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# Civil Rights: Judicial Interpretation of Bona Fide Occupational Qualification Exception of 1964 Civil Rights Act

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# Case Comments

## Civil Rights: Judicial Interpretation of Bona Fide Occupational Qualification Exception of 1964 Civil Rights Act

Certain female employees brought an action against Colgate-Palmolive Company for violations of the 1964 Civil Rights Act. Plaintiffs charged that Colgate intentionally discriminated against them by using a system of job classification which denied to females jobs requiring the lifting of over thirty-five pounds and by using separate male and female seniority lists, which resulted in layoffs which were discriminatory to females. The district court *held* that the separate male and female seniority lists and the layoffs made therefrom did not comply with the requirements of Title VII of the Civil Rights Act of 1964, but *held* that the weight standard came within an exception to the Act and therefore was valid. *Bowe v. Colgate-Palmolive Company*, 272 F. Supp. 332 (S.D. Ind. 1967).

Subsequent to the grant of franchise to women by the nineteenth amendment, case law and statutes have made significant strides towards guaranteeing women equal political and employment rights.[1] State laws regulating the conditions of employment of women or prohibiting their employment altogether,[2] and thereby protecting their health and welfare, have been upheld consistently under the doctrine that sex furnishes a reasonable basis for legislative classification.[3] While the laws

1. An equal rights amendment to the Constitution has been proposed every year since 1923. PRESIDENT'S COMM'N ON THE STATUS OF WOMEN, REPORT OF THE COMMITTEE ON CIVIL AND POLITICAL RIGHTS 32 (1963) [hereinafter cited as REPORT ON CIVIL AND POLITICAL RIGHTS]. Recent concern for the legal status of women is evidenced by the adoption of various measures on the state and federal level. *See, e.g.*, Comment, *Jane Crow and the Law*, 34 GEO. WASH. L. REV. 232, 233 (1965) [hereinafter cited as *Jane Crow*]; Exec. Order No. 10,980, 3 C.F.R. at 500 (1961); U.S. CIVIL SERVICE COMM'N, FEDERAL PERSONNEL MANUAL ch. 713-6 to 713-8 (1963); 29 U.S.C. § 206(d) (1964).

2. Examples of this type of legislation are minimum wage and maximum hour laws, and laws which prohibit nightwork in certain occupations or industries or under certain working conditions which are considered hazardous to health and safety. Some of the prohibited occupations are railroad crossing watchmen, bellhops, electric meter readers, and bartenders. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, 1965 HANDBOOK ON WOMEN WORKERS 226-46 (1965).

3. *See* REPORT ON CIVIL AND POLITICAL RIGHTS 34; *Jane Crow* 236 & n.30.

The bases for the states' legitimate legislative interest are the physical, psychological, and social inequalities that exist between the

upheld under this doctrine were once hailed as great social measures necessary for the protection of women,[4] the purpose and necessity of legislation which classifies according to sex is being questioned today.[5] Some statutes may still serve to protect women,[6] but others only discriminate against them for undesirable reasons.[7] Thus, there is an increasing need for re-evaluation in this area.[8]

Just prior to the passage of the 1964 Civil Rights Act, a prohibition against sex discrimination was inserted into Title VII.[9] This provision makes it unlawful for an employer to discriminate against individuals on the basis of sex in hiring or firing and with respect to the compensation, terms, conditions, or privileges of employment.[10] However, there is an exception

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sexes. *See* Muller v. Oregon, 208 U.S. 412, 421-23 (1908). An attempt to limit these bases was made in Adkins v. Children's Hosp., 261 U.S. 525 (1923), where the Court stated that inequalities other than physical had almost reached the vanishing point and legislation could no longer take those inequalities into account. *Id.* at 552-53. *Adkins* was overruled in West Coast Hotel v. Parish, 300 U.S. 379 (1937), and those inequalities other than physical were again allowed as bases for separate treatment of the sexes. *Id.* at 398. Furthermore, since *West Coast Hotel*, interest in the public welfare and morals has also been allowed as a basis for sex classification. *See* Goesaert v. Cleary, 335 U.S. 464 (1948); State v. Burke, 79 Idaho 205, 312 P.2d 806 (1957).

4. Anderson, *Civil Rights and Fair Employment*, 22 BUS. LAW. 513, 522 (1967).

5. PRESIDENT'S COMM'N ON THE STATUS OF WOMEN, AMERICAN WOMEN 7, 44 (1963) [hereinafter cited as AMERCIAN WOMEN]. One writer suggests that the "classification by sex" doctrine should not be shelved alongside the "separate but equal" doctrine. *Jane Crow* 240. Another writer urges that "[m]any 'sacred cows' should die during the next few years as the prohibition against sexual discrimination is applied." Cooksey, *The Role of Law in Equal Employment Opportunity*, 7 B.C. IND. & COM. L. REV. 417, 429 (1966).

6. *See* 272 F. Supp. at 364.

7. *See id.*; AMERICAN WOMEN 36-37; 110 CONG. REC. 2580 (1964) (Rep. Griffiths stated that: "Most of the so-called protective legislation has really been to protect men's rights in better paying jobs").

8. *See* AMERICAN WOMEN 44-45.

9. In the House, the sex amendment was not considered until the day before the passage of the Act. Rep. Howard Smith who proposed the amendment professed to be serious about it, but Rep. Edith Green believed Rep. Smith only meant to clutter up the bill. The result was that opponents of the bill were in favor of the amendment, in hopes it would defeat the bill's passage, while proponents of the bill could only halfheartedly oppose the amendment because it would appear they favored discrimination against women which was a politically dangerous position. Most discussion on the bill was based on emotional reactions and at times bordered on irrelevancy. Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 880-82 (1967).

10. 42 U.S.C. § 2000e-2(a). Similar prohibitions also apply to em-

to the sex discrimination provision which allows hiring and employing on the basis of sex where sex is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business or enterprise."[11] However, because of the late addition of the sex discrimination provision, there exists no useful legislative history to guide the courts in interpreting the exception,[12] although there are other sources to which the courts can look.[13] An excessively broad interpretation of the "bona fide occupational qualification" could subvert the Act's purpose to provide equal employment opportunity,[14] while too strict an interpretation would permit sex discrimination only in extreme cases.[15]

While the *Colgate* court held without discussion that the separate male-female seniority lists clearly violated Title VII, it found, after formulation of a judicial standard to determine the meaning of the exception,[16] that the weight lifting discrimination was within the exception and therefore valid. The court first examined three recently suggested standards[17] for applying the "bona fide occupational qualification" exception to Title VII's prohibition against sex discrimination. The "necessity" test[18] would allow the employer to discriminate where, in the strictest sense, only one of the sexes could perform a particular task, such as working as a fashion model or restroom attendant. The court

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ployment agencies, labor organizations, and training programs. 42 U.S.C. §§ 2000e-2(b)-(d).

11. 42 U.S.C. § 2000e-2(e).

12. The amendment was introduced on the last day of House debate. No committee hearings were held and it was adopted under the "five minute" rule. The House debate covers no more than nine pages of the *Congressional Record.* Vaas, *Title VII, Legislative History,* 7 B.C. IND. & COM. L. REV. 431, 442 (1966). Furthermore, little attention was given to the amendment in the Senate because the leading proponents of the Act felt that any discussion would only delay final passage of the bill. Miller, *supra* note 9, at 882.

13. The courts will consider state legislation, the guidelines established by the Equal Employment Opportunity Commission and other sources such as the International Labor Organization study, discussed note 21 *infra,* as evidenced by the *Colgate* opinion. *See* 272 F. Supp. at 354-55. The EEOC guidelines may be found in BNA Daily Labor Report No. 225, Nov. 22, 1965, at E-1; Schmidt, *Title VII: Coverage and Comments,* 7 B.C. IND. & COM. L. REV. 459, 469 n.19 (1966).

14. *Jane Crow* 244.

15. Miller, *supra* note 9, at 879.

16. Ward v. Firestone Tire & Rubber Co., 260 F. Supp. 579 (W.D. Tenn. 1966), discussed the exception but it did not attempt to formulate a standard by which to interpret it.

17. *See* Note, *Classification on the Basis of Sex and the 1964 Civil Rights Act,* 50 IOWA L. REV. 778 (1965).

18. *Id.* at 794.

found that this narrow interpretation was inconsistent with the language of the Act. The "traditional roles" test[19] would allow an employer to exclude one sex from jobs traditionally performed by the other. This was rejected by the court as repugnant to the purpose of the Act.

The final suggested standard was an "equal protection" test[20] under which courts would utilize the reasoning of decisions based upon the equal protection clause of the fourteenth amendment. This standard would permit employers to discriminate, but only where such discrimination is rationally related to those ends which they have a right to achieve—production, profit, or business reputation. The court concluded that employers could profitably use the equal protection reasoning for guidelines, but proceeded to formulate a standard incorporating equal protection with other elements.

The court considered the employer's motives in establishing the weight limitation. It noted that in imposing the discriminatory standards, Colgate had not been guided by evil intent, but had allegedly wanted to avoid putting women to tests of strength and endurance that might be harmful to them.[21] Although the weight limitation would increase operational efficiency, this was not deemed inconsistent with the safety motive. Moreover, the court found it material that the weight limitation was not adopted in order to avoid the consequences of the Act. The court then concluded that classification on the basis of sex would be permitted on the basis of general, scientifically recognized differences in the physical characteristics, abilities, capacities, and restrictions and limitations of the respective sexes. It cautioned, however, that classification would not be permitted on the basis of traditional roles or stereotyped characteristics of taste, talent, emotions, or tactile ability.

Several difficulties inhere in the court's analysis of the weight lifting limitation issue. One chief difficulty is its treatment of the employer's motives for establishing a discriminatory

19. *Id.* at 795-96.
20. *Id.* at 795.
21. The court and Colgate considered a study held under the auspices of the International Labor Organization. Experts from eleven countries concluded that the maximum permissible weight to be carried by women should be fixed at between 33 and 41.1 pounds. The results were based on psychological, medical, physiological, social, and economic factors and the avoidance of residual fatigue. Special account was taken of the unfavorable effects upon the health and progeny of women. I.L.O. OFFICIAL BULLETIN No. 3 (1964).

practice. This consideration appeared to be material to both elements of the Title VII exception, whether a "bona fide occupational qualification" does exist, and whether it is "reasonably necessary to the normal operation" of the business.

First, in determining the existence of a "bona fide occupational qualification" the concern for health and safety of female employees and a desire to maintain the efficient operation of Colgate's business were seen by the court as acceptable motives while motivation for financial gain was not considered permissible.[22] This acceptance of efficiency and rejection of financial gain as motives is seemingly contradictory since efficiency may often lead to higher profits. When higher profits result from a desire to increase efficiency, such as the exclusion of women from a particular job which they cannot adequately perform, such motive of efficiency, even though resulting in financial gain, should be acceptable. The court implies by its emphasis on the health and safety of female employees that efficiency alone is not an acceptable motive. However, the language of the exception to Title VII seems to make efficiency alone an acceptable motive for excluding one sex from a particular job because of an inability to perform the work sufficiently well to maintain "normal business operation." The purpose of Title VII is to provide equal employment opportunity. If there are prejudices on the basis of which this opportunity is being denied, it should also be the purpose of the Act to create the social atmosphere needed to alleviate the prejudice. Thus, in balancing the desirability of providing equal employment opportunity and eliminating prejudicial social attitudes against some drop in profits, Title VII's prohibition against discrimination should prevail. Any drop in profits would be temporary since all competing employers will be similarly situated and customers will have no choice between one business that discriminates and one that does not.

Having determined that the weight limitation was a "bona fide occupational qualification," the court too abruptly found that the limitation satisfied the second statutory element that the limitation be "reasonably necessary to the normal operation" of Colgate's plant. It could be argued that the exception would be satisfied by a showing that statistically a large percentage of females cannot perform a certain job without disrupting normal operations. Therefore, a discrimination based on this showing alone might be permissible as "reasonably necessary to the nor-

22. 272 F. Supp. 353-57.

mal operation" of a business.[23] However, the court apparently did not restrict "reasonably necessary" this narrowly. The court looked to evidence that it was not commercially practical for Colgate to assess each individual's ability and still maintain "normal business operation."

It is not clear, however, that the court gave the matter of assessing individual ability sufficient consideration. It took the position that since the jobs required lifting over thirty-five pounds, it was not practical to operate without the limitation. No further explanation was given. However, evidence was introduced showing that the jobs could be performed by women on an individual basis with proper instruction and that in fact some plaintiffs already could perform the prohibited work. Furthermore, it was proved that under the old contract, men were assigned to jobs without regard for their ability to perform the work even though Colgate realized that not all men could perform the jobs in an equally efficient manner. From the evidence as to certain plaintiffs' abilities, it can be inferred that some women could perform certain prohibited tasks as efficiently as some men. And since not all women had the seniority necessary to acquire these jobs, it appears that Colgate would be able to determine the capabilities of those having seniority without unreasonably disrupting normal business operations. Such an individual determination would follow from the apparent intent of Title VII to judge women as individuals according to their abilities, rather than as members of a class whose characteristics

23. *Cf.* Air Line Pilots Ass'n, Int'l v. Quesada, 182 F. Supp. 595 (S.D.N.Y.), *aff'd*, 276 F.2d 892 (2d Cir. 1960), *cert. denied*, 366 U.S. 962 (1961), where a blanket prohibition on flying by commercial air carrier pilots over sixty years old was deemed reasonable in light of medical data that at this age, or even younger, deteriorating physical health rendered them increasingly susceptible to heart attacks and other illnesses and the prohibition was considered in the best interests of air safety. The court held that it was not necessary to give each pilot a hearing to determine his particular health status even though he might be in good physical condition not only because it was not required by the Federal Aviation Act, 49 U.S.C. § 1421, *see* 276 F.2d at 896-97, but also because the public interest in the matter was strong due to the disastrous consequences that could result in the event of an air fatality.

In the pilot situation, there is a federal agency operating under a congressional directive whose judgment, if reasonable, will not be replaced by the court's. *See* 182 F. Supp. at 599. However, in an employment situation such as in *Colgate*, an employer is exercising a private judgment as to whether the discrimination is reasonably necessary to the normal operation of his business and so the element of a wrong decision resulting in disaster is missing. Therefore, it would be reasonable to require testing on an individual basis where it would not impose too great a burden on the employer.

the individual may or may not possess.[24]

Motive appears to be a factor in the court's decision as to the weight lifting discrimination. The court noted that the seniority and job assignment system under the new contract, of which the weight limitation is a part, was the result of the pressures and compromises of the collective bargaining process and, thus, was not adopted in order to avoid the consequences of Title VII.[25] Thus, it may be inferred that had the system been implemented to avoid Title VII, the court would have required Colgate to establish procedures which would provide for testing ability on an individual basis. Thus, if two similar systems existed and one was developed through the bargaining process over a period of years while the other was implemented so as to take advantage of a "bona fide occupational qualification," the former system would be sustained on what would logically seem an immaterial difference. The only relevant determination should be whether alternatives are available which would either alleviate the discrimination or reduce its extent without creating unreasonable hardship to the normal operation of the business.[26] In this way the process of balancing the purpose of Title VII and the burden imposed on the business could best be implemented to achieve the desirable result.

A separate difficulty arises from the court's blanket prohibition against stereotyped characteristics as the basis for discrimination. Those physical differences between the sexes which may come within the exception to Title VII might be identical to stereotype characteristics which were declared by the court not to fall within the exception. For example, that women generally are not capable of strenuous physical work is a stereotype attitude. On the other hand, the court determined that this was a physical difference on which discrimination could be based. The court's citation of scientific data[27] showing such a difference supports the court's decision. Thus, rather than reject all stereotypes per se, it would be better to allow discrimination based on

24. *Jane Crow* 239; LRX LAB. REL. REP. 1882.

25. 272 F. Supp. at 357.

26. The Equal Employment Opportunity Commission cautions against disrupting longstanding employment practices resulting from collective bargaining agreements without achieving compensating benefits in terms of equal employment opportunity. *See* LRX LAB. REL. REP. 1835. Businesses should not be required to radically rearrange jobs, but should make some adjustments to avoid unnecessary layoffs. *See In re* Whittaker Corp. v. International Ass'n of Machinists, Local 575, 44 Lab. Arb. 152, 153 (1965).

27. *See* note 32 *supra* and accompanying text.

differences which are grounded on something more reasonable and concrete than popular value judgments.

Finally, the court apparently was influenced by state legislation fixing weight limits for women and the Equal Employment Opportunity Commission's finding that it could not assume that Congress by passing Title VII intended to strike down such state legislation.[28] Reliance per se on the existence of legislation is unwarranted for several reasons. Some of these state laws, although originally for valid protective reasons, have ceased to be relevant to modern technology or the expanding role of women in the economy.[29] Also, many of these laws were passed so many years ago that the data on which they were based might now be obsolete,[30] or the attitude which prompted their passage might have been based on stereotypes unsupported by scientific data.[31] Furthermore, the laws themselves may deny equal employment opportunity and thus must yield to Title VII under the supremacy clause.[32]

As a corollary to this argument, a reliance on EEOC determinations is justifiable to some extent because of the Commission's expertise in the area, but this does not mean that the rationale underlying EEOC determinations should go unquestioned. This is of necessity true in the area of state legislation where the new policy of the EEOC has been to refrain from making determinations on the merits where Title VII and state laws conflict, and to advise the parties of their right to bring suit in an effort to secure judicial determination of the matter.[33]

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28. 272 F. Supp. at 354-55, 361.

29. *See Enforcement of Sex Discrimination Ban Under Title VII*, 1966 LAB. REL. REP. YEAR BOOK 167, 168.

30. *See Jane Crow* 237; *Call by EEOC for Court Challenge to State Law*, 1966 LAB. REL. REP. YEAR BOOK 355.

31. *See* Muller v. Oregon, 208 U.S. 412 (1908). The Court stated that when there is doubt as to whether the inequalities between the sexes do exist, widespread and long continued beliefs concerning the matter are worthy of consideration. Such widespread beliefs include the idea that women's physical structure and maternal functions place her at a disadvantage in the struggle for subsistence, that women have always been dependent on men, that the sexes differ in functions performed by each, amount of physical strength, and capacity for long continued labor. *Id.* at 420-22.

32. 42 U.S.C. § 2000e-7.

33. *See* LRX LAB. REL. REP. 2062. But in one case before the Arizona Civil Rights Commission, where a state law restricting women's work week to forty-eight hours came into direct conflict with the state and federal civil rights laws, the civil rights laws controlled. *See* Reynolds v. Mountain States Tel. & Tel. Co., Case No. 17-12E (Arizona Civil Rights Comm'n, Dec. 2, 1966); *Women's Protective Laws Versus Civil Rights Acts*, 1966 LAB. REL. REP. YEAR BOOK 370.