not have been treated in the same manner . . ."); cf. EEOC Dec. No. 70-198, 1973 EEOC Dec. (CCH) ¶ 6087 (1969) (employer cannot discharge black worker because his manner was self-confident rather than submissive).

The EEOC Guidelines proscribe the following employment practices:

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

(ii) The refusal to hire an individual based on stereotyped characterizations of the sexes The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

29 C.F.R. § 1604.2(a)(1) (1985).

Courts have consistently required that an individual be allowed to prove nonconformity with a sexual stereotype and thus capability for the job. See, e.g., *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235-36 (5th Cir. 1969) (quoted with approval in *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977)). See generally Note, *The Mandate of Title VII of the Civil Rights Act of 1964: To Treat Women as Individuals*, 59 GEO. L.J. 221 (1970).

48. See cases cited at note 42 *supra*.

49. *Laffey v. Northwest Airlines*, 366 F. Supp. 763 (D.D.C. 1973), *affd. in part and vacated in part on other grounds*, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

50. *Gerdon v. Continental Airlines*, 692 F.2d 602 (9th Cir. 1982), *cert. denied*, 460 U.S. 1074 (1983).

51. See *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599 (S.D.N.Y. 1981).

Personal grooming requirements mark the current line between permissible and impermissible employment actions under title VII. Courts have upheld some grooming requirements as reasonable⁵² even though they clearly enforce general community expectations regarding how a member of a certain sex will appear. For example, an employer can require that both sexes wear "proper business attire," although common societal norms interpret different types of clothing as appropriate for men and women.⁵³ Similarly, an employer can require male employees to wear short hair⁵⁴ or ties,⁵⁵ while not imposing the same requirement on women. However, a facially neutral standard cannot be applied more strictly to one sex than the other.⁵⁶ Furthermore, an appearance requirement cannot embody offensive⁵⁷ or demeaning⁵⁸

52. See, e.g., *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753 (9th Cir. 1977); *Barker v. Taft Broadcasting Co.*, 549 F.2d 400 (6th Cir. 1977); *Longo v. Carlisle DeCoppet & Co.*, 537 F.2d 685 (2d Cir. 1976) (per curiam); *Knott v. Missouri Pac. R.R.*, 527 F.2d 1249 (8th Cir. 1975).

53. See *Carroll v. Talman Fed. Sav. & Loan Assn.*, 604 F.2d 1028, 1031-32 (7th Cir. 1979) (acknowledging the employer's right to require "appropriate business attire" for both men and women, although striking down a dress code that required only women employees to wear uniforms), cert. denied, 445 U.S. 929 (1980); *Craft v. Metromedia, Inc.*, 572 F. Supp. 868, 877 (W.D. Mo. 1983), aff'd. in relevant part and rev'd. in part, 766 F.2d 1205 (8th Cir. 1985), cert. denied, 106 S. Ct. 1285 (1986).

54. All seven circuits that have addressed the hair length issue have concluded that short hair requirements for men do not constitute sex discrimination under title VII. See *Barker v. Taft Broadcasting Co.*, 549 F.2d 400 (6th Cir. 1977); *Earwood v. Continental Southeastern Lines*, 539 F.2d 1349 (4th Cir. 1976); *Longo v. Carlisle DeCoppet & Co.*, 537 F.2d 685 (2d Cir. 1976) (per curiam); *Knott v. Missouri Pac. R.R.*, 527 F.2d 1249 (8th Cir. 1975); *Willingham v. Macon Tel. Publishing Co.*, 507 F.2d 1084 (5th Cir. 1975) (en banc); *Baker v. California Land Title Co.*, 507 F.2d 895 (9th Cir. 1974), cert. denied, 422 U.S. 1046 (1975); *Dodge v. Giant Food*, 488 F.2d 1333 (D.C. Cir. 1973) (per curiam); *Fagan v. National Cash Register Co.*, 481 F.2d 1115 (D.C. Cir. 1973).

Some courts and individual judges, however, have opined that male short hair requirements violate title VII. See *Barker v. Taft Broadcasting Co.*, 549 F.2d at 402 (McCree, J., dissenting); *Earwood v. Continental Southeastern Lines*, 539 F.2d at 1351 (Winter, J., dissenting); *Willingham v. Macon Tel. Publishing Co.*, 482 F.2d 535 (5th Cir. 1973), vacated en banc, 507 F.2d 1084 (5th Cir. 1975); *Aros v. McDonnell Douglas Corp.*, 348 F. Supp. 661 (C.D. Cal. 1972); *Donohue v. Shoe Corp. of Am.*, 337 F. Supp. 1357 (C.D. Cal. 1972); *Roberts v. General Mills*, 337 F. Supp. 1057 (N.D. Ohio 1971).

55. E.g., *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753 (9th Cir. 1977).

56. See *Craft v. Metromedia, Inc.*, 572 F. Supp. 868, 877 (W.D. Mo. 1983) ("This court recognizes that otherwise permissible appearance and grooming standards could be unlawful if invidiously applied."), aff'd. in relevant part and rev'd. in part, 766 F.2d 1205 (8th Cir. 1985), cert. denied, 106 S. Ct. 1285 (1986).

57. See *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599 (S.D.N.Y. 1981) (employer cannot require female to wear sexually revealing costume).

58. Exactly what constitutes a "demeaning" stereotype remains unclear. One court has held that requiring female bank employees to wear a uniform, while allowing similarly situated males to wear "proper business attire," is demeaning because the public will naturally assume that the uniformed females hold a lower job position. *Carroll v. Talman Fed. Sav. & Loan Assn.*, 604 F.2d 1028 (7th Cir. 1979), cert. denied, 445 U.S. 929 (1980).

Another court, however, has rejected an employee's claim that requiring females to wear skirts, as opposed to any sort of pants, in an executive office demonstrates a "sexist, chauvinist attitude in employment" and "perpetuates the stereotype that men are more capable than women of making business decisions." *Lanigan v. Bartlett & Co. Grain*, 466 F. Supp. 1388, 1390-92 (W.D. Mo. 1979) ("Employment decisions . . . based on either dress codes or policies regarding

stereotypes. Thus only a limited range of dress and grooming requirements are considered "reasonable" under title VII.⁵⁹

Comments by various news industry personnel indicate that sex-plus discrimination against female anchors does, in fact, occur frequently. According to one news consultant, "Women in this business face pressures that men do not, but those pressures often stem from the public."⁶⁰ Others admit, "[Appearance is] a heck of a lot more of

hair length are more closely related to the company's choice of how to run its business rather than to its obligation to provide equal employment opportunities."). *But see* EEOC Dec. No. 77-36, 1983 EEOC Dec. (CCH) ¶ 6588 (1977) (female employee not required to wear a revealing costume where similarly situated males are not required to wear the same); EEOC Dec. No. 70-920, 1973 EEOC Dec. (CCH) ¶ 6156 (1970) (finding that women must be allowed to wear pants to work).

59. The future expansion or contraction of this "reasonable" category will depend upon which stereotypes courts view as significantly detrimental to job opportunity. *See, e.g., Fagan v. National Cash Register Co.*, 481 F.2d 1115, 1123 (D.C. Cir. 1973) (condemning, in dictum, "outmoded and unjustifiable sex stereotypes") (quoting *Boyce v. Safeway Stores, Inc.*, 351 F. Supp. 402, 403 (D.D.C. 1972)). It is plaintiff's responsibility to demonstrate that a sexual stereotype underlies an employment decision and that the stereotype poses a threat to job opportunity. *See Note, Evolving Enigma, supra* note 32, at 111 (footnote omitted):

[Dothard v. Rawlinson, 433 U.S. 321, 334-36 (1977), in which the Supreme Court held that a woman could not perform the job of security guard because of her "very womanhood"] may suggest that sexuality and patriarchal myths will continue to shroud a woman's status as an individual absent a litigation effort which consciously identifies and builds a record to challenge each gender-based assumption found in an adversary's argument.

At present, certain personal appearance regulations are viewed as more within the scope of employer discretion than injurious to employee job opportunity. *See, e.g., Craft v. Metromedia, Inc.*, 572 F. Supp. 868, 877 (W.D. Mo. 1983) (courts have taken a "realistic and common-sense approach" by permitting different grooming requirements for men and women), *affd. in relevant part and revd. in part*, 766 F.2d 1205 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1285 (1986). However, a concrete demonstration of injury to employee job opportunity resulting from such stereotypes could reverse the "common sense" presumption. *See Taub, supra* note 15, at 387-88:

[Personal appearance requirements represent] a company decision to project a certain image, [however] not all images are permissible. A company presumably would not be permitted to post posters throughout its premises advertising itself as dedicated to the suppression of blacks, nor would it be able to require all Negro employees to wear blackface. The problem is thus one of recognizing how potent and how detrimental are the messages conveyed, a matter perhaps best handled on a case-by-case basis. An *ad hoc* approach, however, will only succeed in eliminating sex based barriers to equal employment opportunity if judicial concepts of discriminatory behavior are expanded.

Documentation of the adverse effect of sexual stereotypes in the workplace should also reduce the alarmingly prevalent attitude that the dangers of sex discrimination are exaggerated and the imposition of liability somehow unfair. *See Weiner, Stewart Doubts Supreme Court Ruling on Executive Privilege*, HARV. L. REC., Mar. 23, 1973, at 1, 15 ("[T]he female of the species has the best of both worlds. . . . The equal protection clause can be used to attack laws that unreasonably discriminate against women while saving some, such as exemption from conscription, which favor them.") (quoting Speech by Justice Potter Stewart at Harvard University's Lowell House (Mar. 13, 1973)); *Craft*, 572 F. Supp. at 879 (pointing out "one notable and ironic exception" to *Craft's* equal employment treatment: "but for the fact that she is female, plaintiff would not have been hired as a co-anchor . . . regardless of her other abilities").

Even prominent public officials can be heard to articulate sex-role assumptions, indicating that the seriousness of these stereotypes is still often underestimated. *See, e.g., Thomas, A Reagan Crony on the Line*, TIME, Jan. 9, 1984, at 20 (Director of the United States Information Agency Charles Wick stated that British Prime Minister Margaret Thatcher disapproved of the United States invasion of Grenada "because she is a woman.").

60. Henry, *supra* note 9, at 57 (quoting ABC News Vice President David Burke).

a factor in hiring a woman than a man,"⁶¹ and "It is a fact of life that men have an easier time of it in this business in terms of aging than women do."⁶² Finally, a female newscaster complains, "If I'm as aggressive as I think I should be in a particular situation, a lot of people get annoyed or write in and ask me, 'Don't I know how ladies behave?'"⁶³ These comments suggest that women news personnel are subject to different criteria than are their male counterparts. Specifically, women not meeting certain age, appearance, and demeanor requirements may lose their jobs (or not get hired at all), while men with the same characteristics do not suffer any adverse consequences. This differential treatment, if proven, should be considered a violation of title VII unless justified under one of the statute's traditional defenses.⁶⁴

B. *The Prima Facie Case*

There are two theories under which a plaintiff may establish a prima facie case of sex discrimination under title VII: disparate treatment and disparate impact. Which theory the plaintiff chooses will depend upon the facts of the case — on whether she wants to argue that her employer intentionally treated her differently because of her sex or, instead, that a facially neutral employment policy has an adverse impact on members of her sex.

1. *Disparate Treatment*

Under the disparate treatment theory,⁶⁵ a plaintiff must show that her employer intentionally treated her differently because of her sex or some sex-related characteristic.⁶⁶ The emphasis is on the employer's motive. The plaintiff's initial burden is not onerous.⁶⁷ To establish a prima facie case, she must merely produce sufficient evidence to support the necessary inference that "it is more likely than not that [the challenged employment decision was] based on a discriminatory crite-

61. N.Y. Times, *supra* note 9, at 44, col. 1 (quoting an unnamed veteran news consultant).

62. *Id.* (quoting Jim Cusick, President of a New York news consulting business).

63. J. GELFMAN, *WOMEN IN TELEVISION NEWS* 87 (1970) (quoting Gloria Rojas, a New York City television news reporter). Barbara Walters confirms that aggressiveness "still is, no matter what they say, a dirty word for a woman and an attractive word for a man. A man should be aggressive and a woman shouldn't." *Id.* at 86.

64. For a discussion of defenses to title VII actions, see Part III *infra*.

65. The disparate treatment theory was first articulated by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). See also *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) ("[Disparate treatment] is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their . . . sex . . .").

66. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

67. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

tion illegal under the Act.’”⁶⁸ Various sorts of differences in treatment have been held sufficient to constitute a prima facie case. Thus, a newscaster may establish a prima facie case merely by showing a difference in treatment between her and a comparably situated male. More directly, she may introduce statements by her employer that exhibit discriminatory intent. Finally, she may demonstrate that an employer used a survey incorporating gender stereotypes to satisfy perceived customer preferences.⁶⁹ Given the fact that the burden is not onerous, a newscaster who is treated differently because of her sex should be able to establish her initial case merely by introducing the facts of her treatment.

2. Disparate Impact

The disparate impact theory⁷⁰ focuses on the consequences of a particular employment action rather than its motivation.⁷¹ The theory was first developed in the race discrimination context, where courts realized that even facially neutral employment practices could have an adverse impact on a protected class.⁷² To establish a prima facie case of disparate impact, a plaintiff claiming sex discrimination must demonstrate that an employment practice produces a substantial adverse impact on members of her group because of their sex.⁷³ Courts are very receptive to the use of statistics in disparate impact cases.⁷⁴

68. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 576 (1978) (quoting *International Bhd. of Teamsters v. United States*, 431 U.S. 334, 358 (1977)).

69. See text following note 98 *infra*.

70. The disparate impact theory was first articulated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

71. *Griggs*, 401 U.S. at 432 (“[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.”); see also Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972).

Height or weight requirements are one example of ostensibly neutral standards that are often attacked under the disparate impact theory as disqualifying a disproportionate number of female job applicants. See, e.g., *Blake v. City of Los Angeles*, 595 F.2d 1367 (9th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980); see also B. SCHLEI & P. GROSSMAN, *supra* note 41, at 359.

72. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Prior to *Griggs*, courts recognized that facially neutral employment practices could perpetuate the effects of past discrimination. In *Griggs* itself, the Court not only upheld this past discrimination rationale, but also recognized that neutral practices could result in discrimination because of widespread societal or cultural conditions. See Comment, *Sex Discrimination: Theories and Defenses Under Title VII and Burwell v. Eastern Airlines, Inc.*, 83 W. VA. L. REV. 605, 611 (1981).

73. See *Dothard v. Rawlinson*, 433 U.S. 321, 328-31 (1977).

74. Statistics are an accepted method of proof in title VII cases. See, e.g., *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 230-31 & n.44 (5th Cir. 1974); *United States v. Ironworkers Local 86*, 443 F.2d 544, 551 (9th Cir.) (“[T]he often-cited aphorism, ‘statistics often tell much and Courts listen,’ has particular application in Title VII cases.”) (quoting *Alabama v. United States*, 304 F.2d 583, 586 (5th Cir.), *aff'd.*, 371 U.S. 37 (1962) (per curiam)), *cert. denied*, 404 U.S. 984 (1971). See generally Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal*, 89 HARV. L. REV. 387 (1975) (describing accepted techniques of statistical analysis in employment discrimination cases); Note, *Employment Discrimi-*

Statistics show that the criteria used by decisionmakers in selecting anchors have resulted in gross underrepresentation of older women in that position.⁷⁵ Unfortunately, statistics such as these are difficult to formulate for traits more subjective than age, such as appearance or demeanor. A prima facie case is made out, however, whenever women who possess a certain trait can demonstrate with statistics that they are significantly underrepresented in a given occupation as compared to men with a similar trait.

II. THE USE OF VIEWER SURVEYS

Once a plaintiff has established a prima facie case of sex discrimination, her employer must "articulate some legitimate, nondiscriminatory reason" for the difference in treatment if the plaintiff's theory is disparate treatment,⁷⁶ or demonstrate a business necessity for the practice if the theory is disparate impact.⁷⁷ It is at this stage of the case that defendants have responded to allegations of sex discrimination by demonstrating that their employment decisions were based on the results of viewer surveys.⁷⁸ Implicit in accepting an employer's reliance upon a viewer survey as an appropriate way to rebut a prima facie case of sex discrimination is that the survey is free from discriminatory taint. However, a viewer survey may well be discriminatory. Even if it is not "designed to effect the removal of [a] plaintiff . . . because of her sex,"⁷⁹ the survey may be discriminatory because it asks questions that, though facially neutral, engender responses colored by

nation: Statistics and Preferences Under Title VII, 59 VA. L. REV. 463 (1973) (examining the role statistics can play in plaintiffs' attempts to show discriminatory practices by employers).

75. See Note, *Title VII Limits on Discrimination Against Television Anchorwomen on the Basis of Age-Related Appearance*, 85 COLUM. L. REV. 190, 190 (1985).

76. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). All the employer need do is raise a "genuine issue of fact as to whether it unlawfully discriminated against the plaintiff;" it need not prove that it was actually motivated by the explanation offered. *Burdine*, 450 U.S. at 254-55.

The great majority of disparate treatment cases will turn on the final stage of the proof process: whether or not the plaintiff can establish that the employer's purported explanation is in fact a pretext for unlawful discrimination. *Burdine*, 450 U.S. at 256; B. SCHLEI & P. GROSSMAN, *supra* note 41, at 14. Comparative evidence is the crux of the plaintiff's case. *Id.* at 15. She must prove that similarly situated males were treated differently, and that the most plausible explanation for the differential treatment is a discriminatory motive. *Cf. McDonnell Douglas*, 411 U.S. at 804-05 (applying disparate treatment theory to a case involving racial discrimination).

77. See B. SCHLEI & P. GROSSMAN, *supra* note 41, at 1287.

78. See *Craft v. Metromedia, Inc.*, 572 F. Supp. 868, 878 (W.D. Mo. 1983), *affd. in relevant part and revd. in part*, 766 F.2d 1205 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1285 (1986); *Goodman v. Washington Radio*, 29 Fair Empl. Prac. Cas. (BNA) 1843, 1845, 31 Empl. Prac. Dec. (CCH) ¶ 33,375, at 28,679 (D.D.C. 1982); *Haines v. Knight-Ridder Broadcasting, Inc.*, 32 Fair Empl. Prac. Cas. (BNA) 1113, 1115-16, 25 Empl. Prac. Dec. (CCH) ¶ 31,650, at 19,763-64 (D.R.I. 1980).

79. *Craft*, 572 F. Supp. at 878. According to the district court, a television station is "entitled to rely on the results of [a] survey" unless that survey is designed to result in discrimination. 572 F. Supp. at 878.

the sexual stereotypes of the viewers.⁸⁰ Viewer surveys that incorporate the sex-role expectations of viewers are insufficient to defend a claim of sex discrimination.⁸¹ Indeed, the elimination of sexual stereotypes was one of the important goals of title VII.⁸²

Nonetheless, the few courts that have reviewed sex discrimination claims of newscasters (all of which have been disparate treatment claims) have refused to determine whether the viewer evaluations that comprise the surveys are themselves sex based, or, alternatively, to explain why the use of surveys is legitimate whether or not they reflect sex-based attitudes.⁸³ The district court's ruling in *Craft v. Metromedia, Inc.*,⁸⁴ as affirmed by the court of appeals, provides a ready example. In *Craft*, the district court deferred to the employer in two important respects. First, it noted that the defendant's emphasis on Craft's dress and make-up was the result of four "focus group" discussions, in which viewers were "overwhelmingly negative" about Craft's appearance.⁸⁵ Assuming, without analysis, that such reliance was legitimate, it upheld the defendant's actions as nondiscriminatory. The court failed to consider whether the survey itself was sex based, or whether the viewers brought sexual stereotypes to the viewings and thereby tainted the outcome of an otherwise sex-neutral survey.

The district court was also deferential toward the survey prompting Craft's demotion, finding it to be a legitimate basis for an employment decision.⁸⁶ The court's decision relied heavily on the concession of one of the plaintiff's experts that the survey was "not sex-biased." The court failed to determine, however, whether the "expert's" testimony was accurate or sensitive to the various ways in which the survey could have been discriminatory.⁸⁷ The court of appeals characterized the district court's decision of sex neutrality as one of

80. For example, a woman might be judged too aggressive by the public while a man exhibiting the same behavior would be praised. See notes 13 & 63 *supra* and accompanying text. A facially neutral question might also ask viewers about the appearance of television newscasters. If these viewers deem appearance more important for women than for men, see notes 12, 38 & 61 *supra* and accompanying text, women who dress poorly, but who otherwise possess comparable skills, will be rated lower than men who also dress poorly.

81. See notes 2-6 *supra* and accompanying text.

82. See note 3 *supra* and accompanying text.

83. See *Craft*, 572 F. Supp. at 878; *Goodman v. Washington Radio*, 29 Fair Empl. Prac. Cas. (BNA) 1843, 1844, 31 Empl. Prac. Dec. (CCH) ¶ 33,375, at 28,678 (D.D.C. 1982); *Haines v. Knight-Ridder Broadcasting*, 32 Fair Empl. Prac. Cas. (BNA) 1113, 25 Empl. Prac. Dec. (CCH) ¶ 31,650 (D.R.I. 1980).

84. 572 F. Supp. 868 (W.D. Mo. 1983), *affd. in relevant part and revd. in part*, 766 F.2d 1205 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1285 (1986).

85. 572 F. Supp. at 873.

86. 572 F. Supp. at 878.

87. 572 F. Supp. at 873-74. The district court's reliance is particularly curious because it found that the expert "lacked credentials and experience in the area of broadcasting research." 572 F. Supp. at 874.

fact and affirmed.⁸⁸ The appellate court noted that Craft had scored poorly on such "sex-neutral" issues as "knowledge of Kansas City, journalism ability, and apparent enjoyment of her job."⁸⁹ However, the court failed to inquire (and failed to direct the district court to inquire) whether viewers' sex-role expectations had influenced their answers to these facially neutral questions. In addition, the appellate court ignored testimony accepted by the district court that the defendant's decision to demote Craft was based mostly on her poor ratings in such non-neutral categories as appearance and demeanor.⁹⁰ Rather than examining the possible discriminatory effect of the survey, both the district court and the court of appeals were satisfied that the survey was legitimate merely because it was not *designed* to cause Craft's removal on the basis of sex.⁹¹

The nature of widely held sex-role expectations,⁹² as well as the specific observations of news personnel,⁹³ indicate that the sex-based stereotypes incorporated in viewer surveys are likely to go beyond those considered "reasonable" under title VII.⁹⁴ Thus, when the plaintiff has established a prima facie case of sex-plus discrimination, a court should not allow a television employer to rebut that prima facie case simply by showing that viewer surveys were the reason for the employment decision. The fact that viewer surveys will usually reflect these impermissible expectations should be enough to make them presumptively *invalid* as an employment tool, not absolutely valid as courts dealing with such surveys have apparently assumed. The burden should be on the employer to prove that the viewer survey is not sexually discriminatory. To meet this burden, employers can use so-

88. Specifically, the court of appeals held that the lower court's fact determination was not clearly erroneous. 766 F.2d at 1216-17.

89. 766 F.2d at 1216.

90. In response to Craft's question concerning why she was being reassigned, the news director is reported to have replied that "the audience perceived plaintiff's dress, appearance, makeup, and presentation as stumbling blocks." 572 F. Supp. at 874. The court of appeals pointed instead to the fact that in one segment of the survey only four of the fourteen categories concerned dress or image, and that Craft trailed her competitors in nearly every category. 766 F.2d at 1209. Merely inferential, this evidence is less probative of the actual reason for Craft's demotion than the revealing statement of the news director.

91. 766 F.2d at 1216 (citing the district court's finding, 572 F. Supp. at 878). Craft's case had been framed as an intentional discrimination action. The court might also have been reluctant to examine the survey closely because the underlying sex-plus factor — appearance — falls on the border of actionable discrimination. See notes 52-59 *supra* and accompanying text. Had the survey asked about viewer reaction to an anchor's marital status — a clear sex-plus factor — the courts might have examined the survey more rigorously.

92. See notes 31-38 *supra*. Sociological studies indicate that sex-role expectations affect an individual's evaluation of others. See, e.g., Gerdes & Kelman, *supra* note 37.

93. See notes 60-63 *supra* and accompanying text.

94. Courts have tried, with varying degrees of success, to distinguish between "reasonable" sex-related employment requirements and impermissible sex discrimination. See, e.g., *Gerdom v. Continental Airlines*, 692 F.2d 602 (9th Cir. 1982); notes 39-59 *supra* and accompanying text.

phisticated statistical techniques⁹⁵ along with expert testimony.⁹⁶ Since surveys are in fact nothing more than customer preference,⁹⁷ the fact that this proof may be difficult requires that any presumption about their use favor the plaintiff, *not* the defendant-employer.⁹⁸

Indeed, the nature of surveys as measures of customer preference suggests that their very use in making employment decisions might establish the plaintiff's prima facie case of sex discrimination. Unlike ratings, surveys are commissioned by the television stations themselves and elicit specific responses to individual newscasters. As a result, underlying sex-role expectations and the role of networks in catering to them are easily identified. Absent a justification for making employment decisions on the basis of customer preference and sex-based considerations, television stations, like any other employer, are prohibited by title VII from doing so.

III. THE DEFENSES

An employer should be able to rebut the plaintiff's prima facie case by demonstrating that its employment decision was based on a *nondiscriminatory* viewer survey.⁹⁹ If the employer is unable to rebut the plaintiff's prima facie case, however, it may seek to justify the use of the discriminatory survey under one of the two title VII defenses: the bona fide occupational qualification defense or the business necessity defense. The emphases of the two defenses mirror the different aspects of the two title VII theories. Since a newscaster may potentially establish a prima facie case of sex discrimination under either of the two theories, both defenses are relevant to sex-plus discrimination against female newscasters.

A. *The BFOQ*

The bona fide occupational qualification (BFOQ) is a statutory de-

95. See notes 136-39 *infra* and accompanying text.

96. See Taub, *supra* note 15, at 413 n.318 (noting that expert witnesses can draw on the available sociological research to assist courts in identifying stereotype-based employment actions).

97. See notes 2-6 *supra* and accompanying text.

98. Arguably, the burden should be on the plaintiff to show that the employer's use of a survey is a pretext for sex discrimination. Under this approach, courts would continue to accept the use of surveys as a legitimate nondiscriminatory reason for disparate treatment or as a business necessity, and the plaintiff would have to proffer the sophisticated statistical techniques and expert testimony demonstrating that the surveys were sexually discriminatory.

While this arrangement would improve upon the completely deferential approach now taken to the use of viewer surveys, it would ignore certain realities that argue for a different allocation of burdens. As already discussed, viewer surveys, by their very nature, ordinarily incorporate sexual stereotypes. In addition, the employer surely has greater knowledge concerning the design and implementation of viewer surveys. Together, these two facts support placing the onus on the employer to show that the particular survey used is not in fact sex based, or, alternatively, that it is sufficiently job related.

99. See text following note 94 *supra*.

fense¹⁰⁰ to a prima facie claim of disparate treatment.¹⁰¹ A BFOQ allows an employer intentionally to choose employees on the basis of their sex or sexual traits when those traits are necessary job qualifications.¹⁰² To take the most obvious example, an employer would admit to hiring only females for the job of wet nurse but would argue that being female is a necessary qualification for the job.¹⁰³

The BFOQ is recognized as a very narrow exception to title VII's general proscription of sex discrimination.¹⁰⁴ To establish a BFOQ defense to a prima facie case of sex discrimination, an employer must demonstrate that being of a certain sex or possessing certain sex-specific traits is necessary to perform the essence of the job.¹⁰⁵ This re-

100. An employer may legally employ an individual on the basis of sex if sex "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1) (1982).

101. For sources that distinguish the BFOQ and business necessity defenses, see *Burwell v. Eastern Air Lines*, 633 F.2d 361 (4th Cir. 1980), *cert. denied*, 450 U.S. 949 (1981); B. SCHLEI & P. GROSSMAN, *supra* note 41, at 358-60; Comment, *supra* note 72.

102. See *Dothard v. Rawlinson*, 433 U.S. 321 (1977); B. SCHLEI & P. GROSSMAN, *supra* note 41, at 358-59; see also notes 109 & 118 *infra*.

103. See *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219, 1224 (9th Cir. 1971) (invoking the job of wet nurse to illustrate when "sexual characteristics of the employee are crucial to the successful performance of the job," as opposed to the case before it where the employer claimed that females could not perform the job of agent-telegrapher because of the "strenuous physical demands").

104. See *Dothard v. Rawlinson*, 433 U.S. 321, 333-34 (1977) (adopting the EEOC's narrow construction: "[T]he bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex."); EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2(a) (1985); 110 CONG. REC. 7213 (1964) (The BFOQ "is a limited right to discriminate.").

105. The court in *Diaz v. Pan American World Airways*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971), articulated the "essence test" whereby a BFOQ is established only when "the essence of the business operation would be undermined" by hiring employees without the relevant employment qualification. 442 F.2d at 388 (emphasis in original). This test was implicitly adopted by the Supreme Court in *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977) ("The essence of a correctional counselor's job is to maintain prison security."). See also *Manhart v. Los Angeles Dept. of Water & Power*, 553 F.2d 581, 587 (9th Cir. 1976), *vacated on other grounds*, 435 U.S. 702 (1978); *Wilson v. Southwest Airlines*, 517 F. Supp. 292, 299 (N.D. Tex. 1981) ("*Diaz's* 'essence of the business' rule has now been adopted by every Circuit that has considered the matter.") (citing *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079, 1085 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980)). The "essence test" has also been applied in cases brought under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1982). See, e.g., *Arriitt v. Grisell*, 567 F.2d 1267, 1271 (4th Cir. 1977); *Hodgson v. Greyhound Lines*, 499 F.2d 859, 862 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975).

Courts have been inexact in distinguishing between the "essence of the business" and the "essence of the job." The Court in *Diaz* focused on the essence of the employer's total business operation. 442 F.2d at 388. Subsequent decisions have focused primarily on the essence of the particular employment position in question. See *Dothard*, 433 U.S. at 331 (holding that sex is a BFOQ for the job of security guard in a maximum security prison); *Sirota*, *supra* note 39, at 1044-45. The latter position, focusing on the essence of the job, makes more sense because different jobs within a single business require different qualifications. Sometimes the essence of the job and of the business will coincide since the job is part of the entire business operation. This was the point of the *Diaz* court when it held that the job of flight attendant did not require sex-based qualities because the essence of the airline business was to transport passengers. This Note will take the same approach in discussing the essence of the job of television newscaster as it relates to a television station's business operation.

quires a *judicial* determination of the “essence” of the particular job;¹⁰⁶ the employer’s characterization of the job is not controlling.¹⁰⁷

The EEOC guidelines promulgated under title VII recognize that sex or sex-related traits¹⁰⁸ may sometimes constitute a bona fide occupational qualification in the entertainment industry.¹⁰⁹ Indeed, the

106. In *Diaz*, the Fifth Circuit rejected the employer’s definition of the essence of the job of flight attendant as providing a pleasant environment and performing nonmechanical job functions. 442 F.2d at 388. The trial court had found on the basis of the expert testimony of a psychiatrist “that an airplane cabin represents a unique environment in which an air carrier is required to take account of the special psychological needs of its passengers. These psychological needs are better attended to by females.” 442 F.2d at 387; *see also* A. LARSON, EMPLOYMENT DISCRIMINATION § 15.31, at 4-25 (1985):

When the seasoned airline traveler goes on to discover that the airline case, in effect, rested on the proposition that the essential element contributed by stewardesses was a more-or-less motherly atmosphere, his smile might well break into a loud guffaw. If this is really so, he might ask, why did the airlines have a rigid policy of firing stewardesses at age 32? Why did they make any stewardess who might be inclined to gain weight step on the scales every two weeks, always with the threat of losing her job if her weight came within twenty pounds of that of the heroine of “I Remember Mama?” Above all, if her role was that of vicarious mother, why was becoming a real mother the surest way of establishing her lack of qualifications for the job?
(Footnotes omitted).

107. The *Diaz* court found that the primary function of an airline business was “to transport passengers safely from one point to another.” 442 F.2d at 388. The cosmetic and non-mechanical functions performed by flight attendants were found to be “tangential to the essence of the business involved.” 442 F.2d at 388.

108. Courts have recognized BFOQs for sex in three additional areas. *See Sirota, supra* note 39, at 1059-71. The legitimacy of these BFOQs, however, has been questioned. The first BFOQ is for psychosexual requirements. *See City of Philadelphia v. Pennsylvania Human Relations Comm.*, 7 Pa. Commw. 500, 300 A.2d 97 (1973) (holding that counselors of one sex could not effectively counsel youths of the other sex about their psychosexual problems). *But see Jatzcak v. Ochburg*, 540 F. Supp. 698 (E.D. Mich. 1982) (employer cannot establish a BFOQ to refuse to hire a woman to work in youth workshop for black, male adolescents).

The second BFOQ is for maintenance of prison security. *See Dothard v. Rawlinson*, 433 U.S. 321 (1977) (refusing to allow women guards to occupy “contact” positions at a violent maximum security prison housing male prisoners is within the narrow BFOQ exception). *But see* Note, Dothard v. Rawlinson: *Misapplication of the Bona Fide Occupational Qualification Defense*, 22 ST. LOUIS U. L.J. 197 (1978) (arguing that *Dothard* was incorrectly decided); Note, *Title VII: Are Exceptions Swallowing the Rule?*, 13 TULSA L.J. 102, 112, 118-20 (1977) (same).

The third BFOQ is for community standards. *See EEOC, TOWARD JOB EQUALITY FOR WOMEN 5* (1969) (stating that an employer could restrict jobs to members of one sex “[b]ecause of community standards of morality or propriety (restroom attendant, lingerie sales clerk)”). *But see* Edwards, *supra* note 3, at 417-18 (questioning the legitimacy of a BFOQ based on “morality”: “What is ‘proper’ is defined by reference to societal standards of morality. Obviously, this approach is hazardous.”); Sirota, *supra* note 39, at 1065:

If Title VII were construed to permit cautious employers to invoke the privacy claim on behalf of their customers, traditional employment roles would remain frozen. Since Congress intended Title VII to alter employment patterns as well as prevailing social mores, customers should be required to assert their own privacy claim. . . . While the presence of members of the opposite sex may initially shock or surprise customers, repeated exposure eventually may result in customer acceptance of the new work roles.
(Footnotes omitted).

109. In addition to the EEOC’s actor and actress exception, *see* note 110 *infra* and accompanying text, employers in the entertainment industry may consider sex or sex related traits in hiring topless waitresses, models, and escorts. *See* Developments in the Law, *supra* note 39, at 1183-85.

Prime examples of an employer discriminating among female employees on the basis of their sexual characteristics are the Playboy Bunny cases. *See, e.g., Playboy Club Intl. v. Hotel &*

guidelines specifically provide that an employer may discriminate on the basis of sex "[w]here it is necessary for the purpose of authenticity or genuineness . . . e.g., an actor or actress."¹¹⁰ A movie director may thus discriminate against men and older women in casting the part of a sixteen-year-old girl. Only if the director is allowed this discretion will the actress be believable in her role.¹¹¹

"Authenticity or genuineness" does not mean, as a television station might argue, merely the ability to appeal to the public. Such an interpretation would establish "fulfilling customer preference" as the primary function, or "essence," of the newscasting business. Of course, catering to the public is, in a sense, the "essence" of most every successful business. Similarly, every employer has an interest in hiring employees who appeal to the public.¹¹² Nevertheless, title VII specifi-

Restaurant Employees' & Bartenders' Intl., Local 1, 74-2 Lab. Arb. Awards (CCH) ¶ 8557 (1974) (Turkus, Arb.) (firing of Bunnies permitted as based not on union activity but on the contractual ground of loss of Bunny image).

An informal EEOC publication specifically recognizes the sex appeal BFOQ: "Jobs may be restricted to members of one sex . . . [i]n jobs in the entertainment industry for which sex appeal is an essential qualification." EEOC, *supra* note 108, at 5. However, to constitute a BFOQ, sex appeal must be the predominant aspect of the job. See *Diaz*, 442 F.2d at 388-89 (rejecting the airline's argument that it should be able to cater to its customers' documented preference for female flight attendants: "Before sex discrimination can be practiced, it must not only be shown that it is impracticable to find the men that possess the abilities that most women possess, but that the abilities are *necessary* to the business, not merely tangential.") (emphasis in original); *Wilson v. Southwest Airlines*, 517 F. Supp. 292, 301 (N.D. Tex. 1981) (interpreting *Diaz* to mean that "customer preference could 'be taken into account only' . . . where sex or sex appeal is itself the dominant service provided") (footnote omitted); Sirota, *supra* note 39, at 1066 (noting that "[a] separate sex appeal category creates the danger that employers will include sex appeal as a qualification for every job requiring contact with members of the opposite sex"); Developments in the Law, *supra* note 39, at 1183-85 (arguing that in order to establish a sex appeal BFOQ the sex appeal aspect of the job must dominate the nonsexual aspects); cf. A. LARSON, *supra* note 106, § 15.10, at 4-19 (formulating a slightly different test whereby sex appeal is a BFOQ if "a component of sex is a partial ingredient in the distinctive product of the enterprise") (emphasis omitted).

110. 29 C.F.R. § 1604.2(a)(2) (1985). This is the only exception set out in the EEOC guidelines to the general prohibition on third-party preference as a BFOQ. The guidelines provide in relevant part:

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

(1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:

. . . .

(iii) The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers except as covered specifically in paragraph (a)(2) of this section.

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

29 C.F.R. § 1604.2(a) (1985).

111. Even for the purpose of authenticity the BFOQ provision does not justify discrimination on the basis of race. According to Senator Clark, speaking during Senate debate on title VII: [A] director of a play or a movie who wished to cast an actor in the role of a Negro, could specify that he wished to hire someone with the physical appearance of a Negro — but such a person might actually be a non-Negro. Therefore, the act would not limit the director's freedom of choice.

110 CONG. REC. 7217 (1964), quoted in Sirota, *supra* note 39, at 1025 n.4.

112. Appealing employees become more important as their public visibility increases. Televi-

cally limits an employer's ability to appeal to the public by prohibiting employment decisions made on the basis of sexual stereotypes.¹¹³ Thus, the statutory BFOQ provision does not provide a blanket exception for jobs with entertainment aspects. Instead, it limits the scope of the BFOQ defense for the entertainment industry to situations in which the essence of the job is sex-based authenticity or genuineness.¹¹⁴ Though television news contains *elements* of show business,¹¹⁵ its main purpose is to inform viewers.¹¹⁶ Because members of

sion newscasters are, of course, highly visible. Consequently, public appeal is a very important quality in a newscaster. However, the degree of public appeal is not the inquiry under title VII. Rather, the inquiry is whether that public appeal can be legitimately sex based. See 1981-1982 *Annual Survey of Labor Relations and Employment Discrimination Law*, 24 B.C. L. REV. 47, 265 (1982) (noting that the courts in *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981), and *Diaz v. Pan American World Airways*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 960 (1971), both recognized "a distinction between a rational customer preference and customer preference based on sexual stereotype. . . . [In *Wynn*] there was no showing that the preference of Wynn's foreign customers was rationally based on the company's inability to perform its primary functions.").

113. See *Wilson v. Southwest Airlines*, 517 F. Supp. 292, 302 n.25 (N.D. Tex. 1981) ("Southwest's argument that its primary function is 'to make a profit,' . . . must be rejected . . . Without a doubt the goal of every business is to make a profit. . . . If an employer could justify employment discrimination merely on the grounds that it is necessary to make a profit, Title VII would be nullified in short order."); EEOC Dec. No. 70-11, 1973 EEOC Dec. (CCH) ¶ 6025 (1969) (the argument that an employer must refuse to hire female guards in order to preserve customer confidence in security "is, in law, without merit, since it presumes that customers' desires may be accommodated even at the price of rendering nugatory the will of Congress."); Sirota, *supra* note 39, at 1065 ("Congress intended Title VII to alter employment patterns as well as prevailing social mores . . .").

The Supreme Court has implicitly rejected a more broadly stated customer preference exception. See *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977) (citing *Weeks* with approval); *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 234-35 (5th Cir. 1969) (criticizing *Bowe's* broad interpretation of the EEOC guidelines); *Bowe v. Colgate-Palmolive Co.*, 272 F. Supp. 332, 362 (S.D. Ind. 1967) (quoting Note, *Classification on the Basis of Sex and the 1964 Civil Rights Act*, 50 IOWA L. REV. 778, 796 (1965): "[W]here a woman applies for a job as a barber, the employer can establish his case merely by showing that hiring her would cause him to lose a significant number of patrons."), *affd. in part, revd. in part*, 416 F.2d 711 (7th Cir. 1969).

114. See A. LARSON, *supra* note 106, § 15.10, at 4-18 (the authenticity consideration comes into play when identification with one of the sexes is the job's essential requirement).

115. See, e.g., B. TEAGUE, *LIVE AND OFF-COLOR: NEWS BIZ* 61-62 (1982). The increasing show business aspects of television news, especially at the local level, have prompted much debate within the broadcasting industry. See, e.g., Day, *Television News: Reporting or Performing?* in PROBLEMS AND CONTROVERSIES IN TELEVISION AND RADIO 313 (H. Skornia & J. Kitson eds. 1968); Dominick, Wurtzel & Lometti, *Television Journalism vs. Show Business*, 52 JOURNALISM Q. 213 (1975); Powers, *Eyewitness News*, COLUM. JOURNALISM REV., May/June 1977, at 17.

116. Although the advent of magazine-style television news shows has blurred the distinction between television entertainment and news, standard news programs are aimed primarily at bringing news to the viewers rather than amusing them. See Note, *supra* note 75, at 206. The appellate court in *Craft v. Metromedia, Inc.*, 766 F.2d 1205 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1285 (1986), however, refused to address the contention that entertainment-related factors such as appearance could be separated from a news program's informational function. In affirming the district court's finding that Christine Craft was not subject to sex discrimination based on her appearance, the Eighth Circuit wrote: "While we believe the record shows an overemphasis by KMBC on appearance, we are not the proper forum in which to debate the relationship between newsgathering and dissemination and considerations of appearance and presentation — i.e., questions of substance versus image — in television journalism." 766 F.2d at 1215.

both sexes are capable of transmitting information, no BFOQ justifies discrimination among newscasters on the basis of sex.

For actors and actresses in pure entertainment programs to appear genuine in their roles, they must often maintain a certain sexual appearance.¹¹⁷ The job of "newscaster," however, is fundamentally different. Qualities necessary to an "authentic" newscaster correlate to sexual characteristics¹¹⁸ only by cultural assumption.¹¹⁹ These cultural stereotypes are impermissible bases for employment decisions under title VII.¹²⁰ Furthermore, the FCC has mandated equal employ-

117. Although a television station is not constrained by title VII from employing actors and actresses to portray sex-stereotyped characters on prime time entertainment programs, such perpetuation of sexual stereotypes has been severely criticized. See, e.g., D. MEEHAN, *LADIES OF THE EVENING: WOMEN CHARACTERS OF PRIME-TIME TELEVISION* (1983); Seggar, *Television's Portrayal of Minorities and Women, 1971-75*, 21 J. BROADCASTING 435 (1977).

118. It is unlikely that a television station would argue that its female newscasters are comparable to Playboy Bunnies who may be discharged when they lose their fresh and youthful appearance. See note 109 *supra*. In any event, such an argument would probably not succeed, because an employer cannot define its own business for purposes of title VII. See notes 107-08 *supra* and accompanying text.

119. In 1979, television consultant Frank Magid prepared a tabular breakdown of what viewers found to be "desirable anchor qualities." The survey compiled results from all over the country for both network and local newscasters. The results of that survey are reprinted below:

	Network	Local
Intelligent	69.6%	61.6%
Experienced	64.0	56.6
Sincere	39.6	37.8
Self-confident	36.6	34.8
Mature	33.2	28.4
Businesslike	29.3	26.4
Positive	27.8	25.2
Understanding	27.7	26.6
Serious	25.9	23.1
Warm	23.8	27.2
Enthusiastic	22.8	25.0
Bright	15.1	14.8
Calm	13.7	14.4
Familiar	13.5	24.2
Reassuring	11.8	12.7
Casual	6.9	12.3
Formal	5.3	3.9

A. WESTIN, *supra* note 7, at 124.

One handbook cites the following qualities: "(1) professional credentials; (2) thorough preparation of significant and interesting copy and actualities; (3) authoritative, confident, credible and fluent delivery; and (4) an ingratiating manner." L. DUDEK, *PROFESSIONAL BROADCAST AN- NOUNCING* 90 (1982).

Dan Rather argues that the most essential characteristic of a news anchor is believability:

Walter Cronkite. David Brinkley. John Chancellor. Harry Reasoner. Mike Wallace. Ed- win Newman. Eric Sevareid. In looks, voice and approach no two are alike. But there is a common denominator. They are believable. No machine known to science can measure the human waves that come across the screen. But believability is the test.

D. RATHER, *THE CAMERA NEVER BLINKS* 281 (1977). Apparently, there is a second "common denominator" in identifying successful anchors; all the anchors mentioned in Rather's quotation are men. This revealing fact illustrates how the ostensibly neutral quality of "believability" can mask society's sex-role expectations.

120. "The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the

ment opportunity in the television industry.¹²¹ Because of this FCC standard, television stations cannot exclude women entirely from the job of newscaster. The fact that either sex can fill the position of "newscaster"¹²² indicates that no specifically sexual characteristics are essential to the job.¹²³

The standards of the television industry, and the statements of its participants, underscore the differences between newscasting and pure entertainment. Television standards distinguish "news" from "entertainment," treating newscasting as requiring professional responsi-

group." 29 C.F.R. § 1604.2(a)(1)(ii) (1985); see *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978) ("[E]mployment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females."); *Carroll v. Talman Fed. Sav. & Loan Assn.*, 604 F.2d 1028, 1033 (7th Cir. 1979) ("[A] justification [that] 'relies heavily on stereotypical assumptions [is] a posture which is anathema to the maturing state of Title VII analysis.'") (quoting *In re Consolidated Pretrial Proceedings in the Airlines Cases*, 582 F.2d 1142, 1146 (7th Cir. 1978)), *cert. denied*, 445 U.S. 929 (1980).

Although cultural stereotypes cannot explicitly justify sex discrimination, they may implicitly do so when courts fail to recognize the stereotypes as such. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 333, 336 (1977) (Although finding it "impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes," the Court held that *all* women could be disqualified from the job of security guard in a maximum security prison because of their "very womanhood.").

121. See *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 60 F.C.C.2d 226 (1976). The FCC has taken upon itself an independent responsibility, apart from the EEOC, to enforce the requirements of the 1964 Civil Rights Act. See, e.g., *Gottfried v. FCC*, 655 F.2d 297, 309 (D.C. Cir. 1981), *revd. in part sub nom. Community Television v. Gottfried*, 459 U.S. 498 (1983). Moreover, courts have specifically reviewed FCC actions for compliance with the Civil Rights Act's standards. See, e.g., *Black Broadcasting Coalition v. FCC*, 556 F.2d 59 (D.C. Cir. 1977) (*per curiam*).

122. One possible way to justify different employment standards for male and female newscasters would be to establish that the jobs of "male newscaster" and "female newscaster" are, in fact, different. The district court in *Craft* appeared to imply this distinction. It noted that KMBC chose to hire a female newscaster "to 'soften' the image of its news presentation," *Craft v. Metromedia, Inc.*, 572 F. Supp. 868, 871 (W.D. Mo. 1983), *affd. in relevant part and revd. in part*, 766 F.2d 1205 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1285 (1986); that viewer surveys compared *Craft* to the female co-anchors at the competing networks, 572 F. Supp. at 874; and that "but for the fact that she is a female, plaintiff would not have been hired as a co-anchor . . . regardless of her other abilities." 572 F. Supp. at 879.

Despite these admitted differences in treatment, the *Craft* trial court insisted that "defendant's actions toward plaintiff during her employment at KMBC were not based on her sex." 572 F. Supp. at 879. Thus, although the trial court implied that the role of "female newscaster" differs from that of "male newscaster," it explicitly recognized that under title VII the relevant comparison involves the treatment of *all* newscasters regardless of sex. 572 F. Supp. at 879 (*Craft* "was a 'co-equal co-anchor.'"). Accepting the trial court's version of the facts, the court of appeals affirmed, finding that "*Craft* was not subject to sex discrimination either in KMBC's application of its appearance standard or in its reassignment of her to reporter." 766 F.2d at 1217.

123. Sexual characteristics cannot be necessary to the job unless it is first necessary for the employee to be a member of a specific gender. For example, the implicit assumption of a requirement that an employee have large breasts is that the employee be a woman. See *State Div. of Human Rights ex rel. Chamberlain v. Indian Valley Realty Corp.*, App. No. 743 (State Human Rights App. Bd. 1970) (the fact that plaintiff was flat-chested caused her not to fulfill the employment requirement that she wear an "abbreviated" Little Fox cocktail waitress uniform), *affd. per curiam*, 38 A.D.2d 890, 330 N.Y.S.2d 320 (1972), *reprinted in* K. DAVIDSON, R. GINSBURG & H. KAY, *TEXT, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION* 634 (1974).

bility in presentation and delivery.¹²⁴ Network executives attempt to disclaim or downplay any show business aspects in the news, as do the newscasting anchors themselves.¹²⁵ According to Bill Leonard, president of CBS News, no surveys were used in the choice of Dan Rather to succeed Walter Cronkite. It was "a news decision."¹²⁶ Many members of the industry now feel that "the emphasis on appearance has gone too far in local news."¹²⁷

Because sex-specific traits are not necessary to the job of newscaster,¹²⁸ a television employer cannot demonstrate that sex is a BFOQ for newscasting employment decisions. Employing sex-role expectations to determine employment decisions does a disservice both to the anchor and to the American public, approximately two-thirds of which relies on television news programs as its primary source of news.¹²⁹ A television station, therefore, cannot follow an employment policy that adopts sexual stereotypes prohibited under title VII. The use of viewer surveys that embody sex-role expectations illegal under title VII is one such policy.

B. *Business Necessity*

Business necessity is a court-created defense to the court-fashioned doctrine of disparate impact.¹³⁰ Where a business practice results in an adverse impact on individuals because of their sex, an employer can justify that practice under the business necessity defense by demonstrating that the practice is necessary to the safe and efficient functioning of its business.¹³¹ For example, an employer may be able to establish that a height or weight requirement is a business necessity for the job of airline pilot even though the requirement acts to disqualify women disproportionately from the job.¹³²

124. The National Association of Broadcasters Television Code, under subsection V, Treatment of News and Public Events, provides: "A television broadcaster should exercise due care in the supervision of content, format, and presentation of newscasts originated by his/her station, and in the selection of newscasters, commentators, and analysts." NATIONAL ASSOCIATION OF BROADCASTERS, CODE AUTHORITY, BROADCAST SELF REGULATION, TELEVISION CODE STANDARD V (1976). ABC's internal standards provide that "[s]taff announcers who are performing as disc jockeys or in other entertainment programming may not read news bulletins interrupting such programming." I. FANG, TELEVISION NEWS 221, 224 (1968).

125. For example, many network executives claim never to have used consultant Magid's chart, *see* note 119 *supra*, in choosing an anchor. A. WESTIN, *supra* note 7, at 123.

126. A. WESTIN, *supra* note 7, at 123.

127. N.Y. Times, *supra* note 9, at 44, col. 5.

128. *See* Diaz v. Pan American World Airways, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

129. Note, *supra* note 75, at 192 n.11.

130. The business necessity defense was first articulated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

131. *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

132. The focus of a business necessity inquiry is not on an explicit sexual classification, like

For an employment practice to constitute a business necessity, three requirements must be met: (1) the practice must identify qualities that have a "manifest relationship to the employment in question;"¹³³ (2) the compelling business need of using the practice must outweigh the discriminatory impact;¹³⁴ and (3) there must be no other practice that could accomplish the same business purpose with less discriminatory impact.¹³⁵

It is helpful here to discuss the third prong of the test first. The relevant question under this prong is whether viewer surveys can be structured to avoid incorporating sex-role expectations that are impermissible under title VII.¹³⁶ Researchers have developed a variety of techniques for determining the sex-based nature of survey responses. For example, factorial surveys allow a researcher to "capture the complexity of real life and the conditions of real human choices and judgments" and to identify the precise factors that shape those choices and judgments.¹³⁷ A television survey could incorporate this technique to measure viewer sensitivity to an anchor's sex as a preface to the survey itself. Other techniques allow researchers to determine what sex-stereotyped assumptions are held by a group of respondents.¹³⁸ The same technique allows those constructing the survey to identify specific words that are strongly sex-linked.¹³⁹ Consequently, even if viewer surveys are determined to be a necessary tool of the television

the BFOQ, but on an employment practice that screens for ostensibly neutral job qualifications. These job qualifications, however, may effectively correspond to sex. For example, the requirement that all employees be over 5'7" disqualifies 95% of the female job applicants, while eliminating only 32% of the men. See 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 S. CAL. L. REV. 585, 588 (1974). Because of this incidental effect, the employer must justify the practice as being necessary to the business. The business necessity defense simply recognizes that even though being of one sex per se is not essential to the job, a discriminatory impact on one sex may be justified in some situations because a certain business practice is essential.

133. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971).

134. *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971).

135. *Robinson*, 444 F.2d at 798; see Note, *Business Necessity under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98 (1974) (analyzing the concept of business necessity).

136. Courts have defined the type of sex-role expectations that are illegal under title VII. See notes 39-59 *supra* and accompanying text. Survey questions may be designed to identify those viewers who possess these stereotypes in a significant enough degree to influence their evaluations of newscasters.

137. Rossi & Anderson, *The Factorial Survey Approach: An Introduction*, in P. ROSSI & S. NOCK, MEASURING SOCIAL JUDGMENTS 15, 16 (1982).

138. See J. WILLIAMS & D. BEST, MEASURING SEX STEREOTYPES 19-27 (1982). See generally C. BEERE, WOMEN AND WOMEN'S ISSUES, A HANDBOOK OF TESTS & MEASURES (1977) (providing a summary of over 200 tests measuring primarily sex-role expectations).

139. See J. WILLIAMS & D. BEST, *supra* note 138, at 21-25 (participants in study asked to characterize certain adjectives as masculine, feminine, or neither). See generally E. BABBIE, SURVEY RESEARCH METHODS (1973) (discussing generally the problems of using "biased" terms in surveys); C. MOSEN & G. KALTON, SURVEY METHODS IN SOCIAL INVESTIGATION 391-408 (2d

news business, they need not incorporate sex-role expectations.¹⁴⁰ In judging the current blanket approval of all viewer surveys, the issue becomes whether the use of potentially *sex-biased* surveys is a business necessity.¹⁴¹

The determination of whether sexual qualities are "manifestly related" to job performance is similar to the "essence of the job" inquiry of the BFOQ defense.¹⁴² Just as the BFOQ defense fails because sex-specific characteristics are not crucial to the essence of the job of newscaster, so the business necessity defense fails because sex-specific qualities are not "manifestly related" to a newscaster's job performance.¹⁴³ Thus, there is no need to cater to the public's sex-based preferences in choosing, or imposing requirements on, the individuals who present the news.

Even if a relationship between sex-specific qualities and the job performance of newscasters is assumed,¹⁴⁴ the balance between the compelling needs of the business¹⁴⁵ and the discriminatory impact of viewer surveys tips decidedly in favor of the employee. Courts have held business practices to be business necessities only where discontinuation of the practice appears to threaten the safety or efficiency of the

ed. 1971) (discussing various causes and potential solutions for response error in surveys, one of which is question wording).

140. The necessity of popularity as the basis for selecting newscasters is itself questionable. See *Haines v. Knight-Ridder Broadcasting*, 32 Fair Empl. Prac. Cas. (BNA) 1113, 25 Empl. Prac. Dec. (CCH) ¶ 31,650 (D.R.I. 1980); Henry, *supra* note 9 (listing some of the issues raised by the *Craft* case as "the rise of show-business values and market research over news judgment; the role of consultants in shaping a newscast's style, cast, and content; the concept of anchors as personalities rather than reporters").

141. The additional cost of revised survey techniques is no justification for continued discrimination. See *Robinson v. Lorillard Corp.*, 444 F.2d 791, 799 n.8 (4th Cir.) ("dollar cost alone is not determinative"), *cert. dismissed*, 404 U.S. 1006 (1971); *Bush v. Lone Star Steel Co.*, 373 F. Supp. 526, 532-33 (E.D. Tex. 1974) ("[T]he expense involved in changing from a discriminatory system . . . [fails to constitute] a business necessity that would justify the continuation of . . . discrimination."); EEOC Dec. No. 72-1293, 1973 EEOC Dec. (CCH) ¶ 6356, at 4642 (1972) ("remediating inequality normally costs money").

That cost alone is not determinative finds further support in the recent deletion of language from the EEOC Guidelines permitting a BFOQ when the expense for construction of separate facilities for men and women would be "clearly unreasonable." 37 Fed. Reg. 6836 (1972) (repealing 30 Fed. Reg. 14,927 (1965)). This language was replaced by a provision that makes an employer's failure to construct additional restrooms to provide for equal employment opportunity an illegal practice regardless of the expense. 29 C.F.R. § 1604.2(b)(5) (1985); see *Sirota*, *supra* note 39, at 1054.

142. For an analysis of the BFOQ defense, see note 105 *supra*.

143. See notes 117-23 *supra* and accompanying text.

144. This is a very large assumption. The only way a television station could relate gender to the job performance of newscasters would be to argue that sex appeal is an essential characteristic of the job. This would mean arguing that a newscaster is more akin to a Playboy Bunny than, for example, a flight attendant. And, no matter what the argument, a television station cannot apply the sex appeal standard more strictly to one sex than the other (i.e., have personality, looks, and clothes be more important factors for female than male newscasters).

145. There is a real issue as to whether the television industry's need to use viewer surveys is as compelling as is often claimed. See notes 159-68 *infra* and accompanying text.

business.¹⁴⁶ No court has held that a business practice is a necessity because a business has a compelling need to hire only individuals who meet customer expectations. Indeed, numerous courts have struck down business practices designed to mold employees to customers' sex stereotypes on the ground that sex-specific qualities were not essential to job performance.¹⁴⁷

In sum, regardless of the theory the plaintiff relies on to bring her sex discrimination case, no title VII defense justifies the kind of sex-plus discrimination prevalent in the television news industry today. Similarly, no defense justifies the use of viewer surveys that incorporate impermissible sexual stereotypes in employment decisions. A television news employer, like any other employer, cannot discriminate on the basis of sex in order to satisfy customer preference.

IV. POLICY CONSIDERATIONS IN THE USE OF VIEWER SURVEYS

Certain policy concerns may underlie the current judicial deference to the television industry's use of viewer surveys in newscasting employment decisions.¹⁴⁸ First, courts may regard viewer surveys as such a fundamental business tool of the television industry¹⁴⁹ that they consider any judicial scrutiny of survey use to be an unwarranted encroachment on management prerogatives. Second, courts may fear that the financial loss resulting from any change in survey techniques will be catastrophic.¹⁵⁰ Finally, courts may doubt whether review of viewer surveys is administratively feasible.

The first policy objection to judicial scrutiny of viewer surveys reflects the judiciary's traditional hesitancy to "diminish traditional management prerogatives."¹⁵¹ Courts have emphasized that surveys

146. *See, e.g.,* *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

147. *See* notes 3-6 *supra* and accompanying text.

148. *See, e.g.,* *Craft v. Metromedia, Inc.*, 572 F. Supp. 868, 879 (W.D. Mo. 1983) ("It might also be argued broadly that defendant should not have relied on the consultant's report as a basis for removing plaintiff as co-anchor, but this is a normative issue not properly before the court under Title VII. . . ."), *aff'd. in relevant part and rev'd. in part*, 766 F.2d 1205 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1285 (1986).

149. *See, e.g.,* *Haines v. Knight-Ridder Broadcasting*, 32 Fair Empl. Prac. Cas. (BNA) 1113, 1116, 25 Empl. Prac. Dec. (CCH) ¶ 31,650, at 19,764 (D.R.I. 1980) ("The news business may indeed have its quirks and vagaries . . . but consultant's reports and ratings routinely serve as the basis for personnel changes.").

150. *See, e.g.,* *Craft*, 766 F.2d at 1214 n.11 ("Newscaster grooming 'consistent with community standards' as tested by surveys is 'critical to defendant's economic well-being.'") (quoting the *Craft* district court, 572 F. Supp. at 877).

151. *Steelworkers v. Weber*, 443 U.S. 193 (1979); *see also* *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1980) (recognizing title VII's mandate of "fair and . . . neutral employment personnel decisions," but citing *Weber* for the need to protect "management prerogatives"); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978) ("Courts are generally less competent than employers to restructure business practices and unless mandated to do so by Congress they should not attempt it.").

“routinely serve as the basis for personnel changes.”¹⁵² However, title VII recognizes that certain routine elements of traditional business practice may result in sex discrimination and specifically mandates courts to intervene in these situations.¹⁵³ The loss of discretion to a television station prohibited from using sex discriminatory viewer surveys is no greater than the loss of discretion, for example, to a small local restaurant forced to serve or employ a black,¹⁵⁴ or to a corporation forced to hire a female despite the claim that its clients prefer male companionship at football games and on hunting trips.¹⁵⁵ Furthermore, the scope of title VII limits the encroachment on a television station’s discretion.¹⁵⁶ Under the statute, television stations are free to remove newscasters who do not appeal to the public for non-sex-based reasons.¹⁵⁷ That is, title VII does not proscribe the use of viewer surveys entirely. It requires only a modification of the current business practices of television stations fully consistent with the burdens imposed on other employers.¹⁵⁸

The second judicial concern, that any restriction on a television station’s use of viewer surveys in employment decisions would be devastating to the station’s financial well-being, may be the result of unexamined assumptions about the legitimate business needs of a television station.¹⁵⁹ First, it must be noted that loss of competitive edge, or even potential business failure, cannot alone justify discrimination on

152. *Haines v. Knight-Ridder Broadcasting*, 32 Fair Empl. Prac. Cas. (BNA) 1113, 1115-16, 25 Empl. Prac. Dec. (CCH) ¶ 31,650, at 19,763-64 (D.R.I. 1980) (noting management’s reliance on consultant’s reports and ratings); see also *Craft*, 572 F. Supp. at 878 (“The survey was a routine procedure . . . conducted, tabulated, and evaluated by persons experienced in the field of broadcast research.”).

153. See *Sirota*, *supra* note 39, at 1065 (“Congress intended Title VII to alter employment patterns as well as prevailing social mores . . .”); see also note 3 *supra* and accompanying text.

154. See *A. LARSON*, *supra* note 106, § 15.40, at 4-32 (noting that the claim of potential loss in patronage if forced to serve blacks was “one of the commonest excuses proffered by restaurant proprietors”).

155. EEOC Dec. No. 71-2338, 1973 EEOC Dec. (CCH) ¶ 6247, at 4438 (1971) (employer cannot refuse to promote a woman to the position of manager on grounds that a manager goes to football games and on hunting trips with male customers who would not accept a woman unless “built like Raquel Welch”).

156. Title VII’s prohibitions relate only to discrimination on the basis of race, color, religion, sex, or national origin. See 42 U.S.C. § 2000e-2(a)(1) (1982). Furthermore, title VII has been interpreted not to apply to certain appearance requirements. See, e.g., *Fagan v. National Cash Register Co.*, 481 F.2d 1115 (D.C. Cir. 1973) (male employee can be required to wear hair at a certain length). Thus the fear expressed by one judge, see *Willingham v. Macon Tel. Publishing Co.*, 352 F. Supp. 1018, 1020 (M.D. Ga. 1972), *affid. en banc*, 507 F.2d 1084 (5th Cir. 1975), *quoted in Fagan*, 481 F.2d at 1124, that employers will be forced to allow male employees to wear dresses is greatly exaggerated.

157. For example, a television station may undoubtedly require that newscasters maintain a professional, businesslike appearance. *Craft*, 766 F.2d at 1215.

158. See notes 4-6 *supra* and accompanying text.

159. See Note, *Evolving Enigma*, *supra* note 32, at 153 (“A court’s decision adverse to a woman employee . . . may represent less some extant misogynist sentiment than a stereotype of institutional or business needs.”).

Courts should require documentation of legitimate business needs before deferring to the

the basis of sex.¹⁶⁰ Nevertheless, if these concerns in fact influence judicial decisionmaking, it is important to recognize that claims of devastating financial impact are speculative at best. First, claims of potential lost revenue resulting from any change in survey techniques are far less convincing when viewed in terms of the entire television industry. All broadcasters are subject to the same title VII standards. Thus any disadvantage imposed on a television station would be short-lived.¹⁶¹ Second, there remain many other avenues of competition open to television stations.¹⁶² The current competitive focus of television stations on their news "anchors" has been created by the industry itself. Such industry-created competition cannot be used to prevent imposition of nondiscriminatory hiring practices.¹⁶³ Third, a television station's claim that it must respond to all aspects of viewer taste, even though that taste may be based on impermissible sex-role expectations, ignores the enormous role television plays in the creation, and thus the potential alteration of, societal role expectations.¹⁶⁴

employer's business prerogatives. *See Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969):

[T]o rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a *factual basis for believing*, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.

(Emphasis added). Indeed, courts have refused to sustain an employer's defense where there was no empirical evidence as to the job-relatedness of the asserted qualification. *See, e.g., Wetzel v. Liberty Mut. Ins. Co.*, 511 F.2d 199 (3d Cir. 1974) (finding time limit on maternity leave discriminatory because it makes no provision for individual capabilities), *vacated*, 424 U.S. 737 (1976); *Cheatwood v. South Cent. Bell Tel. & Tel. Co.*, 303 F. Supp. 754, 758 (M.D. Ala. 1969) (rejecting employer's claim that job requiring rural canvassing could not be filled by women because the job might require changing tires and because access to restrooms was limited).

160. *See Wilson v. Southwest Airlines*, 517 F. Supp. 292, 304 (N.D. Tex. 1981) (quoting *Diaz v. Pan American World Airways*, 442 F.2d 385, 389 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971)):

[The] necessity test focuses on the company's ability "to perform the primary function or service it offers," not its ability to compete. . . . [A] potential loss of profits or possible loss of competitive advantage following a shift to non-discriminatory hiring does not establish business necessity A rule prohibiting only financially successful enterprises from discriminating under Title VII, while allowing their less successful competitors to ignore the law, has no merit.

See also Sirota, supra note 39, at 1052 n.164 (noting the undesirability of recognizing a "business failure avoidance" BFOQ since it would "permit employers to establish differing hiring standards based on the financial condition of their respective businesses").

Even if the change to a nondiscriminatory practice may result in a partial or complete refusal of customers to deal with the business, business necessity is not established. *See, e.g., Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981).

161. *See A. LARSON, supra* note 106, § 15.40, at 4-33 (Title VII "has to be interpreted on the assumption that it will apply equally to all enterprises competing with each other, and that therefore the relative impact of compliance on a firm's business-getting ability will wash out, as all other firms are forced to operate under the same constraints.").

162. For example, style of presentation, story content, length or time of the program, number of newscasters.

163. *See Wilson v. Southwest Airlines*, 517 F. Supp. 292, 303 (N.D. Tex. 1981) ("Southwest exploited, indeed nurtured, the very customer preference for females it now cites to justify discriminating against males.").

164. *See generally* W. DAVISON & F. YU, MASS COMMUNICATION RESEARCH: MAJOR IS-

Courts should also question whether viewer surveys are an accurate predictor of viewer behavior.¹⁶⁵ Predictions by other employers of potential business failure if forced to comply with title VII have proved exaggerated. That is, customers have not discontinued their patronage after imposition of nondiscriminatory employment practices.¹⁶⁶ Examples of exaggerated claims exist even within the television industry itself. Television executives first claimed that viewers would not accept female newscasters at all.¹⁶⁷ Now female newscasters have been accepted,¹⁶⁸ and it is the more subtle aspects of employment decisions that remain potentially discriminatory. In light of the history of the television industry, there is little reason to believe that this more subtle form of sex discrimination is essential to the presentation of the news.

The final policy concern, that judicial review of viewer surveys is infeasible, proves unfounded when the method of such review is compared to the judicial inquiry required in other title VII cases. Although sex-role expectations are deeply imbedded in our society,¹⁶⁹ courts have demonstrated their ability under title VII to determine

SUES AND FUTURE DIRECTIONS (1974); F. MANKIEWICZ & J. SWERDLOW, *REMOTE CONTROL: TELEVISION AND THE MANIPULATION OF AMERICAN LIFE* (1978); Hicks, *Imitation and Retention of Film-Mediated Aggressive Peer & Adult Models*, 2 J. PERSONALITY & SOC. PSYCHOLOGY 97 (1965); Miller & Reeves, *Dramatic TV Content and Children's Sex-Role Stereotypes*, 20 J. BROADCASTING 35-47 (1976).

165. See *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1216 (8th Cir. 1985) (lack of correspondence between viewer survey predictions and ratings shows not intentional sex discrimination, but rather "only that broadcast market research is an inexact science"), *cert. denied*, 106 S. Ct. 1285 (1986); Haines v. Knight-Ridder Broadcasting, 32 Fair Empl. Prac. Cas. (BNA) 1113, 1116, 25 Empl. Prac. Dec. (CCH) ¶ 31,650, at 19,764 (D.R.I. 1980) ("One might legitimately challenge the reliability of a study of this kind, especially since it is so subjective.").

Viewer surveys currently compare the newscasters of one station with those of competing stations. See, e.g., *Craft*, 766 F.2d at 1209. They do not purport to measure whether viewer preference for stereotyped newscasters is so strong that if not fulfilled, viewers will stop watching the news altogether.

166. See Saenger & Gilbert, *Customer Reactions to the Integration of Negro Sales Personnel*, 4 INTL. J. OPINION & ATTITUDE RESEARCH 57 (1950).

167. See N.Y. Times, *supra* note 9.

168. See *id.*, § 1, at 44, col. 2 (quoting a news consultant to say, "I can find no research that we have done that says the audience prefers men over women in anchor roles.").

169. It may also be argued that the widespread nature of sex-role expectations indicates that all transactions between the public and employees of any business will inevitably be tinged with sex bias. For example, a salesperson who satisfies customers' sex-role expectations may attract more customers and make more sales than a similarly situated salesperson who does not conform. The extra sales may lead to preferential treatment for the successful salesperson based on stereotyped customer preference.

Such situations undoubtedly occur frequently without imposition of title VII liability. However, this is not because title VII sanctions the result, but rather because of the inherent difficulty of proving that the reason for the different treatment was stereotyped customer preference.

If the salesperson adversely affected could prove that the employer had a policy of favoring employees who conformed to sex stereotypes, the salesperson could prove discriminatory animus on the part of the employer and thereby establish a disparate treatment case. If the salesperson could demonstrate a pattern of adverse employment actions and successfully trace their cause to the employer's efforts to cater to stereotyped customer preference, the salesperson could establish a claim of disparate impact. Again, since there is no method to ascertain whether the public's

whether an employment action is indeed sex based,¹⁷⁰ and further to differentiate impermissible stereotypes from reasonable requirements.¹⁷¹ Certainly the subtle influence of sex-role expectations in many employment situations is beyond the ability of courts to scrutinize.¹⁷² But subtle sex discrimination occurs not because the law sanctions it, but because it is difficult to prove. In the newscasting context, television stations explicitly rely on customer preference documented in the form of viewer surveys. Just as the surveys have thus far formed a respected, legitimate defense for television stations, they, coupled with expert testimony as to the nature of sex-role stereotypes, can provide a fact record that enables courts to discern illegal sex discrimination. Furthermore, the existence of survey techniques that compensate for impermissible levels of viewer sex bias provides the basis for a judicial remedy,¹⁷³ as well as a method for television stations to protect themselves against allegations of sex discrimination. Consequently, the judicial review of viewer surveys mandated by title VII is administratively feasible.

CONCLUSION

The widespread nature of sexual stereotypes in society indicates that sex-role expectations will often influence public reactions to a newscaster. Television stations routinely incorporate these public evaluations into newscasting employment decisions through the use of viewer surveys. The resulting employment decisions therefore present potential title VII violations. Because no sex-specific traits are necessary to the job of newscaster, television stations cannot justify explicit sex-based employment actions. Furthermore, viewer surveys may feasibly be restructured to eliminate impermissible sexual assumptions.

buying habits are based on stereotyped criteria, the case would be virtually impossible to establish.

The television industry, however, has an institutionalized policy of measuring and reacting directly to viewer preference. Employees evaluated by monitored and tabulated viewer judgments are in a better position to demonstrate that the criteria used to judge their performance embody sexual stereotypes. A judicial insistence that television stations reveal the underlying criteria of employee evaluations is much more fair and feasible than in other business settings since the direct measurement of viewer preference is an institutionalized part of television employment decisionmaking.

170. *See, e.g., Carroll v. Talman Fed. Sav. & Loan*, 604 F.2d 1028, 1033 (7th Cir. 1979) (examining defendant's assertion that female employees must wear a uniform to reduce dress competition among women: "Clearly these justifications for the rule reveal that it is based on offensive stereotypes prohibited by Title VII."), *cert. denied*, 445 U.S. 929 (1980).

171. *See Taub, supra* note 15, at 407-14 (demonstrating that courts have established guidelines for differentiating irrational stereotypes from reasonable requirements).

172. *See Taub, supra* note 15, at 355 (identifying the reasons that underlying role expectations are often difficult to discern in evaluations of individuals: "Bias is, first of all, frequently unconscious. Second, since the focus is on the individual rather than group performance or capability, often the easier explanation is that the individual is at fault. Third, bias is further disguised by the expression of judgment in terms that appear both neutral and relevant.").

173. *See notes 136-41 supra* and accompanying text.

Consequently, a television station cannot justify the use of viewer surveys that fail to compensate for sexual bias. Finally, both the potential impact on a television station from imposition of title VII liability and the judicial inquiry required to examine viewer surveys is comparable to that in other employment discrimination settings. Therefore, the content of viewer surveys is a proper, feasible, and necessary issue for courts to review under title VII.

— *Leslie S. Gielow*