Civil Rights Act of 1964 - Title VII - Sex Discrimination - Pregnancy - Defenses

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CIVIL RIGHTS ACT OF 1964—TITLE VII—SEX DISCRIMINATION—PREGNANCY—DEFENSES—The United States Court of Appeals for the Ninth Circuit has held that an airline's employment policy mandating immediate unpaid maternity leave for all flight attendants upon discovery of pregnancy is sex discrimination but is justified by safety considerations.

Harriss v. Pan American World Airways, Inc., 649 F.2d 670 (9th Cir. 1980).

In 1977, Ute Harriss and Margaret Feather instituted a class action suit charging their employer, Pan American World Airways, Inc. (Pan Am), with sex discrimination in violation of Title VII, sections 703 (a)(1) and (2) of the Civil Rights Act of 1964.1 The plaintiffs challenged Pan Am's policies mandating immediate unpaid maternity leave for all flight attendants upon discovery of pregnancy (Stop Policy), prohibiting their return to work until at least sixty days after giving birth (Start Policy), denying them accrual of seniority after the first ninety days of leave, and refusing them sick leave benefits during the leave.2 Pan Am's Stop Policy requires a pregnant flight attendant to notify her supervisor immediately upon discovery of pregnancy. Failure to do so constitutes voluntary resignation from Pan Am.3 Pan Am's Start Policy requires that the flight attendant remain on unpaid leave until sixty days after delivery, and it further requires that

   It shall be an unlawful employment practice for an employer—
   (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
   (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

2. 437 F. Supp. at 414.

3. Id. at 415-16.
she return to work within ninety days after giving birth. At the
time this litigation was initiated a flight attendant on pregnancy
leave accrued no seniority beyond the first ninety days of leave
and lost sick pay and some medical insurance coverage. Like
medical and emergency leave, Pan Am classified pregnancy leave
as a nondiscretionary leave. An employee on medical leave,
however, receiving full sick leave benefits, accrued seniority for
a maximum of three years.

The United States District Court for the Northern District of
California, in denying the plaintiffs' requests for injunctive relief
or damages, held that Pan Am's Stop and Start Policies con-
stituted prima facie sex discrimination because their result was
to disproportionately exclude women from employment tem-
porarily. The district court found, however, that Pan Am had
not violated Title VII because safety considerations—the risk
that a pregnant or post-partum flight attendant would unpredict-
ably suffer complications during an emergency landing—justified
these policies as a business necessity and bona fide occupational
qualification (BFOQ). The district court held that neither the
seniority policy nor the sick leave policy constituted prima facie
sex discrimination.

4. Id. The leave could be extended from 60 to 90 days upon request, and
further reasonable extensions would be granted for medical reasons. Id. at 416.
5. Id. at 416-17. An employee taking a discretionary leave, which may be
granted for personal reasons, accrued seniority for only the first 90 days away
from work. Id.
6. The district court determined that the plaintiffs' action could be main-
tained as a class action on behalf of "all female flight attendants who have been
employed as such by [Pan Am] after October 24, 1972, or who may be so
employed . . . in the future." Id. at 414 (quoting Harriss v. Pan Am. World Air-
ways, Inc., 74 F.R.D. 24, 48 (N.D. Cal. 1977)).
7. 437 F. Supp. at 431.
8. Id. at 420-24, 434-35. The district court found that the possibility of
spontaneous abortions and disabling nausea or fatigue was unpredictable.
Therefore, pregnant flight attendants ran the risk of becoming incapacitated
during flight and, more importantly, when called upon to participate in
emergency evacuations. Moreover, Pan Am offered evidence to show that the
risk of post-partum hemorrhaging cannot be assessed without a medical ex-
amination. Two of Pan Am's witnesses maintained that an accurate examination
could not be performed until six weeks after delivery. Id. at 424.
9. Id. at 434.
10. Id. at 436-37. The district court relied on General Electric Co. v.
Gilbert, 429 U.S. 125 (1976), where the United States Supreme Court held that
the exclusion of pregnancy-related disability from an employer's otherwise com-
Harriss and Feather appealed to the United States Court of Appeals for the Ninth Circuit, which held that the Stop Policy constituted prima facie sex discrimination, but was justified by safety considerations. The Start Policy was also found to be prima facie discriminatory; however, the circuit court remanded this issue because the district court's findings of fact were insufficient to determine whether the Start Policy was justified. The court of appeals found Pan Am's seniority policy to be prima facie discriminatory, and remanded for a determination of whether the policy was nonetheless justified as a business necessity or BFOQ. In 1978, between the time of the district court decision and the appeal, Congress passed an amendment to the Civil Rights Act of 1964 which explicitly categorized distinctions based on pregnancy as sex discrimination. Because the plaintiffs sought back pay as well as injunctive relief, the court of appeals considered the legality of Pan Am's policies both prior to and subsequent to the amendment.

The court noted that the plaintiff initially has the burden of establishing a prima facie Title VII violation by showing that the challenged practice is discriminatory on its face or has a sexually discriminatory impact. Prior to the 1978 amendment, Pan Am's policies were not discriminatory on their face, and therefore, to

prehensive disability insurance plan was not sex discrimination, but merely a refusal to confer a benefit which men also could not obtain. Id. at 138-39.

11. Harriss v. Pan Am. World Airways, Inc., 649 F.2d 670 (9th Cir. 1980). The plaintiffs appealed the district court's holdings on the Stop, Start, and Seniority Policies. They did not challenge the court's holding on sick leave benefits. Id. at 672.

12. Id.

13. Id.

14. Id. at 672-73.

15. The amendment added subsection (k) to section 701 of the Civil Rights Act of 1964 which provides:

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 . . . .


16. 649 F.2d at 673.

establish prima facie sex discrimination, the plaintiffs must show that the policies had a discriminatory impact on women. After such a prima facie case is established, the burden shifts to the employer to justify these policies. The business necessity defense is a judicially developed defense to a finding of prima facie discrimination where an employment policy, though not facially or intentionally discriminatory, has an adverse and disproportionate impact on members of a protected group.

The court noted that the business necessity defense requires a showing that the challenged practice, although having a discriminatory impact on women, is nonetheless necessary to safe and efficient job performance. In order to meet this requirement, there must exist a business purpose sufficiently compelling to override the discriminatory impact; the challenged policy must effectively carry out the business purpose it is alleged to serve; and there must be no acceptable alternatives available which would better accomplish the business purpose or do so with a less discriminatory impact. If the employer is able to meet the burden of showing a business necessity, the plaintiffs may then show that alternative practices which do not have a discriminatory effect are available and feasible.

18. The Supreme Court in Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), established that pregnancy classifications which had a discriminatory impact on women constituted prima facie violations of Title VII. In Satty the Court held that an employer's practice of requiring pregnant employees to take a formal leave of absence, during which the employees forfeited any seniority which had accrued before the leave commenced, was not merely a refusal to extend to women a benefit that men also could not obtain, as in Gilbert, see note 10 supra, but the imposition on women of a substantial burden that men need not suffer. 434 U.S. at 141-42.


20. 649 F.2d at 674 & n.2.

21. The court stated that its most thorough consideration of the business necessity defense arose in Blake v. City of Los Angeles, 595 F.2d 1367 (9th Cir. 1979), cert. dismissed, 446 U.S. 926 (1980) (height requirement and physical abilities test for entry level police positions prima facie discrimination because of disproportionate impact on women). 649 F.2d at 674-75.

22. 649 F.2d at 675 (quoting Dothard v. Rawlinson, 433 U.S. 321, 332 n.14 (1977)).

23. 649 F.2d at 675 (quoting Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), cert. denied, 404 U.S. 1006 (1971)).

24. 649 F.2d at 673. See Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); deLaurier v. San Diego Unified School Dist., 588 F.2d 674 (9th Cir. 1978).
After the 1978 amendment, classifications based on pregnancy are facially discriminatory. Consequently, plaintiffs are not required to make a showing of discriminatory impact. In causes of action accruing after 1978, employers have the burden of justifying any classification based on pregnancy as a BFOQ. Unlike the business necessity defense, the BFOQ is provided for by statute.

In order to justify facial discrimination in terms of the BFOQ defense, the Harriss court held that job qualifications that an employer invokes to justify his discrimination must be reasonably necessary to the essence of his business. The court maintained that the BFOQ defense placed the burden of proof on the employer to show that all or substantially all women cannot safely and efficiently perform the job duties involved. If, however, such a showing cannot be made, a reasonable general rule can be justified by showing that it is impossible or impractical to deal with women on an individualized basis.

26. 649 F.2d at 676.
27. Id. at 676 n.2. See 42 U.S.C. § 2000e-2(e) which provides in pertinent part:
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 . . . religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

Id.

28. The court adopted the BFOQ standard developed by the fifth circuit in Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976) (bus company policy of refusing applicants between the ages of 40 years and 65 years for initial employment as intercity bus driver upheld as BFOQ). 649 F.2d at 676. In formulating the BFOQ standard, the Tamiami court drew upon Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir.), cert. denied, 404 U.S. 950 (1971) (BFOQ must be reasonably necessary to the normal operation of employer's business; being female is not a BFOQ for job of flight attendant, and employer's refusal to hire males on basis of sex constituted violation of Civil Rights Act of 1964); and Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969) (BFOQ defense based on generalizations about women's physical abilities rejected; employer must prove factual basis for believing all or substantially all women would be unable to perform duties safely and efficiently).
29. 649 F.2d at 676 (quoting 531 F.2d at 236).
30. 649 F.2d at 676 (quoting 408 F.2d at 235).
31. 649 F.2d at 676 (citing 408 F.2d at 235 n.5).
Applying these standards to Pan Am's policies, the court first examined the pre-amendment legality of the Stop Policy. The court concluded that the Stop Policy was gender neutral on its face, but disparately impacted women by excluding a disproportionate number of them from employment temporarily. The court observed that to establish the legality of its Stop Policy prior to 1978, Pan Am must therefore show that the Policy was a business necessity. Applying the criteria of the business necessity defense, the court held that passenger safety was a sufficiently compelling business purpose. The court also noted that the district court had found that individual appraisal of the abilities of pregnant flight attendants was impractical and that the plaintiffs had failed to establish the existence of feasible alternatives having a less discriminatory impact. According to the court, these findings were not clearly erroneous.

The court recognized that the district court had not made specific findings on the effectiveness of Pan Am's Stop Policy in furthering passenger safety. Therefore, the district court had not established the criterion that the challenged practice effectively carry out the business purpose it allegedly serves.

32. 649 F.2d at 673. See General Electric Co. v. Gilbert, 429 U.S. 125 (1976) (exclusion of pregnancy-related disability from disability insurance coverage is not facial sex discrimination).

33. 649 F.2d at 673. The court cited its decision in deLaurier v. San Diego Unified School Dist., 588 F.2d 674 (9th Cir. 1978), where the court found that mandatory maternity leave for school teachers has a discriminatory impact on women. 649 F.2d at 673. The deLaurier court stated that mandatory leave does not withhold a potential benefit as in Gilbert, see note 10 supra, but rather is a restriction on women's employment opportunities. 649 F.2d at 673-74 (quoting 588 F.2d at 684-85).

34. 649 F.2d at 674. Before examining Pan Am's justification for its Stop Policy, the court observed that the district court had incorrectly treated the business necessity and BFOQ defenses interchangeably. The court of appeals clarified the distinction, noting that the BFOQ defense applies to business practices which purposely discriminate on the basis of sex, and the business necessity defense applies to facially neutral practices which have a disparate impact. Id.

35. See text accompanying notes 21-23 supra.

36. 649 F.2d at 675.

37. Id. (quoting 437 F. Supp. at 434).

38. 649 F.2d at 675 (quoting 437 F. Supp. at 434).

39. 649 F.2d at 675.

40. Id. The district court had found that incapacitation was more likely to occur during an emergency evacuation if the flight attendant were pregnant.
However, reasoning that the requirement of effectiveness is not independent of the requirement that the purpose be compelling, the court of appeals stated that the requisite degree of effectiveness will depend on the gravity of the safety hazard posed by a flight attendant's becoming incapacitated during an emergency.41 Again the court maintained that the district court findings were not clearly erroneous42 and concluded that Pan Am had satisfied the narrow business necessity defense standard by adequately proving the correlation between the Stop Policy and passenger safety.43

Because all pregnancy classifications are per se sexually discriminatory after the 1978 amendment, the court evaluated Pan Am's post-amendment justification for the Stop Policy in terms of the BFOQ defense.44 Applying the requirements for a BFOQ defense45 to Pan Am's Stop Policy, the court noted that the district court had acknowledged that passenger safety is the essence of Pan Am's business.46 Moreover, the court assented to the district court's interpretation of the Stop Policy as a reasonable general rule and to its concurrent finding that it is impractical to deal with pregnant flight attendants individually.47 However, the court

than if she were not, because of possible disabling complications. Id. (citing 437 F. Supp. at 423). However, in concluding that the Stop Policy was reasonably calculated to further the safety objective, the district court required only that the practice be reasonable in light of safety considerations; it did not require a showing of actual effectiveness in furthering passenger safety. 649 F.2d at 675 (citing 437 F. Supp. at 434).

41. 649 F.2d at 675.

42. Id. The district court had found that each flight attendant's ability to perform is vital in an emergency situation; that a flight attendant's ability to perform during an emergency may be impaired during the first two trimesters by fatigue, nausea and vomiting, or spontaneous abortion; and that the gravity of the safety risk, measured by the likelihood of harm and the probable severity of harm, was great enough to warrant the imposition of a stringent personnel policy for flight attendants. Id. See 437 F. Supp. at 435.

43. 649 F.2d at 676.

44. Id.

45. See text accompanying notes 28-31 supra.

46. 649 F.2d at 676.

47. Id. at 676-77. The court cited Burwell v. Eastern Air Lines, Inc., 633 F.2d 361 (4th Cir. 1980), cert. denied, 101 S. Ct. 1480 (1981), to support the district court's finding that the Stop Policy was a reasonable general rule. 649 F.2d at 677. In Burwell the trial court concluded that there was an acceptable alternative to mandatory pregnancy leave because of testimony from medical
disagreed with the district court's requirement that the policy need only be reasonable in light of the safety factor. The court stated that the correct standard requires that the policy be reasonably necessary in light of Pan Am's strict safety obligations to the public, otherwise the BFOQ defense, which the United States Supreme Court had characterized as an extremely narrow exception to the prohibition on sex discrimination, would be unnecessarily broadened. Nevertheless, the court found the requisite necessity in the significance of the safety risk involved in allowing pregnant flight attendants to remain on the job and held the Stop Policy to be reasonably necessary to passenger safety, and nonpregnancy a bona fide occupational qualification.

The court next examined the pre-amendment legality of Pan Am's Start Policy. Because the Start Policy had a discriminatory impact on women, it was a prima facie violation of Title VII, and Pan Am had the burden of showing that it was justified as a business necessity. The court noted that there was medical testimony at trial that prior to six weeks following delivery, uterine size and body functions are not normal enough to permit post-partum examinations and thus all women risk disability. However, the district court failed to determine the gravity of the risk to passenger safety which would result if flight attendants were allowed to return to work prior to sixty days after childbirth, and did not find that the Start Policy was necessary in light of that risk. The issue of the pre-amendment legality of the Start Policy was therefore remanded to determine whether Pan Am had shown the policy to be a business necessity. Because the district court findings were also insufficient to determine whether the policy was justified as a BFOQ, the court

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49. 649 F.2d at 677.
50. Id.
51. Id.
52. Id.
53. Id. at 678.
of appeals also remanded the issue of the post-amendment legality of the Start Policy.\textsuperscript{54}

Turning to the issue of the pre-amendment legality of Pan Am's seniority policy, the court of appeals observed the district court's conclusion that the seniority policy was not prima facie discriminatory.\textsuperscript{55} The court of appeals disagreed, finding that the seniority policy adversely affected pregnant women beyond the term of their pregnancy leave\textsuperscript{56} by lowering their position on the seniority roster for the remainder of their employment with Pan Am.\textsuperscript{57} Therefore, the court found Pan Am's seniority policy to be prima facie sex discrimination. Because the district court did not address whether the seniority policy was justified as a business necessity, the court remanded for a determination of whether, on the record, Pan Am had carried its burden of proving the necessity of the policy.\textsuperscript{58}

After the 1978 amendment, Pan Am's seniority policy was facially discriminatory. The issue of the policy's post-amendment legality was similarly remanded for a determination of whether Pan Am had successfully justified it as a BFOQ.\textsuperscript{59}

Speaking in dissent, Judge Schroeder pointed out that the ma-

\textsuperscript{54} \textit{Id.}

\textsuperscript{55} \textit{Id.} The district court relied on the Supreme Court's holdings in General Electric Co. v. Gilbert, 429 U.S. 125 (1976), and Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), in determining that Pan Am's seniority policy was not prima facie discriminatory. See notes 10 & 18 \textit{supra}. In a Supplemental Memorandum Opinion, the district court reasoned that, unlike the policy challenged in \textit{Satty}, see note 18 \textit{supra}, Pan Am's policy does not deprive pregnant women of accumulated seniority, but merely precludes them from accumulating additional seniority beyond the first 90 days of maternity leave. Harriss v. Pan Am. World Airways, Inc., 441 F. Supp. 881, 883 (1977). The court concluded that this is more akin to the denial of a benefit, as in \textit{Gilbert}, see note 10 \textit{supra}, than to the imposition of a substantial burden. 441 F. Supp. at 883.

\textsuperscript{56} The court quoted with approval Justice Stevens' position in \textit{Satty} that a distinction between an employment policy that discriminates against pregnant women and one that does not can be made by determining whether the policy adversely affects the woman beyond the term of her pregnancy leave. 649 F.2d at 678-79 (quoting 434 U.S. at 155 (Stevens, J., concurring in the judgment)).

\textsuperscript{57} 649 F.2d at 679. As a consequence of Pan Am's policies, plaintiffs Feather and Harriss lost approximately 130 days seniority. This could result in a loss of 20 to 40 positions on the seniority roster. \textit{Id.} (citing 437 F. Supp. at 417).

\textsuperscript{58} 649 F.2d at 679.

\textsuperscript{59} \textit{Id.}
iority failed to address why pregnancy should be treated differently from other physical conditions: flight attendants with other physical conditions are permitted to fly upon a visual inspection determining that, from appearances only, they are not incapacitated. The dissent agreed with the majority's conclusion that Pan Am's policies were prima facie violations of Title VII, but disagreed with their holding that the policies were or could be justified.

Judge Schroeder maintained that Pan Am's justification of its Stop Policy as a passenger safety measure is flawed by its assumption that those who replace the grounded pregnant stewardesses will be better able to perform their duties. He concluded that there was no evidence that replacing pregnant flight attendants with others whose physical conditions are unknown or unmonitored, will promote passenger safety.

Judge Schroeder asserted that according to the leading employment discrimination cases, a business necessity or BFOQ defense requires, at a minimum, a showing that the challenged policy has a valid purpose and that the policy accomplishes that purpose. There must also be some factual basis for believing that all or substantially all of those who cannot perform the job are within the class excluded. He pointed out that Pan Am had claimed passenger safety as the purpose of the challenged

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60. 649 F.2d at 679 (Schroeder, J., dissenting). This visual inspection is made by persons with no medical training. Id.
61. Id.
62. 649 F.2d at 680 (Schroeder, J., dissenting). Pan Am had argued that because of a risk of miscarriage or other disability due to pregnancy, during an emergency, passengers will be safer if pregnant flight attendants are not permitted to work. Id.
63. Id. Pan Am makes no attempt to prevent flight attendants with other potentially disabling conditions from flying. It presented no evidence that persons with, e.g., ulcers, hernias, colitis, high blood pressure or heart disease will be less likely than pregnant flight attendants to suffer incapacitation during flight. Moreover, Pan Am has no procedure for ascertaining the existence of these other potentially disabling conditions, and persons suffering them need not report their condition. No company policy excludes these persons from in-flight service. Id.
64. Id. (citing Blake v. City of Los Angeles, 595 F.2d 1367, 1376 (9th Cir. 1979), cert. denied, 446 U.S. 928 (1980); Arritt v. Grisell, 567 F.2d 1267, 1271 (4th Cir. 1977); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir.), cert. denied, 404 U.S. 950 (1971); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969)).
policies, but had not demonstrated that the policies served that purpose.65

Moreover, if Pan Am's passenger safety justification is to accord with the judicially developed Title VII requirement that employment policies must measure the person for the job and not the person in the abstract,66 the company should, Judge Schroeder maintained, design procedures which will directly test the ability of all flight attendants with medical conditions which might affect job performance in an emergency.67 He noted that the 1978 pregnancy amendment to Title VII and the interpretive Equal Employment Opportunity Commission (EEOC) guidelines require that persons with similar ability or inability to work be treated equally.68

Judge Schroeder maintained that Pan Am also had not articulated any business requirements which justified its Start Policy. Consequently, he found it impossible to determine whether the policy was either sufficiently compelling or reasonably necessary.69 He stated that there is nothing in the

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65. 649 F.2d at 680 (Schroeder, J., dissenting).
67. 649 F.2d at 680 (Schroeder, J., dissenting).
68. Id. Judge Schroeder quoted from the EEOC's position on the effects of the 1978 amendment, published in question and answer form in the Code of Federal Regulations:

6. Q. What procedures may an employer use to determine whether to place on leave as unable to work a pregnant employee who claims she is able to work or deny leave to a pregnant employee who claims that she is disabled from work?

A. An employer may not single out pregnancy-related conditions for special procedures for determining an employee's ability to work. However, an employer may use any procedure used to determine the ability of all employees to work. . . . [I]f an employer allows its employees to obtain doctor's statements from their personal physicians for absences due to other disabilities or return dates from other disabilities, it must accept doctor's statements from personal physicians for absences and return dates connected with pregnancy-related disabilities.

649 F.2d at 680-81 n.1 (Schroeder, J., dissenting) (quoting 29 C.F.R. § 1604 app., at 927 (1980)).
69. 649 F.2d at 681 (Schroeder, J., dissenting). The record showed no factual basis, he maintained, for finding that women are unable to perform their duties prior to the time set by the Start Policy. Nor had Pan Am shown that individual medical determinations of fitness for duty are impossible or impractical. Judge Schroeder believed that the failure to make such a showing should in and of itself invalidate the Start Policy. Id. (citing Blake v. City of Los
record that warrants a remand to the district court because the Start Policy is wholly unjustifiable. 70

Judge Schroeder pointed out that a seniority policy that treats pregnant flight attendants less favorably than those with other medical disabilities has specifically been found to violate Title VII. 71 He believed that the majority correctly found Pan Am's seniority policy to be prima facie discriminatory, but because Pan Am had not offered any evidence that supported the policy as a business necessity, a remand would be pointless. 72 Judge Schroeder concluded that the case should be reversed and the district court required to issue an injunction against further enforcement of the policies and to consider appropriate damages. 73

The protection afforded women against employment discrimination is broader under Title VII than under the equal protection clause of the fourteenth amendment, 74 and is more easily invoked. 75

Angeles, 595 F.2d 1367 (9th Cir. 1979), cert. denied, 446 U.S. 928 (1980). See Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969). He also noted that the EEOC's position is that an employer cannot have a rule prohibiting an employee from returning to work for a predetermined length of time after childbirth. 649 F.2d at 681 n.2 (Schroeder, J., dissenting) (quoting 29 C.F.R. § 1604 app., at 927 (1980)).

70. 649 F.2d at 681 (Schroeder, J., dissenting).
71. Id. (citing Burwell v. Eastern Air Lines, Inc., 633 F.2d 361 (4th Cir. 1980), cert. denied, 101 S. Ct. 1480 (1981)).
72. 649 F.2d at 682 (Schroeder, J., dissenting). Judge Schroeder further acknowledged that because of the 1978 amendment, the Civil Rights Act now requires that women affected by pregnancy be treated the same as other persons not so affected for all employment-related purposes, including the receipt of fringe benefits. 649 F.2d at 681-82 (Schroeder, J., dissenting) (quoting 42 U.S.C. § 2000e(k) (Supp. II 1978)). Pan Am had already conceded that it may not enforce the seniority policy under the new law and has since permitted full seniority accrual during pregnancy leave. The dissent therefore concluded that the majority not only ignored the language of the statute, but remanded the question when there is nothing further for the district court to do. 649 F.2d at 682 (Schroeder, J., dissenting).
73. Id.
74. U.S. CONST. amend. XIV, § 1 provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."
75. See generally Erickson, Pregnancy Discrimination: An Analytical Approach, 5 WOMEN'S RTS. L. REP. 83 (1979) [hereinafter cited as Erickson]; Note, Covert Sex Discrimination: Evidentiary Burdens Under Title VII and Section 1983 Compared, 53 S. CAL. L. REV. 1747 (1980). See also Washington v. Davis, 426 U.S. 229 (1976). In Davis the Supreme Court held that a Title VII challenge to facially neutral employment practices that have a racially discriminatory impact calls for a more probing judicial review of, and less deference to, employer decisions than is appropriate under the constitution. Id. at 246-48.
In *Griggs v. Duke Power Co.* the Supreme Court held that Title VII aims at eradicating inequitable employment practices which arbitrarily limit individual opportunities by effectively discriminating on the basis of race, color, religion, sex or national origin. At issue, the Court held, are the consequences of employment practices, not simply the motivation for their adoption. If an employment practice or policy, though neutral on its face, works to disproportionately exclude members of a protected class, the practice is unlawful unless the employer can justify it as a business necessity. In order to trigger judicial scrutiny of a governmental action with a similar effect under the equal protection clause, however, a purpose to discriminate must be shown.

Since *Griggs* first articulated the business necessity defense, courts and commentators have been divided on how narrow or how broad the defense is, and on how the burdens of proof and production are to be allocated. The narrowest interpretation of the defense was formulated in *Robinson v. Lorillard Corp.*, which held that to defend against a showing of prima facie

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76. 401 U.S. 424 (1971).
77. Id. at 431. In *Griggs* the requirement of a high school diploma or passing a standardized intelligence test as a condition of employment was found to be a violation of Title VII, because both requirements operated to disqualify blacks at a substantially higher rate than whites and neither was shown to be significantly related to successful job performance. Id. at 426, 431.
78. Id. at 432 (emphasis in original).
79. Id. at 431.
80. See Washington v. Davis, 426 U.S. 229, 239 (1976). In *Davis*, the requirement that applicants for employment as police officers pass a written personnel test, neutral on its face and used generally throughout the federal service, did not constitute that invidious racial discrimination forbidden by the equal protection clause, although blacks were shown to be disproportionately excluded from employment as a result; proof of intent to discriminate is essential. Id. at 246-48. Discriminatory purpose will be found when either the statute or policy explicitly classifies along racial, sexual, religious or ethnic lines, or the burdens imposed by its facially neutral classification fall disproportionately on members of a protected class and the proffered justification is found to be a pretext for discrimination. See Geduldig v. Aiello, 417 U.S. 484, 496-97 n.20 (1973); Erickson, *supra* note 75, at 86-88.
discrimination, the employer had to show an overriding legitimate business purpose for the challenged practice. The business purpose must be sufficiently compelling to override any discriminatory impact; the practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policy which would better accomplish the business purpose, or accomplish it equally as well with a less discriminatory impact. Subsequently, the Supreme Court in *Albemarle Paper Co. v. Moody* applied a less stringent standard, lightening the burden on the employer. *Albemarle* held that the employer must demonstrate only a significant correlation between the qualifying traits and job-related abilities which contribute to safe and efficient job performance. If an employer carries this burden, the complaining party may then show the availability of equally effective, less-discriminatory alternatives as evidence of a pretext for discrimination.

In *Furnco Construction Corp. v. Waters* the Court further broadened the defense, holding that the employer need only show that his hiring procedures are reasonably related to the achievement of some legitimate purpose. Title VII, the Court held, does not impose a duty on employers to adopt a hiring procedure that maximizes the number of minority employees; courts may not step in and restructure business practices to ad-

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82. 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971) (departmental seniority system perpetuating effects of past company practices of overt racial discrimination in hiring held insufficiently justified by proffered business reasons of being in accordance with industry practice, avoidance of union pressure, maintenance of efficiency, economy, and morale).

83. *Id.* at 798 (emphasis added).

84. 422 U.S. 405 (1975).

85. *Id.* at 431 (emphasis added).

86. *Id.* at 425.

87. 438 U.S. 567 (1978) (company practice of hiring only those bricklayers whom the job superintendent knew were experienced and competent or who had been recommended to him as similarly skilled held justified as conducive to the safe and efficient operation of the business, despite its disproportionate exclusion of blacks, and notwithstanding the availability of less discriminatory alternative hiring practices fashioned and imposed by court of appeals below).


89. 440 U.S. at 577-78.
vance minority representation if no violation of Title VII has been shown.90

Title VII expressly prohibits employment practices and policies that classify persons in terms of their race, sex, religion or national origin.91 Because women are to be considered on the basis of individual ability, employment opportunities must not be denied on the basis of characteristics generally attributed to the female sex.92 The BFOQ, however, is an express statutory exception to this prohibition.93

In apparent contradiction with Title VII's main objective, a successful BFOQ defense allows an employment policy to rely on generalizations about women.94 The Supreme Court in Dothard v. Rawlinson95 found the exclusion of women from contact positions in Alabama's all-male maximum security penitentiaries to be a BFOQ on the grounds that, under the very special conditions existing in the prisons, a female guard's very womanhood would endanger prison security.96 The exceedingly narrow BFOQ

90. Id. at 578.  
91. See note 1 supra.  
93. See note 27 supra. An employer can defend against a finding of intentional discrimination only when the discrimination is based on sex, religion or national origin. There is no statutory defense to intentional racial discrimination. Id.  
94. See Sirota, Sex Discrimination: Title VII and the Bona Fide Occupational Qualification, 55 TEX. L. REV. 1025, 1048 (1977). But see City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 708 (1978) ("Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply").  
96. The conditions in state prisons were characterized by "rampant violence" and a "jungle atmosphere" which were constitutionally intolerable. Id. at 334 (quoting Pugh v. Locke, 406 F. Supp. 318, 325 (M.D. Ala. 1976), aff'd, 559 F.2d 283 (5th Cir. 1977)). Inadequate staff and facilities precluded classification and segregation of inmates according to their offenses or level of dangerousness; prisoners who were sex offenders were scattered throughout the prison's dormitory facilities. 433 U.S. at 335.  
97. Id. at 336. Justice Marshall, concurring in part and dissenting in part, argued that the BFOQ exception, applied in connection with the normal operation of a business, cannot be made to depend on the existence of constitutionally intolerable conditions. Given the existing conditions in the penitentiary,
defense thus focuses on characteristics demonstrably inherent in class membership. These inherently sex-linked traits, however, must be essential to the job at issue and the job itself must be essential to the employer's business.88

As a constitutional issue, the Supreme Court has not treated pregnancy classifications as being based on sex,99 despite its historical pronouncements on the unique role and destiny of women.100 In  

Justice Marshall maintained that there was no evidence in the record to suggest that women guards would create any danger to security significantly greater than that which already existed in Alabama prisons. Id. at 342 (Marshall, J., concurring in part and dissenting in part). The majority's contention that the employee's very womanhood disqualifies her, is based, Justice Marshall maintained, on the stereotypical myth that women are seductive sexual objects and thus will generate sexual assaults. Id. at 345 (Marshall, J., concurring in part and dissenting in part).

98. See Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388 (5th Cir. 1971) (sex discrimination permissible only when the essence of the business operation would be undermined by not hiring members of one sex exclusively; customer preference for flight service by women did not justify the exclusion of males from flight attendant positions). The only acceptable sex-based BFOQ provided for in the EEOC guidelines is one based on a need for authenticity or genuineness, e.g., for an actor or actress. 29 C.F.R. § 1604.2(a)(2) (1980). A BFOQ might be asserted where sexuality is part of the product or service, as in, e.g., a single-sex dating or escort service or a tavern featuring topless waitresses. The defense would apply, however, only to the extent that this product is essential to the total business enterprise. 22 ST. LOUIS U.L.J. 197, 202-03 (1978).

99. In Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974), the Court struck down a school board's mandatory maternity leave policy on due process rather than equal protection grounds. The policy was found to penalize a female teacher for asserting her right to bear children. Id. at 650. In Geduldig v. Aiello, 417 U.S. 484 (1974), the equal protection issue was squarely addressed in a challenge to California's exclusion of pregnancy-related disabilities from its otherwise comprehensive disability insurance program. The Court stated that pregnancy classifications were not per se classifications based on sex, nor were they a pretext for discrimination; for although only women can become pregnant, pregnancy is an objectively identifiable condition having unique characteristics by which it can be reasonably distinguished from all other physically disabling conditions. Id. at 496-97 n.20. See text accompanying note 122 infra.

100. Consider: "[A woman's] physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man." Muller v. Oregon, 208 U.S. 412, 422 (1908) (upholding Oregon statute limiting number of hours women were permitted to work in laundries). "The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator." Bradwell v. Illinois, 83 U.S. (16 Wall.) 442, 446 (1873) (Bradley, J., concurring)
General Electric Co. v. Gilbert, the Court adopted an equal protection analysis of sex discrimination and applied it to a Title VII challenge to General Electric's practice of excluding pregnancy benefits from its otherwise comprehensive disability program. Because it believed the program merely denied women a benefit that men also could not receive, the Court found no sex discrimination and thus no violation of Title VII.

In Nashville Gas Co. v. Satty, the Court recognized that an employment policy that classified on the basis of pregnancy might constitute prima facie discrimination if it imposed substantial burdens on women that men need not suffer. Because of the uncertain benefit and burden distinctions drawn in Gilbert and Satty, and the recognition that discrimination based on pregnancy is often at the root of practices that keep women in low paying and dead-end jobs, Congress passed the 1978 amendment to the Civil Rights Act of 1964. The amendment defines pregnancy discrimination as sex discrimination, and sets standards that require that pregnant workers be treated the same as other employees—on the basis of their ability or inability to work.

The Harris court, in testing the pre-amendment legality of Pan Am's Stop Policy, expressly applied the most restrictive standard of business necessity, the "sufficiently compelling" test formulated in Robinson v. Lorillard Corp. In applying the standard, however, the court broadened it significantly. The

(upholding denial by the Supreme Court of Illinois of admission of women to the practice of law).

102. Id. at 132-33 (citing Geduldig v. Aiello, 417 U.S. 484 (1974)).
103. 429 U.S. at 136. See note 10 supra.
105. Id. at 142. See note 18 supra.
108. See note 15 supra.
109. HOUSE REPORT. supra note 106, at 4751.
110. Pan Am's justification for its Start Policy was not fully considered by the court, and its justification for the Seniority Policy was not considered at all. 649 F.2d at 677-79. See text accompanying notes 51-59 supra.
111. 649 F.2d at 675. See text accompanying notes 82 & 83 supra.
court recognized that passenger safety is a compelling business purpose, but this compelling business purpose can override the Stop Policy's discriminatory impact, according to Lorillard, only if the purpose is in fact effectively advanced by the policy. Yet the Harriss court explicitly acknowledged that Pan Am had not shown its Stop Policy to be effective in promoting passenger safety. The court found Pan Am's Stop Policy to be a business necessity by applying a greatly weakened standard, according to which the importance of the business purpose—here the physical safety of airline passengers—mitigates the need for a factual showing of the policy's effectiveness in advancing that purpose. The court relied on Spurlock v. United Airlines, Inc. to hold that the degree to which an employer must demonstrate the effectiveness of a policy depends on the safety hazard involved. The Spurlock court stressed that courts should proceed with great caution before requiring an employer to lower his employment standards where the economic and human risks in hiring an unqualified applicant were very substantial. But Spurlock did not suggest that a court abdicate its role as fact finder in testing the job-relatedness of pre-employment requirements shown to impact disproportionately on members of a protected class.

112. 649 F.2d at 675.
113. See 444 F.2d at 798; text accompanying notes 21-24 supra.
114. 649 F.2d at 675. See text accompanying note 40 supra.
115. See text accompanying note 41 supra.
116. 475 F.2d 216 (10th Cir. 1973) (upholding pre-employment requirements of 500 hours flying time and a college degree for the position of commercial pilot, despite disproportionate exclusion of black applicants).
118. 475 F.2d at 219. According to the Spurlock court, the job of airline pilot is indeed highly skilled, and the lives of many persons are directly and constantly dependent upon these skills. The requirement of a college degree, as indicating the ability to absorb technical training, and the requirement of 500 hours flight service, as indicating greater skill born of experience, are not impossibly stringent: Id. at 218-19.
119. The Spurlock court reviewed the evidence that a person with a college degree could better cope with the rigorous on-going training program required of flight officers and concluded that the evidence supported the trial court's
Where a relationship has not been or cannot be shown, the business necessity defense fails.

The BFOQ standard is also broadened by the Harriss decision. The court required no showing of the magnitude of the risks involved or of the actual prospect that business operations would be undermined. More importantly, the court failed to question whether there was a correlation between the traits which posed the risks to passenger safety and membership in the protected class (pregnant women) sufficient to justify intentional discrimination. Underlying this failure was the court's implicit acceptance of the premise that pregnancy is a unique, objectively identifiable condition which is incomparable to any other physical finding that United's college degree requirement was job-related. 475 F.2d at 219. Cf. Blumrosen, Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination, 71 MICH. L. REV. 59, 82, 101 & n.173 (1972) (standards of necessity under Title VII to be judicially established; Congress intended subordination of managerial prerogative with respect to racial discrimination).

120. Were these given more attention by the court, the question whether Pan Am's policies were merely a pretext for discrimination clearly would have been raised. The district court, inquiring into the origin of the policies, found that the specific considerations which entered into their adoption were unknown. Pan Am's medical department had proposed the start and stop times, but no one knew of any studies, deliberations or specific considerations which underlay the policies. None of the witnesses testifying on this issue were able to discuss its merits or alternatives that might have been considered. 437 F. Supp. at 416. Moreover, prior to the time the Stop and Start Policies were initiated, Pan Am's policy was to terminate any flight attendant who became pregnant. Pan Am also retained, at that time, the option to terminate female flight attendants after six months of marriage. Id. at 415. See generally Comment, Pregnancy and the Constitution: The Uniqueness Trap, 62 CALIF. L. REV. 1532 (1974) (ability to become pregnant has historically been significant in justifying laws and practices which discriminate against women) [hereinafter cited as The Uniqueness Trap]. Because of its deference to Pan Am's responsibility for risk management, the Harriss court did not seriously consider the possibility of pretext.

121. See generally Note, Sex as a Bona Fide Occupational Qualification: Defining Title VII's Evolving Enigma, Related Litigation Problems, and the Judicial Vision of Womanhood After Dothard v. Rawlinson, 5 WOMEN'S RTS. L. REP. 107, 120-27 (1974) (BFOQ not established where sex has not been shown to be the best available index of the attribute which would pose severe and probable risk to job performance and essence of business). Clearly, the risk of unpredictable incapacitation is inherent in a wide range of physical conditions, see 649 F.2d at 679-80 (Schroeder, J., dissenting), and is not identifiable only by reference to the pregnant condition.
condition and so may justifiably be treated differently in the formulation of employment policies.\textsuperscript{122}

In light of the explicit congressional intent to prohibit the use of pregnancy or the capacity to become pregnant to perpetuate sex discrimination in employment,\textsuperscript{123} the implications of the Harriss decision are unsettling. Because the capacity to become pregnant has been used to distinguish the male from the female, Congress now equates pregnancy distinctions with sex discrimination.\textsuperscript{124} However, the 1978 amendment leaves open the possibility, realized in Harriss, that deeply engrained stereotypes about pregnancy and about a pregnant woman’s ability to work will continue to limit employment opportunities for women. Moreover, the Harriss court’s dilution of the BFOQ defense could allow exclusion of all pregnant women from any job that might require greater than normal alertness or agility at some unpredictable time during employment. It is only a short step to excluding all women of childbearing age from such positions, because pregnancy itself is often unpredictable and undiscernible until a certain stage.\textsuperscript{125}

To avoid these results, the EEOC guidelines on pregnancy discrimination and application of the BFOQ exception\textsuperscript{126} must be given adequate judicial recognition. Although the Supreme Court has regarded these administrative guidelines as authoritative,\textsuperscript{127}

\textsuperscript{122} See Geduldig v. Aiello, 417 U.S. 484, 496-97 n.20 (1974); The Uniqueness Trap, supra note 120, at 1560 (because pregnancy stereotypes can be associated with some objective physical characteristics, they are easy to call “rational,” although the characteristics are unrelated to the laws based on the stereotypes). Cf. Ostrer, General Electric Co. v. Gilbert: Defining the Equal Opportunity Rights of Pregnant Workers, 10 COLUM. HUMAN RIGHTS L. REV. 605, 615 (1979) (“[to say that pregnancy is unique is to say] that a pregnant woman is dissimilarly situated to all men, and similarly situated to none”). It is instructive that the district court in Harriss made a finding that pregnancy is a unique condition for which provision must be made by Pan Am. 437 F. Supp. at 436.

\textsuperscript{123} See HOUSE REPORT, supra note 106.

\textsuperscript{124} Id. at 4750-51 (quoting General Electric Co. v. Gilbert, 429 U.S. 125, 162 (1976) (Stevens, J., dissenting)).

\textsuperscript{125} 4B R. GRAY, ATTORNEYS’ TEXTBOOK OF MEDICINE ¶305.00 (3d ed. 1981).

\textsuperscript{126} Guidelines on Discrimination Because of Sex, 29 C.F.R. §§ 1604.2, -.10 & app. (1980).

it has occasionally deferred to them only selectively or has rejected them outright. These guidelines, aimed at eliminating subterfuge, sophistry, and long-held stereotypes about pregnancy, and therefore about women's rights as workers, must be enforced if the congressional mandate of the 1978 amendment is to be realized and the bases for sex discrimination are to be effectively eliminated.

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