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Sex Discrimination in the Airline Industry: Title VII Flying High

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Women have historically been relegated to a secondary role in life. Contemporary experience suggests that they may become legal secretaries, but rarely lawyers;¹ secondary school teachers, but rarely university professors;² airline stewardesses, but never pilots.³ The purpose of this Article is to argue, based on examples of sexual discrimination in the airline industry, that society can and must change these existing patterns of unequal employment opportunities. Specifically, the sex discrimination provisions of the Civil Rights Act of 1964,⁴ and the legislative and judicial exceptions to it, have been the basis of bitter argument between stewardesses and airlines. The resolution of that conflict may represent the beginning of similar progressive change in other areas of sexual discrimination.

Part I examines the relevant provisions of the Civil Rights Act of 1964 and the standards that administrative agencies and the courts have evolved to implement the broad purposes of the Act. Part II applies these standards to judge various restrictions that airlines have imposed upon their stewardesses.

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1. See generally White, *Woman in the Law*, 65 MICH. L. REV. 1051 (1967). See also *In re Lockwood*, 154 U.S. 116 (1894), upholding the right of a state to deny admission of women to practice.

2. WOMAN'S BUREAU, U.S. DEPT. OF LABOR, FACT SHEET ON WOMAN IN PROFESSIONAL AND TECHNICAL POSITION 3 (1966).

3. L. KANOWITZ, *WOMAN AND THE LAW* 101 (1969); Oakland Tribune, Apr. 5, 1970 (Parade Magazine), at 20; *id.*, Aug. 17, 1969 (Parade Magazine), at 7.

4. 42 U.S.C. §§ 2000a-2000h-6 (1964).

I

THE CIVIL RIGHTS ACT OF 1964: TITLE VII

Section 703(a)⁵ of the Civil Rights Act of 1964 provides:

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 . . . sex . . . ; or

(2) to limit, segregate, or classify his employees 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 . . . sex

The sweep of this ban against sex discrimination is qualified, however, by section 703(e), which allows sex discrimination if sex is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."⁶

The bona fide occupational qualification is the only statutory exception to the Title VII ban against sex discrimination, and it is subject to conflicting interpretations.⁷ Unfortunately, neither the Act nor its legislative history offers clear guidance to the meaning of the bona-fide-occupational-qualification exception, and the courts and administrative agencies have had to determine the extent of this exception on a case-by-case basis.

A. *Legislative History of Title VII*

In the case of the sex-discrimination provisions of Title VII, a search of the committee reports, hearings, and debates for evidence of legislative intent proves largely futile. The sex-discrimination provisions were added to the Civil Rights Act of 1964 only one day prior to House passage,⁸ in an amendment proposed by Representative Howard Smith, Chairman of the House Ways and Means Committee⁹ and an

5. *Id.* § 2000-2(a). Section 703(c) contains a similar provision aimed at labor organizations. *Id.* § 2000e-2(c). This Article does not discuss the problems of unfair representation by unions, either under the Civil Rights Act of 1964 or the doctrine of the National Labor Relations Board in *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), *enforcement denied*, *NLRB v. Miranda Fuel Co.*, 326 F.2d 172 (2d Cir. 1963), because the stewardess unions have for the most part fairly represented their members, both stewardesses and stewards. For a discussion of the interrelationship of Title VII and *Miranda Fuel*, see Comment, *Jurisdictional Conflicts in Minority Employment Relations: NLRB and EEOC*, 2 U.S.F.L. REV. 149 (1967).

6. 42 U.S.C. § 2000e-2(e) (1964).

7. Note, *Sex as a Bona Fide Occupational Qualification*, 1968 UTAH L. REV. 395, 398.

8. *Id.*

9. 110 CONG. REC. 2577 (1964).

outspoken opponent of the Act.¹⁰ His intent apparently was to prevent passage of the Civil Rights Act by confusing the issues and adding an unpopular section to the Act.¹¹ However, his plan failed, and debate on the sex provisions lasted only an hour, adding little substance to the legislative history of the bill.¹²

Regardless of its unique background, the sex-discrimination ban is now law and must be enforced. In accordance with the principle that a legislative body is deemed to have exercised its lawmaking powers for a purpose, even the most restrained interpretation of the statute will have to accept the implication that Congress intended to change the status quo of sex discrimination in employment. Interpretation beyond this basic premise is left to the Equal Employment Opportunity Commission (EEOC) and the courts.

B. The Equal Employment Opportunity Commission

The Civil Rights Act of 1964 established the Equal Employment Opportunity Commission (EEOC) to help eliminate unlawful employment practices.¹³ The EEOC is vested with the responsibility of interpreting and administering the Act.¹⁴ It carries out this function in part through the issuance of employment guidelines and opinion letters as to whether a given practice violates the Act. In addition, the EEOC

10. Representative Smith and other supporters of the sex-discrimination amendment, including Representatives Dowdy and Pool of Texas, Tuten of Georgia, Andrews and Huddleston of Alabama, Rivers and Watson of South Carolina and Gathings of Arkansas all voted against the Bill as finally drafted. 110 CONG. REC. 2804-05 (1964).

11. Note, *Classification on the Basis of Sex and the 1964 Civil Rights Act*, 50 IOWA L. REV. 778, 790 (1965); Note, *Sex Discrimination in Employment Under Title VII of the Civil Rights Act of 1964*, 21 VAND. L. REV. 484, 491 (1968).

12. Some courts and commentators have read a congressional intent into the sex-discrimination provisions in spite of the record. For example, in *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 232 (5th Cir. 1969), the court stated that "legislative history indicates that this exception [bona fide occupational qualification] was intended to be narrowly construed." *But see* *Diaz v. Pan Am. World Airways, Inc.*, 311 F. Supp. 559, 568-69 (S.D. Fla. 1970), *rev'd*, 442 F.2d 385 (5th Cir. 1971). One commentator argues that Title VII should be interpreted in the light of the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1964), and its extensive legislative history. Margolin, *Equal Pay and Equal Employment Opportunities for Women*, in N.Y.U. NINETEENTH ANNUAL CONFERENCE ON LABOR 297, 301-02 (1967).

13. 42 U.S.C. § 2000e-4 (1964). The EEOC began actual operations on July 2, 1965.

14. Employers, employees, or unions may ask the EEOC for its opinion in a particular case or over a particular policy. 42 U.S.C. § 2000e-4(f) (1964). The Commission then investigates and attempts to eliminate discriminatory conduct or practices through conference, conciliation, and persuasion. 42 U.S.C. § 2000e-5(a) (1964). Its decisions do not have the force of law, and it cannot issue a cease-and-desist order. For a fuller discussion of the procedure of the EEOC, see Comment, *A Primer to Procedure and Remedy Under Title VII of the Civil Rights Act of 1964*, 31 PITT. L. REV. 407 (1970).

is empowered to hear complaints and issue opinions in cases where sex discrimination is charged.¹⁵ The EEOC does not, however, exercise judicial power—its employment guidelines, opinion letters, and decisions are advisory only. Consequently, a law suit initiated after an EEOC decision is a *de novo* proceeding.¹⁶ Although the courts are thus free to agree or disagree with the EEOC decisions, in practice they are accorded substantial weight, and most courts follow the EEOC's interpretations in recognition of the responsibility Congress has vested in the agency.¹⁷ Therefore, a firm understanding of the basic policy guidelines adopted by the EEOC in the area of sex discrimination is an excellent starting point for analysis of the meaning of the Act.

In large part the EEOC's basic policy has been shaped by a report compiled by the Citizens' Advisory Council on the Status of Women to the Committee on the Status of Women.¹⁸ The Citizens' Advisory Council was formed to study the problems of sexual discrimination and advise the Committee. Based on its investigation, the Council recommended that the EEOC formally adopt certain statements of policy, primary among which was the position that the bona fide occupational qualification be interpreted narrowly.¹⁹

The Council also recommended that the EEOC reject as a matter of policy three premises that it felt would be offered in support of the existence of a bona fide occupational qualification: First, "mythical assumptions about the comparative employment characteristics of

15. 42 U.S.C. § 2000e-5(a) (1964).

16. *Grimm v. Westinghouse Elec. Corp.*, 300 F. Supp. 984, 989 (N.D. Cal. 1969); *Diaz v. Pan Am. World Airways*, 311 F. Supp. 559, 568 (S.D. Fla. 1970), *rev'd on other grounds*, 442 F.2d 385 (5th Cir. 1971).

17. *Local 189, United Papermakers v. United States*, 416 F.2d 980, 997 (5th Cir. 1969); *International Chem. Workers Union v. Planters Mfg. Co.*, 259 F. Supp. 365, 366 (N.D. Miss. 1966); *cf. Phillips v. Martin-Marietta Corp.*, 400 U.S. 542, 545 (1971) (Marshall, J., concurring). *See generally* *Udall v. Tallman*, 380 U.S. 1 (1965); *cf. Diaz v. Pan Am. World Airways*, 311 F. Supp. 559, 568 (S.D. Fla. 1970), *rev'd*, 442 F.2d 385 (5th Cir. 1971).

18. The Citizens' Advisory Council and the Interdepartmental Committee on the Status of Women were created by Exec. Order No. 11,126, 3 C.F.R. 791 (1963). The Committee is composed of Cabinet officers and other administrative officials, while the Council is larger, consisting of 17 members. Members of the Council are appointed by the President of the United States. *Id.* at 792.

19. The bona fide occupational qualification exception as to sex should be interpreted narrowly. Sex labels—"men's jobs" and "women's jobs"—deny equal employment opportunities to both sexes. The experience of the Federal government as an employer, as well as much of private industry, has demonstrated that there are very few jobs which cannot be effectively performed by qualified persons of either sex.

CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, A MEMORANDUM OF POLICY FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION 5-7 (CACSW Item 91, 1965) [hereinafter cited as CITIZENS' ADVISORY COUNCIL MEMORANDUM]. This document is one of the best explanations of the underlying rules and policies of the EEOC available.

women in general";²⁰ second, "stereotyped characterizations of the sexes";²¹ and finally, "assumption of sex prejudice on the part of the public, clients, customers, other employees or some other group which the employee will come in contact with."²²

In short, the Council recommended that the EEOC reject all arguments that do not focus on the individual involved in the specific case:

The principal of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally assigned to that group.²³

A particular person may be denied employment because he or she is emotional, is seeking only temporary work, or is incapable of meeting the physical demands of the job. But rejection on the ground that all members of that sex are assumed to have a given characteristic, the Council argued, should not be permitted.

These recommendations of the Citizens' Advisory Council were adopted by the EEOC²⁴ and have been consistently adhered to. The overriding emphasis has been on the individual qualifications of the applicant for a job. The EEOC holds that refusal of employment or advancement according to generic concepts of the sexes, or stereotyped sexual characterizations, or because of coworker preference, constitutes an unlawful employment practice.²⁵

C. Title VII and the Courts

1. The Bona-Fide-Occupational-Qualification Exception

The significance of the EEOC's position was somewhat dimmed

20. *Id.* at 6. The Council cited the assumptions that women are only temporary workers, and that the turnover rate among women is higher than among men. "Assumptions such as these are often found to be based on myths when actual comparisons are made with male employees in the same type and level of jobs. Even if it could be proved that women as a class are more likely to leave earlier, this would not justify pre-judging a particular individual because of class membership." *Id.*

21. *Id.* Examples of such characterizations are claims that women are more emotional than men, that men are less capable of assembling intricate equipment, that men are stronger than women, and that women have more endurance than men. "This would not mean that a woman (or a man) who is not capable of doing heavy physical labor must be hired or employed in that kind of work." *Id.*

22. *Id.* ("This likewise is an assumption which may well be false. Even if it could be proved to be true, it does not follow that the prejudice would affect the particular woman's performance of the job or that she would not be able to overcome the prejudice and change discriminatory attitudes").

23. *Id.*

24. 29 C.F.R. §§ 1604.1-1604.7 (1965). See also U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, TOWARD JOB EQUALITY FOR WOMEN (1969). This pamphlet contains a good analysis of the myths generally associated with the employment of women.

25. 29 C.F.R. § 1604.1(a)(1) (1965).

by the initial reaction of the district courts, which have construed the bona-fide-occupational-qualification exception broadly, thereby limiting the effect of the sex-discrimination provisions. For example, in *Bowe v. Colgate-Palmolive Co.*²⁶ the court was asked to pass on the legality of an employer's rule that female employees could not lift or carry more than 35 pounds. In effect, the rule precluded female employees from holding certain positions with the company. Finding that it would not be practical for Colgate-Palmolive "to assess the physical abilities and capabilities of each female who might seek a particular job,"²⁷ the trial court held that "generally recognized physical capabilities and physical limitations of the sexes may be made the basis for occupational qualification in generic terms"²⁸ and concluded that "restrictions and limits on the weights that may be lifted by female employees may be imposed and enforced . . . as a 'bona fide occupational qualification reasonably necessary to the normal operation of that [employer's] particular business or enterprise.'"²⁹ Rejecting other suggested criteria,³⁰ the court specifically adopted a standard which it equated with that used in economic equal-protection cases by allowing generic qualifications if "the discrimination of the employer is rationally related to an end which he has a right to achieve—production, profit, or business reputation."³¹

26. 272 F. Supp. 332 (S.D. Ind. 1967), *rev'd*, 416 F.2d 711 (7th Cir. 1969).

27. 272 F. Supp. at 357.

28. *Id.* at 365.

29. *Id.*

30. *Id.* at 361-62. The court relied upon a note [Note, *Classification on the Basis of Sex and the 1964 Civil Rights Act*, *supra* note 11, at 794-96] that had examined the legislative intent and concluded that Congress probably had rejected the standards of "strict necessity" and "traditional roles." "Strict necessity" would occur if one sex were felt to be necessary for morality or authenticity, such as positions as washroom attendant, actor and actress, nurse, and model. "Traditional roles" are those roles that generally have been performed only by one sex—for example, women as secretaries.

Surprisingly, the only cases so far involving strict necessity are arbitration decisions. In *Kaiser Foundation Hosps. & Medical Centers v. Building Serv. Employees Local 399*, 67-2 CCH LAB. ARB. AWARDS 4665 (1967), an arbitrator upheld a requirement that only female nurses could attend woman patients. Another arbitrator held that sex was a bona fide occupational qualification for the position of restroom attendant. *Corn Products Co., Int'l, Inc. v. Atomic Workers Local 7-662*, CCH EMPL. PRAC. GUIDE ¶ 5039 (1970).

31. 272 F. Supp. at 362. The court also rejected the claim that there is no distinction between racial and sexual discrimination. *Id.* at 362-63. This appears to be the court's rationale for applying the more permissive rational-basis test, as opposed to the much more restrictive standard applied when fundamental human rights are involved. However, some commentators argue that laws relating to sex discrimination should be equated to those relating to racial discrimination. Comment, *Sex Discrimination in Employment or Can Nettie Play Professional Football?*, 4 U.S.F.L. REV. 323, 324 (1970); Note, *supra* note 7, at 400. *Contra*, Note, *Classification on the Basis of Sex and the 1964 Civil Rights Act*, *supra* note 11, at 797-98; Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 888-89

On appeal, the Seventh Circuit reversed,³² totally rejecting the trial court's approval of the use of generic classifications:

[I]t is best to consider individual qualifications and conditions, such as the physical capability and physiological makeup of an individual, climatic conditions, and the manner in which the weight is to be lifted

Accordingly, we hold that Colgate may, if it so desires, retain its 35-pound weight-lifting limit as a general guideline for all of its employees, male and female. However, it must notify all of its workers that each of them who desires to do so will be afforded a reasonable opportunity to demonstrate his or her ability to perform more strenuous jobs on a regular basis.³³

Thus, in the Seventh Circuit at least, the generic approach to sex discrimination has been rejected.

Another lower court decision that suffered the same fate on appeal is *Weeks v. Southern Bell Tel. & Tel. Co.*,³⁴ in which the female plaintiff had been denied a position as a switchman on the ground that the job was reserved for men only. The lower court held for the employer for two reasons: First, a state statute limited the weight a woman could lift; and second, the employer had labelled the job "strenuous" and fraught with other "undesirable working conditions."³⁵ On appeal

(1967). The rationale for equating sexual discrimination with racial discrimination is based on the great similarities between the two forms of discrimination, both historical and causal. See Murray & Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 233-35 (1965), and authorities cited therein.

There is as yet no authority in case law for the proposition that there is a fundamental human right to equal employment, but the argument is clear. The right to employment is one of the most crucial known to man. Without a job, a person cannot eat, support a family, or secure decent housing, all of which are constitutionally protected values of the most immediate importance to the individual. In addition, even if the right to equal employment is given secondary status under the equal protection clause, it is generally recognized that Title VII protects against some forms of discrimination that are constitutionally permissible under the equal protection clause. See, e.g., *Richards v. Griffith Rubber Mills*, 300 F. Supp. 338, 340 (D. Ore. 1969).

32. 416 F.2d 711 (7th Cir. 1969).

33. *Id.* at 718. The court did not specifically answer the trial court's finding that individualized testing would be impractical [see text accompanying note 27 *supra*]; however, it implicitly rejected this as a valid reason for generic classification. In contrast, one district court has accepted the related defense that individualized testing would subject the worker to the possibility of injury and the company itself to liability claims. *Gudbrandson v. Genuine Parts Co.*, 297 F. Supp. 134, 136 (D. Minn. 1968). Such a defense can easily serve as a screen for perpetuating sex discrimination and should therefore only be accepted after careful factual inquiry, and after the employer has met the burden of proving that individual testing cannot be conducted without dangerous consequences.

34. 277 F. Supp. 117 (S.D. Ga. 1967), *rev'd*, 408 F.2d 228 (5th Cir. 1969).

35. 277 F. Supp. at 118. The position required the lifting of equipment from the over-the-head position, pushing and shoving of heavy objects, being subject to call 24 hours a day, and working alone during late hours of the night.

the Fifth Circuit held that the employer must meet the burden of proving sex as a bona fide occupational qualification,³⁶ and that this exception to Title VII was to be interpreted narrowly.³⁷ To justify a generic classification, the employer must show that "he had reasonable cause to believe, that is, a *factual basis* for believing, that *all or substantially all* women would be unable to perform safely and efficiently the duties of the job involved."³⁸ Applying this test, the court rejected the employer's assertions that strenuous work³⁹ or undesirable working conditions⁴⁰ create a bona-fide-occupational-qualification exception.

Bowe and *Weeks*, read together, give the bona fide occupational qualification a very narrow interpretation, thereby broadening the potential scope of the ban against sex discrimination in employment.⁴¹ Under *Weeks*, to justify a generic classification scheme, the employer must prove that at the time of the discriminatory practice he had factual reason to believe that all or substantially all women could not fulfill the requirements of the position. If the employer cannot meet this test he must then judge the individual applicant on his or her personal qualifications, not those generically applied to a single sex. As another

36. 408 F.2d at 235.

37. *Id.* at 232. Although a narrow interpretation of the bona-fide-occupational-qualification exception may advance the goal of equal employment opportunity for women, the reasoning of the court is subject to criticism since it supported its conclusion by reference to the intent of Congress in passing the Civil Rights Act of 1964. See note 12 *supra* and accompanying text.

38. *Id.* at 235 (emphasis added).

39. "Labeling a job 'strenuous' simply does not meet the burden of proving that the job is within the bona fide occupational qualification exception." *Id.* at 234.

40. Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing. We cannot conclude that by including the bona fide occupational qualification exception Congress intended to renege on that promise.

Id. at 236. See also *Cheatwood v. South Central Bell Tel. & Tel. Co.*, 303 F. Supp. 754, 758 (M.D. Ala. 1969). For a vivid description of paternalism and discrimination, see G. MYRDAL, *AN AMERICAN DILEMMA* 1075 (2d ed. 1962).

41. Although *Bowe* and *Weeks* represent the trend in sex-discrimination cases, there is one lower court decision that seems contrary. In *Ward v. Firestone Tire & Rubber Co.*, 260 F. Supp. 579 (W.D. Tenn. 1966), the employer set aside certain "light work" jobs for women and invalids. A male employee's request for a transfer to a light-work position was denied. The court said: "Firestone and the Local [union] were bona fide in the sense that they acted with honest purpose and acted within reason in their effort to accomplish the end that is expressly recognized as legitimate by Sec. 2000e-2(e)(2) of the Act." *Id.* at 581. The court ignored the "reasonably necessary" limitation on the bona fide occupational qualification, since good faith alone does not excuse sex discrimination. Cf. *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 715-16 (7th Cir. 1969). For this reason, *Ward* has been criticized by certain commentators: Note, *Sex Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964*, 1968 DUKE L.J. 671, 696; Note, *supra* note 7, at 402.

court stated in *Richards v. Griffith Rubber Mills*,⁴² "Individuals must be judged as individuals and not on the basis of characteristics generally attributed to racial, religious or sexual groups."⁴³

2. "Sex-Plus" Discrimination

The bona fide occupational qualification is the only statutory exception to Title VII's ban on sex discrimination. It was soon joined, however, by a more subtle judicially created exception which can best be described as the "sex-plus" defense. The employer, while admitting discrimination, typically asserts that it is not based on sex per se, but rather on an additional factor such as children or marriage. The leading case in this area is *Phillips v. Martin-Marietta Corp.*⁴⁴ The employer, who did not discriminate against women per se,⁴⁵ had a policy of not hiring women with preschool-age children—a restriction that did not extend to male applicants.⁴⁶ The Fifth Circuit upheld the employer's refusal to hire the female applicant, reasoning that the existence of another factor was sufficient to make the provisions of Title VII inapplicable.⁴⁷ The court's reasoning fails, however, for closer examination shows that the employer's discrimination was based solely upon sex. The "plus" factor—preschool-age children—was only considered when the applicant was female. Thus, a widowed or divorced male applicant who had preschool-age children in his care, would not automatically be refused employment.

The Supreme Court apparently recognized this weakness in the lower court's reasoning, for it unanimously reversed:

Section 703(a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex. The Court of Appeals therefore erred in reading this section as permitting one hiring practice for women and another for men—each having pre-school age children.⁴⁸

In other words, sex-plus qualifications do not automatically escape scrutiny under the Civil Rights Act of 1964, any more than generic classifications. Sex-plus qualifications may, however, come under the bona-fide-occupational-qualification exception; the Supreme Court, in remand-

42. 300 F. Supp. 338 (D. Ore. 1969).

43. *Id.* at 340.

44. 411 F.2d 1 (5th Cir. 1969), *rev'd*, 400 U.S. 542 (1971). Two other cases involving the sex-plus defense are *Cooper v. Delta Air Lines, Inc.*, 274 F. Supp. 781 (E.D. La. 1967) and *Lansdale v. United Air Lines*, 2 F.E.P. Cases 462 (S.D. Fla. 1969), *rev'd per curiam*, 437 F.2d 454 (5th Cir. 1971).

45. 411 F.2d at 2. Seventy-five percent of the workers in this position were women.

46. *Id.*

47. *Id.* at 3-4.

48. *Phillips v. Martin-Marietta Corp.*, 400 U.S. 542 (1971).

ing the case to resolve this issue,⁴⁹ has left unclear the proper application of this exception to sex-plus cases.

Two major objections are raised if the Court subscribes to the premise that the hiring only of women without preschool-age children can constitute a bona fide occupational qualification. First, this displays a paternalistic approach⁵⁰ that does not reflect the financial necessity of female employment.⁵¹ Value judgments over the proper role of women are best left to the mothers involved and should not be used as a basis for discrimination,⁵² a point recognized by Justice Marshall in his concurring opinion:

I fear that in this case, where the issue is not squarely before us, the Court has fallen into the trap of assuming that the Act permits ancient canards about the proper role of women to be a basis for discrimination. . . .

. . . .

When performance characteristics of an individual are involved, even when parental roles are concerned, employment opportunity may be limited only by employment criteria that are neutral as to the sex of the applicant.⁵³

Second, the sex-plus approach is subject to almost unlimited manipulation due to the infinity of "plus" factors that can be added to sex classifications. In two cases decided before *Martin-Marietta*, the courts held that marriage can constitute a valid "plus" factor.⁵⁴ Further examples are limited only by the ingenuity of counsel. Consequently, any employer who views sex discrimination as advantageous or convenient could discriminate simply by adopting a "plus" factor.

To control this potential manipulation, the courts must disregard "plus" factors that are merely "ancient canards about the proper role of women," and judge these factors solely as they affect the employer's

49. *Id.* at 544.

50. Apparently, *Martin-Marietta* was concerned with the normally greater responsibilities of women to their young children since it did not present any evidence to show that these women would perform with less competence or a higher absenteeism rate than their male or female counterparts without preschool-age children. Brief for the United States as Amicus Curiae at 5-6, *Phillips v. Martin-Marietta Corp.*, 400 U.S. 542 (1971). This concern also seems to have motivated the decision of the circuit court of appeals. 411 F.2d at 4.

51. Over half of all working mothers do so because they need the money to help raise their families. WOMAN'S BUREAU, U.S. DEP'T OF LABOR, WHO ARE THE WORKING MOTHERS? (Leaflet No. 37, 1966). If a large number of employers were to adopt *Martin-Marietta's* policy, many families would be hurt rather than helped.

52. *Cf. Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 236 (5th Cir. 1969).

53. 400 U.S. at 545, 547 (1971).

54. *Cooper v. Delta Air Lines, Inc.*, 274 F. Supp. 781 (E.D. La. 1967); *Lansdale v. United Air Lines, Inc.*, 2 F.E.P. Cases 462 (S.D. Fla. 1969), *rev'd per curiam*, 437 F.2d 454 (5th Cir. 1971).

business—that is, as bona fide occupational qualifications governed by the *Weeks* test:⁵⁵ In order to discriminate against women as a class, the employer must prove that all or substantially all women with pre-school-age children will perform less competently than their coworkers. In requiring such a test, the courts will avoid basing their decisions on generalized notions of woman's role in society, which is the type of discrimination that Title VII meant to combat.

II

STEWARDESSES AND SEX DISCRIMINATION

On December 17, 1903, the Wright brothers inaugurated the air age. On May 15, 1930, only 27 years later, stewardesses⁵⁶ were first employed on a commercial flight by the Boeing Air Transport Company from San Francisco to Chicago.⁵⁷ This initial employment of stewardesses met with opposition, particularly from hardy pilots who did not want women in their planes. But once in the air, the marketing advantages of stewardesses overcame all opposition of pilots or management.⁵⁸

The full acceptance of stewardesses as an integral part of the commercial air-passenger industry did not, however, spell an end to sex discrimination. Almost from the beginning stewardesses have been subject to restrictions that have not been applied to male employees, not even male stewards. The primary restrictions have been related to age and marriage.

A. *Marital Restrictions*

Until a few years ago, many airlines reassigned or terminated stewardesses upon marriage,⁵⁹ imposing a major restriction that cut the average length of employment to two or three years.⁶⁰ It is not sur-

55. See notes 34-43 *supra* and accompanying text.

56. As of 1967 there were over 23,000 flight attendants employed on American airlines and 50,000 worldwide. *Diaz v. Pan. Am. World Airways*, 311 F. Supp. 559, 564 (S.D. Fla. 1970), *rev'd*, 442 F.2d 385 (5th Cir. 1971). "Stewardesses," "stewards," "flight attendants," and "flight cabin attendants" are interchangeable terms that generally have the same meaning. Regardless of the term chosen by the various airlines as to the job classification for this position, the functions are the same from airline to airline. The only difference is whether the position is held by a man or woman.

57. *Oakland Tribune*, May 10, 1970, at 3, col. 1. The Boeing Air Transport Company is now United Air Lines.

58. *Id.*

59. United Air Lines has admitted terminating over 8,500 stewardesses since 1945, primarily due to marriage. *United Air Lines v. International Air Lines Pilots Ass'n*, 67-1 CCH LAB. ARB. AWARDS 3720, 3721 (1967).

60. AVIATION WEEK AND SPACE TECHNOLOGY, August 28, 1967, at 34; BUREAU OF LABOR STATISTICS, UNITED STATES DEPT. OF LABOR, EMPLOYMENT OUTLOOK FOR CIVIL AVIATION 9 (Bulletin No. 1550-102, 1968).

prising, therefore, that marital restrictions have been subject to vigorous attack by the stewardess unions. The unions have been highly successful in ending these restrictions through grievance procedures, arbitration, and negotiations during collective bargaining sessions.⁶¹ Unfortunately, there remains a body of poorly reasoned case law generated by the controversy, even though the restrictions themselves have vanished. These cases should be critically examined, for if the law in this area is incorrect, it should be changed to provide a legal bar to reinstatement of the marital restriction in the airline industry and, perhaps more important, to prevent these cases from being used as authority to avoid Title VII's effect on marital restrictions in other industries.

1. *The EEOC and Airline Employment Practices*

From its inception the EEOC was aware of the problems in the airline industry relating to sex.⁶² After receiving numerous complaints from ex-stewardesses who had been terminated due to marriage and requests from airlines for a general statement, the EEOC conducted a long study of the sex-discrimination problems in the airline industry.⁶³ On June 20, 1968, the agency issued two opinions holding that the marital restrictions on stewardesses violated Title VII.

The first of these opinions, *Neal v. American Airlines, Inc.*,⁶⁴ involved the termination of a stewardess six months after her marriage.

61. The early arbitration awards had all been in the airlines' favor. See *United Air Lines v. International Air Lines Pilots Ass'n*, 67-1 CCH LAB. ARB. AWARDS 3720 (1967). The underlying rationale was the historic uniformity of the practice in the airline industry. *Id.* at 3726.

In the 1960's the stewardess unions mounted generally successful new efforts to abrogate these restrictions through grievance proceedings initiated by stewardesses who had been discharged due to marriage. *American Air Lines, Inc. v. Transport Workers Local 550*, 67-1 CCH LAB. ARB. AWARDS 4236 (1967) (a contract that a company may terminate a stewardess after six months does not give the right to terminate automatically); *Allegheny Airlines, Inc. v. International Air Lines Pilots Ass'n*, 67-1 CCH LAB. ARB. AWARDS 3854 (1967) (individual agreement to maintain unmarried status is superceded by collective bargaining agreement that was silent on this point but purported to cover all employment matters); *Braniff Airways, Inc. v. Air Line Pilots Ass'n*, 65-2 CCH LAB. ARB. AWARDS 5434 (1965) (agreement not to marry must be struck with certified collective bargaining agent, not the individual). However, only in *Braniff* did the arbitrator consider Title VII of the Civil Rights Act of 1964 in his decision: "[T]his Board is impressed with the language of the Civil Rights Act which also expressed, on a wider basis, the modern trend of thought concerning discrimination based upon sex." *Id.* at 5435.

62. See *Dodd v. American Airlines, Inc.*, CCH EMPL. PRAC. GUIDE ¶ 6001, at 4006 (EEOC 1968).

63. Questionnaires were sent to the various unions and airlines and a public hearing was held on September 12, 1967. See *Neal v. American Airlines, Inc.*, CCH EMPL. PRAC. GUIDE ¶ 6002, at 4012, 4015 n.21 (EEOC 1968).

64. CCH EMPL. PRAC. GUIDE ¶ 6002 (EEOC 1968).

A clause in the stewardess' contract provided that the company "may, at its option, release from employment a married stewardess at any time following the expiration of six (6) months after her marriage or pregnancy."⁶⁵ The Commission held that the provision discriminated on the basis of sex within the meaning of Title VII.⁶⁶ It rejected the airlines' argument that since all the holders of the position of flight attendant were women, there could be no discrimination based on sex. The relevant question, held the EEOC, is whether all employees of the airline were subject to the same restrictions:

The concept of discrimination based on sex does not require an actual disparity of treatment among male and female employees in the same job classification. It is sufficient that a company policy or rule is applied to a class of employees because of their sex, rather than because of the requirements of the job.⁶⁷

The second case, *Colvin v. Piedmont Aviation, Inc.*,⁶⁸ paralleled the facts in *Neal* except that the airline employed both male and female flight attendants, and the marital restrictions were not placed on the stewards, many of whom married while employed.⁶⁹ Again, the airline failed to establish the relevance of marital restrictions only in the case of female employees.⁷⁰ The EEOC has consistently reaffirmed its holdings in *Neal* and *Colvin*,⁷¹ but unfortunately the Commission's position has only recently been followed by the courts.

2. *Sex Discrimination Before the Courts*

The courts have five times been confronted with the marital restriction on stewardesses. Two of the cases involved procedural issues and have not yet reached an adjudication on the merits.⁷² In two of the three cases decided on the merits, the district courts held in favor of the airlines on the ground that Title VII did not prohibit sex-plus discrimination such as that involved in the termination of married women.⁷³ However, both lower court decisions were handed down before

65. *Id.* at 4011.

66. "[T]he no-marriage rule has been adopted because *female* flight attendants are involved rather than because marriage disqualifies an individual from performing as a flight attendant." *Id.* at 4015 (emphasis in original).

67. *Id.* at 4014.

68. CCH EMPL. PRAC. GUIDE ¶ 6003 (EEOC 1968).

69. *Id.* at 4016.

70. *Id.* at 4017-18.

71. *See, e.g.*, EEOC Case No. YSF9-060, CCH EMPL. PRAC. GUIDE ¶ 6011 (1969).

72. *Evenson v. Northwest Airlines, Inc.*, 268 F. Supp. 29 (E.D. Va. 1967) (whether the EEOC must attempt to secure voluntary compliance before court action can be initiated); *Gerstle v. Continental Airlines, Inc.*, 2 F.E.P. Cases 830 (D. Colo. 1970) (the propriety of a class action suit).

73. *Cooper v. Delta Air Lines, Inc.*, 274 F. Supp. 781, 783 (E.D. La. 1967); *Lansdale v. United Air Lines, Inc.*, 2 F.E.P. Cases 462, 463 (S.D. Fla. 1969), *rev'd*

the Supreme Court opinion in *Martin-Marietta*, which abrogated the automatic sex-plus defense to actions based on discrimination that may violate Title VII.⁷⁴ Marital restrictions may still qualify as bona fide occupational qualifications if the airlines can sustain the burden of proof in this regard.⁷⁵

3. *Marital Restrictions and the Bona Fide Occupational Qualification*

There are four possible justifications for marital restrictions as bona fide occupational qualifications: First, customer preference is for single stewardesses.⁷⁶ Second, marriage will lead to a drop in charm, efficiency, and reliability.⁷⁷ Third, the working conditions and hours of stewardesses are such that it would detrimentally affect a married person's homelife.⁷⁸ And finally, the probability of pregnancy is much higher in the case of a married stewardess.⁷⁹

a. Customer preference. There are sound reasons for rejecting the customer-preference argument, beyond the difficulty of ascertaining whether these preferences in fact exist.⁸⁰ First, if there is a preference

per curiam, 437 F.2d 454 (5th Cir. 1971). The third case decided on the merits was *Sprogis v. United Air Lines, Inc.*, 308 F. Supp. 959 (N.D. Ill. 1970), *aff'd*, 3 F.E.P. Cases 621 (7th Cir. 1971). In *Sprogis* the court held the airline failed to meet its burden of proof.

74. See text accompanying note 48 *supra*. One of the cases was overruled on appeal. *Lansdale v. United Air Lines, Inc.*, 437 F.2d 454 (5th Cir. 1971). The plaintiff in *Cooper* appealed, but when the airline rescinded its marital ban and asked her to return to work, she accepted and dismissed the appeal. Comment, *Marital Restrictions on Stewardesses: Is This Any Way to Run an Airline?*, 117 U. PA. L. REV. 616, 620 (1969).

75. See text accompanying note 49 *supra*. An interesting side issue is whether sex itself is a bona fide occupational qualification for stewardesses. The leading case so far in this regard is *Diaz v. Pan Am. World Airways*, 311 F. Supp. 559 (S.D. Fla. 1970), *rev'd*, 3 F.E.P. Cases 337 (5th Cir. 1971). The Fifth Circuit, in reversing the district court holding that sex was a bona fide occupational qualification for the position of flight cabin attendant from which male applicants could be excluded, held that sex was merely tangential to the real business of the airline—transportation—and did not meet the business-necessity test dictated by the Court. 3 F.E.P. Cases at 339.

76. *Cooper v. Delta Air Lines, Inc.*, 274 F. Supp. 781, 782 (E.D. La. 1967).

77. *American Airlines, Inc. v. Transport Workers Local 550*, 67-1 CCH LAB. ARB. AWARDS 4236, 4257 (1967).

78. *Neal v. American Airlines, Inc.*, CCH EMPL. PRAC. GUIDE ¶ 6002, at 4013 (EEOC 1968).

79. "The essential basis for the Company's rule is directed towards pregnancy and not marriage." *Allegheny Airlines, Inc. v. International Air Lines Pilots Ass'n*, 67-1 CCH LAB. ARB. AWARDS 3854, 3857 (1967). See also *American Airlines, Inc. v. Transport Workers Local 550*, 67-1 CCH LAB. ARB. AWARDS 4236, 4257 (1967); *Neal v. American Airlines, Inc.*, CCH EMPL. PRAC. GUIDE ¶ 6002, at 4013 (EEOC 1968); *Cooper v. Delta Air Lines, Inc.*, 274 F. Supp. 781, 782 (E.D. La. 1967).

80. Results of a recent poll indicate that the marital status of stewardesses may be irrelevant to most passengers. In 1965 the Airways Club undertook a survey of its members as to whether or not stewardesses should be single. The club is comprised of 25,000 members who average 25 flights a year. On the question "Should stewardesses

for glamorous single stewardesses, it probably has been created in large part through the airlines' own sales campaigns.⁸¹ Employers should not be allowed to perpetuate discriminatory employment practices that their own advertising has built up into so-called customer preferences.

Furthermore, the allowance of customer preference as a defense to charges of employment discrimination would incorporate into the law a very unreliable factor, since it is frequently difficult to determine exactly what the customer preference may be.⁸² In addition, these preferences may change, and to allow these to dictate employment patterns throughout the country would vitiate the equal employment dictated by Title VII.

The most important reason for excluding customer preference as a bona fide occupational qualification is that it perpetuates discrimination on a generic rather than an individual level—a practice that has been rejected by the courts.⁸³ The basis of discriminatory preference may

be single?", the results were:

YES	862
NO	1,445
Don't Care	2,827

Thus, over 80 percent had no opinion on the desirability of single stewardesses or definitely did not prefer them. *Neal v. American Airlines, Inc.*, CCH EMPL. PRAC. GUIDE ¶ 6002, at 4014 n.17 (EEOC 1968).

81. *See, e.g.*, AVIATION WEEK AND SPACE TECHNOLOGY, Aug. 28, 1967, at 34. Surprisingly, although the airlines sell the glamor image of beautiful single stewardesses under 32, the stewardesses' sex appeal has never been used as a legal defense to discrimination. The United Air Lines advertisement, "Everyone gets warmth, friendliness and extra care— and someone may get a wife" [NEWSWEEK, January 1, 1968, at 55], has never been tested in court. The airlines are quite adamant in denying that sex appeal has played a role in the formulation of their sex-discrimination practices. *See, e.g.*, *Dodd v. American Airlines, Inc.*, CCH EMPL. PRAC. GUIDE ¶ 6001, at 4010 (EEOC 1968).

The EEOC takes the position that sex appeal should serve as a bona fide occupational qualification only in cases where it is strictly required for purposes of authenticity, as in the case of actors and actresses. 29 C.F.R. § 1604.1(a)(2) (1970). This view has received the support of at least one Supreme Court Justice [see *Phillips v. Martin-Marietta Corp.*, 400 U.S. 542, 547 (1970) (Marshall, J., concurring)] and several commentators [*e.g.*, Comment, *supra* note 31, at 353].

The position that sex appeal should be a bona fide occupational qualification only if strictly necessary is certainly the correct one if equal employment opportunity is to be extended to all women. Since sex appeal is really nothing more than the customary masculine preference for beautiful women, allowing this preference to dictate employment practices would hardly promote the cause of equal employment opportunity for all men and women.

82. Public opinion polls can be very unreliable. Not only is it frequently difficult to obtain a representative sample, but the results of such polls can easily be manipulated by the manner and phraseology of the questions asked. Consequently, many courts are reluctant to allow them into evidence. *See, e.g.*, *Lerner Stores Corp. v. Lerner*, 162 F.2d 160, 162 (9th Cir. 1947). Once admitted, however, they can play a large role in the ultimate verdict. *See generally* H.C. BARSDALE, *THE USE OF SURVEY RESEARCH FINDINGS AS LEGAL EVIDENCE* (1957).

83. *See* text accompanying notes 32-43 *supra*.

be totally unrelated to the functional requirements of the position. As expressed by the Citizens' Advisory Council:

The refusal to hire a woman because of an assumption of sex prejudice on the part of the public, clients, customers . . . is an assumption which may well be false. Even if it could be proved to be true, it does not follow that the prejudice would affect the particular woman's performance of the job or that she would not be able to overcome the prejudice and change discriminatory attitudes.⁸⁴

Customer preference might possibly be useful in uncovering underlying factors that could justify imposition of a separate bona fide occupational qualification. For example, customer preference might be based on the performance of a job by one sex in a vastly superior manner. However, this does not mean that customer preferences, which themselves may be arbitrary and discriminatory, should provide any independent bona fide occupational qualification.

b. Job performance. The airlines have argued that a married stewardess is less likely to be able to perform her duties "with that grace and charm which the Airline expects of its stewardesses."⁸⁵ To justify the existence of a generic ban against married stewardesses under *Weeks* and *Bowe*, the airlines should be required to show that all or nearly all married stewardesses would be unable to perform with the requisite degree of grace and charm.⁸⁶ There are several reasons why the airlines would be incapable of sustaining this burden of proof. First, in order to maintain their positions as stewardesses upon marriage many women concealed their marriages from the airlines.⁸⁷ If marriage had seriously affected their job performances, the employer should have noticed it and taken appropriate action. That many married stewardesses escaped detection for long periods indicates that there was no noticeable change in their job performances.

Second, many of the newer airline contracts contained clauses creating six-month retention periods upon marriage,⁸⁸ in which the airlines could evaluate the performance of newly married stewardesses. This practice amounted to a recognition by at least some airlines that an outright marital restriction was unwarranted, and is clearly preferable as a reasonable alternative to a generic ban.

Third, even if marriage could be shown to affect job performance,

84. CITIZENS' ADVISORY COUNCIL MEMORANDUM, *supra* note 19, at 6.

85. *E.g.*, American Airlines, Inc. v. Transport Workers Local 550, 67-1 CCH LAB. ARB. AWARDS 4236, 4237 (1967).

86. See text accompanying notes 26-43 *supra*.

87. It has been estimated that up to half of American Airlines' stewardesses have been secretly married. See the claim made by the union in American Airlines, Inc. v. Transport Workers Local 550, 67-1 CCH LAB. ARB. AWARDS 4236, 4237 (1967).

88. See the contract terms quoted *id.* at 4239.

it would not justify applying sanctions only to married stewardesses. The airlines did not apply marital restrictions to male stewards, even though many of them married while so employed.⁸⁹ Nor were marital restrictions placed on ticket clerks or reservation agents who, like stewardesses, must also exercise grace and charm. Indeed, many stewardesses were not terminated upon marriage but were reassigned as reservation clerks. By failing to apply marital restrictions to these substantially similar occupations, the airlines indicate that job performance—"grace and charm"—does not in fact suffer upon marriage.

Fourth, because of the increasing size and passenger capacity of commercial planes, and the increasing number of duties assigned to the stewardesses, the average amount of time available for stewardess attention per passenger has dropped to 23 seconds per flight.⁹⁰ The time spent per passenger on each contact will therefore be much less than 23 seconds. In such short periods of time it will be very difficult for most passengers to assay the grace and charm of a stewardess, and even if these qualities do suffer upon marriage, they are relatively unimportant in the impersonal world of today's commercial flight.

Finally, marital restrictions on stewardesses had not been uniformly applied throughout the airline industry even before the airlines dropped them.⁹¹ Most European airlines, and over half the American airlines, either did not have such a requirement or had ceased enforcing it.⁹² Apparently, these airlines did not feel that marriage substantially affected a stewardess' performance.

Since all the airlines have now dropped the marital restriction, studies of the job performance of married stewardesses could be helpful in determining whether marriage should be a bona fide occupational qualification. No complaints about married stewardesses have been publicly aired by the airlines, and this silence may indicate that there is in fact no difference in performance between the two classes.

c. Concern about the stewardess' homelife. In defending their marital policies, the airlines frequently express concern for the homelife of married stewardesses.⁹³ While in most senses the homelife of a married

89. *E.g.*, *Lansdale v. United Air Lines*, 2 F.E.P. Cases 462 (S.D. Fla. 1969), *rev'd per curiam*, 437 F.2d 454 (5th Cir. 1971).

90. This figure is based on a time-and-motion study done on an 85-minute flight with 122 passengers aboard. *NEWSWEEK*, January 1, 1968, at 55.

91. See note 61 *supra* and accompanying text.

92. Of the 48 airlines questioned by the Equal Employment Opportunity Commission in 1967, 25 responded. Of these, twelve did not impose any marital restriction, two had options to terminate after six months of marriage (which options had not recently been exercised), six terminated stewardesses upon marriage, and five had varying policies. *Neal v. American Airlines, Inc.*, CCH *EMPL. PRAC. GUIDE* ¶ 6002, at 4015 n.21 (EEOC 1968).

93. In *Neal* the airline argued that because our society places the responsibility

stewardess is none of her employer's business,⁹⁴ the airlines contend that disruption of a stewardess' homelife presents them with administrative problems. For example, husbands may phone in about their wives' flight schedules and married stewardesses may try to juggle flight assignments to suit their husbands' schedules.⁹⁵ The *Weeks* test⁹⁶ places the burden on the airlines to show that all or nearly all married stewardesses would create this problem. Failing to carry this burden means that the airlines would have to act on an individual basis.

Just as important, the airlines' concern for the homelife of the married stewardess is misplaced. It is based on the assumption that a stewardess cannot both work and lead a happily married life. Yet the airlines fail to apply this assumption to their thousands of married secretaries, reservation clerks, and other woman employees.⁹⁷ While these employees work the standard 160 hours a month, stewardesses are limited under union contracts to 80 hours of flight time⁹⁸ and normally have only 35 hours of ground duty each month.⁹⁹ This leaves more time for homelife to the married stewardess than to the normal working mother.

On a broader scale, it is important to consider the implications of marital restrictions for the general economy. In 1967, 63.5% of all women in the labor force were married,¹⁰⁰ and of the working women between the ages of 20 and 24, 41.1% were married.¹⁰¹ If the air-

for homemaking and childbearing on females, absences of married females from home on business are more disruptive of family harmony than similar absences by males. *Id.* at 4013 n.11.

94. *Cf.*, Comment, *supra* note 74, at 618. See also the somewhat cynical comments in Comment, *supra* note 31, at 336.

95. See *Neal v. American Airlines, Inc.*, CCH EMPL. PRAC. GUIDE ¶ 6002, at 4015 (EEOC 1968). However valid the airlines' arguments might be with regard to these women, there is nothing that distinguishes the husbands of stewardesses in this respect from the wives of pilots and stewards. Their spouses are also concerned about their mates' flight schedules. Furthermore, these problems could be remedied by taking administrative action, including dismissal, when improper interference actually occurs. See *Sprogis v. United Air Lines*, 3 F.E.P. Cases 621, 624-25 (7th Cir. 1971).

96. See text accompanying notes 34-43 *supra*.

97. "The Company does employ female Reservation Agents who cover shifts starting at 7:00 a.m. and ending at Midnight or later. A Company Witness testified that these Agents, who are permitted to be married, have a record of being 'very good' as to dependability." *Allegheny Airlines, Inc. v. International Air Lines Pilots Ass'n*, 67-1 CCH LAB. ARB. AWARDS 3854, 3857 (1967).

98. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT OUTLOOK FOR CIVIL AVIATION 9 (Bulletin No. 1550-102, 1968).

99. *Id.*

100. WOMAN'S BUREAU, U.S. DEP'T OF LABOR, 1969 HANDBOOK ON WOMAN WORKERS 23, Table 7 (Bulletin No. 294, 1969). As of May 1969, 49% of the non-stewardess female workforce of United Air Lines were married. *Lansdale v. United Air Lines*, 2 F.E.P. Cases 462 (S.D. Fla. 1969), *rev'd per curiam*, 437 F.2d 454 (5th Cir. 1971).

101. WOMAN'S BUREAU, *supra* note 100, at 27, Table 8. The general age limits for

lines' concern for married stewardesses was universally exhibited by all employers for all working wives, there would be a serious disruption in the labor force and financial hardship for families that depend on working mothers' salaries.¹⁰²

In reality the airlines' concern for the married stewardess is based on an old myth that the woman's place is in the home with her husband.¹⁰³ Title VII, especially as interpreted by the EEOC,¹⁰⁴ was intended to eliminate such myths as operational employment policies, and emancipate the modern woman as an equal of her husband.

d. Pregnancy. The final reason advanced by airlines for the marital ban is the greater probability that newly married stewardesses will become pregnant.¹⁰⁵ The airlines seem repelled by the thought that pregnant stewardesses will detract from the glamor image they wish to associate with stewardesses.¹⁰⁶ Even if it is conceded that pregnancy detracts from image or performance,¹⁰⁷ the airlines may deal with the problem without automatic termination of married stewardesses. If a stewardess becomes visibly pregnant, they can dismiss her (assuming *arguendo* that such action would be legal), reassign her to a ground position, or grant her a maternity leave of absence.¹⁰⁸ There is no justification for terminating all married stewardesses simply because some will become pregnant. The employer seeks to discriminate on a generic level, whereas an individual approach is perfectly adequate. *Weeks* and *Bowe* clearly forbid the unnecessarily broad categorization.¹⁰⁹

B. Age Restrictions

A restriction similar to the marital ban was the age limitation on

applying to the airlines for the position of stewardess are 20-27. BUREAU OF LABOR STATISTICS, *supra* note 98, at 8.

102. See note 51 *supra* and accompanying text.

103. See note 93 *supra*.

104. See text accompanying notes 20-25 *supra*.

105. See note 79 *supra*.

106. See note 81 *supra* and accompanying text.

107. For a discussion of the problems of pregnant stewardesses flying, see Comment, *supra* note 74, at 617-18.

108. Some pressure is beginning to bear on the airlines to adopt reasonable leaves of absence: Grievances have been filed to start the arbitration process, complaints have been registered with the EEOC, and legal action has been threatened. Letter from Allen J. Berk, Assistant Director, Legal Department, Air Line Pilots Association, to the author, Jan. 21, 1971.

109. See text accompanying notes 32-43 *supra*. There are no court decisions relating to pregnancy and Title VII violations. However, in dictum one court has stated:

[The employer] can have a rule against pregnant women being considered for this position, but Title VII surely means that all women cannot be excluded from consideration because some of them may become pregnant.

Cheatwood v. South Cent. Bell Tel. & Tel. Co., 303 F. Supp 754, 759-60 (M.D. Ala. 1969).

stewardesses. Many airlines grounded stewardesses when they reached ages between 32 and 35.¹¹⁰ Male stewards and other employees, except pilots, were subject to the normal company retirement age of 65.¹¹¹ Like the marital restriction it was not uniformly applied throughout the industry.¹¹²

The airlines defended their age requirement on the premise that the older stewardesses lacked the strength, stamina, and enthusiasm required for the position.¹¹³ The physical-strength argument may have some merit. Today's stewardesses literally walk their way across the country.¹¹⁴ But the fact remains that the airlines have imposed early retirement automatically, without individual exceptions. As *Weeks* clearly dictates,¹¹⁵ absent a showing that all or substantially all women over age 32 or 35 would be unable to meet the physical demands of the work—a showing which the airlines have not made¹¹⁶—a woman must be judged on her own abilities, not by those commonly ascribed to her sex.

The EEOC has held that age is not a bona fide occupational qualification for the position of female flight-cabin attendant. In *Dodd v. American Air Lines*,¹¹⁷ the EEOC found that the age restriction was

110. Until recently this rule did not affect many stewardesses since, due to normal attrition rates and the termination of stewardesses upon marriage, very few were still flying by the time they reached 32. AVIATION WEEK AND SPACE TECHNOLOGY, Aug. 28, 1967, at 35. However, with the end of the marital restriction in sight, it was foreseeable that the rule would assume new importance.

111. Pilots are grounded at age 60 due to a Federal Aviation Administration regulation. 14 C.F.R. § 121.383(c) (1964). The attempts of the pilots to legally raise the 60-year limit to 65 were unsuccessful. *Air Line Pilots Ass'n 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); *Gitt v. Eastern Airlines, Inc.*, CCH EMPL. PRAC. GUIDE ¶ 5047 (N.Y. State Div. of Human Rights 1970).

112. An EEOC survey showed that, of the 26 carriers responding, 18 had no policy relating to the age of stewardesses. *Dodd v. American Airlines, Inc.*, CCH EMPL. PRAC. GUIDE ¶ 6001, at 4009 n.23 (EEOC 1968). In a 1967 *Aviation Week and Space Technology* survey of the aviation industry, only ten airlines imposed an age limitation on their stewardesses. These included four major lines and six local-service airlines. On the other hand over 30 airlines never had an age limitation, had ceased enforcing it, or had rescinded it. AVIATION WEEK AND SPACE TECHNOLOGY, Aug. 28, 1967, at 34.

113. *Dodd v. American Airlines, Inc.*, CCH EMPL. PRAC. GUIDE ¶ 6001, at 4009 (EEOC 1968). Their list of arguments does not include customer preference as a reason for the age restriction.

114. On a recent San Francisco-to-Chicago turnaround flight, a stewardess attached a pedometer to her feet. At the end of the trip it registered 17 miles. NEWSWEEK, Jan. 1, 1968, at 55.

115. See notes 32-43 *supra* and accompanying text.

116. One immediate flaw in the airlines' argument is that less than half of the American airlines imposed this requirement. In 1963, Delta Airlines had over 60 stewardesses out of 600 who were over 35 and an official of Delta stated, "Our older girls, as much as anyone else, are responsible for Delta's successful image." WALL ST. J., Aug. 9, 1963, at 1, col. 4.

117. CCH EMPL. PRAC. GUIDE ¶ 6001 (EEOC 1968). In this case plaintiff was

based strictly on sex and was not relevant to satisfactory job performance.¹¹⁸ Regarding individual versus generic classifications, the EEOC stated:

If a stewardess is unable to satisfactorily perform her job, Respondent may, of course, terminate her employment as it does that of other employees who cannot satisfactorily perform. It cannot, however, terminate her prior to individual dereliction on her part because of its assumptions about women over 32 as a class.¹¹⁹

The EEOC noted that the airlines were bound by Federal Aviation Administration regulations requiring an annual competence check on stewardesses,¹²⁰ implying that this examination would provide an appropriate and convenient time for the airlines to determine whether the individual stewardess can satisfactorily perform her duties. Consequently, a generic approach to the problem was not necessary.¹²¹

CONCLUSION

Collective bargaining contracts have satisfactorily resolved the problems of age and marital restrictions for the stewardesses presently flying, but this does not make the subject moot. There are still suits pending in the courts on behalf of stewardesses previously terminated under these restrictions, including class action suits.¹²² Consequently, judicial relief may still prove important to many ex-stewardesses.

More important are the long-range limitations of the present settlement. The only bar to the reimposition of these restrictions by the airlines is contractual. If the airlines should choose to fight the battle out again in collective bargaining sessions, and should they prevail, these restrictions would once again become problems for the EEOC and the courts. As expressed by one commentator, "The stewardess problem is currently under control but only because the carriers are not pressing their views."¹²³ Of course, the airlines can always terminate an individual stewardess whose performance is below standards, but the use of a generic classification should be disallowed under the test of *Weeks* and *Bowe*.¹²⁴

Finally, the airlines have not really eliminated these practices at

terminated as a stewardess upon reaching the age of 33. During her eight years of employment she had maintained an excellent work record.

118. *Id.* at 4009.

119. *Id.* at 4010.

120. 14 C.F.R. §§ 121.421(b), 121.433(c)(ii) (1970), *misquoting* in *Dodd v. American Airlines*, CCH EMPL. PRAC. GUIDE ¶ 6001, at 4010 (EEOC 1968).

121. CCH EMPL. PRAC. GUIDE at 4010.

122. See note 72 *supra* and accompanying text.

123. Bergman, *Age Discrimination in Employment: Air Carriers*, 36 AIR L. & COM. 3, 28 (1970).

124. See notes 32-43 *supra* and accompanying text.

all; they are only employing them in a selective fashion, for while the restrictions no longer affect stewardesses presently flying, the airlines still refuse to hire women who are married or past a specified age.¹²⁵ An initial denial of employment for discriminatory reasons should be just as unlawful as a termination of employment on similar grounds. Eventually, the courts will have to force the airlines to drop sex discrimination on all levels of the employment scale.

The application of Title VII to these discriminatory practices has been less than satisfactory. Part of this ineffectiveness can be attributed to the Act's newness. It takes time for cases to climb the judicial ladder and receive a definitive interpretation. This delay has been accentuated in the area of sex discrimination because of the ambiguity of the bona fide occupational qualification and the absence of a clear legislative intent.

The lack of power in the EEOC furthers its ineffectiveness. Although a claimant must first litigate his case before the Commission, the Commission has no power to bind the parties. If employers would yield upon adverse EEOC determinations, the Commission could serve as a relatively inexpensive shortcut to litigation, but this has not been the case in the airline industry.

However, the Act has not been totally ineffective. The unions were able to use it as a lever in lifting the age and marital restrictions, and are presently using it in a similar manner to obtain reasonable maternity leaves of absence for stewardesses. Also, it can be expected that as the law becomes increasingly established, strong sex-discrimination precedents should prevent the airlines from readily violating it.

One proposed remedy stands out from a view of the shortrun prospects of ending sex discrimination: The Equal Employment Opportunity Commission should be empowered to issue binding decisions, administrative regulations and rules, and cease-and-desist orders, subject to judicial review—powers similar to those exercised by other federal agencies. Not only would this power speed up the legal drive towards full employment opportunity, but it is also the only means short of collective union pressure that can attack the problems of an entire industry. The lesson of the airline industry thus far is that individual cases have not changed the practices of even an individual employer, much less the entire industry.

125. Berry Spera, Transport Workers Local 550, private communication to the author. Some litigation of such denials of employment has begun. See, e.g., EEOC Case No. YSF9-060, CCH EMPL. PRAC. GUIDE ¶ 6011 (1969).