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## Phillips v. Martin Marietta Corporation: A Muted Victory

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## Phillips v. Martin Marietta Corporation: A Muted Victory

Enforcement of the right to freedom from employment discrimination under Title VII of the Civil Rights Act of 1964<sup>1</sup> [hereinafter referred to as "Title VII"] has been limited essentially to private suits.<sup>2</sup> Outside of the attempts of the Equal Employment Opportunity Commission [hereinafter referred to as the "EEOC"] to effect conciliation and the rare pattern and practice suits<sup>3</sup> brought by the Department of Justice, enforcement of the Congressional policies manifest in Title VII has been entrusted to individual employees who take on the "mantle of the sovereign"<sup>4</sup> to protect not merely individual rights but the public interest as well.

It is thus incumbent upon any court of appellate review in a Title VII case to probe the issues presented and provide guidance to EEOC administrators, employers, and employees, while establishing standards of decision for the lower courts.<sup>5</sup> Although the courts have embraced this task with enthusiasm in the context of racial discrimination, they have exhibited a curious reluctance in cases of sex discrimination.<sup>6</sup>

In *Phillips v. Martin Marietta Corp.*,<sup>7</sup> the first Title VII sex discrimination

1. Secs. 701-716, 42 U.S.C. §§ 2000e-2000e-15 (1970).

2. Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62, 64-68 (1964). The Equal Employment Opportunity Act of 1972 (P.L. 92-261) amended the 1964 Act to provide court enforcement authority for the EEOC. 42 U.S.C.A. § 2000e-5 (Supp. 1972). However, problems of complex procedures, personnel shortages, and the sheer volume of cases will keep the EEOC's enforcement achievements at a minimum and require the continued prosecution of litigation by private individuals to eliminate employment discrimination.

3. Sec. 707(a), 42 U.S.C. § 2000e-6(a) (1970).

4. *Jenkins v. United Gas Corp.*, 400 F.2d 28, 32-33 (5th Cir. 1968); *Mack v. Gen. Elec. Co.*, 329 F. Supp. 72 (E.D. Pa. 1971). See *Johnson v. Georgia Highway Express Inc.*, 417 F.2d 1122 (5th Cir. 1969).

5. *Phillips v. Martin Marietta Corp.*, 416 F.2d 1257, 1258 (5th Cir. 1969) (Brown, C.J., dissenting). Cf. *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 401-02 (1968).

6. *E.g.*, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968); *Local 189, United Papermakers v. United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); *Jenkins v. United Gas Corp.*, 400 F.2d 28 (5th Cir. 1968); *Quarles v. Phillip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968). The Third Circuit supported the proposition that discrimination in employment practices was equally bad regardless of its basis, stating as follows:

We do not make . . . [this] distinction on the basis that discrimination on account of sex is any less reprehensible or any less protected than discrimination because of race.

*Rosen v. Public Serv. Elec. & Gas Co.*, 409 F.2d 775, 781 (3rd Cir. 1969).

7. 400 U.S. 542 (1971), *rev'g* 411 F.2d 1 (1969).

case to reach the Supreme Court on the merits, the Court ignored its crucial role in the Title VII scheme, summarily disposing of the case in a two-page per curiam opinion. This note will briefly summarize the development of Title VII<sup>8</sup> and the facts of this case and then analyze the potential detrimental impact of *Phillips* on future sex discrimination cases.

### *Title VII and Sex Discrimination*

Title VII, enacted in 1964 to halt discriminatory employment practices in the private sector, was intended to open the labor market to all individuals regardless of "race, color, sex, religion or national origin."<sup>9</sup> Recognizing the long history of mistreatment and inequities which burdened minorities in the employment sphere, Title VII affirmatively rejects as discriminatory all employment practices that establish criteria for employment based on one of the protected categories.<sup>10</sup> However, extensive discussion focused on the legislative purpose (or lack thereof) which may have prompted the inclusion of "sex" as one of the categories has raised a serious question as to the validity of any claims of affirmative legislative intent made in the area of sex discrimination.<sup>11</sup> Nonetheless, since the final language of the Act did

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8. For an extensive discussion of the development of Title VII, see, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971) [hereinafter cited as *Developments*].

9. The legislative history is amply documented in BUREAU OF NATIONAL AFFAIRS, INC., *THE CIVIL RIGHTS ACT OF 1964*; DEVELOPMENTS 1166-70; Kanowitz, *Sex-Based Discrimination in American Law: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 HASTINGS L.J. 305, 307 (1968).

10. Section 703, 42 U.S.C. § 2000e-2 (1964) provides as follows:

(a) Employer practices.

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 [her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion.

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . .

11. Comment, *The Mandate of Title VII of the Civil Rights Act of 1964: To Treat Women as Individuals*, 59 GEO. L.J. 221, 225 (1970) [hereinafter cited as *Mandate*]. Cf. 110 CONG. REC. 2577-84, 2720 (1964) (House debate on Title VII); Berger, *Equal Pay, Equal Employment Opportunity and Equal Employment of the Law for Women*, 5 VAL. U.L. REV. 326, 333-81 (1971) [hereinafter cited as Berger]; Comment, *Sex Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964*, 1968 DUKE L.J. 671, 676-78; Indritz, Book Review, 4 FAM. L.Q. 6, 8-9 (1970). But see Miller, *Sex Discrimination and Title VII of the*

include "sex" as one of the five protected categories,<sup>12</sup> discrimination based on sex should thereby be entitled to the same protection under Title VII as discrimination based on race, color, national origin or religion.

In its prohibition against discriminatory employment practices on the basis of sex, Title VII appears to reject the historical exclusion of women from freely competing within the national work force based on unsupported assumptions concerning the role of women.<sup>13</sup> Specifically, the Act sought to remedy the exclusion of women from supervisory and management positions, compensation at different rates, and the relegation of women to a generally inferior status vis-a-vis male employees.<sup>14</sup> Because of stereotyped assumptions concerning women's alleged inability to perform most physically strenuous jobs, employers had long utilized class-wide distinctions on the basis of sex.<sup>15</sup> Section 703(a) of the Act<sup>16</sup> offered a weapon with which women could demand treatment as individuals and combat employment practices based on arbitrary, class-wide assumptions.

However, the statutory prohibition against discriminatory employment practices based on sex was not absolute. Section 703(e) would allow such discrimination where sex was a "bona fide occupational qualification [hereinafter sometimes referred to as BFOQ] reasonably necessary to the normal operation of that particular business enterprise."<sup>17</sup> Although early district court cases read this section broadly, sustaining employers' exemptions on grounds of questionable business import,<sup>18</sup> the latest decisions, including

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*Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 879 (1967); Note, *Classification on the Basis of Sex and the 1964 Civil Rights Act*, 50 IOWA L. REV. 778, 779 (1965).

12. Sec. 703(a), 42 U.S.C. § 2000e-2(a) (1970).

13. The attributes most commonly "ascribed" to women are inferior intellectual capacity, emotional instability, irresponsibility, and physical weakness. See, e.g., THE REPORT OF THE PRESIDENT'S TASK FORCE ON WOMEN'S RIGHTS AND RESPONSIBILITIES, A MATTER OF SIMPLE JUSTICE 18-19 (1970); Freeman, *The Legal Basis of the Sexual Caste System*, 5 VAL. U.L. REV. 203, 213-15 (1971); Murray, *Economic and Educational Inequality Based on Sex: An Overview*, 5 VAL. U.L. REV. 237, 239-47 (1971); Note, "A Little Dearer than His Horse": *Legal Stereotypes and the Feminine Personality*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 269 (1971).

14. The disparity in wages between men and women of like qualifications reveals graphically the discrimination practiced by employers. For example, in 1955 the median wage or salary for women of \$2,719 was 64 percent of the \$4,252 received by men. By 1966 the proportion had dropped to 58 percent, where it remained through 1968. But in 1969 women's median earnings of \$4,977 were 60 percent of the \$8,227 received by men. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, FACT SHEET ON THE EARNINGS GAP 1 (1971). Such statistics reveal not only that women earn less, but that the gap, generated by differences in occupational distribution of men and women and in the types and levels of jobs held within each occupation, is widening. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, BULL. NO. 294, 1969 HANDBOOK ON WOMEN WORKERS 132-3; U.S. DEP'T OF LABOR, WOMEN WORKERS TODAY 6 (1970).

15. U.S. DEP'T OF LABOR UNDER UTILIZATION OF WOMEN WORKERS (1971).

16. 42 U.S.C. § 2000e-2(a) (1970).

17. 42 U.S.C. § 2000e-2(e) (1970).

18. *Gudbrandson v. Genuine Parts Co.*, 297 F. Supp. 134 (D. Minn. 1968); Weeks

the circuit courts which have considered the question and the EEOC regulations, have construed the BFOQ quite narrowly.<sup>19</sup> Therefore, in any decision on the merits in a sex discrimination case there are two pivotal issues: first, whether the alleged discrimination exists, and, secondly, whether such discrimination is justified as a BFOQ.

In *Phillips* the BFOQ question was not squarely before the Court,<sup>20</sup> since the respondent had not relied on the BFOQ defense below, but rather had defended on the ground that its hiring practice did not constitute discrimination per se on the basis of sex.<sup>21</sup> It is important, nonetheless, to recognize the BFOQ justification in light of the Supreme Court's suggestion regarding the applicability of the BFOQ to this case.<sup>22</sup> Against the legislative background of Title VII,<sup>23</sup> the facts in the *Phillips* case may be simply stated.

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v. S. Bell Tel. & Tel. Co., 277 F. Supp. 117 (S.D. Ga. 1967), *rev'd in part*, 408 F.2d 228 (5th Cir. 1969); *Bowe v. Colgate-Palmolive Co.*, 272 F. Supp. 332 (S.D. Ind. 1967), *rev'd in part*, 416 F.2d 711 (7th Cir. 1969); *Ward v. Firestone Tire and Rubber Co.*, 260 F. Supp. 579 (W.D. Tenn. 1966).

19. *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971); *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971); *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969); *Cheatwood v. S. Cent. Bell Tel. & Tel. Co.*, 303 F. Supp. 754 (M.D. Ala. 1969); EEOC: GUIDELINES ON DISCRIMINATION BECAUSE OF SEX, 29 C.F.R. § 1604.1 (1971) [hereinafter cited as GUIDELINES].

20. 400 U.S. at 545 (Marshall, J., concurring).

21. 411 F.2d at 2-3. One commentator has suggested that respondent's failure to raise the BFOQ issue below, as an affirmative defense under Rule 8 of the Federal Rules of Civil Procedure, constituted waiver of the defense for all subsequent proceedings (Rule 12(h)) including the appeal to the Supreme Court and subsequent remand to the Florida District Court. Therefore, the only evidence admissible would be that relating to Ms. Phillips' individual capacity to perform the job. *Berger*, 354-55.

However, the Supreme Court suggested, citing *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256-57 (1948), that summary judgment was inappropriate and further development of the record was in order. 400 U.S. at 544. The Court's language, in addition to similar language in the *Kennedy* case, suggests that the parties would be given an opportunity to amend their pleadings on remand. *Accord*, 6 J. MOORE, FEDERAL PRACTICE ¶ 56.27(3) (3d ed. 1966). *Cf. Phillips*, 416 F.2d at 1262 n.16 (Brown, C.J., dissenting).

22. 400 U.S. at 544.

23. It should be noted that Title VII does not stand alone as the sole guaranty of equal employment opportunity for women. Other federal fair employment legislation, includes the Fair Labor Standards Act, 29 U.S.C. §§ 201-19 (1970) (minimum hourly and overtime rates of pay for employees in certain industries); the Equal Pay Act, 29 U.S.C. § 206(d)(1) (1970) (prohibition against employers discriminating on the basis of sex in the payment of wages for equal work); and the executive orders concerning federal employees, Exec. Order No. 11, 478, 3 C.F.R. 133 (Supp. 1969), 42 U.S.C. § 2000e (1970), and federal contractors and subcontractors on federally assisted projects, Exec. Order No. 11, 375, 3 C.F.R. 320 (Supp. 1967), 42 U.S.C. § 2000e (1970). These tools support and reinforce Title VII in its goal of providing equal pay and employment standards for working women. *See BERGER* 338-46, *Fuentes, Federal Remedial Sanctions: Focus on Title VII*, 5 VAL. U.L. REV. 374, 375-78 (1971); *Mandate* at 224.

Of particular importance are several federal programs which reflect clear national sup-

Petitioner, Ida Phillips, the mother of pre-school children, answered a local newspaper advertisement placed by the respondent seeking factory assembly-trainees. Her application was denied because the respondent did not accept applications of women with pre-school aged children, although males with pre-school children were considered. Claiming that the respondent refused to hire her because of her sex, Ms. Phillips filed a charge with the EEOC. She exhausted her administrative remedies, pursuing all the EEOC procedures<sup>24</sup> in full compliance with Title VII.<sup>25</sup> The petitioner subsequently filed her complaint in the United States District Court for the Middle District of Florida,<sup>26</sup> which granted summary judgment for respondent on the basis of affidavits demonstrating that it did not discriminate against women in its hiring practices. The Fifth Circuit affirmed<sup>27</sup> on a somewhat different ground—namely, that the respondent's policy was not sex discrimination within the meaning of Title VII, inasmuch as the discrimination was not based "solely" on sex, but rather on "a two-pronged qualification, *i.e.*, a woman with pre-school age children."<sup>28</sup>

The "sex-plus" theory advocated by the Fifth Circuit interprets Title VII as a prohibition against only those employment practices where sex is the sole factor upon which distinctions are made. Therefore, once an employer has added some further factor (other than membership in one of the protected categories) to his scheme, he is then free to discriminate, as sex becomes merely one of two factors considered in the development of his em-

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port for working mothers, offering incentives such as free vocational training and federally funded child care centers to encourage mothers with young children to seek employment. 42 U.S.C. §§ 2711 and 2728(b) (1970) (vocational training for women eligible for the Job Corps with minimum percentages for female participation in each program); 42 U.S.C. §§ 630 *et seq.* (1970) (under the Work Incentive program, vocational training is provided for welfare mothers as well as day care centers for their pre-schoolers during their training and employment). U.S. DEP'T OF LABOR, FEDERAL FUNDS FOR DAY CARE PROJECTS (1970). *Cf.* H.R. 1, 92nd Cong., 1st Sess. (1971).

24. *Developments* 1195-1216.

25. Sec. 706, 42 U.S.C. § 2000e-5 (1970). The Act provides that the EEOC may attempt conciliation and notify the charging party of her right to sue prior to the filing of a private suit in the District Court. However, an individual does not have to wait for the EEOC to attempt conciliation or to proceed under the enforcement provisions as the statute does not condition an individual's right to sue on EEOC's performance of administrative duties. Once the statutory waiting period (now six months) has lapsed, the individual may request the issuance of a "right to sue letter" and then initiate private litigation. *Id.* at § 2000e-5e; *Jefferson v. Peerless Pumps*, 456 F.2d 1359 (9th Cir. 1972). *Cf.* *Caldwell v. National Brewing Co.*, 443 F.2d 1044 (5th Cir. 1971).

26. Order entered, February 26, 1968, summarized in *Phillips v. Martin Marietta Corp.*, 58 CCH LAB. CAS. ¶ 9152 at 6579 (M.D. Fla. 1968). The District Court struck the allegations based on the petitioner's status as a parent and limited the issue to whether respondent discriminated against women as a class. *Id.* See, *Mandate* 233.

27. 411 F.2d 1 (5th Cir. 1969).

28. *Id.* at 4. See *King v. Laborers*, 443 F.2d 273 (6th Cir. 1971).

ployment criteria.<sup>29</sup> In effect, this reasoning amounts to "judicial addition of the word 'solely' to Title VII"<sup>30</sup> and undermines the rationale of the Act. A petition for rehearing and request for rehearing en banc were denied<sup>31</sup> over the vigorous dissent of Chief Judge Brown.<sup>32</sup>

On review under a writ of certiorari, the Supreme Court, in a per curiam opinion vacated the summary judgment in favor of the employer (respondent) and remanded the case for further development of the record.<sup>33</sup> The Court decided that Title VII requires employment opportunities to be the same for persons of "like qualifications" regardless of sex. An employer, in short, may not maintain one hiring policy for women with pre-school children and another for men with such children.

### *A Positive Result Without a Rationale*

In analyzing any Title VII case, it is not unreasonable to expect the Court to interpret the statute in light of related statutes,<sup>34</sup> the legislative history, administrative guidelines, Title VII cases generally, and sex discrimination cases specifically.

Initially, under recognized standards of statutory construction,<sup>35</sup> a court reviews the language of the given provision to determine whether the questioned action constitutes a violation of the statute. It is essential to our doctrine of stare decisis that written opinions clearly delineate a court's

29. Following this rationale any characteristic—being a Ph.D., having red hair or being the mother of children between the ages of 6 and 10—could be added to the statutory factor under the Court's formula to void the illegality of the practice. The question of discrimination based on marital status has been successfully challenged as sex bias in some jurisdictions. *Cf.* *Lansdale v. Air Line Pilots*, 430 F.2d 1341 (5th Cir. 1970); *Sprogis v. United Air Lines Inc.*, 308 F. Supp. 959 (N.D. Ill. 1970); GUIDELINES, Sec. 1604.3; OFFICE OF FEDERAL CONTRACT COMPLIANCE, U.S. DEP'T OF LABOR, SEX DISCRIMINATION GUIDELINES, 41 C.F.R. §§ 60-20.3(d) (1970) *with* *Cooper v. Delta Air Lines, Inc.*, 274 F. Supp. 781 (E.D. La. 1967); *Lansdale v. United Air Lines, Inc.*, 62 CCH LAB. CAS. ¶ 9417, at 6633 (S.D. Fla. 1969).

30. *Developments* at 1172. The House rejected an amendment which would have qualified the proscribed categories of Sec. 703(a) by adding the word "solely." 110 CONG. REC. 2728 (1964) (amendment offered by Congressman Dowdy).

31. 416 F.2d 1257.

32. *Id.* at 1258.

33. 400 U.S. 542.

34. *See, supra* note 23. Moreover, as stated in the Brief of the National Organization for Women:

It is against common sense to suppose that Congress would guarantee equal employment opportunities to women, provide for training women workers, provide support for day care centers, yet intend to allow employment discrimination against women with preschool children.

Brief of National Organization for Women as Amicus Curiae at 6-8, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542.

35. Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930); *but see*, Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886 (1930).

rationale for statutory interpretation. Whether the problem lies in an important public policy issue or in ascertaining legislative intent,<sup>36</sup> the court's reasoning is the key factor in applying the principles of the case to different factual situations. Normally, a court will ferret out the "plain meaning" of language, or determine "true meaning" based upon the purpose and legislative history of a statute.<sup>37</sup> Yet, the *Phillips* opinion gives no guide whatever as to how it reached its decision that the Fifth Circuit had misread Section 703(a). In its brief per curiam<sup>38</sup> opinion, the Court falls short of its duty, neither detailing its rationale, nor justifying its conclusion. The opinion merely states in the first sentence that the lower court "erred in reading this section [§ 703(a)] . . . ."<sup>39</sup> Without further amplification of the Court's reasoning, it is folly to suggest that the Court has spoken authoritatively concerning sex discrimination or voided the sex-plus theory. Indeed, the passage referred to above immediately precedes the following:

The existence of such conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be the basis for distinction under § 703(e) . . . .<sup>40</sup>

Such language bodes ill for future cases of discrimination based on sex, in that the language severely weakens the narrow construction of Section 703(e).<sup>41</sup> Moreover, as the only indication of the Court's thinking on the substantive issue of alleged differences between men and women where each have pre-school children, this language may indicate that the Court itself still harbors misplaced assumptions concerning women of the sort that Title VII was specifically designed to eliminate. Perhaps these assumptions account for the Court's reluctance to attack sex discrimination practices more forthrightly. As Justice Marshall stated in his concurring opinion,

. . . the Court has fallen into the trap of assuming that the Act permits ancient canards about the proper role of women to be a basis for discrimination.<sup>42</sup>

36. Landis, *supra* note 35, at 887-88.

37. *Id.* See Brief of ACLU as Amicus Curiae at 8, *Phillips v. Martin Marietta*, 400 U.S. 542.

38. Although a per curiam opinion traditionally indicates that all the judges (or justices) are of one mind and that the question is so clear as to negate the need for extended discussion, there are no limits to the grounds that may prompt it. *Newmons v. Lake Worth Drainage Dist.*, 87 So. 2d 49 (Sup. Ct. Fla. 1956). Here, it seems that the court was in agreement as to the error of the lower court but not as to the rationale in support of the conclusion. Since the law in the area of sex discrimination is not at all clear, the court's retreat to the per curiam device instead of an opinion with perhaps several concurring opinions was most unfortunate.

39. 400 U.S. 542, 544.

40. *Id.*

41. See, *supra* note 20 and accompanying text.

42. 400 U.S. 542, 545.

The *Phillips* opinion is thus most noteworthy for its narrow holding regarding sex-plus discrimination, and for its indirect injury to the BFOQ. Armed with the extensive briefs of the parties and the amici curiae,<sup>43</sup> as well as the strong dissenting opinion below by the chief judge of a court well-versed in Title VII litigation,<sup>44</sup> the Court was in a position to state broadly that the respondent's policy and any such "sex-plus" policies were discriminatory.

Instead, the Court summarily concluded (in only one sentence) that the lower court had misinterpreted the statute. In stating that "[s]ection 703(a) . . . requires that persons of like qualifications be given employment opportunities irrespective of their sex,"<sup>45</sup> the Court acknowledged that men and women similarly situated, *i.e.*, each having pre-school children, should have equal access to the job market. Moreover, it concluded that Martin Marietta had, in fact, discriminated on the basis of sex by maintaining different hiring policies for men and women, each having pre-school children.<sup>46</sup> However, perhaps more significantly, the Court gave little if any guidance as to the meaning of "like qualifications." (One may infer, though, that men and women, both being married<sup>47</sup> or both being entitled to retirement benefits,<sup>48</sup> should be treated in the same manner by an employer.)

The "like qualifications" language will prove helpful in establishing violations of Title VII where the *effect* of an employment practice, neutral on its face, is to discriminate against women.<sup>49</sup> Thus, the *Papermakers* doctrine,<sup>50</sup> which had been applied in racial discrimination cases, was extended to

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43. Briefs as Amici Curiae were filed by the following parties in support of petitioner's writ for certiorari: American Civil Liberties Union; Human Rights for Women, Inc.; National Organization for Women; Air Line Stewards and Stewardesses Assoc.; Local 550, Transport Workers Union of America, AFL-CIO; United States.

44. Chief Judge Brown himself refers to the wide expertise of the Fifth Circuit in Title VII cases. 416 F.2d 1257, 1258 n.2.

45. 400 U.S. 542, 544.

46. *Id.*

47. *Diaz v. Pan Am. World Airways*, 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971).

48. *Bartmess v. Drewrys U.S.A. Inc.*, 444 F.2d 1186 (7th Cir. 1971), *cert. denied*, 404 U.S. 939 (1971).

49. The Fifth Circuit in *Phillips* and some of the marital status cases, *supra* note 34, had concluded that the inclusion of a non-statutory factor neutralized an employer's policy despite the fact that only women were effected by such policy. Yet, in the context of race discrimination the courts have "pierced the veil of supposed neutrality when the facts show underlying discrimination." *Mandate* at 229 n.46 and accompanying text.

50. Where an employer's seniority system was neutral on its face, but discriminatory against blacks in practice, a violation of Title VII occurred. *Local 189, Papermakers v. United States*, 416 F.2d 980, 988 (5th Cir. 1969), *cert denied*, 397 U.S. 919 (1970). *Cf.* *Local 53, Heat & Frost Insulators v. Vogler*, 407 F.2d 1047 (5th Cir. 1969) (nepotism membership); *Dobbins v. Local 212, IBEW*, 292 F. Supp. 413 (S.D. Ohio 1968) (union membership and job referral); *Quarles v. Phillip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968) (departmental lines of progression).

cases involving sex discrimination. At the very least, the Court's decision means that employers will no longer be able to establish double standards for men and women job applicants or to circumvent Title VII merely by tacking on additional factors to protected category status where the effect is to discriminate against women.

One could argue that the Court's discussion of the BFOQ is "pure dictum" and therefore without precedential value.<sup>51</sup> Nonetheless, in light of the Court's suggestion that on remand a BFOQ justification might be raised, it is important to analyze the Court's apparent interpretation of the BFOQ. The Court suggested that, in further development of the record on remand, the employer might be able to demonstrate the relevancy of "such conflicting family obligations" to job performance and justify discrimination against mothers of pre-school children as a BFOQ.<sup>52</sup>

The Fifth Circuit had questioned its own "sex-plus" rationale in the *Phillips* context as "arguably an apparent discrimination founded upon sex"<sup>53</sup> and recognized the possibility that the

. . . Congressional scheme for the handling of a situation of this kind was to give the employer an opportunity to justify this seeming difference in treatment under the "bona fide employment qualification" provision of the statute.<sup>54</sup>

However, the circuit court then performed a logical back-flip and rejected as "irrational" any intent of Congress to require the employer to resort to the BFOQ justification in *every* instance of unequal treatment of job applicants. Rather, it suggested that the prohibition did not require absolute equality of treatment, and that if the employer, reflecting on the

. . . normal relationship of working fathers and working mothers to their pre-school age children [did not] treat the two exactly alike  
. . . in general hiring policies . . .

such was not a violation of Title VII as any rational person would realize!<sup>55</sup>

Although the Supreme Court recognized that *Martin Marietta's* policy was in fact discriminatory and therefore could only be justified if it were a BFOQ, it made an illogical maneuver, similar to that of the Fifth Circuit, and fell into the same trap when it suggested that "such conflicting family obligations" might be grounds for a BFOQ.<sup>56</sup>

Both courts premised their discussion of the relationship of working fathers and working mothers to their children on the ground that a difference of ob-

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51. See *supra* notes 20-21 and accompanying text.

52. 400 U.S. 542, 544.

53. 411 F.2d 1, 4.

54. *Id.*

55. *Id.*

56. 400 U.S. 542, 544.

ligations exists between motherhood and fatherhood. Yet, this premise should be available to an employer only in instances where he can establish a relationship between the categories of fatherhood and motherhood on the one hand, and functional job qualifications on the other. It should be impermissible for him to assume that the category necessarily, or even presumably, justifies an effective distinction, inasmuch as Title VII was clearly not intended “. . . to allow ‘nonbusiness justified’ discrimination against women on the ground that they were mothers or mothers of pre-school children.”<sup>57</sup> With the large class<sup>58</sup> of working mothers in the labor force and the expanded availability of day care centers as well as babysitters, “. . . neither an employer nor a reviewing court can—absent proof of ‘business justification’<sup>59</sup> [§ 703(e)]—assume that a mother of pre-school children will, from parental obligations, be an unreliable, unfit employee.”<sup>60</sup>

The Court's reliance on such a premise countenances precisely the lack of uniform standards Title VII was designed to eliminate, and conjures up “ancient canards about the proper role of women.”<sup>61</sup> Mr. Justice Marshall, in his concurring opinion, bemoans the tragedy of offering the employer an escape valve from the mandate of Title VII.<sup>62</sup> He recognizes the potential disaster of an expansive interpretation of Section 703(e), which would in effect obliterate any positive effects of the remainder of Title VII. And, clearly, if the exception were to swallow the rule, “. . . the Act [would be] dead.”<sup>63</sup>

Justice Marshall gives “great deference” to, and quotes approvingly from, the agency guidelines which limit the BFOQ exception to situations where “authenticity or genuineness are required.”<sup>64</sup> This narrow interpretation supports the Congressional intent to restrict the use of this section. The Supreme Court majority, in contrast, by suggesting expansion of the ex-

57. 416 F.2d 1257, 1260 (Brown, C.J., dissenting).

58. As of March, 1969 there were 31 million women in the labor force representing 38 percent of all workers. Of these, 11.6 million had children under 18 years of age. The number of working mothers with children under 6 was 4.2 million. WOMEN'S BUREAU, U.S. DEPT OF LABOR, WOMEN WORKERS TODAY 2 (1970).

59. The requirement of showing a “business need” under Sec. 703(a) should not be confused with the Sec. 703(e) requirement of justifying sex as a BFOQ. A showing of “business need” may be relevant in disproving the existence of discrimination per se. But “business need” is not a valid ground for justification of discrimination based on sex as a BFOQ. Brief for Human Rights for Women, Inc. as Amicus Curiae at 9, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542.

60. 416 F.2d 1257, 1261 (Brown, C.J., dissenting).

61. 400 U.S. 542, 545 (Marshall, J., concurring).

62. *Id.* at 546.

63. 416 F.2d 1257, 1260.

64. GUIDELINES, Sec. 1604.2 (1971); *Udall v. Tallman*, 380 U.S. 1, 16 (1965). *Cf.* *Crosslin v. Mountain Sts. Tel. & Tel. Co.*, 400 U.S. 1004, 1005 (1971) (Douglas, J., dissenting).

ception in its directions to the district court on remand appears to leave open an escape mechanism for employers to avoid Title VII.

The mandate of Title VII that women should be treated as individuals has been reflected in narrow interpretation of the BFOQ by several circuit courts.<sup>65</sup> Of immediate importance is the Fifth Circuit test for the BFOQ established in *Weeks v. Southern Bell Telephone and Telegraph Co.*,<sup>66</sup> where an employer's policy of hiring men, but not women, for jobs requiring the lifting of weights over 30 pounds was declared to be discrimination on the basis of sex.<sup>67</sup> The *Weeks* standard for determining whether sex is a BFOQ is as follows:

In order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.<sup>68</sup>

Assuming *arguendo* that the BFOQ will pose a new issue on remand, the *Weeks* test sets the precedent which should govern disposition by the district court.

Seventy-five to eighty percent of the persons hired for the position of assembly-trainee in *Phillips* were women, belying the establishment of sex per se as a BFOQ for the position.<sup>69</sup> The question then arises as to whether a BFOQ can be applied to less than all members of a protected category, *i.e.*, only to women with pre-school children. On the one hand it could be argued that, according to the unqualified standard of proof set down in *Weeks*, an employer would be prohibited from drawing distinctions within the class of women. The test clearly states that all or substantially all women must be proven unqualified for the position. Therefore, it would be inconsistent with the thrust of *Weeks*, which buttresses the position that women should be treated as individuals, to allow employers to carve out an exception to the *Weeks* standard for those women (among "all women") with pre-school children as a type of sub-class.

The other argument, however, is that the court in *Weeks* used "women" to indicate the class discriminated against in that case.<sup>70</sup> In *Phillips* the class

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65. *Rosenfeld v. S. Pac. Co.*, 444 F.2d 1219 (9th Cir. 1971); *Weeks v. S. Bell Tel. & Tel.*, 408 F.2d 228 (5th Cir. 1969); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969).

66. 408 F.2d 228.

67. *Developments* at 1179-81.

68. 408 F.2d 228, 235.

69. The affidavits submitted on the motion for summary judgment established that a higher percentage of women than men applied for and held the job of assembly trainee. 411 F.2d 1, 2.

70. 408 F.2d 228, 235-36. But the thrust of civil rights legislation is the protection of an individual because she is a member of a wider sex based group: it is not merely the protection of a majority of the group. *Developments* at 1172.

discriminated against was "mothers of pre-school children." Therefore, when the class was injected into the *Weeks* formula the result would be all or substantially all mothers of pre-school children. Moreover, it could be argued that, if discriminating against mothers with pre-school children is discrimination based on sex, then a BFOQ should be permitted for the same class on the basis of sex. The Supreme Court's decision seems to imply the possibility of having a BFOQ that applied to less than all the class.<sup>71</sup> It is important to note, though, that in racial discrimination cases the courts have not allowed employers to justify a practice because it affects only a portion of the class.<sup>72</sup>

The respondent's brief, as a barometer of the tactics it will use on remand, suggests that it intends to demonstrate statistically the relative job performance—rate of absenteeism and turnover—of women with pre-school children as compared with women without pre-school children.<sup>73</sup> However, two critical flaws undermine this approach. First, the disputed classification relates to women with pre-school children versus men with such children.<sup>74</sup> Therefore, any comparison between the performance of women with and without pre-school children is irrelevant.<sup>75</sup> Secondly, even if conflicting obligations between men and women each having pre-school children were demonstrated, it would serve as no more than a single element in the respondent's burden of proof, for to assume that "an individual woman would likely follow that pattern is a forbidden basis for refusing to hire her."<sup>76</sup>

In other words, if a BFOQ is applicable to less than all women, Martin Marietta will bear the burden of showing that all or substantially all women with pre-school children would be unable to perform the duties of assembly-trainees. The requirement of factual evidence and the standard of proof dictate that women be considered as individuals for all positions. Stereotyped assumptions, unsupported by fact, will not be allowed as criteria for discriminatory employment practices. Therefore, under the *Weeks* rationale,

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71. "But that is a matter of evidence tending to show [t]he condition in question" is a BFOQ. 400 U.S. 542, 544.

72. *E.g.*, Local 189, United Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969); Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968). Of course, since race may never be a BFOQ, the intra-class distinctions in these cases were discussed in the context of whether the practice constituted discrimination per se. Nonetheless, the analogy to the sex-based BFOQ remains appropriate in light of the parallel effect.

73. Brief for Respondent at 28-29 n.4, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542. See also statistics provided by the Department of Labor which indicate that the actual rate of absenteeism for illness or injury differs little between men and women: 5.3 days for women and 5.4 days for men on a per annum basis. U.S. DEPT OF LABOR, 1969 HANDBOOK ON WOMEN WORKERS 80.

74. 411 F.2d 1, 2.

75. Brief for Human Rights For Women, Inc. as Amicus Curiae at 5, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542.

76. *Id. Accord*, *Rosenfeld v. S. Pac. Co.*, 444 F.2d 1219.

unless Martin Marietta can demonstrate that all or substantially all women with pre-school children cannot perform the duties of assembly-trainee in a safe, efficient manner, Ms. Phillips and other mothers with pre-school children will be able to apply for such positions.

Even if the *Weeks* test were met, Ms. Phillips might still challenge her exclusion with another argument, namely, that women should have the right to demonstrate their individual ability to perform any given job. This position is supported by the earlier Seventh Circuit decision in *Bowe v. Colgate-Palmolive Co.*,<sup>77</sup> a Ninth Circuit decision, *Rosenfeld v. Southern Pacific Co.*,<sup>78</sup> and the EEOC Guidelines.<sup>79</sup> The *Rosenfeld* test goes beyond *Weeks* in that it totally eliminates the vestiges of stereotyped assumptions that emanate from the all or substantially all standard: it requires employers to consider each applicant on her own merits.

The Supreme Court offered little or no guidance for resolving the conflict between the *Weeks* and *Rosenfeld* tests. It has been argued that, in suggesting that Martin Marietta's hiring policy might be justified if "demonstrably . . . relevant to job performance," the Court accepted the *Weeks* rationale of "safe and efficient" performance.<sup>80</sup> However, it seems more likely that the Court was merely paraphrasing the BFOQ language rather than taking a position on the BFOQ test.

Unfortunately, future cases will more likely stress the *Weeks* test simply because it represents a more palatable compromise for employers. It seems that the Supreme Court, as well as the Fifth Circuit (which has made some landmark decisions on discriminatory practices based on race<sup>81</sup>), is not prepared to follow the *Rosenfeld* test out of fear that the exception under Section 703(e) would become extremely narrow.<sup>82</sup> The employer would be required to evaluate each individual, male or female, on his or her merits. Although this does not appear to be an unusually burdensome requirement, and certainly in the case of blacks the requirement has not been unduly burdensome,<sup>83</sup> the courts continue to exhibit their reluctance to offer women truly equal access to employment opportunities.

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77. 416 F.2d 711.

78. 444 F.2d 1219.

79. 29 C.F.R. § 1604.1 (1971).

80. Comment, *Title VII: How to Break the Law Without Really Trying*, 21 CATH. U.L. REV. 103, 129 (1971).

81. See, *supra* note 6.

82. *Mandate* at 231-32.

83. No BFOQ is allowable on the basis of race. Although Congress made the judgment that there might be instances where sex-based discrimination was justified, it seems reasonable to assume that Congress intended to limit such exception [the BFOQ] to the narrowest of circumstances, since for another of the proscribed categories (race), no exception was allowed. 110 CONG. REC. 7212 (Memorandum of Senators Clark and Case).

In jurisdictions where a standard for the BFOQ has not been adopted, the potential danger is that employers may twist the language in *Phillips* to justify discriminatory practices without sustaining the factual burden that all or substantially all women are not qualified for a given position. The minute a court follows such a tack and allows the word "some" to be substituted for "all or substantially all," women could again be unfairly excluded from jobs without being evaluated as individuals.<sup>84</sup>

### *Observations and Conclusions*

In summary, the *Phillips* case offers scant hope for future sex discrimination cases under Title VII. Although the Court recognized the unlawfulness of maintaining different hiring policies for men and women of like qualifications, it failed to establish a clear or meaningful standard to which lower courts and administrative agencies, as well as employers and employees, might look for guidance in assessing discriminatory employment practices based on sex.

The remand of this case for further proceedings in the context of the Court's gratuitous suggestion that there might indeed be job-related differences between men and women, each with family obligations, leaves considerable leeway for lower courts to abandon the prevailing narrow interpretation of the BFOQ.

In subsequent cases, it is hoped that the Court will recognize its responsibility to speak out on sex discrimination cases, demanding neutral employment criteria, in light of the limited enforcement procedures available to support Title VII rights and also in light of the critical need for judicial direction and guidance. Indeed, the Court should refrain from gratis, potentially damaging commentary regarding the BFOQ and move into a position more consistent with the EEOC guidelines and the Act's legislative history. The use of sex-based criteria, in whatever guise, should be permanently eliminated from the employer's qualifications manual.

For too long traditional presumptions, biases, and social stigmas have dictated the "proper role" of women and have excluded them from the work force and from advancement consistent with their capabilities. In view of existing federal policy and legislation aimed at halting abusive employment practices based on sex, the Court should, within the context of the cases and controversies before it, play a central role in vindicating the rights of women in the private employment sector.

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84. *Mandate* at 232.