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# Civil Rights—Dothard v. Rawlinson: A Method of Analysis for Future BFOQ Cases

# *DOTHARD V. RAWLINSON*: A METHOD OF ANALYSIS FOR FUTURE BFOQ CASES

Title VII of the 1964 Civil Rights Act[1] prohibits sex-based discrimination in employment[2] except "in those certain instances where . . . sex . . . is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation"[3] of the employer's business. Once a Title VII plaintiff demonstrates discrimination on the basis of sex, the defendant may assert the BFOQ as an affirmative defense. Courts usually approach the BFOQ through a two-step analysis, first considering which qualifications are reasonably necessary for the job and then deciding whether the evidence proves that members of one sex do not possess such qualifications.[4] Throughout the "early" sex discrimination cases, federal courts failed to produce a uniform standard for application of the BFOQ defense.[5] In

1. Civil Rights Act of 1964, §§ 701-718, 42 U.S.C. § 2000(e) (1976), as amended by Act of Oct. 31, 1978, Pub. L. No. 95-555.

2. The Civil Rights Act of 1964, § 703(a), 42 U.S.C. § 2000e-2(a) (1976) provides:

> It shall be an unlawful employment practice for an employer
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> (1) to . . . . discriminate against any individual . . . . because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities . . . ., because of such individual's race, color, religion, sex, or national origin.

3. Civil Rights Act of 1964, § 703(e), 42 U.S.C. § 2000e-2 (e) (1976). The BFOQ exception also specifies religion and national origin, but not race or color. *Id.*

4. *E.g.*, Long v. Sapp, 502 F.2d 34, 38-40 (5th Cir. 1974) (court considered weight lifting required for position of warehouseman, and testimony of employees of warehouse concerning whether a woman could do the work); Bowe v. Colgate Palmolive Co., 416 F.2d 711, 715, 717-78 (7th Cir. 1969) (court apparently accepted contention that some jobs at defendant's plant required lifting thirty-five pound objects, and then considered evidence that state law limits on weights women may lift at work varied considerably, and that the International Labor Organization had rejected any numerical limit); Cheatwood v. Southern Bell Tel. & Tel. Co., 303 F. Supp. 754, 758-59 (M.D. Ala. 1969) (court found job required lifting of heavy coin boxes, and then discussed medical testimony on weight lifting abilities of women).

5. *See* notes 20-32 and accompanying text *infra*.

*Dothard v. Rawlinson*,[6] the United States Supreme Court applied a standard composed of elements from several of these earlier cases, in holding that being male is a BFOQ for employment as a guard in a maximum security prison for men.[7]

The defendant in *Rawlinson*, the Alabama Board of Corrections, restricted employment as guard in Alabama's maximum security male prisons to men by regulation.[8] Plaintiff, a female applicant for the position, brought a class action in federal court,[9] asserting that this rule violated Title VII and the Fourteenth Amendment.[10] The district court granted judgment for the plaintiff[11] but the Supreme Court reversed.[12] Operating on the premise that the essence of a

6. 433 U.S. 321 (1977).

7. *Id.* at 334-37.

8. *Id.* at 323-25. Although Alabama allows women to serve in contact positions at its male minimum security prisons, the challenged regulation precludes men from serving as guards at the state's female maximum security institution. Since more jobs are available at the male maximum security penitentiaries than at the female counterpart, the regulation eliminates proportionately more jobs for women than men. *Id.* at 327-28, 332-33 n.16.

9. Mieth v. Dothard, 418 F. Supp. 1169 (M.D. Ala. 1976), *aff'd in part, rev'd in part sub nom* Dothard v. Rawlinson, 433 U.S. 321 (1977). Plaintiff also challenged statutory minimum height (five foot two inches) and weight (120 pounds) requirements for guards. She asserted these minima disproportionately exclude women and therefore violated Title VII and the Equal Protection clause. At the same time, another plaintiff, Brenda Mieth, challenged Alabama's height and weight requirements for state troopers. She based her action solely on the Fourteenth Amendment Equal Protection Clause.

Pursuant to 28 U.S.C. § 2281 (1970) (repealed 1976), which authorized three judge courts to hear claims of unconstitutionality of state statutes and administrative regulations, three district court judges decided the two cases. 418 F. Supp. at 1172. Although a single judge could have considered Rawlinson's Title VII claims, the issues of the two cases were sufficiently similar that it was not inappropriate for three judges to hear both cases. 433 U.S. at 324 n.5.

The district court struck down the height and weight requirements for state troopers. 418 F. Supp. at 1182. The state did not appeal this portion of the decision. 433 U.S. at 324 n.4.

The district court also gave judgment for Plaintiff Rawlinson on both the height and weight issue and the issue of whether women could serve as guards in the all male maximum security prisons. The state appealed both holdings. 433 U.S. at 328.

10. Plaintiff did not assert that the Equal Protection Clause requires more rigorous scrutiny of a state's sexually discriminatory employment practices than does Title VII. Accordingly, the Supreme Court did not give independent consideration to the district court's ruling that the administrative regulation violates the Fourteenth Amendment. 433 U.S. at 334 n.20.

11. 418 F. Supp. at 1185.

12. 433 U.S. at 337. There was no intermediate appeal. Under 28 U.S.C. § 1253

guard's job is to maintain security, the Court found that the violence and disorder which characterized the Alabama prison could not be controlled by female guards. Since women[13] were inherently unable to satisfy the conditions of their employment, the Alabama Board of Corrections could successfully invoke the BFOQ defense.

Both the Equal Employment Opportunity Commission and lower federal courts have consistently interpreted the BFOQ as a narrow exception to the rule against discrimination based on sex.[14] This in-

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(1976) any party to an action may directly appeal to the Supreme Court from an order of a properly convened three judge district court. *See* note 9 and accompanying test *supra*.

13. 433 U.S. at 334-37. The Supreme Court affirmed the district court's finding that the height and weight requirements violate Title VII. *Id.* at 331. Hence plaintiff Rawlinson is eligible for a contact position at Alabama's minimum security prisons, or the female maximum security prison.

Three justices agreed that the district court would have been justified in reaching a different result on the height and weight issue if the defendant had argued that the reason for the requirement was an appearance of strength. *Id.* at 340 (Rehnquist, J., concurring). The only job-related justification the defendant offered was that of physical strength. 433 U.S. at 331; 418 F. Supp. at 1182. The majority opinion noted that defendant could administer some sort of test to determine whether the applicant was strong enough to serve as a guard. 433 U.S. at 332.

A fourth justice objected to plaintiff's use of national height and weight statistics to establish her claim of disproportionate exclusion of women. He thought it was unlikely that these statistics corresponded to the heights and weights of females who would consider a career in corrections. Bigger women would be more likely to want to be guards than smaller women. 433 U.S. at 348-49 (White, J., dissenting).

Two justices dissented from the Court's holding that being male is a BFOQ for the position of guard in the all-male penitentiaries. They emphasized that there was no evidence in the record that the presence of female guards would create any greater danger in the Alabama prisons than already existed. *Id.* at 342 (Marshall, J., concurring in part and dissenting in part).

14. Long v. Sapp, 502 F.2d 34, 39 (5th Cir. 1974) ("Effective implementation of the anti-discrimination legislation compels a narrow interpretation of the [BFOQ] exception . . ."); Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1227 (9th Cir. 1971) ("We conclude . . . that the [Equal Employment Opportunity] Commission is correct in determining that BFOQ establishes a narrow exception . . . ."); 29 C.F.R. § 1604.2(a) (1977). *See also* White, *Women in the Law*, 65 MICH. L. REV. 1051, 1102-03 (1967).

The EEOC regulations recognize only one circumstance as justifying a BFOQ finding: "[w]here it is necessary for the purpose of authenticity or genuineness, e.g., actor or actress." 29 C.F.R. § 1604.2(a)(2) (1977). The regulations specify that the EEOC will not find the following situations to warrant application of the BFOQ: assumptions of employment characteristics of women (e.g., a higher turnover rate); stereotyped characterizations of the sexes (e.g., that women are not capable of aggressive salesmanship); or preference of customers or fellow workers. *Id.* § 1604.2(a)(1).

Courts faced with the BFOQ defense usually give the EEOC regulations consideration. *E.g.*, Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1224-25 (9th Cir. 1971);

terpretation conforms to the scheme of non-discrimination under Title VII: employers should consider individuals for a job solely on the basis of individual capacity rather than on characteristics associated with one sex.[15]

Federal courts have imposed a strict burden on proof of Title VII defendants and have identified a number of circumstances that do not justify the BFOQ defense. For example, stereotyped characterizations of men and women never suffice.[16] A demonstration of rigors or hazards of a job,[17] even if a majority of women would not seek such employment,[18] will not warrant application of the BFOQ. Further, if certain job requirements conflict with state laws regulating employment of women, the job does not automatically fall into the BFOQ category. Title VII supersedes such statutes when they serve as classifications that restrict women to lower-paying jobs.[19]

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Bowe v. Colgate Palmolive Co., 416 F.2d 711, 716-17 (7th Cir. 1969). In *Rawlinson*, the Supreme Court mentioned that the EEOC regulations should be given weight, 433 U.S. 334 n.19, but did not acknowledge that it had not followed them.

15. *E.g.*, Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1225 (9th Cir. 1971); Bowe v. Colgate Palmolive Co., 416 F.2d 711, 717 (7th Cir. 1969); 29 C.F.R. § 1604.2 (a)(1)(ii) (1977).

16. *E.g.*, Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 236 (Rejecting defendant's BFOQ defense, the court stated: "What does seem clear is that using these class stereotypes denies desirable positions to a great many women perfectly capable of performing the duties involved."); Ostapowicz v. Johnson Bronze Co., 369 F. Supp. 522, 537 (W.D. Pa. 1973) (The court rejected defendant's claim that females did not want advancement as follows: "[T]his appears to be a type of warrantless assumption based on the generalizations or stereotyped characterizations of the sexes . . . .").

17. Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 234 (5th Cir. 1969) ("Labeling a job 'strenuous' does not meet the burden of proving that the job is within the bona fide occupational qualification exception"); Cheatwood v. Southern Bell Tel. & Tel. Co., 303 F. Supp. 754, 758-59 (M.D. Ala. 1969) (court rejected BFOQ defense, even though there was evidence that some of the physical requirements of the job were such that many women could not manage it).

18. Ostapowicz v. Johnson Bronze Co., 369 F. Supp. 522, 537 (W.D. Pa. 1973) (court disregarded testimony of certain female employees of defendant that they would not want the jobs in question). *Accord*, Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 236 (5th Cir. 1969):

> Title VII . . . . vests individual women with the power to decide whether to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing.

19. Homemakers, Inc. v. Division of Indus. Welfare, 509 F.2d 20 (9th Cir. 1974) (invalidated state law requiring premium overtime pay for women but not men); Ro-

Although fifteen years have passed since the enactment of Title VII, federal courts have found it difficult to articulate the employment conditions that properly call for sex as a BFOQ and the standard of proof necessary to reach that conclusion. The two-step analysis required by Title VII has produced a myriad of standards which courts may apply in determining the appropriateness of the defense. In *Diaz v. Pan-American World Airways, Inc.*,[20] the Fifth Circuit specified employment circumstances under which the BFOQ should apply: "[D]iscrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively."[21] Thus, the BFOQ calls for a business necessity test rather than a business convenience test.[22] Under the *Diaz* test, an employee could invoke the BFOQ when hiring members of one sex would infringe on the privacy rights of the other.[23] In contrast, the BFOQ test developed by the Ninth Circuit

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senfeld v. Southern Pac. Co., 444 F.2d 1219, 1227 (9th Cir. 1971) (invalidated state law regulating weight women could lift on the job); Le Blanc v. Southern Bell Tel. & Tel. Co., 333 F. Supp. 602, 609 (E.D.La. 1971) (invalidated state law regulating number of hours women could work), *aff'd per curiam* 460 F.2d 1228 (5th Cir. 1972). *See generally Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1186-95 (1971).

20. 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971). Plaintiff Diaz applied for a job as a flight cabin attendant. Defendant rejected him because of its policy of restricting these positions to females. *Id.* at 386.

The trial court accepted defendant's BFOQ defense. The court found that Pan Am based its hiring policy on its considerable experience that females performed better as cabin attendants than males. Females could reassure anxious passengers and give more courteous service. Furthermore, the policy of excluding males was the best method of eliminating applicants likely to become unsatisfactory employees. 311 F. Supp. 559, 563, 568 (S.D. Fla. 1970) (memorandum).

The Fifth Circuit reversed, holding that the BFOQ did not apply unless the essence of the business would be undermined by not hiring both sexes. The essence of Pan Am's business was to provide safe transportation, not to provide a pleasant flight environment. 442 F.2d at 388.

The Fifth Circuit carefully noted that Pan Am could take into account the abilities of individuals to perform the non-mechanical functions of cabin attendant. However, defendant could not exclude all males simply because most males might not perform adequately. *Id.*

21. 442 F.2d at 388.

22. *Id.* Since the ability to soothe passengers and give courteous service was not necessary to the essence of Pan Am's business, the Fifth Circuit did not have to consider evidence that males generally did not possess these abilities.

23. *See* Fesel v. Masonic Home of Del., Inc., 447 F. Supp. 1346 (D. Del. 1978). The court found that being female was a BFOQ for the position of nurse's aide at a home for the elderly. The position required providing intimate personal care for the residents. Some women in the home strongly objected to receiving such care from a

would eliminate even this possibility. In *Rosenfeld v. Southern Pacific Co.*,[24] the court declared that "sexual characteristics, rather than characteristics that might, to one degree or another, correlate with a particular sex, must be the basis of the BFOQ exception."[25] In practice, this narrower formulation would restrict the BFOQ to positions such as actor/actress, escort or model.

Turning to the second phase of the Title VII analysis, the Fifth Circuit confronted the burden of proof issue in *Weeks v. Southern Bell Telephone & Telegraph Co.*[26] *Weeks* specified that the defendant must show a factual basis for believing "all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."[27] The court qualified this test in a footnote: "It may be that where an employer sustains its burden in demonstrating

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man. The court noted that due to tort and criminal cases recognizing personal privacy interests, the home could not force guests to accept such care. Hiring of males would therefore directly undermine the essence of the home's business—to provide care for the patients. Due to the small size of the staff, selective job assignment was impossible. *Id.* at 1351-53.

*See also Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1185-86. (1971).

24. 444 F.2d 1219 (9th cir. 1971). Plaintiff alleged that defendant discriminated against her on the basis of sex, by assigning the position of agent-telegrapher to a junior male employee. *Id.* at 1220. The position required heavy physical effort-climbing over and around boxcars to adjust their vents, collapse their bunkers and close and seal their doors. It also required long hours during harvest season, and lifting the objects heavier than twenty-five pounds. The defendant asserted the BFOQ applied because of the strenuous nature of the job and state laws which limited the hours women could work and the weight they could lift. *Id.* at 1223. The court ultimately rejected the defendant's contention that the job was too strenuous for a woman and also struck down the state laws. *Id.* at 1225-26.

One author has questioned the Ninth Circuit's interpretation of the BFOQ. Oldham, *Questions of Exclusion and Exception Under Title VII — "Sex-Plus" and the BFOQ*, 23 HAST. L.J. 55, 81 (1971).

25. 444 F.2d at 1225.

26. 408 F.2d 228 (5th Cir. 1969).

27. *Id.* at 235. Plaintiff was a female employee who had worked for Bell for nineteen years. She applied for the job of switchman. The company responded that it did not assign women to that position. *Id.* at 230. The trial court found sex was a BFOQ for switchman because the job required lifting weights in excess of thirty pounds, other strenuous activity, and irregular hours. 277 F. Supp. 117, 118-19 (S.D. Ga. 1967). The Fifth Circuit reversed because defendant had not met its burden of showing that it "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." 408 F.2d at 235.

One flaw of the *Weeks* test is that it fails to extend Title VII protection to those women who could do the job. It excuses the employer from showing that the individ-

that it is impossible or highly impractical to deal with women on an individual basis, it may apply a reasonable general rule."[28] This "all or substantially all" test of *Weeks* has been used frequently in later cases.[29]

The Supreme Court dealt briefly with defendants' burden of proof in *Phillips v. Martin Marietta Corp.*[30] In a case that questioned whether an employer who otherwise did not discriminate against women could refuse to hire women, but not men, with pre-school-age children,[31] the Court recognized that circumstances could exist which are "demonstrably more relevant to job performance for a woman

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ual testing is not possible. *Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1179-80 (1971).

A second difficulty with the *Weeks* test is that it does not take into account that the capabilities of "substantially all women" may differ from those of the women who want the job in question. The job application process always entails a certain amount of self-selection.

28. 408 F.2d at 235 n.5. The Fifth Circuit elaborated on this test in Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976). "One method by which the employer can carry this burden is to establish that some members of the discriminated-against class possess a trait precluding safe and efficient job performance that cannot be ascertained by means other than knowledge of the applicant's membership in the class." *Id.* at 235.

*Tamiami Trail Tours* was an age discrimination case. Federal law generally prohibits discrimination based on age against persons between forty and seventy years old. Age Discrimination in Employment Act of 1967, §§ 2 & 4, 29 U.S.C. §§ 623 & 631 (1976), as amended by Act of Apr. 6, 1978, Pub. L. No. 95-256 § 2, 3. The Act provides a BFOQ exception. 29 U.S.C. § 623(f)(1) (1976).

In *Tamiami Trail Tours*, the Fifth Circuit upheld defendant's maximum hiring age for a bus driver of forty. The court stated that the essence of defendant's business was safe transportation of bus passengers. 531 F.2d at 236. The court found that defendant sustained its *Weeks* "footnote five" burden by expert medical testimony that medical science could not accurately separate chronlogical from functional age. Certain physiological changes accompanying age decrease a person's driving ability, and medical examinations could not detect all these changes. It was thus impossible to determine which person over forty had the stamina to begin bus driving. *Id.* at 237-38.

29. *E.g.* Long v. Sapp, 502 F.2d 34, 39 (5th Cir. 1974); Diaz v. Pan-American World Airways, Inc., 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971); Newmon v. Delta Air Lines, Inc., 374 F. Supp. 238, 244 (N.D. Ga. 1973); Utility Workers Local 246 v. Southern Cal. Edison Co., 320 F. Supp. 1262, 1266 (C.D. Cal. 1970) (memorandum).

30. 400 U.S. at 542 (1971) (per curiam).

31. *Id.* at 543. The employer showed by statistical evidence that it had no general policy of discrimination against women. The district court granted summary judgment for the defendant and the Fifth Circuit affirmed. The Supreme Court held that "[t]he Court of Appeals . . . . erred in reading [§ 703(a) of the Civil Rights] Act as permitting one hiring policy for men and another for women, both with pre-school-

than for a man."[32] The "demonstrably more relevant" standard then suggests that the BFOQ could apply any time an employee could show that men or women generally perform the job better.

*Rawlinson* apparently adopts the substance of the business necessity test of *Diaz* and the "all or substantially all" test of *Weeks*. Emphasizing that "[t]he essence of a correctional counselor's job is to maintain prison security"[33] and the finding that the penitentiary conditions violated the Eighth Amendment prohibition of cruel and unusual punishment,[34] the Court concluded that women would be unable

age children." *Id.* at 544. The Court remanded the case for consideration of whether the BFOQ applied.

Justice Marshall, in his concerrence, noted the danger of the Court's reasoning—that sex stereotypes would be used to establish a BFOQ. He stated that even if defendant could show that the vast majority of women with pre-school-age children have family responsibilities that interfere with job performance, and that men generally do not have such responsibilities, the BFOQ should not apply. *Id.* at 544-45.

*See also* Comment, Phillips v. Martin Marietta Corp.: *A Muted Victory*, 22 CATH. L. REV. 441 (1972).

32. 400 U.S. 542, 544.

33. 433 U.S. at 335.

34. *Id.* at 334. The Court was referring to Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976) (memorandum). Excerpts from the district court's finding of cruel and unusual punishment follow.

> [L]ack of sanitation throughout the institutions—in living areas, infirmaries, and food service—presents an imminent danger to the health of each and every inmate. Prisoners suffer from further physical deterioration because there are no opportunities for exercise and recreation. Treatment for prisoners with physical or emotional problems is totally inadequate . . . .
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> Prison officials are under a duty to provide inmates reasonable protection from constant threat of violence . . . .
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> The defendants in these cases have failed to carry out that duty. The evidence establishes that inmates are housed in virtually unguarded, overcrowded dormitories, with no realistic attempt by officials to separate violent, aggressive inmates from those who are passive or weak.

*Id.* at 329.

These general findings, although grim, did not begin to tell the entire story. The specific finding concerning sanitation illustrates how deplorable prison conditions were:

> In general, Alabama's penal institutions are filthy. There was repeated testimony at trial that they are overrun with roaches, flies, mosquitos, and other vermin . . . . Plumbing facilities are in an exceptional state of disrepair. In one area housing well over 200 men, there is one functioning toilet. Many toilets will not flush and are overflowing. Some showers can not be turned off . . . . Witnesses repeatedly commented on the overpowering odor emanating from these facilities.

*Id.* at 323.

The district court gave an extensive order calling for improvements in the peniten-

to maintain order.[35] The dormitory-type structure of the prison buildings, understaffing, constant violence, and lack of any segregation of sexual offenders from other prisoners would render female guards especially vulnerable to attack. Such an attack would threaten not only the woman herself but the basic control of the penitentiary.[36] "A woman's relative ability to maintain order in a male, maximum-security, unclassified penitentiary of the type that Alabama now runs could be directly reduced by her womanhood."[37]

One question posed by the *Rawlinson* decision is whether it should apply at all outside the prison context. The Court followed the reasoning of the opinion testimony of the Alabama prison officials,[38]

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tiaries. *Id.* at 331-35. The Supreme Court did not consider whether women should be allowed to serve as guards once order is established.

One explanation of the *Rawlinson* results is that the Supreme Court considered the Eighth Amendment violations already so serious that if there was any danger that female guards would cause further chaos, it would not be conscionable to order that they be hired. A more likely explanation is that the Court thought, on the whole, that prisons were no place for a woman. The Court, however, recognized that "[i]n the usual case, the argument that a particular job is too dangerous for a woman may be appropriately met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make the choice for herself". 433 U.S. at 335.

35. 433 U.S. at 334-37.

36. *Id.* at 335-36. Justice Marshall pointed out the fallacy of this reasoning in his dissent. A guard could not rely solely on his own physical strength to deter attacks. Instead, he had to depend upon the authority of his position, the threat of swift punishment for miscreants, and psychological weapons. *Id.* at 343.

Justice Marshall further suggested that the Court's concern about sexual attacks on female guards was misplaced. Common sense an "innate recognition" did not dictate that prisoners would rape a female guard. "The only matter of innate recognition is that the incidence of sexually motivated attacks on guards will be minute compared to the 'likelihood that inmates will assault' a guard because he or she is a guard." *Id.* at 345-46.

For evidence suggesting the success of the use of female guards in male prisons, see FEDERAL BUREAU OF PRISON, DEP'T OF JUSTICE, POLICY STATEMENT NO. 3713.7 44-45 (Jan. 7, 1976), quoted in Brief for Amicus Curiae, American Civil Liberties Union at 19, Dothard v. Rawlinson, 433 U.S. 321 (1977); Brief for Amicus Curiae, State of California at 3, Dothard v. Rawlinson, 433 U.S. 321 (1977); Ward, *Impact of Female Employees in Adult All-Male Correctional Institutions*, 5 CRIME & DELINQUENCY LIT. 90 (1973).

37. 433 U.S. at 335. It is thus unclear whether the Supreme Court found that all women could not perform as guards, or just "substantially all."

38. *Compare* the Court's reasoning, 433 U.S. at 335-36, *with* Brief of Appellants at 6-7 (summary of testimony of Alabama Corrections Commissioner Locke).

The Court also referred to the testimony of plaintiff's expert witness that it would be unwise to use women as guards in a prison where even ten percent of the inmates had been convicted of sex crimes and were not segregated from other prisoners (in the Alabama penitentiaries, the percentage of sex offenders was twenty). 433 U.S. at 336.

even though the testimony reflected a patronizing attitude towards women.[39] The Court's acceptance of this testimony may be due to the traditional "hands off" attitude of federal courts toward state prisons, even though the Court stated in a footnote that Congress intended Title VII to apply equally to private and public employers.[40] Additionally, the reasoning in *Rawlinson* strongly resembles that of *Jones v. North Carolina Prisoners' Union*,[41] decided only four days earlier. In that case, the Court stated that a federal court should gve appropriate deference to the decisions of prison administrators.[42] Because the prison officials' belief that a prisoners' union would be disruptive was not unreasonable, the administrators did not need objective evidence to support their position.[43] The *Dothard* Court

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The court probably would have reached the same result even in the absence of this admission by plaintiff's expert. The Court's reasoning before noting this admission reflects that of the defendant, and that of defendant's experts. *Compare* 433 U.S. at 334-36 *with* Brief of Appellants at 6, 7, 50, & 51.

39. 433 U.S. at 343-44 & n.2 (Marshall, J., concurring & dissenting). In the footnote, Justice Marshall quoted testimony of Corrections Commissioner Locke. Locke responded to the question of why he thought a woman could not handle the job of prison guard as follows:

> The innate intention between a male and a female. The physical capabilities, the emotions that go into the make-up of a female vs. that of a male. The attitude of the rural type inmate we have vs. that of a woman. The superior feeling that a man has, historically, over that of a female.

40. 433 U.S. at 331, n.14. Title VII originally only applied to private employers. Congress extended it to state and federal employers in the Equal Opportunity Act of 1972, P.L. 92-261, 86 Stat. 103.

41. 433 U.S. 119 (1977). The Court decided *North Carolina Prisoner's Union* on June 23, 1977, and *Rawlinson* on June 27.

42. 433 U.S. at 125. *Accord*, Meachum v. Fano, 427 U.S. 215, 229 (1976) ("The federal courts do not sit to supervise state prisons, the administration of which is of acute interest to the states"); Pell v. Procunier, 417 U.S. 817, 827 (1974) ("Such considerations [visitation rules] are peculiarly within the province and professional expertise of corrections officials, and . . . courts should ordinarily defer to their expert judgment in such matters.") *But cf.* Procunier v. Martinez, 416 U.S. 396, 415 (1974) (Court struck down certain mail censorship rules, because they allowed too much discretion to correctional employees); Cruz v. Beto, 405 U.S. 319, 321-22 (1972) (Court reversed dismissal of Buddhist prisoner's claim that he denied privileges accorded to Christian and Jewish prisoners); Johnson v. Avery, 393 U.S. 483, 488 (1969) (where a penitentiary provides no guaranteed means of assistance for writing applications for writs of habeas corpus, it may not forbid a "jail house attorney" from doing so). *See also* Comment, *Confronting the Conditions of Confinement: An Expanded Role for Courts in Prison Reform* 12 HARV. C.R.-C.L. L. REV. 367 (1977).

43. 433 U.S. at 132-33. The Union's stated purpose was "to seek through collective bargaining to improve working conditions," and to work to change certain of the Department of Correction's policies of which it did not approve. *Id.* at 122. The

did not cite *North Carolina Prisoner's Union*, however, and in fact failed to recognize the tension between its "hands off" policy toward state prisons and the Title VII claim.

Since the Supreme Court did not acknowledge the conflict posed by dealing with a Title VII state prison defendant[44] and referred to BFOQ cases not involving prisons, *Rawlinson* should apply in all future BFOQ cases. The Court did not explicitly adopt any BFOQ test. However, it implicitly adopted the "essence of the business" test of *Diaz* and the "all or substantially all" test of *Weeks*. The BFOQ applied because the essence of a guard's job was to keep order, and the likelihood that women could not do this. The Court thus rejected the *Rosenfeld* test of "sexual characteristics rather than characteristaics that might, to one degree or another, correlate with a particular sex."[45]

Even though the Court apparently thought that substantially all women could not perform as guards, the *Weeks* test was not crucial to the *Rawlinson* holding.[46] Certainly the same result could have been reached by use of the *Phillips* dicta—that the BFOQ applies if

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Department of Corrections issued regulations which forbade inmates from soliciting other inmates to join the Union, barred all Union meetings, and forbade delivery of Union publications to prisoners. *Id.* at 121. The Union claimed that its rights, and the rights of its members, to engage in free speech and association was infringed. Further, it asserted an Equal Protection claim, because the authorities allowed the Jaycees and Alcoholics Anonymous to have meetings in the prisons. *Id.* at 122-23. The district court enjoined enforcement of these regulations because the Defendant presented no factual evidence that the Union activities would cause disorder. 409 F. Supp. 937, 944-45 (E.D. N.C. 1976). The Supreme Court reversed, holding that it was not necessary for the defendant to present any objective proof; its actions must stand if based on beliefs that were not unreasonable. 433 U.S. at 128.

44. 433 U.S. at 333 & n.17. *See* note 20 and accompanying test *supra*. The *Rawlinson* formulation differs somewhat from *Diaz* in that *Diaz* spoke of the "essence of the business," 442 F.2d at 388, rather than the essence of the job. However, a prison is not a "business" in the usual sense of the word. The Supreme Court would have reached the same result had it considered something along the line of the essence of the functions of a penitentiary.

The reason that the statutory language of the BFOQ mentions "business or enterprise" rather than government is that Congress enacted in the BFOQ provision with the original Civil Rights Act of 1964. Congress extended coverage of this Act to state and federal governments in 1972. *See* note 39 and accompanying text *supra*.

45. Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1225 (9th Cir. 1971). The Court also implicitly rejected the EEOC regulations, which allow the BFOQ only "[w]here it is necessary for the purpose of authenticity or genuineness . . . e.g., actor or actress". 29 C.F.R. § 1604.2(a)(2) (1977).

46. Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969).

one sex or the other generally performs the job better.[47] The Court may have rejected this dicta, however, by stating that "the BFOQ was in fact meant to be an extremely narrow exception."[48]

The burden of proof test left untouched by the Court was the *Weeks* footnote test, that of the impossibility of dealing with women on an individual basis.[49] Again, if the Court had used this test, it would probably have reached the same result. Serious understaffing in all of the male penitentiaries meant that male guards could not be summoned to the aid of a female guard in case of an attack.[50] Since Alabama apparently had never used female guards in the male penitentiaries, it is unlikely that the defendant could have devised some sort of test or training program to weed out women who would not be able to maintain order.[51] However, the Court did not consider the possibility that as members of a self-selected group, some females who wanted to be guards could maintain security.

Despite the *Rawlinson* Court's failure to clearly articulate a standard capable of use by other courts, it implicitly established a method of analysis for future BFOQ cases.[52] First, courts should determine the qualifications essential to the job. In this phase of the analysis,

47. *See* text accompanying note 31 *supra.*

48. 433 U.S. at 334.

49. Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 n.5. *See* note 29 and accompanying text *supra.*

50. *See* Pugh v. Locke, 406 F. Supp. 318, 325 (M.D. Ala. 1976) (memorandum). The Supreme Court also mentioned understaffing of the prisons in *Rawlinson.* 433 U.S. at 335.

51. Neither plaintiff's nor defendant's briefs argued for the success or failure of previous employment of female guards in the Alabama maximum security prisons. The most likely explanation is that no females had been so employed.

52. Two BFOQ cases since *Rawlinson* are Fesel v. Masonic Home of Delaware, Inc., 447 F. Supp. 1346 (D. Del. 1978) and Manley v. Mobile County, 441 F. Supp. 1351 (S.D. Ala. 1977). In *Fesel,* the question was whether being female was a FBOQ for the positions of nurse's aide in a home for the elderly. *See* note 23 and accompanying text *supra.* The court first applied the *Diaz* business necessity test, and found that it was necessary for the home to provide female nurse's aides for some of the female patients. It then considered the *Weeks* "footnote five" test, and concluded the home could not deal with male nurse's aides on an individual basis. Selective work assignments would not be feasible, because of staff size limitations.

In *Manley,* the position in question was identifiable officer at the county jail. Defendant claimed that due to extraordinary circumstances (state prisoners were being put in county jails due to a court order mandating reduction of population in state prisons), a male was required for the job. The court held that the BFOQ did not apply. The identification officer did not have any supervisory duties. The position thus did not have as its "essence" maintaining order. Further, a male staff member

the employer must show that a characteristic is necessary rather than tangentially related to the position in question. Assuming the defendant demonstrates this necessity, he has two methods of proving the correlation between sex and the desired qualities. He can show that all or substantially all women (or men) do not possess the qualification. Alternatively, he can prove that it is impossible to determine which women (or men) possess the necessary qualification.

*Virginia H. Gaddy*

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could accompany the plaintiff when she fingerprinted and photographed a new prisoner. *Id.* at 1358-59.