University of Richmond Law Review

Volume 6 | Issue 2 Article 23

1972

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Narrowing the Scope of the Bona Fide Occupational Qualification Exception—Sex Discrimination in Professional Baseball Runs Afoul of the Law—*New York State Division of Human Rights v. New York-Pennsylvania Baseball League*

"Should a gentleman offer a lady a Tiparillo?" Such a question, popularized in a familiar advertisement only a few years ago, gives one keen insight into the stereotyped roles accepted for men and women during the past decade. In sharp relief today, women's liberation groups would have one believe that a man need not offer a woman anything; if she wants something, it is hers for the taking. Indeed, a recent national convention of hardcore feminists, echoing this aggressive attitude and citing that women compose fifty-three per cent of the nation's population, have warned that they intend to capture a majority of the elected offices in the United States.[1] While such groups[2] admittedly have implemented some social progress, the real moving force has been the federal courts, newly emboldened by the potent elixir of Title VII of the Civil Rights Act of 1964. Not only have the courts through this Act widely eliminated sex discrimination in the recent past,[3] but they have continued to do so, both on the state and federal level, primarily through further interpretation in recent cases[4] of the con-

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[1] U.S. News & World Report, Aug. 16, 1971, at 67.

[2] *See, e.g.*, Jacobsen, *Women's Political Caucuses*, Washington Post, Oct. 24, 1971, (Potomac), at 11, which exemplifies a practical outgrowth of the liberation movement.

[3] *See* Hollowell, *Women and Equal Employment: From Romantic Paternalism to the 1964 Civil Rights Act*, 56 Women Law. J. 28, 30 (1970).

[4] The courts have eliminated sex discrimination in diverse areas, although decisions involving women in employment, especially industry, have occurred with the greatest frequency. Several notable decisions have invalidated weight-lifting standards for women. *See, e.g.*, Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969); Utility Workers' Local 246 v. Southern Cal. Edison Co., 320 F. Supp. 1262 (C.D. Cal. 1970); Richards v. Griffith Rubber Mills, 300 F. Supp. 338 (D. Ore. 1969); Rosenfeld v. Southern Pac. Co., 293 F. Supp. 1219 (C.D. Cal. 1968), *aff'd*, — F.2d — (9th Cir. 1971). *But see* Gudbrandson v. Genuine Parts Co., 297 F. Supp. 134 (D. Minn. 1968). Likewise, courts have struck down the discriminatory aspects of hours restrictions. *See* Ridinger v. General Motors Corp., 325 F. Supp. 1089 (S.D. Ohio 1971); Caterpillar Tractor Co. v. Grabiec, 317 F. Supp. 1304 (S.D. Ohio 1970). Courts have also eliminated limitations on women tending bar. *See* McCrimmon v. Daley, 2 F.E.P. Cas. 971 (N.D. Ill. 1970), *on remand from* 418 F.2d 366 (7th Cir. 1969); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971); Paterson Tavern & Grill Owners' Ass'n v. Borough of Hawthorne, 57 N.J. 180, 270 A.2d 628 (1970). *See also* Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir. 1971), *cert. denied*, — U.S. — (1971), which effectively barred the "female sex only" requisite for the position of flight cabin attendant.

troversial "bona fide occupational qualification" exception[5] to the Act.[6] Specifically, the decision of *New York State Division of Human Rights v. New York-Pennsylvania Professional Baseball League*,[7] in striking another blow against sex discrimination, further defined and logically narrowed the "bona fide occupational qualification" (hereinafter BFOQ) exception.

In the *Baseball League* case, one of first impression in New York, the complainant was upheld in her effort to obtain employment as an umpire in a professional baseball organization, even though the management contended that she did not meet the necessary height and weight standards.[8] The baseball employer defended its refusal to hire the complainant on the basis of the BFOQ exception.[9] The court held, however, that a BFOQ must be affirmatively proved by the party claiming it,[10] and that the employer's evidence that the job was physically taxing did not meet the necessary burden.[11] Moreover, the court felt that, in light of the defendant's testimony that a woman meeting the physical qualifications would be accepted, being of the male sex was not a BFOQ for the job.[12] Likewise, the court concluded that the employment standards requiring an applicant to be 5'10" in height and 170 pounds in weight were unnecessary and inherently discriminatory, especially when some male umpires in the past had not met these standards and only one per cent of all females in the nation could do so today.[13]

Thus, the issue, whether an employer may do indirectly that which he may not do directly, emerged; more specifically, whether an employer may circumvent a statutory ban on sex discrimination by setting physical standards for qualification which in themselves may be inherently discriminatory. The court, in holding invalid sex discrimination of this type, based its decision on two related aspects. First, it was necessary to determine whether size and weight standards were merely a vehicle for discrimination or were in fact a BFOQ, bearing a reasonable relationship to the requirements of the

[5] 42 U.S.C. § 2000e-2(e) (1970).

[6] 42 U.S.C. § 2000e-2(a) (1970).

[7] 36 App. Div. 2d 364, 320 N.Y.S.2d 788 (1971).

[8] The complainant, a female 5'2" in height and 129 pounds in weight, with extensive experience in coaching little league teams and umpiring semi-professional league games, applied for a position as an umpire with a small professional league. Although initially dissuaded by the league president, she was subsequently given a contract which she accepted, and which was forwarded to the president of the National Association of Professional Baseball Leagues. The president, in turn, disapproved her contract, contending that she did not meet the necessary height and weight standards, and thus she could not be considered. *Id.* at 366-68, 320 N.Y.S.2d at 790-92.

[9] *Id.* at 368, 320 N.Y.S.2d at 792.

[10] *Id.* at 368, 320 N.Y.S.2d at 792.

[11] *Id.* at 368-69, 320 N.Y.S.2d at 792-93.

[12] *Id.* at 369, 320 N.Y.S.2d at 793.

[13] *Id.* at 369-70, 320 N.Y.S.2d at 793-94.

job. The court felt that these requisites were unnecessary, despite the possibilty of physical depletion and confrontation with big athletes.[14] Certainly this is plausible: anyone with a rudimentary interest in baseball is aware that an umpire need not protect himself, since with the simple toss of a thumb he can eject any potential assailant.[15] As to the strain of the position, the employers failed to prove why the job would be too strenuous for a female.[16] Indeed, never having tried women as umpires, such proof was especially difficult to obtain. Thus, the court found that the defendant had failed to establish that its specified physical standard is or ever was a BFOQ, because the standard plainly bore no reasonable relationship to the job.

The second aspect on which the court based its decision involved the question of equal application of the size requirement to all applicants. The court found that some male applicants in the past, although not meeting the size requirement, had performed satisfactorily as umpires.[17] Because the physical requisites had not been applied equally, the court had little trouble in discounting the validity of the size requirement restriction.

The *Baseball League* decision is in accord with two previously decided cases involving physical requirements relative to prospective female employees. The first case, *Bowe v. Colgate-Palmolive Co.*,[18] involved a manufacturer's seniority and job assignment policy restricting women to positions which did not require lifting more than thirty-five pounds. The Seventh Circuit held that the defendant could retain its thirty-five pound weight lifting limit as a general guideline for all employees, male and female, but each employee who was able to demonstrate that he could lift greater amounts on a regular basis should be permitted to bid on and fill any position to

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[14] *Id.* at 370, 320 N.Y.S.2d at 794.

[15] *Cf.* Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) which invalidated a state statute prohibiting the hiring of most women as bartenders. The court rejected the "contention that a bartender must be physically strong enough to protect himself against inebriated customers and to maintain order in the bar, and that women as a class are unable to do so. . . ." *Id.* at 9, 485 P.2d at 537, 95 Cal. Rptr. at 337. Moreover, the court stated that:

> [T]here is no evidence that women bartenders are more likely than male bartenders to suffer injury at the hands of customers. The desire to protect women from the general hazards inherent in many occupations cannot be a valid ground for excluding them from those occupations. . . . Women must be permitted to take their chances along with men when they are otherwise qualified and capable of meeting the requirements of their employment.

Id. at 4, 485 P.2d at 534, 95 Cal. Rptr. at 334.

Clearly the California court's reasoning is equally applicable to women performing the duties of a professional baseball umpire.

[16] *See* Schoenstein, *Can You Really Go Play With The Boys?*, SEVENTEEN, June 1971, at 28 (noting the lack of physiological differences between males and females).

[17] 36 App. Div. 2d 370, 320 N.Y.S.2d at 794.

[18] 416 F.2d 711 (7th Cir. 1969).

which his seniority might entitle him.[19] The court specified "that it is best to consider individual qualifications and conditions, such as physical capability, and physiological makeup of an individual, climatic condition, and the manner in which the weight is to be lifted." [20]

Likewise, in *Weeks v. Southern Bell Telephone & Telegraph Co.*,[21] the defendant company, relying on a statute limiting to thirty pounds the weight to be lifted by women, denied the female plaintiff a job as switchman on the basis of her sex, despite the fact that she was the senior bidder. The statute in question had been subsequently repealed and thus its validity was not decided. However, the court ruled that no BFOQ existed and that the defendant's conduct was unlawful under the Civil Rights Act, reasoning that to rely on the BFOQ exception, an employer must bear the burden of proving that he has 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." [22] Furthermore, *Weeks* noted that merely "labelling a job as 'strenuous' simply does not meet the burden of proving that the job is within the bona fide occupational qualification exception." [23] Several other cases featuring comparable factual situations have rendered essentially the same results.[24]

A brief consideration of *Bowe* and *Weeks*, in comparison with the *Baseball League* case, reveals the soundness of the last named decision in its application of the BFOQ exception. One immediate observation is that in both *Bowe* and *Weeks* the employer labelled the job "strenuous," based an employment requirement on arbitrary weight limits, and contended without substantiation that a woman could not reasonably accomplish the task. The *Baseball League* case is analogous, in that the League had contrived an arbitrary standard for an applicant's height and weight. Upon further analysis, however, it appears that the rationale of the *Weeks* decision, more so than that of *Bowe*, more closely parallels and substantiates the court's holding in *Baseball League*.[25] Whereas *Bowe* indicated that an

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[19] *Id.* at 718.

[20] *Id.* at 718.

[21] 408 F.2d 228 (5th Cir. 1969).

[22] *Id.* at 235. *But see* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971), *rev'g* 411 F.2d 1 (5th Cir. 1968) (suggesting that the BFOQ exception could be broader).

[23] Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 234 (5th Cir. 1969).

[24] *See, e.g.*, Ridinger v. General Motors Corp., 325 F. Supp. 1089 (S.D. Ohio 1971); Cheatwood v. South Cent. Bell Tel. & Tel. Co., 303 F. Supp. 754 (M.D. Ala. 1969); Richards v. Griffith Rubber Mills, 300 F. Supp. 338 (D. Ore. 1969).

[25] It would seem that the court could have obtained the same result had it followed the *Bowe* test instead. By the *Bowe* test, the League could have kept some size standard as a general guideline for all applicants, but allowed an applicant not meeting the standard to demonstrate that he or she could in fact effectively perform the duties of

employer must consider each applicant as an individual, *Weeks* emphasized that an employer must demonstrate that substantially all women as a class could not meet the requirements of the job. Conceding, however, that *Baseball League* does essentially follow *Weeks*, perhaps the New York court would have obtained the same result solely on the basis of the League's haphazard application of its own standard. Unlike the employers in *Bowe* and *Weeks* who patently employed distinct standards for women, the employer in *Baseball League*, while allegedly applying the same standard to both sexes, undermined its own defense by previously having employed male applicants who did not satisfy the controversial standard. Thus, even if the League's size and weight standard had been found valid in itself, it would have been held ineffective because of the inconsistencies in past hiring practices.

The underlying significance of *Baseball League*, then, is that while it was argued and decided much like *Weeks* and *Bowe*, it differs factually. Consequently, the decision narrows the scope of the BFOQ exception by adding to the list of outlawed practices[26] a requirement which ostensibly does not discriminate, but which in fact discriminates against women by eliminating all but a small number who can qualify.[27] In addition to continuing the

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the position involved. Had the League considered the appellant on an individual basis, in view of her past experience and performance, doubtless she could have satisfactorily demonstrated the necessary ability. However, the court seemed more concerned with the League's contention that substantially all women could not adequately perform, and with the League's lack of evidence to support its contention. Nevertheless, in an employment situation such as in the instant case where the applicants are relatively few in number, the individual consideration suggested in *Bowe* appears both practical and equitable, and hence more desirable.

[26] One source has divided the types of prohibited sex discrimination into three general classifications: explicit sex discrimination; "sex-plus some other factor" discrimination; and discrimination based on statistical differences. Note, *Developments in the Law–Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1170-76 (1971). *See* Berger, *Equal Pay, Equal Employment Opportunity and Equal Enforcement of the Law for Women*, 5 VAL. U.L. REV. 326, 350-371 (1971); Comment, *Sex Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964*, 1968 DUKE L.J. 671, 686-694.

[27] In the parallel area of racial discrimination, the courts have struck down seemingly neutral standards and "tests" which have been used by employers as a means to perpetuate discrimination. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971) where the Court stated:

> What Congress has forbidden is giving . . . devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract. *Id.* at 436.

trend of narrowly construing the BFOQ, this case strongly suggests the possibility of future litigation in professional sports.[28] Legislative intent indicates that a BFOQ should be sustained in this area,[29] as might business necessity[30] and customer preference,[31] if such are valid tests. However, the

[28] Already, women's attempts to gain entry into certain heretofore all male professional sports have generated some litigation. Two recent decisions, although not based upon Title VII, have permitted women to compete as jockeys. In Rubin v. Florida State Racing Comm'n, No. 6819113 (11th Cir., Dade County, Fla., 1968), the Florida State Racing Commission, under an alternative writ of mandamus, issued an apprentice jockey's license to the female petitioner; *accord*, Kusner v. Maryland Racing Comm'n, No. 37,044 (Cir. Ct., Prince George's County, Md., 1968), where the court found the Maryland Racing Commission's previous refusal to issue a jockey's license to the female plaintiff had been sex based, and thus ordered the Commission to issue the license. *See* SPORTS ILLUSTRATED, Aug. 2, 1971, at 44, which notes the similar progress women have made in bowling. Likewise, women have broken the sex barrier and have made brief appearances in the more popular spectator sports. One intrepid young female, playing several games for a Florida semi-professional football team, held the ball on point-after-touchdown kicks; another young woman recently tried-out for one of the minor league baseball affiliates of the Washington Senators. N.Y. Times, Aug. 22, 1971, § v., at 3, col. 8.

[29] A memorandum of Senators Clark and Case, floor managers of Title VII, stated that the limiting of a professional baseball team to males only should exemplify legitimate discrimination under the BFOQ exception. 110 CONG. REC. 7213 (1964). Doubtless this example would apply to the other major team spectator sports, basketball and football. Moreover, in sports where frequent physical contact is essential (*e.g.*, football) conceivably EEOC guidelines would sustain sex as a BFOQ should the deference to cultural taboos involving bodily intimacy receive liberal interpretation. *See* note 32 *infra*.

[30] *See* Comment, *Sex Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964*, 1968 DUKE L.J. 671, which recognized that a baseball team might hire only male players, commenting that such action might be based upon business necessity:

> [S]uch [an] application [of the BFOQ] could easily be based upon considerations other than player or crowd attitude, such as the cost of installing additional dressing room facilities. *Id.* at 698 & n.134.

But see GUIDELINES ON DISCRIMINATION BECAUSE OF SEX, 29 C.F.R. § 1604.1(a)(1)(iv) (1971). *See generally* Eastern Greyhound v. New York State Div. of Human Rights, 27 N.Y.2d 279, 265 N.E.2d 745, 317 N.Y.S.2d 322 (1970), wherein the court, discussing business necessity in the related area of discrimination against creed, held that a "[p]olicy resting on a desire to promote business by greater public support could justify the exclusion by an employer of beards and have no possible religious connotation." *Id.* at 281, 265 N.E.2d at 746, 317 N.Y.S.2d at 325. *But see* Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir. 1971), *cert. denied*, — U.S. — (1971), wherein the court stated:

> [T]he use of the word "necessary" in [the BFOQ] requires that we apply a business *necessity* test, not a business *convenience* test. That is to say, discrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively. *Id.* at 388.

See Note, *A Woman's Place: Diminishing Justifications for Sex Discrimination in Employment*, 42 S. CAL. L. REV. 183, 196-97, 200 (1969).

decided cases involving sex discrimination demonstrate with increasing frequency that only BFOQ's based on extreme necessity will be upheld.[32] The instant case supports this observation and reinforces the desirable trend toward sexual equality in employment practices. If the overall intent of the Civil Rights Act is to be achieved, women must be given equal opportunity in all facets of employment, and sports should be no exception.

J. L. K.

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[31]At least one source has suggested that customer preference may substantiate a male-only BFOQ in professional sports, commenting that:

> [A] professional baseball team is *designed* to satisfy the customer's *desire* to see a skillful exhibition of the game. Although there may be a few women who possess the requisite ability, this is surely the exception rather than the rule. Therefore, utilizing the EEOC approach, the owner is allowed to hire only male ball players because surely there would be no difficulty in establishing that all or substantially all women could perform at the same level. Note, *Title VII—Sexual Discrimination in Employment—Female Sex as a BFOQ for Position of Airline Cabin Attendant*, 17 WAYNE L. REV. 242, 249 (1971).

But cf. Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir. 1971), *cert. denied*, — U.S. — (1971), wherein the court severely limited the use of customer preference in establishing a BFOQ:

> While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether sex discrimination was valid. . . . Thus, we feel that customer preference may be taken into account only when it is based on the company's inability to perform the primary function or service it offers. *Id.* at 389.

Similarly, the EEOC guidelines state that a BFOQ should not be established "because of the preferences of co-workers, the employer, clients, or customers . . . ." 29 C.F.R. § 1604.1(a)(1)(iii) (1971). Several courts have noted that these guidelines are entitled to "great deference." Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1971) (Marshall, J., concurring); Udall v. Tallman, 380 U.S. 1, 16 (1965). Other authorities, however, have specified that these guidelines have no force or effect of law, and thus are not binding. *See* Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186, 1190 (7th Cir.), *cert. denied*, — U.S. — (1971); Grimm v. Westinghouse Elec. Corp., 300 F. Supp. 984, 989 (N.D. Cal. 1969); American Newspaper Publishers Ass'n v. Alexander, 294 F. Supp. 1100, 1103 (D.D.C. 1968).

[32] *See, e.g.*, Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719 (5th Cir. 1970), noting that "[t]he kind of 'customer preference' reflected in the hospital's assignment of orderlies to perform certain services for male patients otherwise assignable to aides is cognizable under Title VII." *Id.* at 727. Indeed, the EEOC would seem to sustain sex as a BFOQ, in deference to cultural taboos in jobs involving bodily intimacy (restroom attendant, orderlies or nurses aides); where sex is needed for authenticity or genuineness (actor or actress); or for positions in which sex appeal is the essence (topless waitress). *See* 29 C.F.R. § 1604.1(a)(2) (1971); EQUAL EMPLOYMENT OPPORTUNITY COMM'N, TOWARD JOB EQUALITY FOR WOMEN 5-6 (1969). *See generally*, Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1183-86 (1971).