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Chapter 7

Gender Discrimination

Learning Objectives

When you finish this chapter, you should be able to:

- **LO1** Recite Title VII and other laws relating to gender discrimination.
- **LO2** Understand the background of gender discrimination and how we know it still exists.
- **LO3** List the different ways in which gender discrimination is manifested in the workplace.
- **LO4** Analyze a fact situation and determine if there are gender issues that may result in employer liability.
- **LO5** Define fetal protection policies, gender-plus discrimination, workplace lactation issues, and gender-based logistical concerns.
- **LO6** Differentiate between legal and illegal grooming policies.
- **LO7** List common gender myths used as a basis for illegal workplace determinations.
- **LO8** Distinguish between equal pay and comparable worth and discuss proposed legislation.

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Opening Scenarios

SCENARIO 1

1 Scenario

A discount department store has a policy requiring that all male clerks be attired in coats and ties and all female clerks wear over their clothing a smock provided by the store, with the store's logo on the front. A female clerk complains to her supervisor that making her wear a smock is illegal gender discrimination. Is it? Why or why not?

SCENARIO 2

2 Scenario

A male applies for a position as a server for a restaurant in his hometown. The restaurant is part of a well-known regional chain named for an animal whose name is a colloquial term for a popular part of the female anatomy. Despite several years of experience as a server for comparable establishments, the male is turned down for the position, which remains vacant. The applicant is instead offered a position as a kitchen helper. The applicant notices that all servers are female and most are blonde. All servers are required to wear very tight and very short shorts, with T-shirts with the restaurant logo on the front, tied in a knot below their, usually ample, breasts. All kitchen help and cooks are male. The applicant feels he has been unlawfully discriminated against because he is a male. Do you agree? Why or why not?

SCENARIO 3

3 Scenario

An applicant for a position of secretary informs the employer that she is pregnant. The employer accepts her application but never seriously considers her for the position because she is pregnant. Is this employment discrimination?

Statutory Basis

LO1

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 [gender]. . . . [Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. § 2000e-2 (a).]

(1) No employer. . .shall discriminate between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. . . . [Equal Pay Act, 29 U.S.C.A. § 206(d).]

(k) The term "because of sex" or "on the basis of sex" includes, but is 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. . . . [Pregnancy Discrimination Act, 42 U.S.C. § 2000e.]

Note: Reread the Preface regarding the use of gender terminology before reading this chapter.

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Does It Really Exist?

LO2

What does a group of 25 attorney-mediators have to do with a swimsuit calendar? Good question. The Miami-based Florida Mediation Group has probably been asking itself that same question ever since it received a good deal of flack for having its name emblazoned across one of several themed calendars given away as gifts to clients.

It can be hard to recognize gender discrimination when it plays itself out in the workplace. A woman is required by her employer to wear two-inch heels to work. Doing so causes her to develop bunions on her feet, which can only be removed by surgery. After surgery she is ordered by her doctor to wear flat shoes for two months. Her employer refuses to permit her to do so. Left with no alternative, she quits. The employer imposes no such requirement or its attendant problems on male employees. When you realize that the employer's two-inch-heels policy cost the woman her job and had she been male, this would not have happened, it becomes more obvious that the policy is discriminatory. Remember the wires of the bird cage. Those wires are probably what the members of the executive board of the Miami-Dade chapter of the Florida Association of Women Lawyers were thinking of when they registered their objection to the calendar. "We believe this type of advertising, whether picturing men or women, does not promote dignity in the law and is inappropriate when circulated by an organization that serves the legal community."

It is not difficult to discriminate on the basis of gender if an employer is not sensitive to the issues involved. (See Exhibit 7.1, "Gender-Neutral Language?") Once again, as with race discrimination, vigilance pays off. This chapter will address gender discrimination in general, including pregnancy discrimination, fetal protection policies, and equal pay. Sexual harassment, another type of gender discrimination, will be considered in the next chapter. Gender discrimination covers both males and females, but because of the unique nature of the history of gender in this country, it is females who feel the effects of gender discrimination in the workplace more so than men, and the vast majority of EEOC gender claims are filed by women.

Women are the single largest group of beneficiaries under affirmative action. They seem to be gaining in all facets of life. As we write this, Condoleezza Rice is secretary of state. Hillary Rodham Clinton made an unprecedented run for president of the United States as the first female candidate with a serious chance of winning. Nancy Pelosi is the first female speaker of the U.S. House of Representatives. Drew Gilpin Faust has taken over as the first female president in Harvard University's 371-year history. Things seem OK. You think to yourself, who would be dumb enough to discriminate against women these days? It can be hard to believe that gender discrimination still exists when you go to school and work with so many people of both genders; you don't feel like *you* view gender as an issue, and it just seems like everything is OK. However, EEOC reports that gender suits account for the second highest percentage of claims brought under Title VII.

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Exhibit 7.1 *Gender-Neutral Language?*

Attorney Harry McCall, arguing before the U.S. Supreme Court, stated, "I would like to remind you gentlemen" of a legal point. Associate Supreme Court Justice Sandra Day O'Connor asked, "Would you like to remind me, too?" McCall later referred to the Court as "Justice O'Connor and gentlemen." Associate Justice Byron White told McCall, "Just 'Justices' would be fine."

Source: *Newsweek,* November 25, 1991, p. 17.

Just recently, one of our female masters' students was told by an employer that if she were a man with her qualifications, he would pay her 50 percent more. Another was told she would be able to have a full-time job upon graduation in a company in which she had experienced a very successful internship, but only if she allowed the very prominent president of the company to set her up in an apartment so she could be available to him whenever he wished to have sex with her. He was not bothered by the fact that she was married with a child. We are glad to report that she did not take him up on his offer. She was, however, put in the unenviable position of starting her job hunt all over again and not finding another job in her field until five months after she graduated.

Even professionals can be caught off guard. In 1999 the media reported that a gender-discrimination charge that started with eight female stockbrokers at Merrill Lynch alleging various forms of gender inequality, particularly economic discrimination, had ballooned to 900 women and was still growing. "It's been a flood. I've been stunned. We were expecting 200–300 claims, but the calls are still coming in," said one of the lawyers representing the women.

In 2004, arbitrators determined that it was standard operating procedure at Merrill Lynch to discriminate against women. It was the first time a Wall Street firm had been found to have engaged in systematic gender discrimination. Merrill Lynch has spent more than $100 million settling close to 95 percent of the 900 or so claims. In subsequent press releases, the firm said this is not an accurate picture of the firm today. Unfortunately, that was only the beginning of Wall Street's gender-based litigation. Cases continue to be brought by female employees against several Wall Street firms for the same types of discrimination that cost Merrill Lynch so much. Morgan Stanley settled a gender-bias class action suit for $46 million in 2007; Putnam Investments was sued for its "ingrained culture of chauvinism," leading to demotions and firings based on gender; Smith Barney was sued for a pattern and practice of gender discrimination against its female financial consultants; and Wall Street bank Dresdner Kleinwort Wasserstein Securities, LLC, was sued for $1.4 billion by female employees who alleged they were hired as "eye candy," subjected to *Animal House*–like antics, passed over for promotions, and generally treated like second-class citizens.

Clearly, Merrill Lynch's $100 million message was not heard by all. But Wall Street is hardly alone. Recent cases have been filed for everything from a female animal handler terminated for refusing to expose her breasts to a 300-pound

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gorilla who had a "nipple fetish"; to a female attorney suing her firm because she alleged she was not being paid the same as similarly situated men and there was a separate, lower track for female lawyers with children or who took maternity leave; to the Clearwater, Florida, Fire & Rescue chief being charged by EEOC with gender discrimination for ordering the department's six female firefighters to stay away from structure fires amid reported threats that their male colleagues might not protect them; to a man suing in California because there is no convenient, easy, comparable way for him to take his wife's name when they marry as it is for her to take his. Add race to the gender mix and it gets even worse. An American Bar Association study on women of color in law firms,[1] commissioned after a National Association for Law Placement study found that 100 percent of female minority lawyers left their jobs in law firms within eight years of being hired, found that 44 percent of the women reported being passed over for desirable assignments (compared to 2 percent for white men), 62 percent said they had been excluded from formal and informal networking opportunities (compared to 4 percent of white men), and 49 percent reported being subjected to demeaning comments or other types of harassment at their firms.

Gender equality in the workplace is an ever-evolving area and does not occur in a vacuum. The issues in the workplace are only one part of a much larger environment of different, often unequal, treatment of individuals based on gender. Imagine the swimsuit calendar having bikini-clad males instead of females. Do you think it would have been received the same way? Manifestations of gender differences in society are the basis for differences in treatment in the workplace. They can be as diverse as the group of Massachusetts teens suing the Selective Service System arguing it is an unconstitutional violation of the Fifth and Fourteenth Amendments' Equal Protection Clause for females not to be subject to the draft just as men are, asserting that "If people want women's rights, they should want it wholeheartedly, including for women to have to fight in wars," to the protest over General Nutrition Center (GNC) dropping women from its GNC Show of Strength bodybuilding competition and replacing it with the International Federation of Body Builders (IFBB) Pro Figure competition; from males suing bars for offering "Ladies' Night" discounts to women because such promotions discriminate against men, to male fans at a major league baseball park suing the park for its Mothers' Day promotion give-away of red net bags only to females 18 and over. Of course, it goes without saying that gender differences also find their way into the workplace through lower pay for women; women being consigned to lower-paid jobs (pink-collar jobs); women being hassled, not promoted, or not given the same assignments and training as men in jobs traditionally held by men; or in men not being hired for traditionally female jobs such as Hooters' servers.

New types of gender claims are constantly evolving. In the past few years, at least 24 states have passed "contraceptive equity" laws requiring that any health plan that provides coverage for prescription drugs also must provide coverage for FDA-approved contraceptive drugs. When it was perceived that employers' health plans routinely covered the cost of Viagra for male employees but not the cost of birth control for females, which EEOC determined violated Title VII, at

least 27 states passed "contraceptive equity" laws requiring that any health plan which provides coverage for prescription drugs also must provide coverage for FDA-approved contraceptive drugs. As a result of state mandates, the number of employers allowing coverage for both tripled from 1993–2002. A 2004 Guttmacher Institute report found that by 2002, 86% of employers covered both.2 The need for lactation facilities for nursing mothers has become a growing area of workplace concern. Increasing male employee interest in balancing work and family also has found its way into the workplace. The first gender-based Family and Medical Leave Act (FMLA) claim involved a new father who won $40,000 after being denied appropriate FMLA leave to take care of his premature baby and seriously ill wife. Within the past few years, in addition to the female coaches who have sued for gender discrimination, several male coaches have alleged gender discrimination. For instance, the coach at the University of Pennsylvania won his claim of being passed over for crew coach in favor of a female. In 2007, EEOC issued guidelines on "caregiver responsibility" discrimination, also known as "caregiver bias" or "family responsibility discrimination" (FRD).[3] The EEOC issued the guidance because it realized the growing issue of the disparate impact that the conflict between work and family had on both male and female employees (though it noted that since most caregiving responsibilities fall on women, such discrimination has a disparate impact on them). That is, because of their caregiving responsibilities, women are more likely to suffer adverse employment actions taken against them such as diminishing workplace responsibilities, failure to promote or train, exclusion from decision-making channels, or other actions coming from the idea that if employees have caregiving responsibilities, then they are less likely to be dependable, competent employees who can live up to their full workplace potential.

As women have increasingly entered the workforce over the past 40 years since passage of Title VII, the focus of claims of gender discrimination have more recently shifted away from hiring discrimination toward on-the-job issues such as equal pay, promotions, harassment, and pregnancy leave. Eric S. Dreiband, EEOC general counsel, recently said this reflects "new issues erupting in a diverse workforce. As blatant discrimination decreased, other areas like harassment increase."

Viewed in this context, it then comes as no surprise that in the past few years, in addition to the substantial sums paid out by Wall Street for gender discrimination, Wachovia Bank reached a settlement with the Office of Federal Contract Compliance Programs (OFCCP) to pay $5.5 million for compensation discrimination against women. Home Depot agreed to pay $5.5 million to resolve a class action suit alleging, among other things, gender discrimination in its Colorado stores. The Palm Steak House agreed to a $500,000 settlement for failing to hire women to wait tables at its 29 restaurants because males, who could make up to $80,000 per year, including tips, were viewed as more prestigious.

Washington is the only state in the country that can boast that it has a female governor, both of its U.S. senators are female, four of its nine state supreme court justices are female, and roughly a third of its state legislators are female, yet Seattle-based aeronautical giant Boeing agreed to pay $72.5 million for gender-based compensation discrimination against its female employees. A University

of California lab agreed to pay $9.7 million to 3,200 women to whom it had paid less wages and whom it had promoted less often than male employees. Costco Wholesale Corp., with a workforce of 78,000, was sued by about 650 women in a class action suit who allege the company did not announce openings for higher-paying managerial jobs, relying instead on a "tap the shoulder" policy of choosing managers. That is, top-level male managers would pick other males for high-level positions. Fewer than one in six of Costco's managers were women, while nearly 50 percent of its workforce is female.

Then, of course, there is Wal-Mart, whose size alone puts it nearly in a class by itself. With sales of $284 billion for fiscal year 2004, it is the world's largest retailer. More than 70 percent of its hourly sales employees are women. In *Dukes v. Wal-Mart Stores, Inc.,*[4] potentially about 1.6 million present and former female employees (roughly the population of San Francisco) were certified for a class action suit against Wal-Mart for gender bias. The employees allege that Wal-Mart systematically mistreats women in a variety of ways, including paying them less even though they may have more experience or outrank men, prohibiting women from advancing by denying them training, prohibiting them from working in departments traditionally staffed by men (positions that usually pay more), and not posting all management position openings. Damages could run into the billions if Wal-Mart, which denies any wrongdoing, is found liable for gender discrimination. A study done at the request of the employees' attorney found that of Wal-Mart's top 20 competitors, 56 percent of the managers are women, compared with about one-third of that for Wal-Mart. Only about 14 percent of the top managers at its 3,000 stores are female. In response to the media surrounding the lawsuit, Wal-Mart took out more than 100 full-page newspaper ads across the country, outlining its wages and benefits and the good the company brings to its communities.

Let's take a look at some of the statistics that might underlie these cases to see if they support the overall picture. Nearly half the workforce is female. At the same time women are nearing the halfway mark in the workforce, they represent two-thirds of all poor adults. Nearly 80 percent of female employees work in traditional "female" jobs—as secretaries, administrative support workers, and salesclerks. Statistics show that 16 percent of the females in the workforce are employed as professionals but 10 percent of them are actually nurses or K-12 teachers—traditionally "pink-collar" female strongholds. For instance, 90 percent of nurses are women, as are 80 percent of teachers. Paradoxically, a 2004 EEOC report[5] found that women have the lowest odds of being managers in nursing care facilities. Even though Title VII has been in effect for over 40 years, only 15 percent of women work in jobs typically held by men (engineers, stockbrokers, judges), while fewer than 8 percent of men hold female-dominated jobs such as nurses, teachers, or sales clerks. According to the EEOC report, women now represent about 36 percent of all officials and managers in private-sector employment, a 7 percent increase over the 12-year period examined. On the other hand, women are well over 50 percent of the 13+million U.S. undergraduates and earn more doctorates than men, yet it is generally recognized that campuses are still predominantly male when it comes to professors, department heads, and other high-level administrators.[6] In a historic move in 2004, Susan Hockfield was

tapped to be the new president of the prestigious Massachusetts Institute of Technology. Shortly thereafter, in January 2005, the president of Harvard University, Lawrence Summers, created quite a stir when he suggested at an academic conference that women represent such a small percentage of math and science faculties because they lack innate ability in math and science. He subsequently apologized, saying, in part, "The human potential to excel in science is not somehow the province of one gender or another." In February 2007, he was replaced by Drew Gilpin Faust, the first female president in Harvard's 371-year history.

A 2004 study by Stephen J. Rose, an economist at the consulting firm of Macro International, Inc., and Heidi I. Hartmann, president of the Institute for Women's Policy Research, found that while the Bureau of Labor Statistics (BLS) reports that women earn about 77 percent of men's pay, over the course of their careers, it is actually more like 44 percent. The researchers say the BLS statistics consider only full-time, year-round employees—a category only about 25 percent of women fit into over the course of their work life—and do not account for the roughly 75 percent of those who work only part time at some point and dip in and out of the labor force to care for children or elderly parents. When the more accurate reality is used for calculation, the figure becomes 44 percent.[7]

A 2007 report by the U.S. Census Bureau found that the median income for a male working full time, year-round was $41,965, while for females the median was $32,168, or 29 percent less. The gender-based wage gap is present in every profession. For instance, female doctors on average earn 58 percent less than male doctors.

The 1991 Civil Rights Act called for the establishment of a Glass Ceiling Commission to investigate the barriers to female and minority advancement in the workplace and suggest ways to combat the situation. In 1995, the U.S. Department of Labor released a study by the bipartisan commission. Findings were based on information obtained from independent studies, existing research, public hearings, and focus groups. The commission reported that while women have gained entry into the workforce in substantial numbers, once there they face all but invisible barriers to promotion into top ranks. "Glass ceilings" prevent them from moving up higher in the workplace. "Glass walls" prevent them from moving laterally into areas that lead to higher advancement. Research indicates that many professional women hold jobs in such areas as public relations, human resources management, and law—areas that are not prone to provide the experience management seeks when it determines promotions to higher-level positions. This was further supported by the study by Professor Blumrosen mentioned in the previous chapter.

Segregation by both race and gender among executives and management ranks is widespread. A survey of top managers in Fortune 1000 industrial and Fortune 500 service firms found that 97 percent are white males. As part of their findings, a survey by Korn/Ferry International found 3 to 5 percent of top managers are women. Of those, 95 percent are white, non-Hispanic. Further, women and minorities are trapped in low-wage, low-prestige, and dead-end jobs, the commission said. It is therefore not difficult to see why, in a *New York Times* poll of

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women about "the most important problem facing women today," job discrimination won overwhelmingly.

Our country, like many others, has a history in which women's contributions to the workplace have historically been precluded, denied, or undervalued. Prior to the 1964 Civil Rights Act, it was common for states to have laws that limited or prohibited women from working at certain jobs under the theory that such laws were for the protection of women. Unfortunately, those jobs also tended to have higher wages. The effect was to prevent women from entering into, progressing within, or receiving higher wages in the workplace. In *Muller v. Oregon,*[8] which upheld protective legislation for women and justified them being in a class of their own for employment purposes, the U.S. Supreme Court stated that a woman must "rest upon and look to her brother for protection . . . to protect her from the greed as well as the passions of man." This is precisely the view our laws took until the Civil Rights Act of 1964.

After women came into the workplace in unprecedented numbers out of necessity during World War II and performed traditional male jobs admirably, it became more difficult to maintain the validity of such arguments. This type of protective legislation was specifically outlawed by Title VII, and the glass ceiling and walls notwithstanding, women have made tremendous strides in the workplace over the past 40-plus years since the Civil Rights Act was passed. In evaluating those strides, keep in mind that women were virtually starting from scratch since there was little or nothing to prevent workplace discrimination before Title VII, so gaining entry into the workplace and the statistics reflected by that should, of course, be high.

Despite the fact that many of the strides made by women were made with the help of male judges, employers, legislators, and others, much of the cause of the figures is attitudinal. (See Exhibit 7.2, "Sexist Thinking.") Workplace policies generally reflect attitudes of management. In a national poll of chief executives at Fortune 1000 companies, more than 80 percent acknowledged that discrimination impedes female employees' progress, yet less than 1 percent regarded *remedying* gender discrimination as a goal that their personnel departments should pursue. In fact, when the companies' human resources officers were asked to rate their departments' priorities, women's advancement ranked last.

Interestingly enough, while the biggest gains under protective employment legislation in the last 40-plus years have been made by women, the truth is, gender was not even originally a part of the Civil Rights Act. Gender was inserted into the civil rights bill at the last moment by Judge Howard Smith, a southern legislator and civil rights foe desperate to maintain segregation in the south, who was confident that, if gender was included in the bill legislating racial equality, the bill would surely be defeated. He was wrong. However, because of the ploy, there was little legislative debate on the gender category, so there is little to guide the courts in interpreting what Congress intended by prohibiting gender discrimination. To date, courts have determined that gender discrimination also includes discrimination due to pregnancy and sexual harassment, but not because of affinity orientation or being transgender.

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Exhibit 7.2 *Sexist Thinking*

An *Esquire* magazine poll asked men: "If you received $1.00 for every sexist thought you had in the past year, how much richer would you be today?" The median answer was $139.50. [We have never had a male student who didn't think the figure should be *much* higher.]

Source: *Parade Magazine,* December 1991, p. 5.

The goal of a manager, supervisor, human resources employee, or business owner is to have workplace policies that maximize the potential for *every* employee to contribute to the productivity and growth of the workplace, while minimizing or eliminating irrelevant, inefficient, and nonproductive policies that prevent them from doing so. The underlying consideration to keep in mind when developing, enforcing, or analyzing policies is that, no matter what we may have been taught about gender by family or cultural and societal mores, gender, alone, is considered by the law as irrelevant to one's ability to perform a job. By law, it is the person's *ability* to perform, *not* his or her *gender,* that must be the basis of workplace decisions. (See Exhibits 7.3, "Career Stereotyping," and 7.4, "Gender Myths.") As we shall see, there may be very limited exceptions to this rule if a bona fide occupational qualification (BFOQ) exists. It is not only the law, but it is in the best interest of any employer who is serious about maximizing production, efficiency, and profits, as well as minimizing legal liability for workplace discrimination, to recognize that gender discrimination, whether subtle or overt, is just plain bad business. After all, workplace turnover, morale, and defending against lawsuits cost the employer money, time, and energy better spent elsewhere. (See Exhibit 7.5, "Discrimination: Bad for Business and Employees.")

The aim of this chapter is to provide information about obvious gender discrimination and what factors must be considered in making determinations about the policies in "gray areas." This chapter provides the tools to use when developing, applying, or analyzing policies that may result in gender discrimination claims.

Gender Discrimination in General

LO3

Title VII and state fair-employment-practice laws regarding gender cover the full scope of the employment relationship. Unless it is a BFOQ, gender may not be the basis of any decision related to employment. This includes the following, taken from actual situations:

- *Advertising* for available positions and specifying a particular gender as being preferred (see Exhibit 7.6, "Pre–Title VII Newspaper Want Ads for Females").

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Exhibit 7.3 *Career Stereotyping*

Dear Abby: As I begin my second year of medical school, I need some advice on how to respond to those ignorant people who assume that, since I am female, I am studying to be a nurse. Men and women alike are guilty of this.

Please don't get me wrong, I have just as much respect for nurses—they work as hard as some physicians, but women are seldom given the credit they deserve. I once heard this statement: "Oh, so you're in medical school? My sister is a nurse, too!"

I cannot tell you how angry this makes me. Many of my female classmates also feel this way. Do you have a response that expresses our feelings without offending the speaker?—Ms. Future Doctor in L.A.

Dear Future Doctor: Anyone who is confused about the role of a student in medical school should be told that future physicians are trained in medical schools, and future nurses are trained in nursing schools.

Dear Abby: After reading the letter from "Ms. Future Doctor," I felt the need to write and give another view on career sexual stereotypes.

I am 27, a registered nurse for four years, and I am a MALE. I am frequently asked, "When will you become a doctor?" Or, "You're doing this just to put yourself through medical school, right?" Also, "What's the matter, couldn't you get into medical school?"

When I first started my schooling to become a nurse, I considered medical school, but the further I got into nursing, the more I enjoyed being a nurse. I enjoy comforting a patient in pain, teaching my patients about their diseases, and holding the hand of someone who is frightened and hurting. These feelings are experienced by every nurse, and being male did not exclude me from doing them. (Most doctors are too busy.) I still work hard being a competent and compassionate nurse.

More males are choosing nursing as a career, and we need to shed our preconceived notions about who nurses are and what they look like.—Mr. Nurse in Tampa

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- Asking questions on an *application* that are only asked of one gender. For example, for background-check purposes asking the applicant's maiden name, rather than simply asking all applicants if there is another name they may have used.
- Asking questions in an *interview* that are only asked of one gender. For example, asking female interviewees if they have proper day care arrangements for their children and not asking male interviewees who also have children. Or asking female applicants about reproductive plans and not asking males. (Yes, people actually do such things. Quite frequently, as a matter of fact.)
- *Requiring one gender to work different hours or job positions* for reasons not related to their ability or availability for the job. For example, not permitting women to work at night or not giving a promotion to a woman because it involves travel.
- *Disciplining* one gender for an act for which the other gender is not disciplined. For example, chastising a female employee who is late for work because of reasons related to her children while not similarly chastising a male employee

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Exhibit 7.4 *Gender MYTHS* LO7

Due to the particular historical development of gender in our country, there are many myths about gender that affect how those of a given gender are perceived. Here are some of the myths we have actually been told by managers and supervisors. These myths impact how we view employees of a given gender in the workplace. See if any are familiar.

- Women are better suited to repetitive, fine-motor-skill tasks.
- Women are too unstable to handle jobs with a great deal of responsibility or high pressure.
- Men make better employees because they are more aggressive.
- Men do not do well at jobs requiring nurturing skills such as day care, nursing, elder care, and the like.
- When women marry, they will get pregnant and leave their jobs.
- When women are criticized at work, they will become angry or cry.
- A married woman's income is only extra family income.
- A woman who changes jobs is being disloyal and unstable.
- A woman should not have a job that requires her to have lunch or dinner meetings with men.
- Women should not have jobs that require travel or a good deal of time away from home.

who is late because of a sick dog, or chastising a female employee for cursing but not a male.

- Providing or not providing *training* for one gender, while doing so for another. For example, requiring all female employees to be trained on word processing equipment, no matter what position they hold in the company, while not requiring that males undergo the same training. Or, alternatively, providing training opportunities for career advancement to male employees and not to similarly situated female employees.
- Establishing *seniority systems* specifically designed to give greater seniority to one gender over another. For example, instituting a new seniority system that bases seniority on how long an employee has been working for the employer, rather than how long the employee has been working in a particular department with the intent that, if the employer ever needs to lay off employees for economic reasons, more males will be able to retain their positions because females have been in the workplace a shorter time and thus have less seniority.
- *Paying* employees different wages based on gender, though the job one employee performs is the same or substantially the same as another. This also may violate the Equal Pay Act, which prohibits discrimination in compensation on the basis of gender for jobs involving equal skill, effort, or responsibility.
- Providing different *benefits* for one gender than for another. For example, providing spouses of male employees with coverage for short-term disabilities,

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Exhibit 7.5 *Discrimination: Bad for Business and Employees*

JURY TELLS NBA TO PAY FEMALE REFEREE $7.85 MILLION

Read what happened when a female rose to number two on the list of those in line to officiate in the NBA, only to be repeatedly passed over:

Sandra Ortiz-Del Valle sued the National Basketball Association (NBA) for gender discrimination for passing her over as a referee, and handed the NBA its first discrimination case loss when the federal jury awarded Ortiz-Del Valle $7.85 million, $7 million of which was punitive damages (the award was later reduced by a judge to $350,000). Ortiz-Del Valle had dreamed of being an NBA referee for years, but kept getting passed over. Despite documents praising Ortiz-Del Valle as being "very knowledgeable about the rules" and having "excellent basketball officiating skills," and although the evaluator said, "I would not hesitate to recommend that at sometime in the near future she be considered to enter our training program," the NBA kept giving her varying reasons for denying her the position. The NBA denied any discrimination and said she was not hired because she failed to upgrade the level of competition in her officiating schedule despite being asked to, and said she was out of shape. Ortiz-Del Valle claimed she had all the qualifications to be an NBA referee, including officiating in top men's amateur and professional basketball leagues for 17 years. She was the first woman in history to officiate a men's professional basketball game. Ortiz-Del Valle said she finally sued after continuously doing everything the league asked of her, and not being promoted, then seeing men she trained hired by the league. "It was like they kept moving the basket," she said.

Source: *Ortiz-Del Valle v. NBA,* 42 F. Supp. 2d 334 (S.D.N.Y. 1999).

including pregnancy, while not providing female employees with similar coverage for short-term disabilities for their spouses, or providing prescription coverage for Viagra for men, but not birth control for women.

- Subjecting one gender to different *terms or conditions of employment.* For example, requiring female associates in an accounting firm to dress, talk, or act "feminine," when no comparable requirement is imposed on males aspiring to partnership.
- *Terminating* the employment of an employee of one gender for reasons that would not serve as the basis for termination for an employee of the other gender. For example, terminating a female employee for fighting on the job, when males engaged in similar activity are retained.

Clearly the antidiscrimination provisions are comprehensive. The law is broad enough to cover virtually every decision or policy that could possibly be made in the workplace. The scope of antidiscrimination laws is intentionally undefined so that decisions can be made on a case-by-case basis. Some of the examples above are not illegal per se. Rather, they elicit gender or gender-related information that can form the basis of illegal gender-based employment decisions—or at least make it appear as if that is the case.

The law takes a case-by-case approach to gender discrimination, so it is imperative to know what factors will be considered in analyzing whether gender

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Exhibit 7.6 *Pre–Title VII Newspaper Want Ads for Females*

This classified ad excerpt, taken from an actual newspaper, is typical of those found in newspapers in the United States before Title VII was passed in 1964. For publication purposes, all names and phone numbers have been omitted. Title VII made it illegal to advertise for jobs based on gender.

FEMALE EMPLOYMENT

Female Help Wanted 23

ATTRACTIVE, NEAT APPEARING, RELIABLE YOUNG LADIES
FOR permanent employment as food waitresses. Interesting work in beautiful surroundings. Good salary plus tips. UNIFORMS FURNISHED. Vacation with pay. Age 21-35 years. For interview appointment phone…

SETTLED white woman who needs home to live in.

LADY to run used furniture store on…

GIRL FRIDAY
If you are a qualified executive secretary, dependable, and would like a solid connection with a growing corporation, write me your qualifications in confidence…

A REFRESHING CHANGE
FROM your household chores! Use those old talents of yours and become a part-time secretary. You can earn that extra money you have been needing by working when you want. XXX has temporary positions open in all locations in town and you can choose what and where you want. TOP HOURLY RATES…NO FEE

Opening Soon…WAITRESSES…NO EXPERIENCE NECESSARY
Will train neat, trim, and alert applicants to be coffee house and cocktail waitresses. Apply at once.

CLERK FOR HOTEL
CLERK for medium-size, unusually nice motor hotel. 6-day wk. Hours 3-11. Experience not necessary. Must be mature, neat, and refined. Call…

discrimination has occurred. To the extent that these factors are considered when developing or implementing policies, it is less likely that illegal considerations or criteria will be used in making workplace decisions and policies. (See Exhibits 7.7, "Appearance-Based Discrimination," and 7.8, "On the Lighter Side.")

Recognizing Gender Discrimination

When analyzing employment policies or practices for gender discrimination, first check to see if it is obviously so. See if the policy excludes members of a particular gender from the workplace or some workplace benefit. An example is a policy that recently appeared in a newspaper story on local restaurants. One owner said that he did not hire males as servers because he thought females were more pleasant and better at serving customers. As *Wedow v. City of Kansas, Missouri,* demonstrates, employers may engage in obvious gender discrimination and claim to be unaware of their policies' negative legal repercussions, even though it is a workplace held in high regard such as a fire department. This case is available at the conclusion of the chapter.

Case 1

Exhibit 7.7 *Appearance-Based Discrimination*

We often discriminate against others without even realizing it. Since only those things prohibited by law are considered illegal, not all discrimination is actionable. However, look at the items below and note the gender differences:

- Very attractive men and women earn at least 5 percent more per hour than people with average looks.
- Plain women earn an average of 5 percent less than women with average looks.
- Plain men earn 10 percent less than average men.
- Most employers pay overweight women 20 percent less per hour than women of average weight.
- Overweight males earn 26 percent more than underweight co-workers.
- Of men with virtually identical résumés, the taller man will be hired 72 percent of the time.
- Men who are 6 feet 2 inches or taller receive starting salaries 12 percent greater than men under 6 feet.
- Married men earn, on average, 11 percent more per hour than men who have never married.
- White women 65 pounds overweight earn 7 percent less than those of median weight; there is little effect of weight on the earnings of Hispanic women, none on black women, and virtually none on the wages of men.
- Better-looking men get more job offers, higher starting salaries, and better raises; good-looking women get better raises but not usually better jobs or starting salaries.
- Plain women tend to attract the lowest-quality husbands (as measured by educational achievement or earnings potential); beautiful women do no better in marriage than average women; looks don't seem to affect men's marriage prospects.

Sources: Taken from *The Paranoid's Pocket Guide,* by Cameron Tuttle, Chronicle Books, 1997. Reprinted with permission; Professors Jeff Biddle and Daniel Hamermesh, "Beauty and the Labor Market," *American Economic Review* 83, no. 1174 (December 1994); John Cawley, *Body Weight and Women's Labor Market Outcomes* 2, no. 1, Joint Center for Poverty Research, 2000.

Not all cases may be as easy to recognize as gender discrimination when making workplace decisions or policies. (See Exhibit 7.9, "Illegal or Unfair?") It is easier to realize there is gender discrimination when the policy says "no women hired as guards" than when, as with the *Dothard v. Rawlinson* case (given at the end of the chapter), there is a policy, neutral on its face, saying all applicants must meet certain height and weight requirements to be guards, yet due to their genetic differences statistically, most women do not generally meet the requirements. In the *Dothard* case, for the first time, the U.S. Supreme Court was faced with whether Title VII's gender discrimination provision applied to the seemingly neutral criteria of height and weight restrictions, which had long been an accepted basis for screening applicants for certain types of jobs such as prison guards, police officers, and firefighters, even though there was little or no legitimate reason for the criteria. The Court decided that Title VII did, in fact, apply to such facially neutral policies when they screened out women (later cases extended this standard to shorter and slighter ethnicities as well) at an unacceptable rate and were not shown to be directly correlated to ability to do the job.

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Exhibit 7.8 *On the Lighter Side**

Women are often accused of being humorless when it comes to gender issues. While the issue of gender discrimination is far from funny, it doesn't mean we can't laugh at ourselves. To wit, the following e-mail:

IS YOUR COMPUTER A HE OR A SHE?

A college professor who was previously a sailor was very aware that ships are addressed as "she" and "her." He often wondered [by] what gender computers should be addressed.

To answer that question, he set up two groups of computer experts. The first was composed of women, and the second of men. Each group was asked to recommend whether computers should be referred to in the feminine gender, or the masculine gender. They were asked to give four reasons for their recommendations.

The group of women reported that the computers should be referred to in the masculine gender because:

1. In order to get their attention, you have to turn them on.
2. They have a lot of data, but they are still clueless.
3. They are supposed to help you solve problems, but half the time they are the problem.
4. As soon as you commit to one, you realize that if you had waited a little longer, you could have had a better model.

The men, on the other hand, concluded that computers should be referred to in the feminine gender because:

1. No one but the Creator understands their internal logic.
2. The native language they use to communicate with other computers is incomprehensible to everyone else.
3. Even your smallest mistakes are stored in long-term memory for later retrieval.
4. As soon as you make a commitment to one, you find yourself spending half your paycheck on accessories for it.

* Thanks to Dr. Andy Walters, Northern Arizona University. Used with permission.

"Gender-Plus" Discrimination

LO5

"gender-plus" discrimination
Employment discrimination based on gender and some other factor such as marital status or children.

There are some situations in which the employer may permit the hiring of women but not if there are other factors present—for example, no hiring of women who are pregnant, are married, are over a certain age, have children under a certain age, or are unmarried with children. This is **"gender-plus" discrimination**. Of course, the problem is that such policies are not neutral at all because males are not subject to the same limitations. (See Exhibit 7.10, "Breast-Feeding: A Gender-Plus Issue?")

Case 3

The *Phillips v. Martin Marietta Corp.* case, included at the end of the chapter, was the first Title VII case to reach the U.S. Supreme Court and is still widely cited. *Martin Marietta* provides insight into the considerations the Court will use in deciding gender-plus discrimination cases. Probably even more insightful is the dissent in the *Martin Marietta* case filed by Justice Thurgood Marshall. The Court evidently took Justice Marshall's dissent seriously because in the years after *Martin Marietta* the Court has not permitted BFOQs to be used in the way

Exhibit 7.9 *Illegal or Unfair?*

Several courts have wrestled with the issue of what constitutes gender discrimination under Title VII. One issue that has arisen several times is whether it is illegal gender discrimination under Title VII if a female who is having a relationship with a supervisor receives a job or promotion over a qualified male who applies for the position. In *Womack v. Runyon,* 77 FEP Cases 769 (11th Cir. 1998), Paul Womack, having excellent credentials, experience, and training, applied for a carrier supervisor position in Waycross, Georgia. He was unanimously selected as the best-qualified candidate by a review board, but O. M. Lee, the newly appointed postmaster of Waycross, instead appointed Lee's paramour, Jeanine Bennett. In rejecting Womack's Title VII claim of gender discrimination, the court held that Title VII did not cover claims of favoritism, saying that such decisions may not be fair, but they are not illegal under Title VII. According to an EEOC policy guidance, "Title VII does not prohibit . . . preferential treatment based upon consensual romantic relationships. An isolated instance of favoritism toward a paramour . . . may be unfair, but it does not [amount to] discrimination against women or men in violation of Title VII, since both [genders] are disadvantaged for reasons other than their genders."

he warned against. Keep in mind that, while BFOQs are permitted as a lawful means of discriminating based on gender, they are very narrowly construed. The employer is under a heavy duty to show that the gender requirement is reasonably necessary for the employer's particular business.

Exhibit 7.10 *Breast-Feeding: A Gender-Plus Issue?*

A federal judge in New York dismissed a gender discrimination and disability suit brought by Alicia Martinez, a cable television producer, alleging that after returning from maternity leave, her employer, MSNBC cable, failed to provide her with a "safe, secure, sanitary and private" place to pump breast milk during work breaks and harassed her for complaining. *Martinez v. NBC, Inc. and MSNBC,* 49 F. Supp. 2d 305 (S.D.N.Y. 1999).

Regarding the ADA claim, Judge Kaplan said it was "preposterous to contend a woman's body is functioning abnormally because she is lactating." As to the Title VII claim, the court said this was not "sex plus" discrimination because "to allow a claim based on sex-plus discrimination here would elevate breast milk pumping—alone—to a protected status," and that could only be done by Congress. It was not plain gender discrimination under Title VII because "the drawing of distinctions among persons of one gender on the basis of criteria that are immaterial to the other, while in given cases perhaps deplorable, is not the sort of behavior covered by Title VII."

Note that a similar argument was struck down by Congress in enacting the Pregnancy Discrimination Act, where the court determined it was not illegal gender discrimination to treat pregnant employees differently, since only females could become pregnant. Keep an eye on what happens with breast-feeding in the workplace. Some states (e.g., California) have already enacted laws providing protection for nursing mothers and others are considering legislation. Even in the absence of legislation, many employers are taking this issue quite seriously and creating policies to address lactation.

Gender Issues

LO4

As we have seen, many issues are included under the umbrella of illegal gender discrimination. Following are some that are most prevalent. Keep in mind that many things we take for granted and dismiss as "that's just the way things are" *may* be illegal in the workplace. That is what Justice Marshall alluded to in his dissent in the Phillips case, which has been fully accepted by subsequent courts. It is extremely important to keep this in mind as managers make workplace decisions and to guard against letting such thoughts be the basis of illegal Title VII decisions that result in employer liability.

Gender Stereotyping

gender stereotypes
The assumption that most or all members of a particular gender must act a certain way.

Much discrimination on the basis of gender is in some way based on **gender stereotypes**. That is, workplace decisions are based on ideas of how a particular gender should act or dress, or what roles they should perform or jobs they should hold. An employer may terminate a female employee who is too "abrasive," or not hire a female for a job as a welder because it is "men's work." Stereotypes generally have little or nothing to do with an individual employee's qualifications or ability to perform. Workplace decisions based on stereotypes are prohibited by Title VII. (See Exhibits 7.5, "Discrimination: Bad for Business and Employees"; 7.11, "Stereotyped Humor"; and 7.12, "Stereotypes.")

Case 4

As *Price Waterhouse v. Hopkins* (included at the end of the chapter) demonstrates, stereotyping frequently leads to actions that form the basis of unnecessary liability for the employer. It is senseless for employers to allow managers and supervisors who hold such views to cause liability that costs the entire company unnecessary loss of revenue. Gender stereotyping began as stereotyping about females, but recent cases also have used the *Price Waterhouse* case to prohibit gender stereotyping of males, particularly as it relates to effeminacy. See the *Azteca* case in the affinity orientation chapter.

Grooming Codes

LO6

The issue of gender stereotypes may be closely linked to that of grooming codes since the issue often arises in a gender context (e.g., men being prohibited from wearing earrings at work or women being required to wear makeup). Courts recognize that employers need to be able to control this aspect of the workplace, and a good deal of flexibility is permitted. As *Harper v. Blockbuster Entertainment Corporation* (included at the end of the chapter) demonstrates, Title VII does not prohibit an employer from using gender as a basis for reasonable grooming codes.

Case 5

Note, however, that we here address grooming codes only in the context of gender discrimination. The more recent workplace issues of, for example, applicants or employees with numerous body piercings, tattoos, and the like is generally not a gender issue but, rather, one of pure dress code–based appropriate business attire. Again, employers are given a good deal of leeway in setting workplace dress codes. The codes can be pretty much whatever the employer wants,

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Exhibit 7.11 *Stereotyped Humor*

"Hey, didja hear the one about the blond bimbo?" Well, you won't hear it here. Whether or not jokes playing on stereotypes of women make you laugh, they might affect your judgments of women. About 100 male and female college students who heard sex-stereotyped jokes before watching female lecturers later rated the women in a more stereotyped fashion than did students who heard nonsexist jokes. "This study suggests we should be on guard about [stereotyped humor]," says co-author Christine Weston, Boston University.

Source: *USA Today,* August 24, 1993, p. D-1.

unless a policy violates law such as being illegally discriminatory on the basis of gender. In making this determination, employers can use reasonable standards of what is generally thought to be male- or female-appropriate attire in a business setting. That is why in the *Blockbuster* case it is permissible under Title VII for an employer to prohibit males from wearing earrings, for instance, even though females are permitted to wear them.

Courts also have upheld grooming codes that required, among other things, male supermarket clerks to wear ties, female employees to not wear pants, a female attorney to "tone down" her "flashy" attire, and male and female flight attendants to keep their weight down. Not permitted were a weight restriction policy applied only to the exclusively female category of flight attendants, but not the category of male directors of passenger service, when both were in-flight employees. Also not permitted was requiring male employees to wear "normal business attire" and women to wear uniforms, though both performed the same duties. The court found "there is a natural tendency to assume that the uniformed women have a lesser professional status than their male colleagues attired in normal business clothes. This is the basis for opening scenario 1, and the reason the female clerk made to wear the smock would have a viable claim for gender discrimination. The wearing of the smock (picture the loose-fitting coverall-type button-down overdress that hairdressers often wear) may seem like a small thing to you, and you might say to yourself, "What's the big deal? Why would anybody complain about such a little thing?" Think back to the wires of the cage. It is not the smock itself that presents the problem. Rather, as the court said above, it is how that smock positions the employee to be perceived in the workplace. That perception is a large part of what happens in that employee's worklife, affecting whether that employee receives promotions, training, raises, and so on. When you think of business attire (keep in mind that the males with the same jobs were required to wear the "normal business attire" of coats and ties), a smock does not generally come to mind. If both genders were performing the same job, a female wearing a smock would not qualify as comparable to a male wearing a coat and tie. If you think she would, just turn the facts around and require the males to wear the blousy-looking smock and the females to wear "normal business attire."

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Exhibit 7.12 *Stereotypes*

Do any of the stereotypes below, taken from actual cases, sound familiar? Note that they are not limited to gender.

- "Older employees have problems adapting to changes and to new policies."
- One had to be wary around "articulate black men."
- Would not consider "some woman" for the position, questioned plaintiff about future pregnancy plans, and asked whether her husband would object to her "running around the country with men."
- Female employee who spent time talking to other black employees was becoming "the black matriarch" within the company.
- A lesser job position was sufficient for women and no woman would be named to the higher position.
- If it were his company, he would not hire any black people.
- He was "not going to hire a black leasing agent."

Not the same picture, is it? And when you think of who should get a promotion, the employee in the smock probably doesn't come to mind. Like the wires, each requirement, in and of itself, may not make a big difference, but taken together, the policies create a picture that is likely to keep the female employee on the low end of the workplace ladder and be more likely to lead to unnecessary litigation.

As a managerial exercise for yourself, try to think of why the employer would have required the smock. Why not require it for all employees if they really are all the same? What is the difference between males wearing them and females wearing them? Once you come up with a reason, ask yourself if it makes sense. Chances are, it doesn't. For instance, if the smock was required to keep the employees' clothes clean, then why not protect the clothing of males also?

Being able to see and really understand the smock case goes a long way toward being able to truly grasp the big picture of how gender discrimination works and how you can think about avoiding liability for it in the workplace when faced with your own situations as a manager.

A gender-based grooming policy that subjects one gender to different conditions of employment also would not be allowed, for instance, where the scant uniform the female lobby attendant was required to wear made her the object of lewd comments and sexual propositions from male entrants,[9] or where a manager required female employees to wear skirts when the "head honcho" visited because he "liked to look at legs." It is not a defense for an employer to argue that the employee knew about the grooming code when he or she came into the workplace. If the code is illegal, it is illegal, period. Agreeing to it makes it no less so, particularly given the unequal bargaining positions of the employer and job applicant/employee.

An interesting case arose when Harrah's Casino in Reno, Nevada, instituted a new dress code that required female employees to wear makeup. The "Personal

Best" program "specified the makeup as foundation or powder, blush, lipstick and mascara, applied precisely the same way every day to match a photograph held by the supervisor." The only requirement for men was that they not wear makeup of any kind and keep their hair and nails trimmed. Darlene Jespersen, a bartender who had been employed by the casino for 21 years and had an excellent work history, was "highly offended she had to doll herself up to look like a hooker." She was terminated for failing to comply with the policy. Jespersen argued that the cosmetics cost hundreds of dollars per year and took a good deal of time to apply and therefore created an unequal burden on female employees. In 2004, the Ninth Circuit Court of Appeals upheld the policy, saying "there is no evidence in the record in support of [Jespersen's] contention that cosmetics can cost hundreds of dollars per year and that applying them requires a significant investment of time."

Can you reconcile the court's position with that of the U.S. Supreme Court in the *Price Waterhouse* decision, which held that gender stereotyping violated Title VII? Remember that the Court found gender discrimination when, among other things, Hopkins was told she must "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled and wear jewelry." The Ninth Circuit said its decision did not run afoul of *Price Waterhouse* because *Price Waterhouse* did not address the specific question of whether an employer can impose sex-differentiated appearance and grooming standards on its male and female employees (presumably because the more direct issue before the Court was Hopkins's assertive/aggressive behavior, which her employers used as a large part of their rejection of her as a partner).

The full Ninth Circuit reheard the case again *en banc* (i.e., with all the judges present, not just a three-judge panel) in *Jespersen v. Harrah's Operating Co.* in 2005 and issued its decision in 2006. What do you think the court decided? If you're scratching your head after reading the case given at the end of the chapter, you are not alone. The decision caused a great deal of controversy.

Customer or Employee Preferences

Frequently an employer uses gender as a basis for assigning work because of the preference of customers, clients, or other employees. Often the work to which one gender is not privy presents a loss of valuable revenue or a professionally beneficial opportunity for that employee. Such considerations may be formidable in client-driven businesses such as law, brokerages, accounting, sales, and other professions. If a customer does not wish to have a female audit his or her books, can her accounting firm legally refuse to let her service the client? Is an employer in violation of Title VII if the employer does not permit an employee of a certain gender to deal with a customer because the customer does not wish to deal with someone of that gender and the employee is thereby denied valuable work experience or earning potential? What if male employees on a construction site don't want a female to work with them?

The answer is yes, the employer is in violation of Title VII and can be held liable to the employee for gender discrimination. Customer preference is *not* a

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legitimate and protected reason to treat otherwise-qualified employees differently based on gender.

Hooters is an Atlanta-based restaurant chain known for its buffalo wings and scantily clad (very short shorts and T-shirts tied around the middle, revealing a bare midriff), generally well-endowed, female servers. It came to light that Hooters refuses to hire males as servers. The conventional wisdom is that despite Hooters' claims that it is a family restaurant and "Hooters" refers to its owl logo, "Hooters" is a not-so-subtle reference to female breasts, and the servers are as, or more, important than the food it serves. This is further supported by the servers' outfits, the fact that Hooters is known for its "Hooters' Girls," complete with pin-up calendars and a 10-page *Playboy* magazine spread, and its "more than a mouthful" logo, which few believe refers to chicken wings or owls.

Hooters alleges that customers want only female servers. In 1996, Hooters launched a "no to male servers" billboard campaign featuring husky male servers clad in the Hooters' attire. Today, Hooters' serving staff is still female, despite the lawsuits brought by EEOC and class action suits by males in Chicago and Maryland. Hooters has chosen to settle cases rather than litigate them, which, of course, it has the right to do as long as it is willing to foot the bill.

2 Scenario

The Hooters situation is the basis for opening scenario 2. Not a semester goes by that one of our students doesn't ask how Hooters can "get away with" hiring only female servers. The short answer is, it can't. At least not legally, in its present incarnation. Hooters has the right to use gender as a BFOQ to protect its female-only server policy if it can show that the gender of its servers is a bona fide occupational qualification reasonably necessary to the particular job done by the servers. For instance, the BFOQ would be defensible if Hooters declared itself to be in the business of entertainment by use of its servers—rather like Playboy Club bunnies. It has chosen, instead, to classify itself otherwise. This means either gender can serve its food and its female-only server policy violates Title VII's prohibition against gender discrimination. The way Hooters "gets away with" hiring only female servers is to settle lawsuits brought by males challenging its exclusionary policy. Obviously, (1) Hooters does not want to classify itself as adult entertainment and allow the BFOQ defense and (2) Hooters has concluded that it is worth more to them to keep its female-only server policy and settle claims by male applicants than to change its policy. Again, that approach is something it has every right to take as long as it is willing to foot the bill for that choice. To see the fine line Hooters walks in trying to characterize itself to avoid liability, visit their Web site and read the "about Hooters" section.

This issue of customer preference may cause special problems now that the Civil Rights Act of 1991 applies Title VII to U.S. citizens employed by American-owned or controlled companies doing business outside the United States. An employer in a country whose mores may not permit women to deal with men professionally must still comply with Title VII unless doing so would cause the company to actually violate the law of the country in which the business is located.

Logistical Considerations

LO5

Case 7

In some workplaces, males and females working together can present logistical challenges; for instance, female sports reporters going into male athletes' locker rooms, female firefighters sleeping at a fire station, or lack of bathrooms at a construction site. This issue arose in the context of construction workers in the *Lynch v. Freeman* case, which is included at the conclusion of the chapter, when a female employee was told to use the same portable toilet as males. The court determined that the unclean (to put it mildly) toilets presented different challenges to males and females, resulting in gender discrimination. Note how the employer can take little for granted in making workplace decisions, as even the seemingly smallest decisions can be the basis of a time-consuming and expensive lawsuit.

A growing logistical concern in recent years has been the matter of female employees breast-feeding or expressing their milk at work. While the benefits of breast-feeding are clear as providing the best means of giving infants, among other things, natural immunities and nutrients, women who needed to, or chose to, return to work before their babies were weaned from the breast had little means of continuing to provide them with the benefits of their milk when they were not available to feed them. It was even illegal in many states to breast-feed in public.

In 2006, a national "nurse-in" was held to protest the treatment of Emily Gillette of Santa Fe, New Mexico. Gillette was sitting aboard a Freedom Airlines (a regional airline for Delta) plane that was three hours late in taking off, when she began to breast-feed her daughter. A flight attendant who told Gillette that Gillette was offending her had Gillette removed from the plane when Gillette refused to cover herself with a blanket. Now, at least 39 states have passed lactation laws that make it permissible for women to breastfeed in public places without being cited for public indecency (see Exhibit 7.10, "Breast-Feeding: A Gender-Plus Issue?"), federal legislation was reintroduced by U.S. Rep. Carolyn Maloney in May 2007 to amend the Civil Rights Act of 1964 to protect breast-feeding and provide tax incentives to businesses that establish lactation areas (Breastfeeding Promotion Act), and a growing number of employers have provided lactation rooms for employees to be able to express milk at work and a means to keep it cool while until they can take it home.

Initially women were consigned to workplace bathrooms when they needed to express milk and had no or inadequate refrigeration facilities to store the milk they cooled and bottled for their breastfeeding babies. Of course, the idea of expressing their milk in a public restroom was less than ideal. With lactation rooms and refrigeration facilities, female employees are able to have privacy and a safe, private place to take care of this issue. A popular route recently is for the employer to draw up a lactation agreement setting forth the parameters of the workplace lactation provisions, and the responsibilities of both the employer and the employee, and have the employee understand and sign it.

Employers may not forgo hiring those of a certain gender because of logistical issues unless it involves an unreasonable financial burden—usually a matter difficult for an employer to prove. These challenges must be resolved in a way

that does not discriminate against the employee based on gender. Generally it is not exceedingly difficult, although it may take thinking about the workplace in a different way. In one situation, the employer said he could not hire females because there was only one restroom on the premises. However, if there is no state sanitation or building code prohibiting it, there is no requirement that males and females use separate restrooms as long as privacy is maintained.

Equal Pay and Comparable Worth

LO8

> (1) No employer . . . shall discriminate between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. . . . [Equal Pay Act, 29 U.S.C.A § 206(d).]

Despite the statute quoted above, according to wage data, women earn on average 77 cents for every dollar earned by men. This is up from 60 cents in 1979. Younger women make 80 cents for every dollar a man makes in the same age group. At the rate the gender wage gap is closing, widely cited AFL-CIO research shows that women's salaries will not be equal until the year 2050.[10] A 2003 General Accounting Office report found that the gender wage gap is not because of less education or experience or because women get on a "mommy track" or choose low-paying professions. Instead, they concluded that discrimination is the biggest factor in the wage gap between genders.[11] While Title VII prohibits discrimination in employment including in the area of compensation, even before Title VII there was legislation protecting employees against discrimination in compensation solely on the basis of gender. The year before Title VII was passed, the Equal Pay Act (EPA), actually part of the Fair Labor Standards Act (FLSA) governing wages and hours in the workplace, became law.

Under the act, employers subject to the minimum wage provisions of the FLSA may not use gender as a basis for paying lower wages to an employee for equal work "on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." There are exceptions. Differences in wages are permitted if based on seniority or merit systems, on systems that measure earnings by quantity or quality of production, or on a differential based on "any other factor other than [gender]."

To comply with the Equal Pay Act, the employer may not reduce the wage rate of the higher-paid employees. According to Bureau of Labor Statistics figures, the pay gap that was supposed to be closed by the legislation actually widened at least nine times from one year to the next since passage of the EPA.

The EPA overlaps with Title VII's general prohibition against discrimination in employment on the basis of gender. Title VII's Bennett Amendment was passed so that the exceptions permitted by the EPA also would be recognized by Title VII.

The EPA also has a longer statute of limitations (two years from the time of the alleged violation, which may be raised to three years for willful violations, rather than 180 days under Title VII). Perhaps due to the fact that Title VII was passed very soon after the EPA, and more generally proscribed discrimination in employment, there has been less activity under the EPA than under Title VII. However, the prohibitions on pay discrimination should be considered no less important. (See Exhibit 7.13, "Equal Pay: Hardly a Dead Issue.") In the *Pollis v. The New School for Social Research* case, included for your review, a professor wins when she sues for making less than her similarly situated male colleagues.

Case 8

Under the EPA, it is the content of the job, not the job title or description, that controls the comparison of whether the jobs are substantially the same. For instance, if a hospital's male "orderlies" and female "aides" perform substantially the same job, they should receive the same pay, despite the difference in job titles.

comparable worth
A Title VII action for pay discrimination based on gender, in which jobs held mostly by women are compared with comparable jobs held mostly by men in regard to pay to determine if there is gender discrimination.

In *County of Washington v. Gunther,*[12] the Court held that Title VII's Bennett Amendment only incorporated the four EPA exceptions into Title VII, not the "substantially equal" requirement; therefore, the jobs compared in a Title VII unequal pay action need not be substantially equal. Thus, under Title VII, employees have attempted to bring **comparable worth** cases in which higher-paid predominantly male jobs with similar value to the employer are compared in order to challenge lower wage rates for jobs held mostly by women. Federal courts, however, have generally rejected Title VII claims based on comparable worth. Take a look at the historic *AFSCME v. State of Washington* case, provided at the end of the chapter, to see some of the considerations involved. *AFSCME* was the first significant statewide case to challenge gender-based pay differences on the basis of the comparable worth theory.

Case 9

Prompted by the flap over pay disparities in women's soccer in January 2000, there was a flurry of activity surrounding the issue of gender-based wage differences in the American workplace. Twenty members of the U.S. Women's Soccer Team refused to play in an Australian tournament and demanded pay equal to that of the U.S. Men's Soccer Team. The women were scheduled to be paid $3,150 per month for the most experienced player and about $250 per game. Men were to receive $5,000 per month and an additional $2,000 for the 18 players going to Australia. In the wake of the incident, at least two pieces of legislation were introduced into Congress (the Fair Pay Act and the stronger Paycheck Fairness Act) to amend the Fair Labor Standards Act to address the issue of gender-based wage disparities. In February 2000, President Clinton, accompanied by women's soccer player Michelle Akers, announced that he was seeking an Equal Pay Initiative of $27 million to close the gap between men's and women's pay, of which $10 million would be allocated to EEOC to deal with the issue of gender-based wage violations. However, nothing much came of the flurry of activity and the laws have not yet been enacted by Congress.

The Paycheck Fairness Act would amend the Equal Pay Act to allow, in addition to the compensatory damages now permitted by the law, punitive damages for wage discrimination; prohibit employers from retaliating against employees

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Exhibit 7.13 *Equal Pay: Hardly a Dead Issue*

A national study undertaken by the AFL-CIO and the Institute for Women's Policy Research reveals very interesting insights into the issue of pay equality among American workers. Almost two-thirds of all working women responded to the survey. When looking at the findings and thinking about the issue of wage equality, keep in mind that the women responding provided half or more of their families' incomes.

- Ninety-four percent of working women described equal pay as "very important"; two of every five cited pay as the biggest problem women face at work.
- Working families lose $200 billion of income annually to the wage gap—an average yearly loss of more than $4,000 for each working woman's family because of unequal pay, even after accounting for differences in education, age, location, and the number of hours worked.
- If married women were paid the same as comparable men, their family income would rise by nearly 6 percent, and their families' poverty rates would fall from 2.1 percent to 0.8 percent.
- If single working mothers earned as much as comparable men, their family incomes would increase by nearly 17 percent, and their poverty rates would be cut in half, from 25.3 percent to 12.6 percent.
- If single women earned as much as comparable men, their incomes would rise by 13.4 percent and their poverty rates would be reduced from 6.3 percent to 1 percent.
- Working families in Ohio, Michigan, Vermont, Indiana, Illinois, Montana, Wisconsin, and Alabama pay the heaviest price for unequal pay to working women, losing an average of roughly $5,000 in family income each year.
- Family income losses due to unequal pay for women range from $326 million in Alaska to $21.8 billion in California.
- Women who work full time are paid the least, compared with men, in Indiana, Louisiana, Michigan, Montana, North Dakota, Wisconsin, and Wyoming, where women earn less than 70 percent of men's weekly earnings.
- Women of color fare especially poorly in Louisiana, Montana, Nebraska, Oregon, Rhode Island, Utah, Wisconsin, and Wyoming, earning less than 60 percent of what men earn.
- Even where women fare best compared with men—in Arizona, California, Florida, Hawaii, Massachusetts, New York, and Rhode Island—women earn little more than 80 percent as much as men.
- Women earn the most in comparison to men—97 percent—in Washington, DC, but the primary reason women appear to fare so well is the very low wages of minority men.
- For women of color, the gender pay gap is smallest in Washington, DC; Hawaii; Florida; New York; and Tennessee, where they earn more than 70 percent of what men overall in those states earn.
- The 25.6 million women who work in predominantly female jobs lose an average of $3,446 each per year; the 4 million men who work in predominantly female occupations lose an average of $6,259 each per year.

Sources: "Equal Pay for Working Families: National and State Data on the Pay Gap and Its Costs," http://www.aflcio.org/issues/jobseconomy/women/equalpay/EqualPayForWorkingFamilies.cfm.

for disseminating wage information to other employees; create training programs to help women strengthen their negotiation skills;[13] enforce equal pay laws for federal contractors; and require the Department of Labor to work with employers to eliminate pay disparities. The Fair Pay Act seeks to end wage discrimination in female- or minority-dominated jobs by ensuring equal pay for equivalent work. This proposed law is aimed at female and minority-dominated employees and would establish equal pay for equivalent work. Employees would be protected on the basis of race and national origin. Wage differentials would be permitted based on seniority, merit, or quantity or quality of work and there would be exemptions for small business. The proposed law would not allow employers to pay predominantly female jobs less than predominantly male jobs if they are equivalent in value to the employer.

However, in May 2007, the U.S. Supreme Court issued its decision in the case of *Ledbetter v. Goodyear Tire and Rubber Co., Inc.*[14] The case seems to have reignited the issue of women and wages in a serious way. Both pieces of legislation have been reintroduced, and Congress is working on a law to reverse the Supreme Court's *Ledbetter* decision. In the case, a woman who had been the victim of illegal pay discrimination over a long period of time and who did not discover it until nearly her retirement, sued the employer for gender discrimination. The issue came down to whether the 180-day statute of limitations in the Civil Rights Act began to run 180 days after the initial act of discrimination, in which case the employee was foreclosed from bringing her cause of action, or whether it ran anew each time she was given a lower paycheck based on the discriminatory pay. The Supreme Court held that she could not sue because the statute of limitations was 180 days after the original act. The decision was roundly criticized by employees and lauded by business. Congress immediately took issue with the Court's decision and introduced the Lilly Ledbetter Fair Pay Act (H.R. 2831, 110th Congress, 1st session (June 22, 2007)) to amend Title VII to allow the statute of limitations to start each time a paycheck is issued based on the discriminatory pay. This case, in which Justice Ruth Bader Ginsburg took the unusual step of reading her spirited dissent from the bench, also reignited the two other laws above and they are receiving much attention in Congress once again.

Under existing law, employers should be aware of any pay differentials between specific males and females, as well as between jobs that are held primarily by males and those held primarily by females. Employers should perform periodic audits to ensure that they are not operating under gender-based pay differentials, which may lead to preventable wage discrimination litigation against the employer.

Gender as a BFOQ

Title VII permits gender to be used as a bona fide occupational qualification (BFOQ) under certain limited circumstances. Under EEOC guidelines, a BFOQ may be used when there is a legitimate need for authenticity such as for the part

of a female in a theater or film production. More often than not, when employers have attempted to use BFOQ as a defense to gender discrimination, courts have found the defense inapplicable. This makes sense when you consider that in EEOC's view, the guideline for determining the appropriateness of a BFOQ is that it would be necessary for a male acting as a sperm donor or a female acting as a wet nurse (a woman who nurses someone else's baby from her own breast). That is a pretty strict guideline and provides insight into how irrelevant EEOC considers the matter of gender in the workplace to be.

The *EEOC v. Audrey Sedita, d/b/a Women's Workout World* case, at the conclusion of the chapter demonstrates, however, that it is not always females who are kept out of the workplace because of gender. Men also are protected by the law, though because of our history with gender in this country, they do not have to call upon the law for assistance nearly as much as women.

Pregnancy Discrimination

The Pregnancy Discrimination Act (PDA) prohibits an employer from using pregnancy, childbirth, or related medical conditions as the basis for treating an employee differently than any other employee with a short-term disability if that employee can perform the job. This is why in opening scenario 3, it is illegal for the employer to evaluate the pregnant employee differently than it would any other. Employers illegally treat employees differently in many ways. For instance, the employer

- Refuses to hire pregnant applicants.
- Terminates an employee on discovering the employee's pregnancy.
- Does not provide benefits to pregnant employees on an equal basis with short-term disabilities of other employees.
- Refuses to allow a pregnant employee to continue to work even though the employee wishes to do so and is physically able to do so.
- Does not provide the employee with lighter duty if needed, when such accommodations are made for employees with other short-term disabilities.
- Eliminates the pregnant employee by moving her to a new job title with the same pay, then eliminates the position in a job restructuring or a reduction in force.
- Evaluates the employee as not having performed as well or as much as other employees when the basis for the evaluation is the employer's own refusal or hesitation to assign equal work to the employee because the employee is pregnant and the employer feels the need to "lighten" the employee's load, though the employee has not requested it.
- Does not permit the pregnant employee to be a part of the normal circle of office culture so she becomes less aware of matters of importance to the office or current projects, resulting in more likelihood that the employee will not be able effectively to compete with those still within the circle.

The Supreme Court determined in *General Electric Co. v. Gilbert*[15] that discrimination on the basis of pregnancy was not gender discrimination under Title VII. Two years later, Congress passed the PDA, amending Title VII's definitions to include discrimination on the basis of pregnancy. Despite the fact that women comprise nearly 50 percent of the workforce, and statistics show that about 75 percent of those of childbearing age will have children sometime during their work life, pregnancy discrimination is still a serious workplace concern.

Many employers have maternity leave policies to address this more-than-likely event, but others, particularly smaller employers, do not. Based on traditional notions about the inappropriateness of women in the workplace in general, or pregnant women in particular, some employers are actually hostile to pregnant employees and run the very real risk of being sued for pregnancy discrimination.

> *It didn't bother me at all that she was pregnant. But whether or not she was going to be able to spend the time to actually perform the job and to be a mom and do all that, yeah, we factored it in, sure. We were concerned.*

This statement by Robert DiFazio, head of Smith Barney's equities division regarding why someone other than the pregnant applicant was promoted to head the over-the-counter sales desk, is typical of many employers' views about pregnant employees. The employee here filed a claim and the arbitration panel said, "it is hard to imagine sentiments more universally regarded as symbolic of illegal gender bias" and ruled the remarks constituted evidence of gender discrimination. A study in the *Journal of Personality and Social Psychology* found that while "business women" were rated similar in competence to "business men" or "millionaires," women who became mothers were rated as similar in competence to the "elderly," "blind," "retarded," or "disabled." That's pretty startling.

EEOC recently reported that there has been at least a 182 percent increase in the filing of pregnancy discrimination charges over the past 10 years. While EEOC says the most common scenario in pregnancy discrimination claims is termination of the pregnant employee (like the car dealer who fired the employee for fear she'd have morning sickness and throw up in the vehicles), employers take all kinds of measures. Wal-Mart rejected pregnant job applicants, thousands of female Verizon Wireless employees lost benefits during maternity leave, Delta Airlines fired one pregnant ramp attendant and forced another to take unpaid leave, a producer on Spelling Entertainment's *Melrose Place* fired pregnant actress Hunter Tylo on the grounds that she was "unable to play the role of a seductress," a Dallas attorney at the law firm of Jenkins & Gilchrist claimed she was constructively discharged due to her pregnancy, and a New York City police commander claims she was passed over because of her pregnancies, as does the first woman promoted within the Annapolis Fire Department and the education reporter for television station WLOX in Biloxi. In the *Asmo v. Keane, Inc.* case, provided for your review, the court concluded there was pregnancy discrimination when the employee's supervisor said nothing when she told him she was pregnant with twins, and then terminated her two months later.

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Management Tips

As you have seen from the chapter, gender discrimination can manifest itself in many forms, some of which may take the employer by surprise. Following these tips can help keep the surprises to a minimum.

- Let employees know from the beginning that gender bias in the workplace will not be tolerated in any way. Give them examples of unacceptable behavior.
- Back up the strong gender message with appropriate enforcement.
- Take employee claims of gender discrimination or bias seriously.
- Promptly and thoroughly investigate all complaints, keeping privacy issues in mind.
- Don't go overboard in responding to offenses substantiated by investigation. Make sure the "punishment fits the crime."
- Conduct periodic training to keep communication lines open and to act as an ongoing reminder of the employer's antibias policy.
- Conduct periodic audits to make sure gender is not adversely affecting hiring, promotion, and raises.
- Review workplace policies to make sure there are no hidden policies or practices that could more adversely impact one gender than another.
- In dealing with gender issues, keep in mind that none of the actions need make the workplace stilted and formal. Employees can respect each other without discriminating against each other.

If the employee is temporarily unable to perform the duties of the job because of pregnancy, then the law requires that the inability to perform be the issue, not the fact that the employee is pregnant. The employee therefore should be treated just as any other employee who is temporarily unable to perform job requirements. Whatever arrangements the employer generally makes in such circumstances must be extended to the pregnant employee. Note, however, that EEOC has ruled that an employer's adherence to a facially neutral sick leave policy and its consequent refusal to provide pregnant employees with a reasonable leave of absence, in the absence of a showing of business necessity, discriminates on the basis of gender because of its disproportionate impact on women.[16] Pregnancy can, of course, be used as a BFOQ.

As a manager, you should be aware of the ingrained ideas people hold about pregnancy and work and be sure to ward off any trouble. According to a recent Jury Verdict Research study, if job applicants or employees with pregnancy discrimination claims go to jury trial, they win 54 percent of the time. On the other hand, while the study shows that pregnancy discrimination claimants are more likely than other kinds of discrimination claimants to recover from a jury, the amount they recover is substantially less. The median jury award in a pregnancy discrimination case was $56,360, while for others it was $146,468. But since the discrimination is avoidable, even a verdict of $56,360 is unnecessary.

Fetal Protection Policies

fetal protection policies
Policies an employer institutes to protect the fetus or the reproductive capacity of employees.

The issue of **fetal protection policies** will be given attention here because of the unique gender employment problems involved. Fetal protection policies are policies adopted by an employer that limit or prohibit employees from performing certain jobs or working in certain areas of the workplace because of the potential harm presented to pregnant employees, their fetuses, or the reproductive system or capacity of employees.

The problem with these policies is that, as in *UAW v. Johnson Controls, Inc.* (provided for your review), many times, even though there is a danger presented to male employees, the policies only exclude females (and do so very broadly), and the jobs from which the females are excluded pay more or have more promotion potential.

Chapter Summary

- Discrimination on the basis of gender is illegal and not in keeping with good business practices of efficiency, maximizing resources, and avoiding unnecessary liability.
- Gender discrimination has many manifestations, including discrimination in hiring, firing, compensation, training, fetal protection policies, client preferences, dress codes, and child care leave.
- In determining whether employment policies are gender biased, look at the obvious, but also look at the subtle bias that may arise from seemingly neutral policies adversely impacting a given gender, such as height and weight requirements. Both types of discrimination are illegal.
- Where employees must be treated differently, ensure that the basis for differentiation is grounded in factors not gender-based but, instead, address the actual limitation of the employee or applicant's qualifications.
- Dress codes are not prohibited under Title VII, but dress code differences based on gender should be reasonable and not based on limiting stereotypical ideas about gender.
- Logistical concerns of bathrooms, lactation rooms, and other such matters should be handled in a way that does not overly burden or unnecessarily exclude either gender.
- Under the PDA, employers must treat a pregnant employee who is able to perform the job just as they treat any other employee with a short-term disability.
- Because of health and other considerations, an employer may use pregnancy as a BFOQ and may have policies excluding or limiting pregnant employees if there is a reasonable business justification for such policies.
- If there are legitimate bases for treating pregnant employees differently, an employer has ample flexibility to make necessary decisions.
- Outmoded ideas regarding pregnant employees may not be the basis of denying them equal employment opportunities.
- Fetal protection policies may not operate to discriminate against employees and fail to extend to them equal employment opportunities.

Chapter-End Questions

1. A female restaurant employee is on the phone in the kitchen talking to her mother. The chef of the restaurant comes up to the employee, throws off his chef's hat, grabs both the employee's arms, and begins shaking her violently and screaming at her. She reports this to the police. She is later terminated and sues for gender discrimination. Will she win? Why or why not? [*Labonia v. Doran Assoc., LLC,* 2004 U.S. Dist. LEXIS 17025 (D. Conn. 2004).]
2. Employee says she was forced to quit her job because of her status as a mother of young children. She claimed that her female supervisor created a hostile work environment that violated Title VII. She was replaced by another mother. Does she win? [*Fuller v. GTE Corp./Contel Cellular, Inc.,* 926 F. Supp. 653 (M.D. Tenn. 1996).]
3. Employer had only one promotion to give, but he was torn between giving it to the single female and the male who had a family and, the employer thought, most needed and could best use the money. He finally decided to give the promotion to the male and told the female he gave it to the male because the male was a family man and needed the money. If the female employee sues, will she win? [*Taylor v. Runyon,* 175 F.3d 861 (11th Cir. 1999).]
4. An accounts receivable supervisor was laid off by her employer after taking an extended disability leave for pregnancy. She claimed that the employer discriminated against her on the basis of gender and ability to bear children, stating that two male employees were retained and her replacement was a childless, 40-year-old unmarried female. She files suit, alleging gender discrimination. The employer said it was a legitimate layoff. What should the court consider in determining whether the employer's argument is true? [*Leahey v. Singer Sewing Co.,* 694 A.2d 609 (N.J. Super. 1996).]
5. A female police officer becomes pregnant and after a scuffle with an arrestee, is told by her doctor to request a light-duty assignment. The police department says it has no such positions available and that the officer must take leave until she could return to full duty, which ended up being from September to June. The female cites two male officers who were injured and did not stop working. Is this discrimination? [*Tysinger v. Police Department of the City of Zanesville,* 463 F.3d 569 (6th Cir. 2006).]
6. A cable company closed its door-to-door sales department and released all employees of that department after settling a discrimination complaint by one of the department's employees. The employee's mother, sister, and two close friends also had been employed in the department. Eighteen months later, the company resumed its door-to-door sales but refused to rehire three of the former employees connected with the employee who had previously sued. The former employees sue, alleging gender discrimination. Will they be successful in their suit? Explain. [*Craig v. Suburban Cablevision, Inc.,* 660 A.2d 505 (N.J. 1995).]
7. A power company began employing women as meter readers, and the job classification went from all-male to all-female within a few years. The labor union that represented bargaining-unit employees negotiated a new collective bargaining agreement that froze wages in the meter reader classification and lowered the wage for new hires. There was evidence that the company president made comments concerning the desirability of housewives to read meters and that he admitted the contract was unfavorable to women. A number of women in the meter reader category filed a state court lawsuit against the employer and union for gender discrimination on the basis of state law and wage discrimination under federal law. The employer argued that the federal labor law

preempted the state law gender discrimination complaint; therefore, the gender complaint should be dismissed. Is the state law preempted? [*Donajkowski v. Alpena Power Co.,* 556 N.W.2d 876 (Mich. App. 1996).]

8. Female employee is terminated for slapping a male employee. The male employee is not disciplined. Is this gender discrimination? Do you know all you need to know? [*Gamboa v. American Airlines,* 170 Fed. Appx. 610, 2006 U.S. App. LEXIS 3649 (11th Cir. 2006).]
9. Employer decides to shut down one of its three plants because the employees at that plant are almost exclusively women. The males who worked at the plant and lost their jobs as a result of the closing wish to sue for gender discrimination under Title VII. If they do, will they be successful? [*Allen v. American Home Foods, Inc.,* 644 F. Supp. 1553 (N.D. Ind. 1986).]
10. During an interview, an employer asks a female applicant questions such as whether she had children, what her child care responsibilities were, and how her family felt about her weekly commute between the business's headquarters in Virginia and the family home in New York. The employer also asked the applicant "how her husband handled the fact that [she] was away from home so much, not caring for the family" and said he had "a very difficult time" understanding why any man would allow his wife to live away from home during the workweek. Is this employer's line of questioning a violation of Title VII? Explain. [*Lettieri v. Equant, Inc.,* 478 F.3d 640 (4th Cir. 2007).]

End Notes

1. *Visible Invisibility: Women of Color in Law Firms,* http://www.abanet.org/women/woc/wocinitiative.html.
2. http//www.factcheck.org/elections-2008/mccains_viagra_moment.html
3. http://www.eeoc.gov/policy/docs/caregiving.html.
4. 474 F.3d 1214 (9th Cir. 2007).
5. Equal Employment Opportunity Commission, *Glass Ceilings: The Status of Women as Officials and Managers in the Private Sector,* http://www.eeoc.gov/stats/reports/glassceiling/index.html.
6. *AAUP Faculty Gender Equity Indicators 2006,* http://www.aaup.org/NR/rydonlyres/63396944-44BE-4ABA-9815-5792.
7. Stephen J. Rose and Heidi I. Hartmann, *Still a Man's Labor Market: The Long-Term Earnings Gap,* http://www.nd.edu/ hlrc/documents/Hartmann-StillManLaborMkt.pdf (last visited February 7, 2008).
8. 208 U.S. 412 (1908).
9. *EEOC v. Sage Realty Corp.,* 507 F. Supp. 599 (S.D.N.Y. 1981).
10. http://www.pay-equity.org/PDFs/payequitysummarytable.pdf.
11. "Women's Earnings: Work Patterns Partially Explain Difference between Men's and Women's Earnings," http://www.maloney.house.gov/documents/olddocs/womenscaucus/2003EarningsReport.pdf.
12. 452 U.S. 161 (1981).
13. Men are more than four times more likely than women to negotiate salary, which generally means higher salaries for men. This can lead women to lose more than $500,000 by age 60. Linda Babcock and Sara Laschever, *Women Don't Ask:*

Negotiation and the Gender Divide, (Princeton, NJ: Princeton University Press, 2003). See also Lee E. Miller and Jessica Miller, *A Woman's Guide to Successful Negotiating: How to Convince, Collaborate, & Create Your Way to Agreement,*" (New York: McGraw-Hill, 2001); Phyllis Mindell, *How to Say It for Women: Communicating with Confidence and Power Using the Language of Success,* (Upper Saddle River, NJ: Prentice Hall, 2001). Online tools for researching salary data preparatory to negotiating include salary.com and payscale.com. Tory Johnson, "Take Control: How to Negotiate Your Salary," ABC news, April 24, 2007, http://www.abcnews.go.com/GMA/TakeControlOfYourLife/story?id=3071603&page=1.

13. 550 U.S. __, 127 S. Ct. 2162 (2007).
14. 429 U.S. 125 (1976).
15. EEOC Dec. No. 74-112, 19 FEP Cases 1817 (April 15, 1974); EEOC Guidelines, 29 C.F.R. § 1604.10(c).

Cases

Wedow v. City of Kansas City, Missouri *442 F.3d 441 (8th Cir. 2006)*

Female firefighters were not given proper firefighting uniforms (while male firefighters were given two uniforms), which put them at risk for years; were not given restroom or shower facilities; and were otherwise not treated comparable to male firefighters. The court found that despite the fire department's arguments to the contrary, this was gender discrimination.

Hansen, J.

Firefighters are each issued two sets of personalized protective clothing called bunker gear, consisting of a coat, pants, boots, helmet, gloves, a tool belt, and a self-contained breathing apparatus. Two sets are necessary because if protective gear becomes wet or soiled with chemicals at one fire, there is a danger of injury from steam when the same gear must be worn at another fire that day. The protective clothing must fit properly

to ensure that the body is protected from injury due to smoke, water, heat, gasoline, and chemicals and to ensure the mobility needed while fighting a fire. The City issued and required Ms. Wedow and Ms. Kline to wear ill-fitting male firefighting clothing, although female clothing and gear were available and management officials knew of sources from which female gear could be obtained. Because the protective clothing did not fit Ms. Wedow and Ms. Kline properly, they suffered injuries from fire and chemicals when the coats would not close properly, or too large hats and boots would fall off while fighting a fire. Ms. Wedow's and Ms. Kline's movements were cumbersome and restricted by pants that caused them to trip or prevented them from easily climbing ladders. Excess length in the fingers of gloves made it difficult to grip objects such as the fire hose. The City's failure to procure protective clothing tailored for women and its provision of only male-sized protective clothing to Ms. Wedow and Ms. Kline made their jobs more difficult and more hazardous than was necessary.

Despite their complaints, no one in the Fire Department made any effort to provide Ms. Kline and Ms. Wedow with adequately fitting protective clothing from 1990 through October 1998. In October 1998, the Fire Department provided Ms. Kline with one set of female-sized protective clothing, although each male firefighter is given two sets of properly fitting clothing. In late 1998, Ms. Wedow received a female-sized pair of bunker pants and a male-sized coat; she never received a complete set of adequately fitting protective clothing during the relevant time period.

Ms. Kline and Ms. Wedow also complained of a lack of adequate restrooms, showers, and private changing facilities (referred to collectively as "facilities"). Showering at the station after fighting a fire is necessary to maintain good health when serving in 24-hour shifts. At a number of stations that Ms. Wedow and Ms. Kline visited on a daily basis as battalion chiefs, the restrooms were located in the male locker rooms with the male shower room, doors were not secure, males had the keys, and where female restrooms existed, they were unsanitary and often used as storage rooms. Food and water for the station's pet dog were kept in the women's room in two stations and sexually explicit magazines and a poster were kept in the female restroom in station 23. Most of the female restrooms that existed did not contain shower rooms and in some stations, the women's shower could be accessed only through the male bunkroom.

Department officials were aware of complaints about the facilities as early as 1993. From 1994 through 2000, the Fire Department submitted yearly budgets to the City requesting money for female locker room upgrades, and every year the City allocated money for this purpose, but the money was diverted to a whole-station upgrade at station 4, which already had a female restroom.

The City argues that it is entitled to judgment as a matter of law on the claim of disparate treatment in protective clothing and facilities because the plaintiffs failed to demonstrate that they suffered an adverse employment action. "An adverse employment action is a tangible change in working conditions that produces a material employment disadvantage." "Mere inconvenience without any decrease in title, salary, or benefits" or that results only in minor changes in working conditions does not meet this standard.

We cannot say as a matter of law that being required to work as a firefighter with inadequate protective clothing and inadequate restroom and shower facilities is a mere inconvenience. Title VII makes it unlawful to discriminate on the basis of sex with regard to the "terms, conditions, or privileges of employment" and prohibits an employer from depriving "any individual of employment opportunities or otherwise adversely affecting his status as an employee" on the basis of sex. The record amply demonstrates that the terms and conditions of a female firefighter's employment are affected by a lack of adequate protective clothing and private, sanitary shower and restroom facilities, because these conditions jeopardize her ability to perform the core functions of her job in a safe and efficient manner. The danger inherent in the job of a firefighter compounded by the need to move and work efficiently in those dangerous circumstances, to quickly change in and out of gear, to shower for health reasons following a fire, and the need to serve in 24-hour shifts, combine to make the provision of adequate protective clothing and facilities integral terms and conditions of employment for a firefighter. JUDGMENT FOR PLAINTIFF AFFIRMED.

Case Questions

1. Are you surprised that this is a 2006 case? Why/why not?
2. How do you think the fire department should have responded when the women registered complaints about their uniforms? Explain.
3. Why do you think the fire department treated the female employees as it did?

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Case 2 Dothard v. Rawlinson *433 U.S. 321 (1977)*

After her application for employment as an Alabama prison guard was rejected because she failed to meet the minimum 120-pound weight, 5-foot-2-inch height requirement of an Alabama statute, the applicant sued, challenging the statutory height and weight requirements as violative of Title VII of the Civil Rights Act of 1964. The Supreme Court found gender discrimination.

Stewart, J.

At the time she applied for a position as a correctional counselor trainee, Rawlinson was a 22-year-old college graduate whose major course of study had been correctional psychology. She was refused employment because she failed to meet the minimum 120-pound weight requirement established by an Alabama statute. The statute stated that the applicant shall not be less than five feet two inches nor more than six feet ten inches in height, shall weigh not less than 120 pounds nor more than 300 pounds. Variances could be granted upon a showing of good cause, but none had ever been applied for by the Board and the Board did not apprise applicants of the waiver possibility.

In considering the effect of the minimum height and weight standards on this disparity in rate of hiring between genders, the district court found that when the height and weight restrictions are combined, Alabama's statutory standards would exclude 41.13% of the female population while excluding less than 1% of the male population.

In enacting Title VII, Congress required "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." The District Court found the minimum height and weight requirements constitute the sort of arbitrary barrier to equal employment opportunity that Title VII forbids. This claim does not involve an assertion of purposeful discriminatory motive. It is asserted, rather, that these facially neutral qualification standards work in fact disproportionately to exclude women from eligibility for employment by the Alabama Board of Corrections.

We turn to Alabama's argument that they have rebutted the prima facie case of discrimination by showing that the height and weight requirements are job related. These requirements, they say, have a relationship to strength, a sufficient but unspecified amount of which is essential to effective job performance as a correctional counselor. In the district court, however, they failed to offer evidence of any kind in specific justification of the statutory standards.

If the job-related quality that the Board identifies is bona fide, their purpose could be achieved by adopting and validating a test for applicants that measures strength directly. But nothing in the present record even approaches such a measurement.

The district court was not in error in holding that Title VII of the Civil Rights Act of 1964 prohibits application of the statutory height and weight requirements to Rawlinson and the class she represents. AFFIRMED in part, REVERSED in part, and REMANDED.

Case Questions

1. What purpose did the height and weight requirements serve? Do you think they were made to intentionally discriminate against women?
2. How could management have avoided this outcome?
3. Does your view of illegal discrimination change now that you have seen how disparate impact claims work? Would you have been able to foresee this outcome? Explain.

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

A female applicant was denied employment because of the employer's policy against hiring women with preschool-age children. There was no policy against hiring men with such children. The Supreme Court held the employer's policy violated Title VII.

Per Curiam

Martin Marietta informed Ida Phillips that it was not accepting job applications from women with pre-school-age children. As of the time of this action, Martin Marietta employed men with pre-school-age children. At the time Phillips applied, 70–75% of the applicants for the position she sought were women; 75–80% of those hired for the position, assembly trainee, were women, hence no question of bias against women as such was presented.

Section 703(a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their gender. The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men—each having pre-school-age children. The existence of such conflicting family obligations, if demonstrably more relevant to job performance for a woman than a man, could arguably be a basis for distinction under 703(3) [BFOQ] of the Act. But that is a matter of evidence tending to show that the condition in question is a BFOQ reasonably necessary to the normal operation of that particular business or enterprise. The record before us, however, is not adequate for resolution of these important issues. VACATED and REMANDED.

Marshall, J., concurring.

While I agree that this case must be remanded for a full development of the facts, I cannot agree with the Court's indication that a BFOQ reasonably necessary to the normal operation of Martin Marietta's business could be established by a showing that some women, even the vast majority, with pre-school-age children have family responsibilities that interfere with job performance and that men do not usually have such responsibilities. Certainly, an employer can require that all of his employees, both men and women, meet minimum performance standards, and he can try to insure compliance by requiring parents, both mothers and fathers, to provide for the care of their children so that job performance is not interfered with.

The Court has fallen into the trap of assuming that the Act permits ancient canards about the proper role of women to be the basis for discrimination. Congress, however, sought just the opposite result.

Even characterizations of the proper domestic roles of the genders were not to serve as predicates for restricting employment opportunity. The exception for a BFOQ was not intended to swallow that rule.

Case Questions

1. Why do you think the employer instituted the rule discussed here? Does it actually address the employer's concern?
2. Can you think of a better way for management to handle its concerns about preschool parents?
3. Does Justice Marshall's position make sense to you? Why or why not?

Price Waterhouse v. Hopkins *490 U.S. 228 (1989)*

Ann Hopkins, a female associate who was refused admission as a partner in an accounting firm, brought a gender discrimination action against the firm. The U.S. Supreme Court held that the evidence was sufficient to show that illegal gender stereotyping played a part in evaluating Hopkins' candidacy.

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Brennan, J.

In a jointly prepared statement supporting her candidacy, the partners in Hopkins' office showcased her successful 2-year effort to secure a $25 million contract with the Department of State, labeling it "an outstanding performance" and one that Hopkins carried out "virtually at the partner level." None of the other partnership candidates had a comparable record in terms of successfully securing major contracts for the partnership.

The partners in Hopkins' office praised her character and her accomplishments, describing her as "an outstanding professional" who had a "deft touch," a "strong character, independence, and integrity." Clients appeared to have agreed with these assessments. Hopkins "had no difficulty dealing with clients and her clients appeared to be very pleased with her work" and she "was generally viewed as a highly competent project leader who worked long hours, pushed vigorously to meet deadlines, and demanded much from the multidisciplinary staffs with which she worked."

Virtually all of the partners' negative comments about Hopkins—even those of partners supporting her—had to do with her "interpersonal skills." Both supporters and opponents of her candidacy indicate she was sometimes "overly aggressive, unduly harsh, difficult to work with, and impatient with staff."

There were clear signs, though, that some of the partners reacted negatively to Hopkins' personality because she was a woman. One partner described her as "macho"; another suggested that she "overcompensated for being a woman"; a third advised her to take "a course at charm school." Several partners criticized her use of profanity; in response, one partner suggested that those partners objected to her swearing only "because it['s] a lady using foul language." Another supporter explained that Hopkins "ha[d] matured from a tough-talking somewhat masculine hard-nosed manager to an authoritative, formidable, but much more appealing lady partner candidate." But it was the man who bore responsibility for explaining to Hopkins the reasons for the Policy Board's decision to place her candidacy on hold who delivered the coup de grace; in order to improve her chances for partnership, Thomas Beyer advised, Hopkins should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."

Dr. Susan Fiske, a social psychologist and Associate Professor of Psychology at Carnegie-Mellon University, testified at trial that the partnership selection process at Price Waterhouse was likely influenced by gender stereotyping. Her testimony focused not only on the overtly gender-based comments of partners but also on gender-neutral remarks, made by partners who knew Hopkins only slightly, that were intensely critical of her. One partner, for example, baldly stated that Hopkins was "universally disliked" by staff and another described her as "consistently annoying and irritating"; yet these were people who had had very little contact with Hopkins. According to Fiske, Hopkins's uniqueness (as the only woman in the pool of candidates) and the subjectivity of the evaluations made it likely that sharply critical remarks such as these were the product of gender stereotyping.

An employer who acts on the basis of a belief that a woman cannot be aggressive or that she must not be has acted on the basis of gender. Although the parties do not overtly dispute this last proposition, the placement by Price Waterhouse of "sex stereotyping" in quotation marks throughout its brief seems to us an insinuation either that such stereotyping was not present in this case or that it lacks legal relevance. We reject both possibilities. A number of the partners' comments showed gender stereotyping at work. As for the legal relevance of gender stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their gender, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." An employer who objects to aggressiveness in women but whose positions require this trait places women in the intolerable and impermissible Catch-22: out of a job if they behave aggressively and out of a job if they don't. Title VII lifts women out of this bind.

Remarks at work that are based on gender stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision. In making this showing, stereotyped remarks can certainly be evidence that gender played a part. REVERSED and REMANDED.

Case Questions

1. What were Price Waterhouse's fatal flaws?
2. Does Hopkins's treatment here make good business sense? Explain.
3. How would you avoid the problems in this case?

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Case 5 Harper v. Blockbuster Entertainment Corporation *139 F.3d 1385 (11th Cir. 1998)*

Male employees sued employer under Title VII and Florida Civil Rights Act, alleging that employer's grooming policy, which prohibited men, but not women, from wearing long hair, discriminated against them on the basis of gender. The court held that the grooming policy did not violate Title VII or Florida law.

Carnes, J.

In May of 1994, Blockbuster implemented a new grooming policy that prohibited men, but not women, from wearing long hair. The employees, all men with long hair, refused to comply with the policy. They protested the policy as discriminatory and communicated their protest to supervisory officials of Blockbuster. Two of the employees were the subject of media stories concerning their protest of the policy. All of the employees were subsequently terminated by Blockbuster because they had refused to cut their hair and because they had protested the grooming policy.

The employees allege that Blockbuster's grooming policy discriminates on the basis of gender in violation of Title VII. In *Willingham v. Macon Telegraph Pub. Co.,* our predecessor court held that differing hair length standards for men and women do not violate Title VII, a holding which squarely forecloses the employees' discrimination claim. [In *Willingham,* the court stated]:

> Willingham argues that the Telegraph discriminates among employees based upon their gender in that female employees may wear their hair any length deemed acceptable by the Telegraph. He therefore asserts that he was denied employment because of his gender because were he a girl with identical length hair and comparable job qualifications, he (she) would have been employed.

We conclude that the undisputed discrimination practiced by the Macon Telegraph is not based upon gender, but rather upon grooming standards, and thus not a violation of Title VII. We perceive the intent of Congress to have been the guarantee of equal job opportunity for males and females. Providing such opportunity is where the emphasis rightly lies. This is to say that Title VII should lie to reach any device or policy of any employer which serves to deny acquisition and retention of a job or promotion in a job to an individual *because* the individual is either male or female. Equal employment *opportunity* may be secured only when employers are barred from discriminating against employees on the basis of immutable characteristics, such as race and national origin. Similarly, an employer cannot have one hiring policy for men and another for women if the distinction is based on some fundamental right. But a hiring policy that distinguishes on some other ground, such as grooming codes or length of hair, is related more closely to the employer's choice of how to run his business than to equality of employment opportunity. Hair length is not immutable and in the situation of an employer vis-à-vis employee, enjoys no constitutional protection. If the employee objects to the grooming code he has the right to reject it by looking elsewhere for employment or alternatively he may choose to subordinate his preference by accepting the code along with the job.

We adopt the view, therefore, that distinctions in employment practices between men and women on the basis of something other than immutable or protected characteristics do not inhibit employment *opportunity* in violation of Title VII. Congress sought only to give all persons equal access to the job market, not to limit an employer's right to exercise his informed judgment as to how best to run his shop. AFFIRMED.

Case Questions

1. Do you agree with the court? Why or why not?
2. In your view, how can the court reach its decision simply by saying Title VII deals only with immutable characteristics? Were the discriminatory factors in *Hopkins* immutable (wear more jewelry, have hair styled, dress more femininely, etc.)? What is the distinction?
3. If you were an employer, what policy would you adopt? Why?

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Case 6 Jespersen v. Harrah's Operating Co. *444 F.3d 1104 (9th Cir. 2006) (en banc)*

A female bartender challenged the employing casino's dress code policy of requiring females to wear makeup, specified as foundation or powder, blush, lipstick, and mascara as gender discrimination in that it imposed a greater burden on females than males. The court did not agree with her and permitted the employer's makeup policy to stand.

Schroeder, J.

In her deposition testimony, Jespersen described the personal indignity she felt as a result of attempting to comply with the makeup policy. Jespersen testified that when she wore the makeup she "felt very degraded and very demeaned." In addition, Jespersen testified that "it prohibited [her] from doing [her] job" because "it affected [her] self-dignity . . . [and] took away [her] credibility as an individual and as a person."

The record does not contain any affidavit or other evidence to establish that complying with the "Personal Best" standards caused burdens to fall unequally on men or women, and there is no evidence to suggest Harrah's motivation was to stereotype the women bartenders. Jespersen relied solely on evidence that she had been a good bartender, and that she had personal objections to complying with the policy, in order to support her argument that Harrah's "sells" and exploits its women employees."

Jespersen argues that the makeup requirement itself establishes a prima facie case of discriminatory intent and must be justified by Harrah's as a bona fide occupational qualification. Our settled law does not support Jespersen's position that a sex-based difference in appearance standards alone, without any further showing of disparate effects, creates a prima facie case.

Here we deal with requirements that, on their face, are not more onerous for one gender than the other. Rather, Harrah's "Personal Best" policy contains sex-differentiated requirements regarding each employee's hair, hands, and face. While those individual requirements differ according to gender, none on its face places a greater burden on one gender than the other. Grooming standards that appropriately differentiate between the genders are not facially discriminatory.

We have long recognized that companies may differentiate between men and women in appearance and grooming policies. The material issue under our settled law is not whether the policies are different, but whether the policy imposed on the plaintiff creates an "unequal burden" for the plaintiff's gender. Not every differentiation between the sexes in a grooming and appearance policy creates a "significantly greater burden of compliance[.]" "Where, as here, such [grooming and appearance] policies are reasonable and are imposed in an evenhanded manner on all employees, slight differences in the appearance requirements for males and females have only a negligible effect on employment opportunities." Under established equal burdens analysis, when an employer's grooming and appearance policy does not unreasonably burden one gender more than the other, that policy will not violate Title VII.

Jespersen asks us to take judicial notice of the fact that it costs more money and takes more time for a woman to comply with the makeup requirement than it takes for a man to comply with the requirement that he keep his hair short, but these are not matters appropriate for judicial notice. Judicial notice is reserved for matters "generally known within the territorial jurisdiction of the trial court" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The time and cost of makeup and haircuts is in neither category. The facts that Jespersen would have this court judicially notice are not subject to the requisite "high degree of indisputability" generally required for such judicial notice. Jespersen did not submit any documentation or any evidence of the relative cost and time required to comply with the grooming requirements by men and women. As a result, we would have to speculate about those issues in order to then guess whether the policy creates unequal burdens for women. This would not be appropriate. Having failed to create a record establishing that the "Personal Best" policies are more burdensome for women than for men, the district court correctly granted summary judgment on the record before it with respect to Jespersen's claim that the makeup policy created an unequal burden for women.

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The stereotyping in *Price Waterhouse* interfered with Hopkins' ability to perform her work; the advice that she should take "a course at charm school" was intended to discourage her use of the forceful and aggressive techniques that made her successful in the first place. Impermissible sex stereotyping was clear be3cause the very traits that she was asked to hide were the same traits considered praiseworthy in men.

Harrah's "Personal Best" policy is very different. The policy does not single out Jespersen. It applies to all of the bartenders, male and female. It requires all of the bartenders to wear exactly the same uniforms while interacting with the public in the context of the entertainment industry. It is for the most part unisex, from the black tie to the non-skid shoes. There is no evidence in this record to indicate that the policy was adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear. The record contains nothing to suggest the grooming standards would objectively inhibit a woman's ability to do the job. The only evidence in the record to support the stereotyping claim is Jespersen's own subjective reaction to the makeup requirement.

We respect Jespersen's resolve to be true to herself and to the image that she wishes to project to the world. We cannot agree, however, that her objection to the makeup requirement, without more, can give rise to a claim of sex stereotyping under Title VII. If we were to do so, we would come perilously close to holding that every grooming, apparel, or appearance requirement that an individual finds personally offensive, or in conflict with his or her own self-image, can create a triable issue of sex discrimination.

We emphasize that we do not preclude, as a matter of law, a claim of sex-stereotyping on the basis of dress or appearance codes. Others may well be filed, and any bases for such claims refined as law in this area evolves. This record, however, is devoid of any basis for permitting this particular claim to go forward, as it is limited to the subjective reaction of a single employee, and there is no evidence of a stereotypical motivation on the part of the employer. This case is essentially a challenge to one small part of what is an overall apparel, appearance, and grooming policy that applies largely the same requirements to both men and women. The touchstone is reasonableness. A makeup requirement must be seen in the context of the overall standards imposed on employees in a given workplace. Decision for Harrah's AFFIRMED.

Kozinski, C. J., with whom Graber, J. and W. Fletcher, J. join, dissenting:

I believe that Jespersen also presented a triable issue of fact on the question of disparate burden. The majority is right that "the [makeup] requirements must be viewed in the context of the overall policy." But I find it perfectly clear that Harrah's overall grooming policy is substantially more burdensome for women than for men. Every requirement that forces men to spend time or money on their appearance has a corresponding requirement that is as, or more, burdensome for women: short hair v. "teased, curled, or styled" hair; clean trimmed nails v. nail length and color requirements; black leather shoes v. black leather shoes. The requirement that women spend time and money applying full facial makeup has no corresponding requirement for men, making the "overall policy" more burdensome for the former than for the latter. The only question is how much.

It is true that Jespersen failed to present evidence about what it costs to buy makeup and how long it takes to apply it. But is there any doubt that putting on makeup costs money and takes time? Harrah's policy requires women to apply face powder, blush, mascara and lipstick. You don't need an expert witness to figure out that such items don't grow on trees.

Nor is there any rational doubt that application of makeup is an intricate and painstaking process that requires considerable time and care. Even those of us who don't wear makeup know how long it can take from the hundreds of hours we've spent over the years frantically tapping our toes and pointing to our wrists. It's hard to imagine that a woman could "put on her face," as they say, in the time it would take a man to shave—certainly not if she were to do the careful and thorough job Harrah's expects. Makeup, moreover, must be applied and removed every day; the policy burdens men with no such daily ritual. While a man could jog to the casino, slip into his uniform, and get right to work, a woman must travel to work so as to avoid smearing her makeup, or arrive early to put on her makeup there.

It might have been tidier if Jespersen had introduced evidence as to the time and cost associated with complying with the makeup requirement, but I can understand her failure to do so, as these hardly seem like questions reasonably subject to dispute. We could—and should—take judicial notice of these incontrovertible facts.

Alternatively, Jespersen did introduce evidence that she finds it burdensome to wear makeup because doing so

is inconsistent with her self-image and interferes with her job performance. My colleagues dismiss this evidence, apparently on the ground that wearing makeup does not, as a matter of law, constitute a substantial burden. This presupposes that Jespersen is unreasonable or idiosyncratic in her discomfort. Why so? Whether to wear cosmetics—literally, the face one presents to the world—is an intensely personal choice. Makeup, moreover, touches delicate parts of the anatomy—the lips, the eyes, the cheeks—and can cause serious discomfort, sometimes even allergic reactions, for someone unaccustomed to wearing it. If you are used to wearing makeup—as most American women are—this may seem like no big deal. But those of us not used to wearing makeup would find a requirement that we do so highly intrusive. Imagine, for example, a rule that all judges wear face powder, blush, mascara and lipstick while on the bench. Like Jespersen, I would find such a regime burdensome and demeaning; it would interfere with my job performance. I suspect many of my colleagues would feel the same way.

Everyone accepts this as a reasonable reaction from a man, but why should it be different for a woman? It is not because of anatomical differences, such as a requirement that women wear bathing suits that cover their breasts. Women's faces, just like those of men, can be perfectly presentable without makeup; it is a cultural artifact that most women raised in the United States learn to put on—and presumably enjoy wearing—cosmetics. But cultural norms change; not so long ago a man wearing an earring was a gypsy, a pirate or an oddity. Today, a man wearing body piercing jewelry is hardly noticed. So, too, a large (and perhaps growing) number of women choose to present themselves to the world without makeup. I see no justification for forcing them to conform to Harrah's quaint notion of what a "real woman" looks like.

Nor do I think it appropriate for a court to dismiss a woman's testimony that she finds wearing makeup degrading and intrusive, as Jespersen clearly does. Not only do we have her sworn statement to that effect, but there can be no doubt about her sincerity or the intensity of her feelings: She quit her job—a job she performed well for two decades—rather than put on the makeup. That is a choice her male colleagues were not forced to make. To me, this states a case of disparate burden, and I would let a jury decide whether an employer can force a woman to make this choice.

Finally, I note with dismay the employer's decision to let go a valued, experienced employee who had gained accolades from her customers, over what, in the end, is a trivial matter. Quality employees are difficult to find in any industry and I would think an employer would long hesitate before forcing a loyal, long-time employee to quit over an honest and heart-felt difference of opinion about a matter of personal significance to her. Having won the legal battle, I hope that Harrah's will now do the generous and decent thing by offering Jespersen her job back, and letting her give it her personal best—without the makeup.

Case Questions

1. What do you understand the difference to be between the majority decision and the dissent?
2. Which decision best represents your approach? Explain.
3. Do you think this majority decision would have been different if the court had been composed of all or a majority of women? Discuss. How could this concept of whether the decision would be different based on the gender of the decision maker impact decision making by supervisors in the workplace?

Lynch v. Freeman *817 F.2d 380 (6th Cir. 1987)*

A female carpenter's apprentice sued her employer for gender discrimination, alleging the failure to furnish adequate sanitary toilet facilities at her worksite. The court found the unsanitary facilities violated Title VII.

Lively, J.

The portable toilets were dirty, often had no toilet paper or paper that was soiled, and were not equipped with running water or sanitary napkins. In addition, those designated for women had no locks or bolts on the doors and one of them had a hole punched in the side.

To avoid using the toilets, Lynch began holding her urine until she left work. Within three days after starting work she experienced pain and was advised that the practice she had adopted, as well as using contaminated toilet paper, frequently caused bladder infections.

The powerhouse, which had large, clean, fully equipped restrooms, was off limits to construction workers. Lynch testified that some of the men she worked with used them regularly and were not disciplined. Knowing the restrooms were off limits, Lynch began using the powerhouse restrooms occasionally, after her doctor diagnosed her condition as cystitis, a type of urinary infection. When the infection returned Lynch began using a restroom in the powerhouse regularly and she had no further urinary tract infections. Lynch was eventually fired for insubordination in using the powerhouse toilet.

The lower court found that the toilets were poorly maintained. The cleaning was accomplished by pumping out the sewage. This process often left the toilets messy, with human feces on the floors, walls, and seats. The contractors were to scrub down the toilets afterwards, but it appears they often failed to do so. Paper covers were not provided, and the toilet paper, if any, was sometimes wet and/or soiled with urine. No running water for washing one's hands was available near the toilets, although a chemical hand cleaner could be checked out from the "gang-boxes."

The lower court found it credible that most women were inhibited from using the toilets. Further, the inhibitions described were not personal peculiarities, but that Lynch and others reasonably believed that the toilets could endanger their health. Lynch introduced credible medical expert testimony to demonstrate that women are more vulnerable to urinary tract infections than are men.

On the basis of that evidence, the court concluded that all increased danger of urinary tract infections may be linked to the practice of females holding their urine and to the use of toilets under the circumstances where the female's bacteria-contaminated hands came into contact with her external genitalia or where a female's perineal area comes into direct contact with bacteria-contaminated surfaces.

Few concerns are more pressing to anyone than those related to personal health. A prima facie case of disparate impact is established when a plaintiff shows that the facially neutral practice has a significantly discriminatory impact. Any employment practice that adversely affects the health of female employees while leaving male employees unaffected has a significantly discriminatory impact. The burden then shifts to the employer to justify the practice which resulted in this discriminatory impact by showing business necessity; that is, that the practice of furnishing unsanitary toilet facilities at the work site substantially promotes the proficient operation of business.

Title VII is remedial legislation, which must be construed liberally to achieve its purpose of eliminating discrimination from the workplace. Although Lynch was discharged for violating a rule, she did so in order to avoid the continued risk to her health which would have resulted from obeying the rule. The employer created an unacceptable situation in which Lynch and other female construction workers were required to choose between submitting to a discriminatory health hazard or risking termination for disobeying a company rule. Anatomical differences between men and women are "immutable characteristics," just as race, color, and national origin are immutable characteristics. When it is shown that employment practices place a heavier burden on minority employees than on members of the majority, and this burden relates to characteristics which identify them as members of the protected group, the requirements of a Title VII disparate impact case are satisfied. REVERSED and REMANDED.

Case Questions

1. Are you surprised by this outcome? Why or why not?
2. Does the outcome make sense to you? Explain.
3. What would you have done if you were the employer in this situation?

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Case 8 Pollis v. The New School for Social Research *132 F.3d 115 (2d Cir. 1997)*

A professor sued her college for, among other things, willful violation of the Equal Pay Act. The Court of Appeals held that the fact that the professor had complained about discrepancies between her salary and salaries of male professors on many occasions and the college did not rectify the situation was sufficient to show reckless or willful violation of the Equal Pay Act by the college.

Leval, J.

Pollis was hired as a professor of political science at the Graduate Faculty of the New School in 1964. She was granted tenure in 1966, and promoted to full professor in 1976. During her employment at the New School, she twice served as chair of the political science department. Her primary areas of specialty were human rights and Greek politics. According to evidence Pollis submitted at trial, during a 19-year period, her salary was lower than the salaries of five male teachers who were comparable to her.

The Equal Pay Act is violated when an employer pays lower wages to an employee of one gender than to substantially equivalent employees of the opposite gender in similar circumstances. A plaintiff need not prove that the pay disparity was motivated by an intention to discriminate on the basis of gender. The New School contends that there is insufficient evidence to support the jury's finding that the New School willfully violated the Equal Pay Act.

A defendant's violation of the Equal Pay Act is willful or reckless if "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." Pollis testified that on multiple occasions over several years, she complained to New School decision-makers about discrepancies between her salary and the salaries of male professors. Responses she received indicated an awareness on the part of the administration that her salary level was below that of comparable male teachers. Nonetheless, the school continued to pay Pollis less than comparable male teachers.

This evidence—that the New School knew that Pollis was paid less than comparable males, but did not rectify the situation—is sufficient to support the jury's finding of reckless or willful violation of the Equal Pay Act. Therefore, compensatory damages for the Equal Pay Act violation should have been calculated by reference to the three-year limitations period for willful violations, and the resulting compensatory award should be doubled pursuant to the Fair Labor Standards Act's liquidated damages provision. AFFIRMED IN PART, VACATED IN PART, and REMANDED.

Case Questions

1. What do you think accounted for the difference in Pollis's salary?
2. If you were the department chair responsible for such things, how would you have avoided this situation?
3. Why do you think the school did not rectify the situation even after the salary differences became clear?

Case 9 American Federation of State, County, and Municipal Employees, AFL-CIO (AFSCME) v. State of Washington *770 F.2d 1401 (9th Cir. 1985)*

The state of Washington conducted studies of prevailing market rates for jobs and wages in order to determine the wages for various state jobs and found that female-dominated jobs were paid lower wages than male-dominated jobs. The state then compared jobs for comparable worth and after finding that female-dominated job salaries were generally about 20 percent less than wages in male-dominated jobs, legislated that it would begin basing its wages on comparable worth rather than the market rate, over a

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10-year period. State employees wanting the scheme to go into effect immediately brought a Title VII suit against the state alleging it was a violation of Title VII for the state to know of the wage differences and not remedy the situation immediately. The court held that since the state was not responsible for the market rates, it did not violate Title VII.

Kennedy, J.

It is evident from the legislative history of the Equal Pay Act that Congress, after explicit consideration, rejected proposals that would have prohibited lower wages for comparable work, as contrasted with equal work. In the instant case, the district court found a violation of Title VII, premised upon both the disparate impact and the disparate treatment theories of discrimination.

AFSCME's disparate impact argument is based on the contention that the State of Washington's practice of taking prevailing market rates into account in setting wages has an adverse impact on women, who, historically, have received lower wages than men in the labor market. Disparate impact analysis is confined to cases that challenge a specific, clearly delineated employment practice applied at a single point in the job selection process.

The instant case does not involve an employment practice that yields to disparate impact analysis. The decision to base compensation on the competitive market, rather than on a theory of comparable worth, involves the assessment of a number of complex factors not easily ascertainable, an assessment too multifaceted to be appropriate for disparate impact analysis. Unlike a specific, clearly delineated employment policy contemplated by precedent such as those requiring a height and weight requirement or a certain score on an exam, the compensation system in question resulted from surveys, agency hearings, administrative recommendations, budget proposals, executive actions, and legislative enactments. A compensation system that is responsive to supply and demand and other market forces is not the type of single practice that suffices to support a claim under disparate impact theory. Such cases are controlled by disparate treatment analysis. Under these principles and precedents, we must reverse the district court's determination of liability under the disparate impact theory of discrimination.

Under the disparate treatment theory, our review of the record indicates failure by AFSCME to establish the requisite element of intent by either circumstantial or direct evidence.

AFSCME contends discriminatory motive may be inferred from the Willis study, which finds the State's practice of setting salaries in reliance on market rates creates a sex-based wage disparity for jobs deemed of comparable worth. AFSCME argues from the study that the market reflects a historical pattern of lower wages to employees in positions staffed predominantly by women, and it contends the State of Washington perpetuates that disparity, in violation of Title VII, by using market rates in the compensation system. The inference of discriminatory motive which AFSCME seeks to draw from the State's participation in the market system fails, as the State did not create the market disparity and has not been shown to have been motivated by impermissible sex-based considerations in setting salaries.

The requirement of intent is linked at least in part to culpability. That concept would be undermined if we were to hold that payment of wages according to prevailing rates in the public and private sectors is an act that, in itself, supports the inference of a purpose to discriminate. Neither law nor logic deems the free market system a suspect enterprise. Economic reality is that the value of a particular job to an employer is but one factor influencing the rate of compensation for that job. Other considerations may include the availability of workers willing to do the job and the effectiveness of collective bargaining in a particular industry. Employers may be constrained by market forces to set salaries under prevailing wage rates for different job classifications. We find nothing in the language of Title VII or its legislative history to indicate Congress intended to abrogate fundamental economic principles such as the laws of supply and demand or to prevent employers from competing in the labor market. While the Washington legislature may have the discretion to enact a comparable worth plan if it chooses to do so, Title VII does not obligate it to eliminate an economic inequality that it did not create. Title VII was enacted to ensure equal opportunity in employment to covered individuals, and the State of Washington is not charged here with barring access to particular job classifications on the basis of sex.

We have recognized that in certain cases an inference of intent may be drawn from statistical evidence. We have admonished, however, that statistics must be relied on with caution. Though the comparability of wage rates in dissimilar jobs may be relevant to a determination of

discriminatory animus, job evaluation studies and comparable worth statistics alone are insufficient to establish the requisite inference of discriminatory motive critical to the disparate treatment theory. The weight to be accorded such statistics is determined by the existence of independent corroborative evidence of discrimination. We conclude the independent evidence of discrimination presented by AFSCME is insufficient to support an inference of the requisite discriminatory motive under the disparate treatment theory.

AFSCME offered proof of isolated incidents of sex segregation as evidence of a history of sex-based wage discrimination. The evidence consists of "help wanted" advertisements restricting various jobs to members of a particular sex. These advertisements were often placed in separate "help wanted—male" and "help wanted—female" columns in state newspapers between 1960 and 1973, though most were discontinued when Title VII became applicable to the states in 1972. At trial, AFSCME called expert witnesses to testify that a causal relationship exists between sex segregation practices and sex-based wage discrimination, and that the effects of sex segregation practices may persist even after the practices are discontinued. However, none of the individually named plaintiffs in the action ever testified regarding specific incidents of discrimination. The isolated incidents alleged by AFSCME are insufficient to corroborate the results of the Willis study and do not justify an inference of discriminatory motive by the State in the setting of salaries for its system as a whole. Given the scope of the alleged intentional act, and given the attempt to show the core principle of the State's market-based compensation system was adopted or maintained with a discriminatory purpose, more is required to support the finding of liability than these isolated acts, which had only an indirect relation to the compensation principle itself.

We also reject AFSCME's contention that, having commissioned the Willis study, the State of Washington was committed to implement a new system of compensation based on comparable worth as defined by the study. Whether comparable worth is a feasible approach to employee compensation is a matter of debate. Assuming, however, that like other job evaluation studies it may be useful as a diagnostic tool, we reject a rule that would penalize rather than commend employers for their effort and innovation in undertaking such a study. The results of comparable worth studies will vary depending on the number and types of factors measured and the maximum number of points allotted to each factor. A study that indicates a particular wage structure might be more equitable should not categorically bind the employer who commissioned it. The employer should also be able to take into account market conditions, bargaining demands, and the possibility that another study will yield different results.

We hold there was a failure to establish a violation of Title VII under the disparate treatment theory of discrimination, and reverse the district court on this aspect of the case as well. The State of Washington's initial reliance on a free market system in which employees in male-dominated jobs are compensated at a higher rate than employees in dissimilar female-dominated jobs is not in and of itself a violation of Title VII, notwithstanding that the Willis study deemed the positions of comparable worth. Absent a showing of discriminatory motive, which has not been made here, the law does not permit the federal courts to interfere in the market-based system for the compensation of Washington's employees. REVERSED.

Case Questions

1. Do you think that using comparable worth is an effective way to determine salaries?
2. Why do you think male-dominated jobs tend to pay less than female-dominated jobs, even if both have virtually the same value to the employer?
3. What would you do to avoid this situation?

EEOC v. Audrey Sedita, d/b/a Women's Workout World *755 F. Supp. 808 (N. Dist. Ill. E.D. 1991)*

The employer, Women's Workout World (WWW), refused to hire males as managers, assistant managers, or instructors in the employer's exercise studio. Employer argued that being a female was reasonably necessary for the particular business. The court did not agree.

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Williams, J.

The employer asserts that the jobs at issue require a substantial amount of physical contact with members' bodies and that they are exposed to nudity in the club locker room, shower, and bathroom, during orientation sessions when they show club facilities to new members. They argue that it would be impossible for WWW to reassign job duties in order to avoid intruding on members' privacy interests, since the conduct which infringes on privacy interests amounts to the essence of the jobs in question.

EEOC argues that the essence of the jobs in question does not require employees to intimately touch health club members, or force employees to be exposed to nudity of members. They suggested WWW could hire male employees by changing the duties of the jobs in question, such as hiring females to assist clients who objected to being touched by males, posting a schedule to inform clients of when male employees would be on duty, or letting clients take themselves through the locker rooms.

The BFOQ exception is meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of gender. Hence, a defendant asserting a BFOQ defense has a heavy burden in terms of justifying his employment practice. An employer asserting a privacy-based BFOQ defense must satisfy a three-part test. First, the employer must assert a factual basis for believing that hiring any members of one gender would undermine the business operation. Second, the employer must prove that the customer's privacy interest is entitled to protection under the law, and third, that no reasonable alternatives exist to protect those interests other than the gender-based hiring policy.

WWW contends a factual basis for their hiring policy exists because their clients have consciously chosen to join an all-female health club. They present the owner's testimony that members have, in the past, been disturbed by the presence of males in the club.

We find that WWW failed to prove either that a factual basis exists for their discriminatory hiring policies, or that no reasonable alternatives exist to protect their customers' privacy interests other than sex-based hiring.

A defendant in a privacy rights case may satisfy its burden of proving a factual basis for sex-based hiring policies by showing that the clients or guests of a business would not consent to service of the opposite gender and would stop patronizing the business if members of the opposite gender were allowed to perform the service. This, WWW has failed to do. Also, WWW has previously hired males as "class givers," suggesting that there is no basis in the law for their present refusal to hire men. The EEOC's evidence of feasibility exists in the nation's other health clubs, which hire both genders, and allow members to be served both by assistants of their own gender and by members of the opposite gender.

The purpose of WWW's business operation is to provide individualized fitness and exercise instruction to the club's women members. Hence, WWW must prove that they cannot achieve their business purpose without engaging in single-gender hiring. In response to EEOC's alternatives, WWW produced nothing more than the owner's assertions that the alternatives were not feasible because of the views of her clientele, and the difficulties of accommodating men in the health club. This is not strong enough to prove that no alternatives were feasible. WWW needed to provide evidence to prove their argument such as data on costs, studies on the feasibility of changing their present operation, or projections on the impact of such changes in terms of lost profits.

The motion for PARTIAL SUMMARY JUDGMENT for EEOC is GRANTED.

Case Questions

1. Do you agree with the court's decision? Why or why not? Do you think the outcome would have been the same if the genders were reversed and females were prevented from working at the club?
2. If you were the employer in this case, what would you do?
3. Do you think Title VII was made to address this type of situation, that is, where a private commercial enterprise wishes to have a particular clientele served a particular way? Explain.

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Case 11 Asmo v. Keane, Inc. *471 F.3d 588 (6th Cir. 2006)*

Employee was terminated shortly after she told her supervisor she was pregnant with twins. The court found sufficient evidence that the basis of the termination was because of the employee's pregnancy with twins, in violation of the Pregnancy Discrimination Act.

Cudahy, J.

Asmo worked out of a home office in Columbus, Ohio. She reported to Keane's Director of Corporate Recruiting, Scott Santoro, at Keane's corporate headquarters in Boston, Massachusetts. After the terrorist attacks in the United States on September 11, 2001, the IT industry suffered a particularly significant slowdown in the context of a general slowdown of the American economy. Keane was affected by this slowdown, and it experienced a significant downturn in its business after September 11.

September 11, 2001 was also the day that Asmo learned she was pregnant with twins. Subsequently, sometime in October 2001, Asmo informed the entire SG&A team of her pregnancy during a conference call. Asmo testified that all of the SG&A recruiters congratulated her, but Santoro remained silent during the congratulations and then tried to quickly change the conversation back to business matters.

In November 2001, Keane's Vice President of Human Resources, Renee Southard, directed Santoro to reduce the number of recruiters on his staff. Santoro decided to consider three main factors in determining which of the five SG&A recruiters would be laid off: (1) relative tenure; (2) the number of hires each SG&A Recruiter had made in 2001; and (3) the forecasted hiring needs for 2002. According to Keane, Santoro selected Asmo for layoff based on the three factors discussed above. Asmo had the least tenure, the lowest number of 2001 hires and Mr. Gindele predicted little need for new SG&A hiring in the Midwest region in 2002.

On December 4, 2001, Santoro informed Asmo that she was being laid off.

On February 20, 2003, Asmo filed her complaint in the district court, alleging that she had been unlawfully terminated from employment.

The district court found that Asmo was unable to prove a prima facie case of discrimination. We disagree. In order to show a prima facie case of pregnancy discrimination under Title VII, a plaintiff must show that "(1) she was pregnant, (2) she was qualified for her job, (3) she was subjected to an adverse employment decision, and (4) there is a nexus between her pregnancy and the adverse employment decision." Here, Keane concedes that Asmo has proven the first three elements. However, Keane argues Asmo was not able to meet the fourth step (a nexus) in establishing a prima facie case.

Asmo met the nexus requirement in part by establishing temporal proximity between Keane's learning of her pregnancy and her termination. Temporal proximity can establish a causal connection between the protected activity and the unlawful employment action in the retaliation context.

Temporal proximity between the employer's learning of an employee's pregnancy and an adverse employment action taken with respect to that employee likewise may be "indirect evidence" in support of an inference of pregnancy discrimination. In early December 2001, Keane decided to terminate Asmo's employment. This was within two months of October 2001, when Santoro learned that Asmo was pregnant. This temporal proximity is sufficient to establish a link between Asmo's pregnancy and her termination for the purposes of a prima facie case. For these reasons, we find that the district court erred in holding that Asmo needed to present evidence beyond a nexus between her pregnancy and the adverse employment decision and we find that Asmo did establish a prima facie case.

The second and more difficult question here is whether Asmo presented sufficient evidence to show that the reasons Keane gave for her termination were pretextual. The district court found that Asmo failed to provide such evidence after Keane gave a legitimate nondiscriminatory reason for terminating Asmo's employment. While this issue is not clear-cut, we ultimately disagree with the district court and find that under summary judgment standards, there was sufficient evidence to show pretext.

The most significant evidence showing pretext is Santoro's conduct after Asmo announced she was pregnant with twins. In October 2001, Asmo, Santoro and the entire SG&A team were participating in a conference call, during which Asmo informed the team that she was pregnant with twins. The news was met with congratulations from all her colleagues except Santoro, who did not

comment and then "simply moved on to the next business topic in the conference call." Santoro's initial silence is suspect. Pregnancies are usually met with congratulatory words, even in professional settings. When people work together they develop relationships beyond the realm of employment, and Asmo's pregnancy was particularly noteworthy given that she was pregnant with twins, a fairly unusual (and overwhelming) occurrence.

Additionally, though Santoro conducted weekly conference calls with the recruiters, he did not mention Asmo's pregnancy again until December 4, 2001, the day he terminated Asmo. Asmo's job involved considerable travel (forty to sixty percent of her time), something an employer might be concerned about given the announcement that Asmo was going to have *twins,* which most people know is a tremendous responsibility. Yet Santoro did not talk with Asmo about how she planned to deal with the impending arrival of her twins and/or what the company could do to help accommodate her. Instead, he did not mention her pregnancy at all. He also did not ask any of his colleagues to discuss Asmo's pregnancy with her, or to provide her with information about how the company accommodates parents. Given the combination of Asmo's job being particularly demanding of time due to travel and her announcement of not just a pregnancy, but a pregnancy of twins, Santoro's silence could be interpreted as discriminatory animus.

Keane's argument that there are other possible explanations for Santoro's silence is correct and well-taken. However, in the context of summary judgment, where we examine the evidence in the light most favorable to the non-moving party, we believe that Asmo's argument is sufficient to call into question Santoro's motives. Santoro's silence is evidence of pretext because it can be read as speculation regarding the impact of Asmo's pregnancy on her work, and an employer's speculation or assumption about how an employee's pregnancy will interfere with her job can constitute evidence of discriminatory animus.

While the temporal proximity between Asmo informing Keane of her pregnancy with twins and Keane's decision to terminate her cannot alone prove pretext temporal proximity can be used as "indirect evidence" to support an employee's claim of pretext. All of this evidence taken together, considered under a summary judgment standard where we evaluate all evidence in the light most favorable to Asmo, indicates that Keane's stated reasons for terminating Asmo were pretext for discrimination. REVERSE the district court's grant of summary judgment for Keane and REMAND.

Case Questions

1. Do you agree with the court's assessment of the evidence? Why/why not?
2. If the situation is as the court determined it to be, do you believe that Santoro was justified in his beliefs about Asmo not being able to do her job because she was pregnant with twins? Explain.
3. If you were Asmo's supervisor, how would you have handled this situation?

UAW v. Johnson Controls, Inc. *499 U.S. 187 (1991)*

A group of employees challenged the employer's policy barring all women except those whose infertility was medically documented from jobs involving actual or potential lead exposure exceeding Occupational Safety and Health Administration (OSHA) standards. The Court found the policy to be illegal gender discrimination.

Blackmun, J.

In this case we are concerned with an employer's gender-based fetal protection policy. May an employer exclude a fertile female employee from certain jobs because of its concern for the health of the fetus the woman might conceive? Our answer is no.

Employees involved in the suit include Elsie Nelson, a 50-year-old divorcee, who suffered a loss in compensation when she was transferred out of a job where she was exposed to lead, Mary Craig who chose to be sterilized in order to avoid losing her job, and Donald Penny, who was denied a request for leave of absence for the purpose of lowering his lead level because he intended to become a father.

The bias in Johnson Control's policy is obvious. Fertile men, but not fertile women, are given the choice as

to whether they wish to risk their reproductive health for a particular job. Johnson Control's fetal protection policy explicitly discriminates against women on the basis of their gender. The policy excludes women with childbearing capacity from lead-exposed jobs and so creates a facial classification based on gender.

The policy classifies on the basis of gender and childbearing capacity, rather than fertility alone. The employer does not seek to protect the unconceived children of all its employees. Despite evidence in the record about the debilitating effect of lead exposure on the male reproductive system, Johnson Controls is concerned only with the harms that may befall the unborn offspring of its female employees. Johnson Controls' policy is facially discriminatory because it requires only a female employee to produce proof that she is not capable of reproducing.

Our conclusion is bolstered by the Pregnancy Discrimination Act of 1978 in which Congress explicitly provided that, for purposes of Title VII, discrimination "on the basis of sex" included discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions." The PDA has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her gender. Johnson Controls has chosen to treat all its female employees as potentially pregnant; that choice evinces discrimination on the basis of gender.

An employer may discriminate on the basis of gender in those certain instances where religion, gender or national origin is a BFOQ reasonably necessary to the normal operation of that particular business or enterprise. We conclude that the language of both the BFOQ provision and the PDA, which amended it, as well as the legislative history and case law, prohibit employers from discriminating against a woman because of her capacity to become pregnant unless her reproductive potential prevents her from performing the duties of her job. We have said before, an employer must direct its concerns about a woman's ability to perform her job safely and efficiently to those aspects of the woman's job-related activities that fall within the "essence" of the particular business.

Johnson Controls cannot establish a BFOQ. Fertile women, as far as appears on the record, participate in the manufacture of batteries as efficiently as anyone else. Johnson Controls' professed moral and ethical concerns about the welfare of the next generation do not suffice to establish a BFOQ of female sterility. Nor can concerns about the welfare of the next generation be considered a part of the "essence" of Johnson Controls' business. It is word play to say that the job at Johnson Controls is to make batteries without risk to fetuses in the same way the job at an airline is to fly planes without crashing. Decisions about the welfare of future children must be left to the parents who conceive, bear, support and raise them rather than to the employers who hire those parents.

A word about tort liability and the increased cost of fertile women in the workplace is perhaps necessary. It is correct to say that Title VII does not prevent an employer from having a conscience. The statute, however, does prevent gender-specific fetal protection policies. These two aspects of Title VII do not conflict. More than 40 states currently recognize a right to recover for a prenatal injury based either on negligence or on wrongful death. According to Johnson Controls, however, the company complies with the lead standard developed by OSHA and warns its female employees about the damaging effects of lead. It is worth noting that OSHA gave the problem of lead lengthy consideration and concluded that "there is no basis whatsoever for the claim that women of childbearing age should be excluded from the workplace in order to protect the fetus or the course of the pregnancy." 43 Fed. Reg. 52952, 52996 (1978). Instead, OSHA established a series of mandatory protections, which, taken together, "should effectively minimize any risk to the fetus and newborn child." Without negligence, it would be difficult for a court to find liability on the part of the employer. If, under general tort principles, Title VII bans gender-specific fetal protection policies, the employer fully informs the woman of the risk, and the employer has not acted negligently, the basis for holding an employer liable seems remote at best.

Our holding today that Title VII, as so amended, forbids gender-specific fetal protection policies is neither remarkable nor unprecedented. Concern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities. Congress and the PDA prohibited discrimination on the basis of a woman's ability to become pregnant. We do no more than hold that the PDA means what it says.

It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make. REVERSED and REMANDED.

Case Questions

1. Do you agree with the Court that the welfare of the child should be left to the parents, not the employer?
2. What do you find most troublesome about the decision, if anything? Explain.
3. As an employer, what would you do in this situation?