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Lisa Stolzy

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ONLY A LITTLE BIT PREGNANT: THE PREGNANCY DISCRIMINATION ACT FROM A PERFORMER'S PERSPECTIVE

I. INTRODUCTION

In 1978, Congress passed the Pregnancy Discrimination Act ("PDA").1 The explicit purpose of the Act was to prohibit discrimination by employers on the basis of pregnancy.2 Nineteen years later, employers are still insisting pregnancy is a condition "unique to women"3 that precludes them from employment in the workplace.4

The continuing attitude that pregnant women are unfit to work is especially apparent in the entertainment industry where producers continue to discharge actresses from their jobs when they become pregnant.[5] The recent firing of actress Hunter Tylo exemplifies the discriminatory treatment actresses often confront if they desire to continue working while pregnant.[6]

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1. 42 U.S.C. § 2000e(k) (1994).

2. H.R. REP. NO. 95-948, at 4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749.

3. General Elec. Co. v. Gilbert, 429 U.S. 125, 139 (1976). In *Gilbert*, Justice Rehnquist reasoned that excluding pregnancy-related disabilities from a state disability insurance plan did not impose an additional burden on women not imposed on men. The plan merely did not extend an additional benefit to pregnant women. Pregnancy disability was an extra risk "unique to women" and its exclusion from a California state disability insurance plan did not create unequal treatment of the sexes. *Id.*

4. *E.g.*, Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482 (10th Cir. 1994) (account executive successfully sues for pregnancy discrimination after being fired); Hayes v. Shelby Mem'l Hosp., 726 F.2d 1543 (11th Cir. 1984) (x-ray technician successfully sued for pregnancy discrimination); *Ex-Worker Sues over Pregnancy*, ROANOKE TIMES & WORLD NEWS, Aug. 3, 1996, at C1 (alleging that an airline ticket clerk was fired because the airline did not want someone "swollen and bloated" working behind the counter); Nancy Hass, *Read This Before You Go on Maternity Leave; CNN Correspondent Patti Paniccia Lost Her Job Shortly After the Birth of Her Second Child*, REDBOOK, July 1996, at 51.

5. *See* Tylo v. Spelling Ent. Group, Inc., No. BC149844 (Cal. Super. Ct. filed May 13, 1996); Robert W. Butler, *Richardson Talks About 'Kansas,'* AUSTIN AM.-STATESMAN, Apr. 21, 1995, at E7 (recounting that when Kim Basinger was forced to withdraw from filming *Kansas City* because of her pregnancy, the casting director revealed that replacing a "star" is not unusual); Pam Lambert et al., *Bringing up Babies*, PEOPLE, July 8, 1996, at 84 (presenting actress Connie Selleca's claim that the producers canceled the television series *Second Chances* when she and another actress on the show disclosed they were pregnant).

6. *Tylo*, No. BC149844 at 5.

On May 13, 1996, daytime soap star Hunter Tylo filed suit in Los Angeles Superior Court alleging pregnancy discrimination against Spelling Entertainment Group, Spelling Television, Inc., and Executive Producer Frank South ("Spelling").[7] According to the Complaint, on February 16, 1996, Tylo entered into a contract with Spelling to appear on *Melrose Place* for the 1996-97 season.[8] However, on April 10, 1996, one month after informing Spelling that she was pregnant, Tylo was fired.[9]

Tylo maintains that she was terminated "solely because of her pregnancy in violation of ... her right to be free of pregnancy discrimination ...."[10] She contends that at the time she was terminated no specific character had been developed for her on *Melrose Place* and that Spelling made no effort to contact her concerning "her pregnancy, her delivery date, or whether any accommodation would be necessary."[11]

Spelling maintains that the agreement with Tylo gave Spelling a contractual right to terminate her if there was a "material change in [her] appearance,"[12] and because Tylo's pregnancy would cause such a change, her termination was justified.[13] Spelling contends Tylo was engaged to play the part of a married woman who has an affair with another character on *Melrose Place*, and Tylo's pregnancy would not conform to the character she had been hired to portray.[14]

This case represents much more than a disagreement over the terms of an employment contract. Spelling's firing of Tylo raises questions about the resiliency of the Pregnancy Discrimination Act as a legal remedy to protect women from discriminatory employment policies based on their reproductive role. If these protections can be suspended simply because

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7. *Id.* Tylo sued under California law claiming pregnancy discrimination. CAL. GOV'T CODE § 12945 (West 1992). For purposes of this Comment, the claims are analyzed under federal law using the *Tylo* case as a factual premise. California law is similar except it provides for a more generous pregnancy leave of up to four months. *Id.* § 12945(b)(2); *see also* California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987). In addition, there is no comparable exception to pregnancy discrimination for "authenticity or genuineness," so under California law Tylo is not subject to the Equal Employment Opportunity Commission "authenticity exception." *See* 29 C.F.R. § 1604.2(2) (1996).

8. *Tylo*, No. BC149844 at 4.

9. *Id.* at 5.

10. *Id.* at 6, 8.

11. *Id.* at 5.

12. Letter from Cortez Smith, Senior Counsel, Spelling Entertainment Group, Inc., to Hunter Tylo 1 (Apr. 10, 1996) (on file with the *Loyola of Los Angeles Entertainment Law Journal*).

13. *See id.*

14. *Id.*

pregnancy is thought to be incompatible with a job, then they are dangerously unreliable.

Reliable legal protection is especially important in the entertainment industry because many producers continue to believe that pregnancy is a wholly unprotected classification.[15] Even the filing of the discrimination suit by Tylo has prompted assertions that actresses are not entitled to the same protections that other female employees enjoy.[16] As one columnist pronounced when discussing the *Tylo* case, "Firing a secretary, college professor or engineer just because she's pregnant is discriminatory; firing an actress whose pregnancy would be incompatible with the role she's playing may be *unfortunate*, but, in this case, it makes sense."[17] Hollywood expects a pregnant actress to take temporary retirement for the duration of the pregnancy even though it may cause serious set-backs to, if not the permanent collapse of, her career.[18]

Although some pregnant actresses have retained their jobs through the benevolence of producers or their personal negotiating power,[19] pregnancy remains a condition to be feared, avoided, and discouraged due to the substantial burden placed on the actress.[20] In a society that legally

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15. *Showbiz Today* (CNN television broadcast, Aug. 20, 1996) [hereinafter *Showbiz Today*: Aug. 20, 1996]; Pamela Warrick, *Acting on a Legality*, L.A. TIMES, Aug. 12, 1996, at E1 (explaining that although Demi Moore managed to maintain her career through three pregnancies, other less famous performers "have trouble finding any work at all when they are obviously, or even a little bit, with child"); *see also* Michael Fleming, *Naked Truth: CAA's Lovett Leaves It for Camera*, DAILY VARIETY, Sept. 7, 1995, at 27 (noting that normally a pregnant client is a manager's "worst nightmare").

16. *See* Loraine O'Connell, *When Feminist Ideology Is Taken to the Extreme*, ORLANDO SENTINEL, June 7, 1996, at E1.

17. *Id.* (emphasis added).

18. *See Showbiz Today* (CNN television broadcast, May 12, 1995) (discussing pregnancy leave as a constraint on a career) [hereinafter *Showbiz Today*: May 12, 1995]; *see also* Michael Fleming, *'SNL's' Michaels Teams with Jagger for 'Enigma,'* VARIETY, Nov. 20, 1995, at 2 (asserting that studios worry about insurance coverage when an actress becomes pregnant); James Ryan, *Brainy Siren, Now a Mom*, N.Y. TIMES, Nov. 12, 1995, § 2, at 19 (discussing how pregnancy prevented Annette Bening from portraying Catwoman in *Batman Returns* and the principal part in *Disclosure*).

19. *See Everybody Still Knows Her Name*, THE PHOENIX GAZETTE, Mar. 7, 1995, at D1 (reporting how the executive producer of *The X-Files* allowed actress Gillian Anderson to retain her job despite her pregnancy); Ann Hodges, *'90210' Gets Another Year Older, Bolder*, HOUS. CHRON., Sept. 5, 1994, at 1 (recounting the producers' assent to including Gabrielle Carteris' pregnancy into the plot line); *Showbiz Today*: May 12, 1995, *supra* note 18 (acknowledging that actress Jessica Lange can take pregnancy leave and still find work in her later years).

20. *See Showbiz Today*: May 12, 1995, *supra* note 18 (recognizing that choosing between a career and starting a family can often be an agonizing choice); *see also* Gloria Allred, Statement to the Press 2–4 (May 13, 1996) (on file with the *Loyola of Los Angeles Entertainment Law Journal*). Tylo's attorney, Gloria Allred, details the potential burdens on an actress who becomes pregnant by contending that women should not have to choose between

and morally professes to encourage childbirth over abortion,[21] it is contradictory to enforce employment policies that require an actress to choose between continuing her pregnancy or sacrificing her job.[22]

Despite the difficulty and uncertainty that confronts a pregnant performer, many actresses have successfully continued to perform throughout their pregnancies.[23] These women demonstrate that pregnancy is not inherently incompatible with acting and can be easily accommodated in many cases.[24] Their success supports the notion that the entertainment industry should not be exempted from the prohibitions against pregnancy discrimination.[25] As actress Marilu Henner confirmed, "I've been not pregnant, playing pregnant. I've been playing not pregnant, but pregnant. And I've been playing pregnant when I was pregnant. And I can tell you, it all comes down to costuming and camera angles . . . ."[26]

This Comment argues that discrimination based on pregnancy is not inherently justified in the entertainment industry. Part II presents an overview of the current legal prohibitions on pregnancy discrimination and the alternative theories for pursuing a discrimination claim under Title VII of the Civil Rights Act of 1964 ("Title VII").[27] Part III contends that the entertainment industry is not exempt from Title VII prohibitions on pregnancy discrimination when an actress' pregnancy can be effectively disguised, allowing her to perform a role. Part IV discusses the burden to employers and the extent to which they must accommodate a pregnant actress. In addition, Part IV argues that the negative implications potentially associated with pregnancy are not sufficient to justify discrimination. Part V examines the contractual provisions that may potentially allow a producer to circumvent the more rigorous legal

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having a baby and keeping their job or tolerate economic or social "punishment" because they are pregnant. *Id.*

21. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833 (1992); *see also* Harris v. McRae, 448 U.S. 297 (1980).

22. *See* Gloria Allred, Statement to the Press, *supra* note 20, at 4 (contending that "big business" should not be allowed to "veto a pregnancy by terminating the potential mother from her job . . .").

23. Daniel Howard Cerone, *A Surreal 'X-Files' Captures Earthlings!*, L.A. TIMES, Oct. 28, 1994, at F1 (explaining how actress Gillian Anderson used props to disguise her pregnancy while filming the television series *The X-Files*); *Showbiz Today*: Aug. 20, 1996, *supra* note 15 (stating that actress Phylicia Rashad hid her pregnancy during filming of the *Cosby Show*); *see generally* Warrick, *supra* note 15, at E1 (noting that actress Shelley Long's pregnant form was hidden behind the *Cheers* bar during filming of the popular television series). *See also infra* Part III.A–B.

24. *See* discussion *infra* Part III.A.

25. *Id.*

26. Warrick, *supra* note 15, at E1.

27. 42 U.S.C. §§ 2000e to 2000e-17 (1994).

standards intended to protect pregnant employees. Finally, Part VI examines the balancing of interests required under Title VII and argues that the scales should tip in favor of protecting the jobs of pregnant actresses.

II. LEGAL BACKGROUND

A. Pregnancy: A Protected Class

When Title VII was originally enacted, it prohibited sex discrimination in employment, but pregnancy was not explicitly included as a protected class.[28] However, when the Supreme Court held that pregnancy discrimination was not prohibited as sex discrimination, Congress disagreed.[29] The legislators nullified the Court's decision by amending Title VII in 1978 to include the PDA.[30] The PDA expands the Title VII definition of discrimination based on sex to include discrimination based on "pregnancy, childbirth, or related medical conditions."[31]

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28. "It shall be an unlawful employment practice for an employer . . . to discharge any individual . . . because of such individual's . . . sex . . . ." *Id.* § 2000e-2(a)(1). "The drafters of the bill originally sought to prohibit discrimination only on the basis of race, and opponents who sought to 'sink the bill under gales of laughter' added sex as a prohibited category of discrimination on the House floor." Sally J. Kenney, *Pregnancy Discrimination: Toward Substantive Equality*, 10 WIS. WOMEN'S L.J. 351, 359–60 (1995) (quoting CAROLYN BIRD, BORN FEMALE: THE HIGH COST OF KEEPING WOMEN DOWN 5 (1968)).

29. *See* H.R. REP. NO. 95-948, at 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749. The House Committee Report reveals Congress's dissatisfaction with the Supreme Court's decisions in *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) and *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), which established an ambiguous test for determining sex discrimination based on pregnancy.

30. 42 U.S.C. § 2000e(k).

31. The relevant portion of the Pregnancy Discrimination Act reads:

> The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in §703(h) of this title shall be interpreted to permit otherwise.

Id.

B. Alternative Theories of Pregnancy Discrimination: Disparate Treatment versus Disparate Impact

Discrimination claims brought under Title VII are analyzed under either a disparate treatment or disparate impact theory. How the case is classified determines an employer's available defenses.[32] Discrimination based on "disparate treatment" occurs when an employment policy facially discriminates against a class of employees protected under Title VII.[33] If the employment policy is facially neutral but disproportionately burdens members of a protected class, it is classified as discrimination based on "disparate impact."[34]

1. Disparate Treatment

Courts consider an employment policy that explicitly discriminates on the basis of a protected characteristic as facially discriminatory and in "direct contravention . . . [of] Title VII's statutory prohibitions."[35] Since the enactment of the PDA, policies that explicitly discriminate on the basis of pregnancy are considered a "prima facie violation of [T]itle VII."[36]

Under Title VII, an employer may discriminate in hiring and employment if the employer can show that one of these prohibited categories is a "bona fide occupational qualification ["BFOQ"]."[37] The BFOQ exception[38] provides that in certain circumstances, a business' "personnel [may be] qualified on [the] basis of religion, sex, or national origin."[39] Therefore, the BFOQ exception presumably exempts explicit

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32. Kenney, *supra* note 28, at 367.

33. Sheryl Rosensky Miller, *From the Inception to the Aftermath of* International Union, UAW v. Johnson Controls, Inc.*: Achieving its Potential to Advance Women's Employment Rights*, 43 CATH. U. L. REV. 227, 244–46 (1993).

34. *Id.* at 235–37.

35. *Id.* at 244.

36. 29 C.F.R. § 1604.10 (1996).

37. 42 U.S.C. § 2000e-2(e)(1) (1994). Specifically, the statute states:

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

Id.

38. Although a BFOQ is commonly referred to as an exception to Title VII, it is more accurately described as a justification for discrimination based on sex. Michael L. Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 TEX. L. REV. 1025, 1026 (1977).

39. 42 U.S.C. § 2000e-2(e).

discrimination based on pregnancy only if nonpregnancy is essential to the company's primary function as a business.[40]

2. Disparate Impact

The disparate impact analysis applies when a facially neutral employment practice disproportionately excludes pregnant women from employment.[41] A prima facie case of discrimination based on disparate impact is established once the plaintiff proves that an employer's facially neutral policy or procedure adversely affects a class of employees protected under Title VII.[42] The burden then shifts to the employer, who must show that the discriminatory requirement is "job related for the position in question and consistent with business necessity."[43] Even if the employer shows that such a requirement is a business necessity,[44] the plaintiff may still prevail if she can show that the discriminatory policy is not necessary because other, less discriminatory policies would "serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'"[45]

The disparate impact approach was first recognized by the Supreme Court in *Griggs v. Duke Power Co.*[46] The Court prohibited employment practices that "disqualif[ied] Negroes at a substantially higher rate than white applicants . . . ."[47] The Duke Power Company in *Griggs* required standardized test scores and high school diplomas as a condition of employment for four of the five departments.[48] The departments requiring the test scores and diplomas were comprised exclusively of white employees, and the lowest paying job in those four departments paid more than the highest paying job in the fifth department.[49] The plaintiffs successfully challenged the practice by establishing that the test scores had no correlative relationship to the performance of the job.[50] The Court held

40. *Id.*; *see also* International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 200 (1991) (holding that explicit discrimination can only be defended as a bona fide occupational qualification).

41. Dothard v. Rawlinson, 433 U.S. 321, 329 (1977).

42. Note, *The Civil Rights Act of 1991: The Business Necessity Standard*, 106 HARV. L. REV. 896, 898 (1993) [hereinafter *Business Necessity Standard*].

43. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

44. *Id.*

45. *Rawlinson*, 433 U.S. at 329 (citations omitted).

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

47. *Id.* at 425–26.

48. *Id.* at 427.

49. *Id.*

50. *Id.* at 431–32.

that "practices, procedures, or tests neutral on their face . . . cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[51] An examination of the legislative history of the Civil Rights Act led the Court to maintain that "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."[52] Therefore, under the disparate impact analysis, a neutral practice that disproportionately burdens members of a protected class can be challenged as discrimination in violation of Title VII.[53] However, employers may justify the policy if they establish that the policy is necessary to the efficient functioning of the business.[54]

The Supreme Court's subsequent decision in *Wards Cove Packing Co. v. Atonio*[55] significantly narrowed the scope of the disparate impact analysis by requiring that the plaintiff retain the burden of proof at all phases.[56] The plaintiff had to establish that there was no business necessity that justified the discriminatory practice, a requirement often not within the scope of the plaintiff's evidentiary findings.[57] The decision also lowered the standard for establishing a business necessity.[58] Although the Court acknowledged that the disputed policy must have a "significant" application to achieving the aims of the enterprise, it removed any requirement that the practice be "essential" or "indispensable" to the operation of the employer's business.[59]

The Civil Rights Act of 1991[60] returned to the employer the burden of proving the business necessity defense. Although the Act does not explicitly define what constitutes a business necessity, its purpose is "to codify the concepts of 'business necessity' and 'job related' expressed by the Supreme Court in *Griggs v. Duke Power Co.* . . ."[61] Presumably, as in *Griggs*, the standard places the burden on the employer to show that any requirement of the job must "have a manifest relationship to the

51. *Id.* at 430.
52. *Griggs*, 401 U.S. at 432.
53. MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 3.20 (1994).
54. *Id.* § 3.24.
55. 490 U.S. 642 (1989).
56. *Id.* at 659 (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 997 (1988)).
57. *Business Necessity Standard, supra* note 42, at 899.
58. *Wards Cove Packing*, 490 U.S. at 659.
59. *Id.*
60. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.
61. *Id.* § 1, 105 Stat. at 1071.

employment in question,"[62] emphasizing that "[t]he touchstone is business necessity."[63]

III. PREGNANCY DISCRIMINATION: ARE ACTRESSES EXCEPTED FROM TITLE VII PROTECTION?

Hunter Tylo contracted to portray a character on *Melrose Place* in February of 1996.[64] One month later she learned she was pregnant and subsequently notified Spelling.[65] Spelling responded by terminating her contract, claiming her pregnancy did "not conform" to the character she was hired to play.[66] The direct inference is that Tylo was fired because she was pregnant.

By premising Tylo's dismissal on her pregnancy, Spelling clearly violated Title VII under the disparate treatment theory.[67] Spelling can only justify Tylo's dismissal by establishing that nonpregnancy is a BFOQ for the job,[68] and there is no established precedent for determining whether nonpregnancy is a BFOQ for acting in a television series.[69] However, the courts have provided some guidance in applying the BFOQ standard in two related areas: sex discrimination premised on a need for authenticity and genuineness in artistic productions, and sex discrimination based on the potential to become pregnant. Therefore, an analysis of Spelling's BFOQ defense can be based on these analogous judicial interpretations of the BFOQ justification.

A. A Bona Fide Occupational Qualification Premised on a Need for Authenticity

The authenticity exception originates in the "Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex."[70] The Guidelines state, "[w]here it is necessary for the purpose of

62. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

63. *Id.* at 431.

64. Tylo v. Spelling Ent. Group, Inc., No. BC149844, at 3 (Cal. Super. Ct. filed May 13, 1996).

65. *Id.* at 5.

66. Letter from Cortez Smith to Hunter Tylo, *supra* note 12, at 1.

67. When an employer admits that an employee was fired solely because that person is the member of a protected class, the practice is a *per se* violation of Title VII. Chambers v. Omaha Girls Club, Inc., 840 F.2d 583, 583–84 (8th Cir. 1988).

68. 42 U.S.C. § 2000e-2(e)(1) (1994); *see also* International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 200 (1991).

69. *See* discussion *infra* Part III.A–B.

70. 29 C.F.R. § 1604.2(2) (1996).

authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress."[71] This specific type of BFOQ allows for a narrow exception under Title VII for discrimination where "sexual identification is essential to the integrity of the production."[72] The authenticity BFOQ permits producers to discriminate in hiring women for female roles and men for male roles.[73] In addition, an advertiser would presumably be allowed to discriminate in hiring men to demonstrate shaving products or women to model bikinis.[74]

An examination of the legislative history reveals that the authenticity exception may have originally been intended to allow for more "traditional perceptions" or stereotypical qualifications in hiring.[75] In the debate concerning the BFOQ exception, senators argued that a BFOQ could be established to support "the preference of a French restaurant for a French cook, [and] . . . a professional baseball team for male players."[76] However, many commentators agree that such a liberal application of the exception has never been challenged in the courts, and it is presently limited to gender discrimination in casting.[77]

Two cases have addressed the issue of sex-based discrimination predicated on a need for authenticity.[78] In *Button v. Rockefeller*,[79] a male applicant for the position of state trooper challenged the hiring of four females with lower test scores on the entrance examination.[80] The New York court upheld sex as a BFOQ for discriminatory hiring based on authenticity and genuineness.[81] The court reasoned that the need for female undercover police to investigate "purse snatching and unlawful abortion" justified the hiring of women to the exclusion of the men with higher test scores.[82]

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71. *Id.* The authenticity exception is sometimes referred to as the "entertainment exception." *See* Patricia A. Buchman, Note, *Title VII Limits on Discrimination Against Television Anchorwomen on the Basis of Age-Related Appearance*, 85 COLUM. L. REV. 190, 206 (1985).

72. BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 341 (2d ed. 1983 & Supp. 1984).

73. Buchman, *supra* note 71, at 206.

74. *See id.*

75. SCHLEI & GROSSMAN, *supra* note 72, at 341.

76. Interpretive Memorandum of Title VII of H.R. 7152, 110 CONG. REC. 7213 (1964).

77. ROTHSTEIN, *supra* note 53, § 3.15; SCHLEI & GROSSMAN, *supra* note 72, at 341.

78. Cook v. Babbitt, 819 F. Supp. 1 (D.D.C. 1993); Button v. Rockefeller, 351 N.Y.S.2d 488 (Sup. Ct. 1973).

79. 351 N.Y.S.2d 488 (Sup. Ct. 1973).

80. *Id.* at 489.

81. *Id.* at 492–93.

82. *Id.* at 492. The court upheld the BFOQ stating, "it [cannot] reasonably be denied, that

A more recent district court case raises doubt about the justification of sex-based discrimination even in cases of gender-specific roles. In *Cook v. Babbitt*,[83] the District Court for the District of Columbia denied authenticity as a gender-based requirement for performances on Equal Protection grounds.[84] In the interest of accuracy, the National Park Service denied a female member of a volunteer infantry the chance to portray a male soldier in the "living history" re-enactments of the Civil War.[85] The court held that by allowing only men to play the male soldiers and requiring that women be restricted to the few available female roles, the National Park Service violated the Equal Protection Clause of the Fourteenth Amendment.[86]

An examination of the language of the performance agreements revealed that the provisions referred to the gender of the participants rather than the gender of the characters.[87] This distinction amounted to "a gender-based classification"[88] that would pass constitutional muster only if "those who tried to disguise their gender for dramatic roles . . . could not do so effectively . . . ."[89] The court concluded that "categorically barring women from portraying male soldiers . . . constitutes unconstitutional discrimination against women," and it granted summary judgment for the plaintiff.[90]

Very few cases rely on the authenticity exception despite its continued inclusion in the EEOC guidelines. *Cook* indicates that courts may be reluctant to uphold authenticity as a legitimate basis for sex-based discrimination.[91] Some commentators even contend that the authenticity exception is logically inconsistent with "the job of [an] actor or actress":[92]

> After all, the very essence of this job is to pretend to be something one is not. All that a producer should be allowed to require is that the pretense be convincing. Thus, it may be

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'for the purpose of authenticity or genuineness' female troopers will be needed for undercover assignments. Undercover assignment to investigate episodes of purse snatching and unlawful abortion are just two examples of situations that would probably require a female undercover agent." *Id.*

83. 819 F. Supp. 1 (D.D.C. 1993).

84. *Id.* at 16

85. *Id.* at 9.

86. *Id.* at 14–16.

87. *Id.* at 15.

88. *Id.*

89. *Cook*, 819 F. Supp. at 16.

90. *Id.* at 28.

91. *See id.* at 16.

92. *See* Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 12 n.23 (1995).

> necessary that actors whose work will require full frontal nudity possess the requisite genitalia or a convincing facsimile, but for most other acting jobs it is difficult to see how sex can be determinative, as the careers of Divine and of the many actresses who played Hamlet, from Sarah Siddons on down, may attest.[93]

Strictly applied, the authenticity requirement would only exempt discrimination based on pregnancy[94] from Title VII protections if it is impossible for the pregnant employee to play the role convincingly.[95] The most recent court opinion on the issue, *Cook*, adopted this strict view of the authenticity exception.[96] Applying this reasoning to the *Tylo* case leads to the conclusion that pregnancy can only be exempted as a BFOQ if the woman's pregnant appearance cannot be effectively disguised. The entertainment industry is uniquely qualified to disguise and conceal a performer's pregnancy. While *The X-Files* star Gillian Anderson was pregnant, she was filmed "talking on the phone or sitting behind a computer, and the directors began shooting her from the bust up."[97] Despite actress Shelley Long's pregnancy, she continued as a principal character on the situation comedy *Cheers*. "[The] writers camouflaged Long's expanding girth behind the bar—and in one episode, even stuck her character beneath the floorboards."[98] Actress Katherine Kelly Lang points out that the producers of *The Bold and the Beautiful*, a daytime soap opera, have become quite adept at disguising the recent pregnancies of several of the show's actresses. Lang will also continue working on the show during her pregnancy and laughs, "I guess [my character] will soon be carrying a lot of big purses. . . ."[99]

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93. *Id.*; *see also Los Angeles Women's Shakespeare Company to Present All-Female 'Richard III' March 15-April 14*, PR NEWSWIRE, Mar. 6, 1996, *available in* LEXIS, News Library, Wires File [hereinafter *Los Angeles Women's Shakespeare Company*].

94. Pregnancy is included in the expanded definition of sex as amended under the PDA. *See* 42 U.S.C. § 2000e(k) (1994). Because a woman can become pregnant after she has been hired, it must be assumed that if nonpregnancy qualifies as a BFOQ, the statutory exception will be extended to firing of a pregnant employee. However, the explicit language of the statute refers only to "hiring and employ[ment]" on the basis of sex, leaving open the argument that the BFOQ defense was only intended to extend to situations where the distinction was between males and females, a qualification that would presumably be apparent at the outset. *See id.* § 2000e-2(e).

95. *See* International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 204 (1991); *see also Cook*, 819 F. Supp. at 12; Case, *supra* note 92, at 12 n.23.

96. *Cook*, 819 F. Supp. at 15.

97. Cerone, *supra* note 23, at F1.

98. Warrick, *supra* note 15, at E1.

99. *B&B's Katherine Kelly Lang Staying*, SOAP OPERA DIGEST, Jan. 14, 1997, at 5.

In addition, production companies may resort to body doubles when the actress' figure is not right for the part. In the remake of the 1979 movie *Tim*, twenty-nine-year-old Shelly Michelle's body was substituted for fifty-year-old Candice Bergen's in a scene in which Bergen's character is strolling down the beach in a bathing suit.[100] Body doubles are regularly utilized when an actress declines to do a love scene or a scene requiring nudity.[101] A similar accommodation was feasible for Tylo during the latter stages of her pregnancy if the script called for intimate scenes.

Because the BFOQ exception for authenticity has never been tested as a defense to pregnancy discrimination, the precedent has not been clearly established.[102] However, the infrequent use of the authenticity exception[103] coupled with the Supreme Court's inclination to limit the scope of BFOQ exceptions[104] cast doubt on its viability as a justification where an actress' pregnancy could have been concealed or disguised. Therefore, if Tylo's pregnancy could have been effectively hidden while she worked on *Melrose Place*, Spelling would not be able to justify terminating her contract because the BFOQ exception would be inapplicable.[105]

B. A Bona Fide Occupational Qualification Premised on the Potential to Become Pregnant

The Supreme Court's most recent decision on pregnancy and the BFOQ defense established that employers can discriminate only when pregnant women are physically incapable of doing their job. *International Union, UAW v. Johnson Controls, Inc.*[106] discusses the BFOQ defense in relation to a woman's potential to become pregnant.[107] The Court struck down a policy that barred women from jobs exposing them to high levels of lead unless the employees could medically document that they were infertile.[108] Johnson Controls, a battery manufacturing plant, contended

100. Diane Haithman, *Just Perfect for the Part*, L.A. TIMES, July 6, 1996, at F1.

101. *Id.*

102. ROTHSTEIN, *supra* note 53, § 3.15.

103. *See id.*

104. *See* International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 204 (1991) (limiting the scope of the BFOQ inquiry to a woman's actual ability to perform the job); Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 419 (1985) (a BFOQ must be based on a showing of reasonable necessity, not merely reasonableness).

105. *See Johnson Controls*, 499 U.S. at 204.

106. 499 U.S. 187 (1991).

107. *Id.*

108. *Id.* at 206–07.

the policy was justified to protect a potentially developing fetus from lead exposure.[109] The Court held that because the policy was directed at fertile women with no comparable restriction for fertile men, the policy was facially discriminatory and could only be defended as a BFOQ.[110]

The Court determined that the factory failed to establish that infertility was essential to the performance of the job; therefore, it held the BFOQ defense was inapplicable.[111] The Court explained that "the BFOQ is limited to instances in which sex or pregnancy actually interferes with the employee's ability to perform, and the employer must direct its concerns in this regard to those aspects of the woman's job-related activities that fall within the 'essence' of the particular business."[112] The Court recognized that in instances where pregnancy is at issue, the PDA contains "a BFOQ standard of its own: Unless pregnant employees differ from others 'in their ability or inability to work,' they must be 'treated the same' as other employees 'for all employment-related purposes.'"[113]

The decision in *Johnson Controls* established that a BFOQ is only applicable when the protected characteristic actually affects an employee's ability to perform the job.[114] If an employee's pregnant condition is only incidental to job performance, the discrimination is not justifiable as a BFOQ.[115] Therefore, in the *Tylo* case, the BFOQ defense hinges on the conflicting facts asserted by Tylo and Spelling concerning the nature of the role she was hired to portray.[116]

1. When Pregnancy Is Incidental to Job Performance

Tylo argues that she was hired to play a female character but the producers informed her "that no specific character for her role on *Melrose Place* had been written."[117] If no specific role had been established for Tylo at the time she was hired, she has a strong argument that nonpregnancy was not essential to the job.[118]

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109. *Id.* at 191.

110. *Id.* at 199–200.

111. *Id.* at 204.

112. *Johnson Controls*, 499 U.S. at 188 (citing Dothard v. Rawlinson, 433 U.S. 321, 333, 335 (1977)).

113. *Id.* at 204 (quoting 42 U.S.C. § 2000e(k) (1994)).

114. *Id.*

115. *Id.*

116. *See* discussion *infra* Part III.B.1–2.

117. Tylo v. Spelling Ent. Group, Inc., No. BC149844, 3–4 (Cal. Super. Ct. filed May 13, 1996).

118. *See Johnson Controls*, 499 U.S. at 204.

There is no general requirement of nonpregnancy for an actress in a television series. Many actresses have successfully performed a variety of roles while pregnant by merely concealing their pregnancy from the audience. Michelle Pfeiffer filmed *Dangerous Minds* while pregnant with no problems more serious than occasional heartburn.[119] Actress Roma Downey played an angel throughout her pregnancy in the television drama *Touched by an Angel*, although pregnancy was completely incompatible with her role as an angel.[120] Similarly, when two of the principal actresses on the television program *Cheers* became pregnant, it did not affect the consistently high ratings earned by the show.[121] The producers chose to camouflage Shelley Long's pregnancy with inventive staging and the use of props, while Rhea Pearlman's pregnancy was easily incorporated into the story line and simply became another aspect of her character, the "ever-fertile Carla."[122]

Under *Johnson Controls*, discrimination can only be defended as a BFOQ if it actually interferes with the job.[123] As the many examples of working pregnant actresses show, pregnancy does not incapacitate an actress, nor does it automatically impede a production. Therefore, if Tylo's pregnancy would not have affected her ability to portray the character for which she was hired, the BFOQ defense is irrelevant. Further, if Tylo was hired to play an unspecified female character on *Melrose Place*, as she contends, then her pregnancy would not substantially interfere with her ability to perform the job for which she contracted.[124]

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119. Lois Romano, *The Reliable Source*, WASH. POST, July 12, 1995, at D3.

120. Warrick, *supra* note 15, at E1.

121. Bill Carter, *The Tonic That Keeps "Cheers" Bubbling Along*, N.Y. TIMES, Apr. 29, 1990, § 2, at 35 (stating that *Cheers* remained highly rated and highly regarded even after it had been in production for several years).

122. Warrick, *supra* note 15, at E1.

123. International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 204 (1991).

124. Some commentators have suggested that the producers of *Melrose Place* were less inclined to accommodate Tylo's pregnancy because she had not yet debuted on the show at the time she became pregnant. *See* O'Connell, *supra* note 16, at E1. Such assertions imply that pregnant actresses must rely on their personal negotiating power rather than reliable legal protections to retain their jobs. The less established actress is precisely the employee that requires the protection of the PDA. If employers could justify pregnancy discrimination on a sliding scale determined by the employee's prominence in the profession, it would return the most vulnerable women in the workforce to the unprotected status they endured prior to the passage of the PDA.

2. When Nonpregnancy Is Essential to Job Performance

Contradicting Tylo's claim, Spelling contends that Tylo was cast to play a very specific character. The producers maintain that Tylo's character was "a seemingly happily married woman who starts having affairs . . . ."[125] They assert that Tylo's pregnancy made her unable to perform that role because the character was "by necessity not pregnant,"[126] therefore, non-pregnancy is a "proper and legal consideration" that can be defended as a BFOQ.[127]

If, as Spelling contends, the pregnancy would interfere with Tylo's ability to perform the job for which she was hired, then the BFOQ defense becomes viable.[128] If Spelling can show that there was no way to disguise or conceal Tylo's pregnancy without a substantial modification of the role, then nonpregnancy would be a BFOQ for the job.[129]

For example, if the only way to accommodate Tylo's pregnancy required rewriting the script and incorporating Tylo's pregnancy into the story line, then Spelling was being asked to change the essential nature of the job to accommodate Tylo's pregnancy. The PDA does not require an employer to make special accommodations for a pregnant employee.[130] Therefore, if a specific character could not be played by a pregnant actress, then under the applicable standards nonpregnancy is a BFOQ.[131] However, even though Spelling may not be required to rewrite the role for Tylo, there remains some burden on the employer to accommodate a pregnant actress.[132]

IV. THE BURDEN ON THE EMPLOYER OF RETAINING A PREGNANT ACTRESS

A. Equal Treatment Under the Pregnancy Discrimination Act

Some commentators have suggested that the primary issue in the *Tylo* case is the extent to which a producer must accommodate a pregnant

125. Warrick, *supra* note 15, at E1.

126. Letter from Cortez Smith to Hunter Tylo, *supra* note 12, at 1.

127. Warrick, *supra* note 15, at E1.

128. International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 204 (1991).

129. *Id.*

130. *See* H.R. REP. NO. 95-948, at 4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749.

131. *See Johnson Controls*, 499 U.S. at 204.

132. *See* 42 U.S.C. § 2000e(k) (1994); H.R. REP. NO. 95-948, at 4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749.

actress.[133] As one attorney queried, "What burden are we going to place on movie studios or television production companies who hire [actresses] to accommodate [actresses] who may become pregnant, and how unreasonable or reasonable do those steps have to be to accommodate those roles?"[134]

The PDA establishes a basis for determining the burden on the employer. Under the PDA's equal treatment model,[135] employers are not required to provide special accommodations; they are only required to be consistent.[136] Therefore, Spelling has the right to provide or refuse to provide accommodations as it sees fit, as long as it treats all similarly situated actors and actresses the same. If pregnancy does not rise to the level of a BFOQ, a comparable accommodation is achieved by any additional concession by the producers that aids an actor or actress in reasonably performing the role.

To avoid liability under the PDA, Spelling must establish that the accommodations requested by Tylo substantially exceed anything that Spelling has provided to other performers. In other words, Spelling must show that anytime an actor or actress has been unable to perform without special accommodations, Spelling has terminated them. However, it is extremely unlikely that the company can establish that it is consistently so unaccommodating.

The general practice in the industry is to provide ample accommodations to actors and actresses in starring roles. For example, another Spelling production was very accommodating to a pregnant actress. When Gabrielle Carteris, who played Andrea Zuckerman on *Beverly Hills 90210*, became pregnant, the producers wrote her pregnancy into the script and even hired an additional actor to play Andrea's husband and the fictional baby's father.[137]

Furthermore, accommodations for pregnancy are not the only relevant sources for comparison. Any additional concession to actors or actresses that allows them to overcome a temporary impediment and

133. *See Showbiz Today*: Aug. 20, 1996, *supra* note 15.

134. *Id.*

135. The equal treatment theory is based on the assumption that where there is no difference between the sexes, they should be treated the same. Where there are biological differences between the sexes, these can be analogized to a similar condition that men have as well. D'Andra Millsap, Comment, *Reasonable Accommodation of Pregnancy in the Workplace: A Proposal to Amend the Pregnancy Discrimination Act*, 32 HOUS. L. REV. 1411, 1424–26 (1996).

136. *See* H.R. REP. NO. 95-948, § 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749.

137. Hodges, *supra* note 19, at 1.

continue working on the production provides a basis for comparison.[138] For example, Michelle Pfeiffer's contract for the film *One Fine Day* stipulated that she would only work for twelve hours a day so she could tuck her children into bed at night, and shooting had to end prior to the date her daughter was to begin preschool.[139] Despite pursuing a successful film career, George Clooney has remained a regular on the television series *ER* because the *ER* producers "have been extraordinarily cooperative when it comes to giving him time off to take advantage of all the good movie offers landing on his doorstep."[140] When Kelsey Grammer unexpectedly checked himself into the Betty Ford Center, the producers of his television show, *Frasier*, began shooting scenes "piecemeal" around the actor, allowing him to shoot his few remaining scenes upon his return.[141]

Based on industry practice and Spelling's prior actions, it can easily be established that Spelling has, at some time, altered a production schedule to accommodate an actor's schedule, adjusted camera angles to emphasize or de-emphasize a specific physical feature, or altered a costume for the loss or gain in a performer's weight. Any such accommodations made by the producers of *Melrose Place* would require that they provide accommodations for pregnancy. For example, consistent accommodations would have required Spelling to begin production earlier and shoot intimate scenes before Tylo's pregnancy became apparent. Alternatively, it would have been necessary to delay shooting Tylo's scenes until she returned from leave. The most feasible and generally utilized means of handling an actress' pregnancy, though, is merely to conceal or avoid filming the actress' developing abdomen.[142]

B. The Connotations of Pregnancy: An Unreliable Basis for Legal Precedent

The success of a television show can be significantly affected by intangible factors such as the image it projects or the subjective associations by the audience. Arguably, the audience's reaction to the

138. *See* H.R. REP. NO. 95-948, at 4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749.

139. Duane Dudek, *'Day' and Date: Clooney and Pfeiffer Discuss Their New Movie and Their Old Flames*, PITT. POST-GAZETTE, Dec. 24, 1996, at D8.

140. Ivor David, *Hollywood Buys into George Clooney's Star Power*, CHI. TRIB., Jan. 3, 1997, at D.

141. Valerie Kuklenski, *The Show Must Go On*, UPI, Oct. 3, 1996, *available in* LEXIS, News Library, Wires File.

142. *See* discussion *supra* Parts III.B.1.

knowledge that Tylo was pregnant (even though the character was not) should be considered when balancing the burden to the employer.[143]

Chambers v. Omaha Girls Club, Inc.[144] assessed an analogous situation in which an unmarried African-American woman was fired from her job as a camp counselor when she became pregnant because the club felt she was not a proper role model.[145] The club premised the firing not on her ability to function as a camp counselor, but rather on what the employer felt Chambers' pregnancy represented.[146] Similarly, Spelling might argue that employing a pregnant actress is inconsistent with the *Melrose Place* image of sex appeal.

Although the employer openly admitted that Chambers was discharged solely because of her pregnancy, the district court approached the situation as a race-based disparate impact, and upheld the discriminatory treatment as a business necessity.[147] The court reasoned that nonpregnancy was necessary to the job of camp counselor because it "may well be viewed by teenage women as a 'tacit' approval by the Girls Club of teenage pregnancies," contrary to the philosophy of the club.[148] On appeal, the Eighth Circuit concluded that although the dismissal may actually have been explicit discrimination, the business necessity defense established by the district court would suffice.[149]

In a highly critical dissent to the denial of a rehearing, Senior Judge Lay pointed out that the court sitting *en banc* failed to appreciate the fundamental differences between the business necessity defense and the BFOQ defense by holding them to be virtually interchangeable.[150] In addition, the circuit court discounted the Supreme Court's guidance, which required the BFOQ defense be "inextricably connected to the essence of a particular job."[151] Judge Lay contended that the circuit court's decision endorsed the "employer's subjective beliefs without any proof whatsoever that Chambers was unable to satisfactorily perform her duties as an arts

143. O'Connell, *supra* note 16, at E1 (arguing that *Melrose Place* is a popular series because of its predictable focus on "preternaturally slim, beautiful people").

144. Chambers v. Omaha Girls Club, Inc., 629 F. Supp. 925, 929 (D. Neb. 1986), *aff'd*, 834 F.2d 697 (8th Cir. 1987), *reh'g denied*, 840 F.2d 583 (8th Cir. 1988) (en banc).

145. *Id.*

146. *Id.* at 928–29.

147. *Id.* at 929.

148. *Id.* at 951.

149. Chambers v. Omaha Girls Club, Inc., 834 F.2d 697, 704 (8th Cir. 1987).

150. Chambers v. Omaha Girls Club, Inc., 840 F.2d 583, 585 (8th Cir. 1988) (en banc) (Lay J., dissenting).

151. *Id.* at 586 n.7 (emphasis omitted).

and crafts instructor."[152] He concluded that such careless application of the standards allowed employers to indulge in their personal biases toward pregnancy and sex in contradiction to the precepts of the law.[153] This decision exemplifies the problems with allowing subjective perceptions to provide a basis for legal discrimination. Such an unclear standard allows for unprincipled decisions and the opportunity for employers to indulge their individual biases about pregnancy and employment.

Analogous to the Omaha Girls Club's reluctance to retain an unmarried pregnant woman, Spelling may not be interested in retaining a pregnant actress because of the impact it may have on the image of the television show. Spelling may conclude that a pregnant woman, regardless of her ability to play the part, conveys a mature, even maternal, image that Spelling finds inconsistent with the image of *Melrose Place* as "a steamy series, featuring a cast of vixens and hunks."[154]

However, there is no clear indication that pregnancy discrimination is defensible based on intangible notions of image or perception.[155] Previous assertions based on such abstract considerations have been held inapplicable to the individual's ability to perform the job. In *Johnson Controls*, potential fetal endangerment liability was held insufficient as a basis for employment discrimination.[156] A woman could not be excluded from the workplace merely because of a subjective assessment by the employer that fertility was incompatible with the job.[157] Similarly, the *Chambers* decision is highly questionable because of the unprincipled manner in which the judges reached their conclusion. By assuming standards to reach the desired result, the circuit court evaded the essential question of whether non-pregnancy was essential to Chambers'

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152. *Id.* at 586.

153. *Id.* at 587.

154. *Showbiz Today*: Aug. 20, 1996, *supra* note 15.

155. *See Chambers*, 840 F.2d at 585 (Lay, J., dissenting). Relying on the Supreme Court's guidance in Dothard v. Rawlinson, 433 U.S. 321 (1977) and the Fifth Circuit's decision in Levin v. Delta Air Lines, Inc., 730 F.2d 994, 998–99 (5th Cir. 1984), Chief Judge Lay summarized the requirements for justifying pregnancy discrimination:

> The BFOQ defense in a pregnancy discrimination case thus invokes only an extremely narrow inquiry: (1) what are the requirements of the *particular* job in question; and (2) is there objective and compelling proof that the excluded woman is unable to perform the duties that constitute the essence of that job because of her pregnancy.

Chambers, 840 F.2d at 585 (Lay, J., dissenting).

156. International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 204 (1991).

157. *Id.* at 203–04 ("[T]he BFOQ . . . is not so broad that it transforms [a] deep social concern into an essential aspect of battery making.").

performance as a camp counselor.[158] As Senior Judge Lay maintained, such secondary considerations allow the employers to make employment decisions based upon their own subjective prejudices about pregnancy.[159] Such unprincipled decisions should not be tolerated and can only be avoided if courts base their decisions on well-founded, objective criteria. This is the lesson from *Johnson Controls*—pregnancy discrimination can only be justified if it actually impedes a worker's ability to do her job.[160] Undeniably, stereotypical assessments of what pregnancy could potentially imply are not such criteria.

Similarly, the impact of a pregnant actress on the image of a sexy prime-time soap opera would appear to be an analogous consideration that courts should be reluctant to uphold. Not only is such a broad extension of the BFOQ defense inconsistent with the narrower application assessed by the relevant cases,[161] but basing legal theory on societal perceptions is extremely transitory and unstable. Even if an actress' pregnancy cannot be completely disguised, the slight inconsistency that it might create with the story line does not necessarily destroy the effectiveness of the production.

V. CONTRACTUAL RIGHT TO TERMINATE: A MANIPULATION OF THE STANDARDS

A. A Disparate Impact Claim

Under the alternative theories for pursuing a claim of pregnancy discrimination under Title VII, it is possible to approach Tylo's claim as disparate impact rather than disparate treatment. Spelling, in defending its position, is careful to point out that Tylo was discharged under a clause in her contract, providing that she could be terminated if there was "a material change in [her] appearance."[162] Although Tylo's material change is premised upon her pregnancy, actors as well as actresses would be subject to termination if they gained or lost significant amounts of weight, cut or grew hair, or had cosmetic surgery, for example. Therefore, the policy is theoretically neutral in its effect.

158. Chambers v. Omaha Girls Club, Inc., 840 F.2d 583, 585–86 (8th Cir. 1988) (Lay, J., dissenting).

159. *Id.* at 587.

160. *Johnson Controls*, 499 U.S. at 204.

161. *See supra* Part III.B.; *see also* Western Air Lines, Inc. v Criswell, 472 U.S. 400 (1985) (limiting the scope of the BFOQ exception in the related area of age discrimination).

162. Letter from Cortez Smith to Hunter Tylo, *supra* note 12, at 1.

If a court agrees that Tylo's claim extends from a neutral employment policy, she must establish that the material change of appearance clause has a disproportionately negative impact on pregnant women.[163] Tylo must show that the clause will always result in the contractual right of the employer to terminate a woman who decides to conceive a child, a consequence that will never be forced upon an actor who decides to become a father.[164]

The *Tylo* case shows just how easily an employer can shift a discrimination case from one of disparate treatment, which can only be defended as a BFOQ, to one of disparate impact, which is justifiable by the less rigorous standard of a business necessity.[165] Conceivably, by incorporating the material change of appearance clause in the contract with Tylo, Spelling created a claim premised on disparate impact.[166] Considering that Tylo signed the contract, presumably with the advice of counsel, it will be difficult to argue that she is not bound by its terms unless she can establish that the clause is illegal, and therefore, unenforceable.

To prove her claim of disparate impact, Tylo must prove that actresses who sign similar clauses and then become pregnant are fired more often than performers who are not pregnant and are fired under these clauses.[167] Establishing such a claim would require data and statistical analysis of practices in the entertainment industry to prove that such a disparate impact has occurred. For example, in *Griggs*, the Supreme Court relied on North Carolina census statistics and test results compiled by the EEOC.[168] In *Chambers*, the court relied on county statistics on birth rates within certain age groups to establish that unmarried, African-American women would be affected in greater proportions by the role model rule imposed by the Omaha Girls Club.[169] For Tylo, compiling data on the termination rates of pregnant actresses who have signed contracts containing material change of appearance clauses could be extremely difficult and even financially prohibitive.[170]

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163. 29 C.F.R. § 1604.10(c) (1996).

164. *Id.*

165. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994); *see* International Union, UAW v. Johnson Controls, 499 U.S. 187, 188 (1991) (asserting that the business necessity standard in disparate impact cases is a less stringent standard than required by the BFOQ defense).

166. *See* Letter from Cortez Smith to Hunter Tylo, *supra* note 12, at 1.

167. *Business Necessity Standard*, *supra* note 42, at 898.

168. Griggs v. Duke Power Co., 401 U.S. 424, 430 n.6 (1971).

169. Chambers v. Omaha Girls Club, Inc., 834 F.2d 697, 701 n.12 (8th Cir. 1987).

170. Performers' unions do collect statistical data to track casting based on race and gender. However, they do not regularly tract the existence of material change clauses in

Assuming that Tylo was successful in establishing a prima facie case of disparate impact, Spelling could defend the practice by arguing that consistent appearance is a business necessity.[171] To justify an employment policy that disproportionately impacts a protected group, the employer must establish that there is a "demonstrable relationship [between the policy and the] successful performance of the job for which it was used."[172] The Supreme Court has maintained that the business necessity standard is not as narrowly defined as the BFOQ standard.[173] However, since the standard was codified in the Civil Rights Act of 1991,[174] there has been no definitive clarification of its requirements.[175]

Nevertheless, the relevant considerations in applying the business necessity standard to a claim of pregnancy discrimination by an actress appear comparable to the BFOQ argument. Both standards require that the producer establish that nonpregnancy is necessary to the production. Therefore, the same arguments are applicable as discussed in relation to the BFOQ defense. Tylo must establish that by disguising her pregnancy she could have adequately performed the role for which she was hired.

B. Disparate Impact Remedies: A Violation of the PDA

Unfortunately, there are indications that disparate impact claims in pregnancy discrimination suits may not be readily upheld by the courts. The remedy for an employment policy that uniformly applies to all employees but disproportionately discriminates against pregnant workers potentially requires special accommodations for pregnancy. Providing such a remedy conflicts with the PDA's explicit pronouncement that preferential treatment for pregnancy is not required.[176] For example, in *Troupe v. May Department Stores Co.*,[177] Kimberly Troupe brought a claim of pregnancy discrimination when she was terminated the day before

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pregnant actresses' contracts. *E.g.*, Screen Actors Guild Casting Data Report, Screen Actors Guild Television Agreement of 1989 for Independent Producers, Exhibit G at 160–61.

171. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994).

172. *Griggs*, 401 U.S. at 431.

173. International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 198 (1991).

174. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

175. *Business Necessity Standard*, *supra* note 42, at 910.

176. *See* Melissa Feinberg, Note, *After* California Federal Savings & Loan Association v. Guerra*: The Parameters of the Pregnancy Discrimination Act*, 31 ARIZ. L. REV. 141, 151–52 (1989) (maintaining that if the Supreme Court follows the equal treatment premise contained in the legislative history, disparate impact claims for leave and benefit policies may not be successful).

177. 20 F.3d 734 (7th Cir. 1994).

she was to begin her maternity leave.[178] Troupe worked as a saleswoman during her first trimester and suffered severe morning sickness.[179] She asked for, and was placed on, part-time status, but she still arrived late or left early on twenty-three separate occasions between February and June.[180] After several warnings, the store terminated her due to her excessive tardiness.[181] Troupe brought a pregnancy discrimination suit, contending that she was fired because the store management did not believe that she would return to work and it did not want to pay her benefits during her maternity leave.[182]

The court found the policy facially neutral, and failed to consider the possibility that a dismissal policy for excessive tardiness or absenteeism would have a disparate impact on pregnant women.[183] As a result, the court granted summary judgment against Troupe on two grounds. First, Troupe presented no statistical evidence of the policy's disproportionate effect on pregnant women to support a pregnancy discrimination claim. Second, the PDA does not require preferential treatment of pregnant workers, and there was no showing that other temporarily disabled workers were excused under the policies regarding tardiness.[184]

The only remedy available to Troupe would have been to excuse her tardiness because she was temporarily disabled by her pregnancy. However, excusing Troupe would constitute special treatment. The employer would be making a concession not extended to other temporarily disabled employees. Therefore, the disparate impact of the company's tardiness policy on pregnant women could never be reconciled with the requirements of the PDA.[185]

Although the Supreme Court has not addressed the contradiction between the PDA and a remedy for disparate impact, in *California Federal Savings & Loan Ass'n v. Guerra,*[186] the Court confirmed the equal treatment premise underlying the PDA. Justice Marshall, writing for the Court, agreed with the conclusion that Congress intended the PDA to be "a

178. *Id.* at 735–36.

179. *Id.* at 735.

180. *Id.*

181. *Id.*

182. *Id.* at 736.

183. *Troupe*, 20 F.3d at 738. The court acknowledged that other courts had recognized pregnancy discrimination based on disparate impact but dismissed it here stating, "properly understood, disparate impact as a theory of liability is a means of dealing with the residues of past discrimination, rather than a warrant for favoritism." *Id.*

184. *Id.* at 738–39.

185. *See* Feinberg, *supra* note 176, at 151–52.

186. 479 U.S. 272 (1987).

floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise."[187] However, the Court reiterated that the PDA did not require employers to institute "any new programs where none currently exist."[188] The implication, therefore, is that in cases of disparate impact, the Court will be unwilling to require employers to implement additional protections for pregnant employees to equalize the disparate effect of a policy.[189]

Under a disparate impact claim, Tylo would be combating the same obstacles that Troupe could not overcome in her pregnancy discrimination suit, probably with no greater success. First, it is unlikely that Tylo would be able to compile the statistical data required to prove disparate impact. Second, the remedy would require that Spelling exempt her from the termination clause, resulting in special treatment not extended to other employees and, hence, not required by the PDA.[190]

VI. A BALANCING OF INTERESTS

In every employment situation, the employer and employee have competing interests that require balancing. Consistent with this notion, Congress enacted the Pregnancy Discrimination Act because job security is sufficiently important to tip the balance in favor of the pregnant employee in the workplace.[191] The only additional balancing that is required in this instance relates to who should bear the burden of coping with the inevitable changes in appearance caused by pregnancy. The choices available to the actress are the same as those of any other pregnant employee left without reliable legal securities. She can terminate the pregnancy to retain her job or contend with sudden unemployment and the uncertainty it includes.[192] Undeniably, being unemployed and pregnant is a serious problem for a woman in any profession.

It is equally apparent that requiring producers to provide accommodations for an actress' pregnancy so that she can continue to perform places a burden on the employer. Changing shooting schedules, adjusting camera angles, altering costumes, and positioning props can be

187. *Id.* at 280 (quoting California Fed. Sav. & Loan Ass'n v. Guerra, 758 F.2d 390, 396 (9th Cir. 1985)).

188. H.R. REP. NO. 95-948, at 4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749.

189. *See* Millsap, *supra* note 135, at 1422; *see also* Feinberg, *supra* note 176, at 151. *But see California Fed. & Loan Ass'n*, 479 U.S. at 292 (Stevens, J., concurring) (stating that under the principles of Title VII, the PDA does not prevent preferential treatment).

190. H.R. REP. NO. 95-948, at 4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4752.

191. *Id.* at 2.

192. *See* Gloria Allred, Statement to the Press, *supra* note 20, at 2–3.

time consuming and costly. In addition, television producers strive for a high level of authenticity in their productions and incorporating an actress' pregnancy makes this more difficult to achieve. However, it may be necessary for the producers to sacrifice some of that authenticity to provide socially responsible job protection to pregnant actresses.

It is not unprecedented for an entertainment medium to sacrifice a portion of the production's genuineness in consideration of a more valuable interest. For example, in the Shakespearean Era, all the major female roles were played by men or young boys.[193] No actresses played in the public theaters during this time.[194] Sexism was a value that society placed above the need for authenticity in the theater, and the convention of the all-male cast did not place significant restraints on Shakespeare's invention, nor impede the enjoyment by the audience.[195]

Similarly, the established star system caused opera to evolve into race-neutral casting.[196] Singers are chosen as early as five years in advance of their performance based on reputation, skill, and virtuosity.[197] An appropriate physical characterization is not a criterion for selecting a star performer. The audience places a higher value on the singer's individual talent and simply overlooks any inconsistencies between the character and the performer's physical appearance.

A similar tolerance for pregnancy in the television industry is possible, even if it requires the medium to slow its quest for virtual reality. The benefit of women in the workplace and the ability of an actress to be free of pregnancy discrimination in employment are sufficient to justify tipping the balance of values in favor of the actress.

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193. CECILE DE BANKE, SHAKESPEAREAN STAGE PRODUCTION THEN & NOW 115–16 (1954).

194. W. ROBERTSON DAVIES, SHAKESPEARE'S BOY ACTORS 3 (1964).

195. Inconsistencies in gender continue to be disregarded in contemporary Shakespearean Theatre, but in this case, to promote the value of an all-female cast. The Los Angeles Women's Shakespeare Company has received critical acclaim for its all-female productions of *Romeo and Juliet*, *Othello*, and *Hamlet*. The company's production of *Richard III*, suggests that authentic physical appearance is not necessary to a successful theatrical production. "[L]ittle effort [is made] to hide [the fact] that all [the] actors are female: They don't bind their chests or do much to their hair, nor do they affect beards. Yet one quickly becomes oblivious to the actors' gender, because the performances are generally fine and convincing regardless of sex." Lisa D. Horowitz, *Richard III*, DAILY VARIETY, Mar. 25, 1996, at 18.

196. *See* Jeff Bradley, *Changing the Cast System; Racial Barriers Crashing on Stage*, THE DENVER POST, May 8, 1994, § A , at F-1; Ethan Mordden, *A 'Carousel' Rethought for the Age*, N.Y. TIMES, Sept. 12, 1993, § 2, at 5.

197. ROSANNE MARTORELLA, THE SOCIOLOGY OF OPERA 133, 174 (1982).

VII. CONCLUSION

Under either the disparate impact or the disparate treatment analysis, discriminatory firing of a pregnant performer can only be justified if the actress cannot perform the role for which she was hired. If a court determines that Spelling was justified in firing Tylo, even though her pregnancy could clearly be concealed, the precedent will undermine every woman's right to have a child and retain her job. It is not in society's interest to disregard the hard-fought battle for equality in the workplace because the producers of *Melrose Place* may experience inconvenience. A holding for Spelling in this case will severely weaken the PDA by undermining the comprehensive protection against pregnancy discrimination and diminishing the rigid controls placed on justified exemptions.

The *Tylo* case is not merely about one actress who was fired because she did not time her pregnancy appropriately. It is about sexism in Hollywood and the discrimination within the entertainment industry. Allowing pregnancy discrimination based either on a BFOQ standard or the lesser business necessity standard has disturbing implications about a woman's value in the workplace: It suggests that an actress is so dispensable that she must choose between her job or her child. This conclusion is contradictory to the spirit of the statute, the direction of the law, and the interests of society. Society benefits when all members are free to contribute their talents. By placing additional burdens on women because of their reproductive capacity, this freedom is unnecessarily stifled and discouraged. As Justice Blackmun stated in *Johnson Controls*, "women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job."[198]

Lisa Stolzy[*]

198. International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 204 (1991).

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