Journal of Air Law and Commerce

Volume 58 | Issue 1 Article 5

1992

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FLIGHT ATTENDANT FURIES: IS TITLE VII REALLY THE SOLUTION TO HIRING POLICY PROBLEMS?

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I. INTRODUCTION

THE HIRING practices for airline flight attendants have changed dramatically over the past twenty years.[1] Airlines have modified or abandoned standards based on sex, age, weight, and appearance for numerous reasons. Flight attendants, women's groups, and unions first opposed airline policies on these standards in the early 1970's. Flight attendants, individually and through unions, filed lawsuits alleging discriminatory hiring standards.[2] Many of these early challenges were successful because of Title VII of the Civil Rights Act of 1964.[3]

Despite the claims of victory from flight attendant groups and unions, it was not clear whether the courts actually adopted the line of reasoning espoused by those groups for the past two decades. The claims of victory were tainted in various ways. First, settlements became more prevalent since neither the unions nor the airlines

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[1] *See* THOMAS M. ASHWOOD, THIS IS YOUR CAPTAIN SPEAKING: A HANDBOOK FOR AIR TRAVELERS 99-103 (1974) (discussing the early development of hiring practices and appearance standards); Franklin A. Nachman, *Hiring, Firing, and Retiring: Recent Developments in Airline Labor and Employment Law*, 53 J. AIR L. & COM. 31, 51-56 (1987)(discussing the development of hiring standards and their subsequent discontinuation).

[2] PAULA KANE & CHRISTOPHER CHANDLER, SEX OBJECTS IN THE SKY 84 (1974). Various groups of stewardesses organized and filed lawsuits against the airlines charging discrimination against women in hiring practices and promotional opportunities. *Id.*

[3] Civil Rights Act of 1964, § 703(a), 42 U.S.C. § 2000e-2 (1988).

wanted to endure the time and expense of prolonged litigation. Moreover, the airlines were eager to avoid the negative publicity of such lawsuits. Second, courts repeatedly denied relief on certain claims brought under Title VII and were reluctant to either expand the traditional interpretation of Title VII or apply other legislation to these claims.

Therefore, the sides compromised with settlements in which the airlines admitted neither liability nor discrimination in hiring practices.[4] Furthermore, the airlines have been successful in maintaining some sort of minimum standards for hiring that inevitably involve appearance. These so-called "grooming standards" survived because they fell outside the statutory protections of Title VII.

In fact, the true Title VII challenges came early in the history of airline policies regarding sex, age, weight and appearance. Using the sex category of Title VII, however, does not easily extend that far, as this comment will demonstrate.

Part II of this Comment traces the historical development of the commercial airlines' use of flight attendants, including an overview of the hiring standards for flight attendants and the justifications for such standards. Part III examines the enactment of Title VII of the Civil Rights Act of 1964 and its impact on the airlines, focusing in particular on the historical changes based on sex. Part IV analyzes the mixed success of current challenges based on weight, age, and appearance. Part V considers the latest analysis that the courts have used and assesses the potential future success of challenges.

II. HISTORICAL DEVELOPMENT

The use of commercial aircraft increased dramatically

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[4] *See, e.g.*, McLoughlin v. American Airlines, Inc., No. 74C 1271/J (E.D.N.Y. Dec. 19, 1977)(Settlements of Class Action); Association of Professional Flight Attendants v. American Airlines, Inc., CA No. 4088-791E (N.D. Tex. Aug. 28, 1991) (Consent Decree).

following World War II.[5] Thirteen million passengers flew on commercial flights in 1946, an increase of 2500 percent in twenty years.[6] Although the general strategy of selling air travel developed in the 1920's, air travel was essentially limited to businessmen and the wealthy.[7] The advancements in the cost-efficiency, size, and speed of aircraft helped air travel grow into mass transportation.[8] As demand grew and competition increased, the airlines started to compete with the ultimate sales pitch: the stewardess.[9] Although various airlines had used stewardesses since the 1930's, the role and perception of the stewardess changed following World War II.

The first flight attendant flew on Boeing Air Transport, a predecessor of United Air Lines, on May 15, 1930.[10] The company planned to hire stewards to help passengers during the flights but as an experiment hired a young woman instead.[11] That young woman and the ones who followed thus became stewardesses. The first stewardesses employed by the airlines were registered nurses, chosen not only because they were able to treat illnesses on board but also because they were institutionally trained and accustomed to discipline.[12]

Other airlines followed by hiring female nurses as well. What began as the experimental use of women for serving sandwiches and refreshments on commercial aircraft led to the current socialization that the job of flight attendant was for women only.[13] Although airline management was pleased with the use of stewardesses, all of the parties in-

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[5] KENNETH HUDSON, AIR TRAVEL: A SOCIAL HISTORY 119 (1972).

[6] ASHWOOD, *supra* note 1, at 98.

[7] HUDSON, *supra* note 5, at 73.

[8] *Id.* at 119.

[9] ASHWOOD, *supra* note 1, at 98.

[10] *Id.*

[11] KANE & CHANDLER, *supra* note 2, at 97-98.

[12] ASHWOOD, *supra* note 1, at 99.

[13] *See* Nadine Taub, *Keeping Women in Their Place: Sterotyping Per Se as a Form of Employment Discrimination*, 21 B.C. L. REV. 345, 349 (1980); Pamela Whitesides, *Flight Attendant Weight Policies: A Title VII Wrong Without a Remedy*, 64 S. CAL. L. REV. 175, 188 (1990).

volved did not share the excitement. At first, the women met only opposition. One of the first stewardesses said that the pilots did not want them on the planes at all, and the wives of the pilots were equally unhappy about the idea.[14] Nevertheless, the airlines eventually respected the nurses as professionals and important members of the crew.[15]

Later developments changed not only the hiring requirements for stewardesses but also the perception of them as parts of the flight crew. World War II caused a shortage of nurses, and the airlines were forced to drop the nursing requirement for hiring.[16] Moreover, soldiers returning from World War II indirectly brought another change in hiring practices. Thousands of soldiers returned from the Far East after having experienced the obedience and femininity of the Asian women.[17] According to studies, the soldiers looked for the "ultimate femininity", and that trait became a commodity for selling goods.[18] Also, increasing competition between the airlines forced the airlines to look for ways to attract customers. As a result of these factors, the airlines created and combatted the increased competition with a "new and improved" stewardess.

The new trend forced stewardesses to be young, beautiful, and single in order to attract the predominantly male customers.[19] The stewardess, as the ultimate sales pitch, had to be the ultimate woman. Many airlines required that flight attendants be women under 25 years of age, under 115 pounds, and under 5 feet 4 inches.[20] The stewardess became the image of the industry and the lure for air traveling businessmen.

According to studies of the industry, all of the airlines

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[14] HUDSON, *supra* note 5, at 46.
[15] *Id.* at 47.
[16] KANE & CHANDLER, *supra* note 2, at 102.
[17] Whitesides, *supra* note 13, at 182.
[18] ASHWOOD, *supra* note 1, at 97-98.
[19] KANE & CHANDLER, *supra* note 2, at 102.
[20] ASHWOOD, *supra* note 1, at 99.

moved toward what commentators have called the "sex object" criteria for hiring flight attendants.[21] The airlines continued to enforce the earlier age, weight, and height standards. Additionally, they imposed strict standards of appearance and grooming for flight attendants.[22] For example, girdles were required and glasses forbidden.[23] Some airlines required all flight attendants to wear only one shade of lipstick such as TWA red.[24] Critics have asserted that the flying "playboy experience" and the "Hefner-esque" atmosphere was the model for the industry.[25]

The airlines created entire marketing campaigns around the new and ideal model of the flight attendant. For example, Braniff International advertised the "end of the plain plane" slogan accompanied by new exotic flight attendant wardrobes.[26] The airlines competed to have the flashiest costumes and sexiest slogans.[27] Continental introduced the "We really move our tails for you" campaign, and Southwest Airlines served "love potions" and "love bites" at thirty thousand feet.[28] In an era of hot pants and mini skirts, the flashier the uniform, the more attention the airlines attracted. Of course, the young and attractive flight attendants were the key to the success of such marketing tactics.

The airlines justified their strict hiring standards for gender, age, and appearance by assertions that their customers preferred seeing young, attractive, single women.[29] They also argued that their sales were due to the

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[21] *See* Whitesides, *supra* note 13, at 183 (to compete, most of the airlines adopted policies regarding sex, age, and appearance).

[22] *Id.* at 184. Applicants were not hired if they were black, needed to wear eyeglasses, or did not have a "good figure." In short, applicants were evaluated and hired based mainly on their value as "sex objects". *Id.*

[23] ASHWOOD, *supra* note 1, at 102.

[24] *Id.*

[25] *Id.* at 103.

[26] KANE & CHANDLER, *supra* note 2, at 103 (wardrobes of the different airlines consisted of hot-pants, peekaboo pettipants, lounging pajamas, and "love at first flight" buttons).

[27] *Id.*

[28] *Id.* at 54, 294.

[29] *See* Wilson v. Southwest Airlines Co., 517 F. Supp. 292, 294-95 (N.D. Tex.

success of their marketing campaigns. Southwest Airlines in particular claimed that its attractive flight attendants were the "largest single component" of its success.[30] The airline's own surveys of customers' preferences showed, however, that "courteous and attentive hostesses" ranked fifth in importance behind on-time departures, frequent departures, helpful reservations and ground personnel, and convenient departure times.[31]

Meanwhile, some detractors argued that such strict hiring requirements were not necessary to ensure passenger safety and to provide the most efficient and safe evacuation in the event of an emergency. In fact, courts started defining the specific purpose of the airlines and the flight attendants in reaching their decisions.[32] Those definitions were the basis of some of the earliest reforms in hiring. Federal Aviation Regulation 121-391 stated that the function of the stewardess was "to provide the most efficient egress of passengers in the event of an emergency evacuation."[33] No court or regulatory agency found that the purpose of the stewardess was to attract customers and attention with beauty and flashy costumes. Thus, women's groups complained that the strict hiring standards had nothing to do with the job of the flight attendant.[34]

The feminist revolt swept through the airline industry in the 1970's.[35] The revolt was led by stewardess unions and ad hoc groups of stewardesses.[36] The groups organized to formally protest hiring standards and treatment of stewardesses.[37] One common argument of the flight at-

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1981) (arguing that the use of beautiful women and flashy costumes was no small part of the airlines' enormous recent success).

[30] *Id.* at 295.

[31] *Id.* at 295-96.

[32] *See* Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 440 (D.C. Cir. 1976) (defining the purpose of the flight attendant as ensuring the safety of passengers during an emergency), *cert. denied*, 434 U.S. 1086 (1978).

[33] ASHWOOD, *supra* note 1, at 100.

[34] KANE & CHANDLER, *supra* note 2, at 84.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 92. One of these groups was Stewardesses For Women's Rights which planned lawsuits against airlines charging discrimination against women in weight

tendants was that the hiring standards used had no relation to the ability of an applicant to perform the required duties. For example, one court set out a very comprehensive list of duties including physical activities, emergency duties, and working conditions which comprised a flight attendant's regular job requirements.[38] Physical activities included lifting up to 25 pounds regularly and 50 pounds occasionally, prolonged walking, prolonged standing, repeated bending and stooping, occasional overhead reaching, kneeling, pushing, and pulling. Emergency duties included performing the Heimlich maneuver, lifting emergency window exits, carrying children, pushing passengers down slides, assisting with life rafts, and operating emergency equipment.[39] Again, the courts did not find that the stewardesses' duties included being beautiful or looking good in hot pants. Thus, requiring the flight attendants to play the part of the beautiful, young, and subservient female was a source of contention between the employees and the airlines. As the tension increased between the airlines and the stewardesses, several lawsuits materialized, and flight attendants began to win cases under Title VII of the Civil Rights Act of 1964.

III. CIVIL RIGHTS ACT OF 1964

The 1970's witnessed great changes in the hiring standards that airlines could legally use.[40] The most significant influence on the airline industry was Title VII of the Civil Rights Act of 1964.[41] The Civil Rights Act prohibits discrimination based on race, color, religion, sex, and na-

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restrictions, promotional opportunities, and hiring practices. Another group composed of slightly older flight attendants was called Mary Poppins, presumably named for the fictional governess who flew with such dignity. *Id.*

[38] *Id.*

[39] Burwell v. Eastern Air Lines, Inc., 633 F.2d 361, 365-66 (4th Cir. 1980) (defining the duties of the flight attendants to determine whether the airline policy of automatic reassignment of pregnant flight attendants had a rational basis or safety reason).

[40] *See* Nachman, *supra* note 1, at 51-56 (discussing challenges to sex, marital status, and pregnancy restrictions under Title VII analysis).

[41] Civil Rights Act of 1964, § 710, 42 U.S.C. § 2000 (1988).

tional origin. The prohibition of sex discrimination in Title VII was continually relied on by stewardesses to show that hiring practices were unfair and illegal.

Ironically, the sex discrimination provisions of the Act were added one day prior to the House passage of an amendment by Howard Smith, Chair of the House Ways and Means Committee.[42] The apparent intent of his action was to prevent the passage of the Act by confusing the issues and adding an unpopular section to the Act.[43] The plan failed, however, and the section prohibiting sex discrimination had the greatest effect on the airline industry and provided the basis for challenging the airline hiring standards. Although there was some discussion following the enactment of the Act about whether sex was actually a protected category under Title VII, the amendment of the Act by the Equal Employment Opportunity Act of 1972 showed that Congress intended to combat discrimination against women as well as other protected groups.[44]

The Civil Rights Act provides:

> (a) It shall be an unlawful employment practice for an employer-
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> (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 race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[45]

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[42] 110 CONG. REC. 2577 (1964).

[43] Denis Binder, *Sex Discrimination in the Airline Industry: Title VII Flying High*, 59 CAL. L. REV. 1091, 1092 (1971).

[44] H.R. REP. No. 92-238, 92d Cong., 2d Sess. (1971), *reprinted in* 1972 U.S.C.C.A.N. 2140-41.

[45] Civil Rights Act of 1964, § 703, 42 U.S.C. § 2000e-2 (1988).

The Act also established the Equal Employment Opportunity Commission (EEOC) to help eliminate unlawful employment practices.[46] The EEOC is vested with the responsibility of interpreting and administering the Act by issuing employment guidelines and opinion letters. In addition, the EEOC can hear complaints and file lawsuits.[47] EEOC decisions are not law, but they are afforded a great deal of deference by courts.[48]

Section 703e does provide an exception to the prohibitions of the Civil Rights Act for Bona Fide Occupational Qualifications (BFOQ's). It is not unlawful for an employer to hire and employ employees on the basis of religion, sex, or national origin where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.[49] Thus, while the Act seeks to provide equal opportunity for employees, employers do have the opportunity to demonstrate that one of these categories is necessary for the operation of the business.

While the flight attendants were successful in arguing that hiring practices were unfair and discriminatory under Title VII, employers argued that their practices should be protected under the BFOQ exception. Thus, court decisions were important not only in interpreting the meaning of Title VII and its protection against sex discrimination, but also in defining exactly what exceptions employers could successfully use to avoid Title VII violations. Hiring only women for flight attendant positions provided the ground for landmark decisions based on Title VII.

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[46] 42 U.S.C. § 2000e-4 (1988).

[47] *Id.* § 2000 3-5(a).

[48] *See* Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971)(stating that "the administrative interpretation of the Act by the enforcing agency is entitled to great deference"); *see also* Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971) (following the Supreme Court's holding), *cert. denied*, 404 U.S. 950 (1971); Binder, *supra* note 43, at 1094 (stating that the courts do give deference to the agency vested with the duty of interpreting the Act).

[49] 42 U.S.C. § 2000e-2(e) (1988).

A. SEX

The Civil Rights Act brought significant changes to the airline industry and invalidated hiring practices used by the airlines since the 1930's.[50] The earliest changes in the industry came from challenges of hiring practices based on sex discrimination. *Diaz v. Pan American World Airways*[51] is the most historic case and earliest major decision using Title VII to invalidate the airline policy of hiring only females as flight attendants. The Fifth Circuit Court of Appeals in *Diaz* stated that the Civil Rights Act of 1964 was meant to provide equal access to the job market for men and women.[52] Thus, Pan Am's policy of hiring only females for flight attendant positions was discriminatory within the meaning of Title VII.[53]

Pan Am tried to argue that being female was a BFOQ for a flight attendant position. It based this argument on alleged passenger preference for females and their ability to better tend to the psychological needs of passengers.[54] The Fifth Circuit rejected those BFOQ arguments and held that the language in the Act required a BFOQ to be a business necessity, not a business convenience.[55] The court held that "discrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively."[56] The court also defined the primary function of the airlines, further limiting the airlines' ability to stretch the business necessity requirement. The primary function

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[50] *Id.* § 2000e(2)(a)-(d).

[51] 442 F.2d 385, 389 (5th Cir. 1971).

[52] *Id.* at 386. Although there was little legislative history, the court stated that "it is reasonable to assume, from a reading of the statute itself, that one of Congress' main goals was to provide equal access to the job market for both men and women." *Id.* The purpose of the Act was to create a foundation for nondiscrimination. *Id.*

[53] *Id.* at 388.

[54] The trial court based its decision to allow Pan Am to continue its hiring practices on finding that Pan Am's passengers overwhelmingly preferred female stewardesses and that the females were better able to tend to the psychological needs of passengers. *Id.* at 387.

[55] *Id.* at 388.

[56] *Id.*

of the airlines, as determined by the court, was to safely transport passengers; a pleasant environment was merely tangential.[57]

The airlines' arguments that customers preferred female flight attendants and that marketing campaigns were based on a sex appeal theme did not change the outcome of cases similar to *Diaz*. Southwest Airlines asserted that its entire marketing campaign was based on the sex appeal of its female flight attendants and that the flight attendants were the "largest single component" of its financial success.[58] As in *Diaz*, the court held that customer preference was not a BFOQ.[59] The court adhered to the EEOC's pronouncement that "the bona fide occupation qualification as to sex should be interpreted narrowly."[60] The EEOC steadfastly adhered to its position that the only time a BFOQ is to be based on sex is "[w]here it is necessary for the purpose of authenticity or genuineness . . . e.g. an actor or actress."[61] Moreover, the Fifth Circuit in *Wilson v. Southwest Airlines Co.* set out the BFOQ two-step analysis.[62] The test asked (1) does the particular job under consideration require that the worker be of one sex only; and if so, (2) is that requirement reasonably necessary to the "essence" of the employer's business.[63]

Based on the two-step test, courts have held that the

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[57] *Id.*

[58] "From the start, Southwest's attractive personnel, dressed in high boots and hot-pants, generated public interest and 'free ink.' Their sex appeal has been used to attract male customers to the airline. Southwest's flight attendants . . . have been featured in newspaper, magazine, billboard and television advertisements during the past ten years." Wilson v. Southwest Airlines Co., 517 F. Supp. 292, 295 (N.D. Tex. 1987).

[59] *Id.* at 298.

[60] *Id.* (*citing* EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2(a) (1965)).

[61] *Id.* (*citing* EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2(a)(2), *as amended* by 45 Fed. Reg. 74,676 (1980)).

[62] *Wilson*, 517 F. Supp. at 299. The court's two-step analysis mirrored that announced previously by the Fifth Circuit. *Diaz*, 442 F.2d at 385; Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969).

[63] *Wilson*, 517 Supp. at 299.

airline policy of hiring females only for the job of flight attendant was discriminatory because sex was not a requirement for the job and did not relate to the essence of the business.[64] The gender provision in the Civil Rights Act as well as the two-step test were also used in other challenges to hiring policies such as the requirement that all stewardesses be unmarried.

B. MARITAL STATUS

Later decisions held that requiring female flight attendants to be unmarried violated Title VII.[65] The decisions stated that applying the unmarried requirement only to females discriminated where no such policy existed for male employees.[66] At the time the marital status cases were decided, they expanded the interpretation of Title VII. The Seventh Circuit Court of Appeals explained its rationale by stating that Section 703(a)(1) of the Civil Rights Act of 1964 was not confined to explicit discrimination "solely" on the basis of sex.[67] Instead, "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. Section 703(a)(1) subjects to scrutiny and eliminates such irrational impediments to job opportunities and enjoyment which have plagued women in the past."[68]

Courts rejected the arguments from airlines that marital status should be viewed as a BFOQ. In *Sprogis v. United Airlines*, for example, the court held that the airline failed

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[64] *Id.*

[65] *See* Sprogis v. United Airlines, 444 F.2d 1194, 1198-99 (7th Cir. 1971) (holding that forbidding female flight attendants from marrying was sex discrimination), *cert. denied*, 404 U.S. 991 (1971); *see also* Jurinko v. Edwin L. Wiegand Co., 477 F.2d 1038, 1044 (3d Cir.), *vacated on other grounds*, 474 U.S. 970 (1973); Inda v. United Air Lines, Inc., 405 F. Supp. 426, 433 (N.D. Cal. 1975), *aff'd in part and vacated in part on other grounds*, 435 F.2d 554 (9th Cir.), *cert. denied*, 435 U.S. 1007 (1977) (all holding that requiring female employees to be unmarried where there was no such policy for male employees constituted sex discrimination).

[66] *Sprogis*, 444 F.2d at 1199; Colvin v. Piedmont Aviation, Inc., EMPL. PRAC. GUIDE (CCH) ¶ 6003 (EEOC 1968).

[67] *Sprogis*, 444 F.2d at 1198.

[68] *Id.*

to offer any salient rationale to support marital status as a BFOQ.[69] The court rejected the airlines' BFOQ arguments which included 1) customers prefer single women, 2) marriage will lead to a drop in charm, efficiency, and reliability, 3) working conditions and hours would detrimentally affect a married person's home life, and 4) the probability of pregnancy is much higher in married women.[70]

The court used the business necessity argument from *Diaz* to support its finding that customer preference of flight attendants' marital status was irrelevant.[71] Moreover, the court held that marital status did not affect the flight attendant's ability to perform her job and found no merit to the arguments regarding a drop in efficiency and reliability.[72] It found that the no marriage policy discriminated against women by depriving them of the fundamental right of marriage when not applying the same policy to male employees.[73]

C. PREGNANCY

Courts also held that the airlines' automatic termination policies of pregnant flight attendants constituted sex discrimination under Title VII.[74] The decisions pointed out that, similar to marriage requirements, the airlines estab-

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[69] *Id.*

[70] *Id.*; Cooper v. Delta Air Lines, Inc., 274 F. Supp. 781, 782 (E.D. La. 1967); American Airlines, Inc. v. Transport Local 550, 67-1 Lab. Arb. Awards (CCH) ¶ 4356, at 4256 (1968); Neal v. American Airlines, Inc., EMPL. PRAC. GUIDE (CCH) ¶ 6002, at 4013 (EEOC 1968); Binder, *supra* note 43, at 1104-05.

[71] *Sprogis*, 444 F.2d at 1199.

[72] *Id.*

> United has presented no direct, rational, or reasonably limited connection between marital status, job performance, and its no-marriage rule for stewardesses. United has failed to explain why marriage should affect female flight cabin attendants' ability to meet the requirements of that position while at the same time leaving unimpaired the capabilities of male flight personnel, particularly stewards.

Id.

[73] *Id.*

[74] *See* Burwell v. Eastern Air Lines, Inc., 633 F.2d 361, 365-66 (4th Cir. 1980) (holding loss of seniority and mandatory reassignment discriminatory); Gardner

lished policies which interfered only with employment opportunities of women.[75]

The decisions involving pregnant flight attendants also addressed seniority issues and required leave policies. Courts disallowed policies taking all seniority from pregnant flight attendants.[76] For example, Eastern established a policy in a collective bargaining agreement requiring all employees to be transferred to non-flying duties due to physical incapacity, sickness, or injury.[77] Employees with physical impairments, injuries, and sicknesses were able to retain seniority rights during such transfers. Under Eastern's interpretation of the agreement, however, physical impairments, or sicknesses or injury did not include pregnancy. Thus, flight attendants could not keep or accrue seniority if they became pregnant.[78] The court held that although the policy appeared neutral on its face, it impacted women by depriving them of employment opportunities.[79] Therefore, the court held that the policy was a violation of Title VII.[80] There was no justification for depriving only women of the right to keep and accrue seniority where no such policy applied to men.

Courts also reviewed mandatory leave policies and held that mandatory leave for the first thirteen weeks of pregnancy violated Title VII but mandatory leave after week thirteen was allowable as a business necessity.[81] The court stated that in both categories, the key issue was whether the mandatory leave policy was needed to ensure

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v. National Airlines, Inc., 434 F. Supp. 249, 258 (S.D. Fla. 1977) (challenging maternity policies).

[75] *Burwell*, 633 F.2d at 372-73; *Gardner*, 434 F. Supp. at 258-59.

[76] *Burwell*, 633 F.2d at 364-65.

[77] *Id.* at 364.

[78] *Id.*

[79] *Id.*

[80] *Id.* at 365.

[81] *Id.* at 367, 371-72. The court found that the airline could not possibly uniformly identify flight attendants who would have difficulties with their pregnancies before such events; therefore, during the first 13 weeks, flight duty should be the choice of the attendant. After the first 13 weeks, the airline may make such a judgment. *Id.* at 372.

passenger safety.[82] The court held that, although neutral on its face, Eastern's mandatory leave affected only one class of employees, pregnant women, and had a disproportionate impact on the opportunities of that group.[83]

Establishing a business necessity was the only defense that courts allowed. The airline failed to prove that mandatory leave during the first thirteen weeks of pregnancy was necessary for the safety of the passengers.[84] The court did hold that the airline's leave policy after week thirteen was a business necessity.[85]

In 1978, Congress passed the Pregnancy Discrimination Act (PDA)[86] as an amendment to Title VII of the Civil Rights Act. The PDA makes it illegal for employers to fire or refuse to hire women because of pregnancy, or to demote or deny promotions because of pregnancy.[87] The law states that "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."[88]

Critics argued that, despite early cases against the airlines and the PDA's specific prohibitions within Title VII, they expected airlines and other industries to continue to discriminate against pregnant women.[89] They contended that the trend was moving away from policies which blatantly discriminated to more disguised practices that involved terms and conditions of employment.[90] Although the EEOC's figures showed a decline in claims filed against employers since the mid 1980s, it reported nearly

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[82] *Id.* at 365.
[83] *Id.* at 369.
[84] *Id.* at 371.
[85] *Id.*
[86] Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1981).
[87] *Id.* §§ 2000e(k), 2000e-2 (1981).
[88] *Id.* § 2000e(k).
[89] *Women's Groups Say Pregnancy Bias Persists 13 Years After Amendment to Title VII*, DAILY LAB. REP., July 16, 1991, DLR No. 136, at C-1.
[90] *Id.*

2900 charges were filed in 1990.[91] In March of 1991, USAir agreed to pay $270,000 in back pay and interest under a consent decree involving charges of pregnancy discrimination brought by flight attendants.[92] The EEOC sued USAir for its policy forcing flight attendants to take maternity leave after the thirteenth week of pregnancy. USAir has discontinued that policy and, without admitting guilt, agreed to the terms of the settlement including back pay to flight attendants.[93] Most airlines now allow flight attendants to work until their last trimester of pregnancy.[94] An EEOC attorney stated that the pregnancy challenge would probably be "one of the last" of the cases on the pregnancy issue in the airline industry.[95]

All of these challenges provided the structure for the current Title VII analysis used to evaluate the claims of discrimination based on age, weight, and appearance. The newest claims used these historical challenges not only for standards for hiring but also for methods of analysis and tests. The language regarding equal employment opportunity and sexual stereotyping bolstered current challenges and provided a framework for analyzing claims. Most critical in this analysis was the development of standards for evaluation and the definition of the BFOQ.

IV. CURRENT CHALLENGES

The most recent challenges to airline hiring practices were based on a number of different theories including age, weight, and appearance discrimination. The courts used the traditional methods of evaluating discrimination in these cases. Because some challenges were repeatedly unsuccessful, the parties resorted to several different bases for challenging hiring practices.

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[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*

In fact, the parties did not have extremely strong arguments for placing those discrimination theories under a Title VII analysis. The challenges were not as clearly based on sex discrimination as were the earlier challenges against employment policies by males, married females, and pregnant females. The traditional standards used in the earlier suits for evaluating discrimination included sex-plus, disparate impact, and disparate treatment.[96] Although those standards were successful in early challenges based directly on sex, they were not as successful in demonstrating discriminatory practices in the areas of weight, age, and appearance.

A. STANDARDS

The courts traditionally evaluated discrimination suits under Title VII based on one of three methods. The first method, sex-plus, was used when an employee or applicant was treated differently than one of the opposite sex on the basis of a Title VII criteria (such as race) or on the basis of some neutral criteria.[97] That different treatment was prima facie sex discrimination. The most often cited case to illustrate sex-plus is *Phillips v. Martin Marietta Corp.*[98] The Supreme Court held in *Phillips* that a company policy not to accept job applications from women with pre-school-age children was discriminatory where the same policy was not enforced for men.[99] The Court refined the sex-plus analysis to include gender, plus some other factor which is immutable or which is a fundamental right.[100] Thus, the policies forbidding married females would fail under a sex-plus analysis. The policies discriminated on the basis of sex, plus a fundamental right of marriage. The limitations regarding immutable factors or fundamental rights were crucial to the current challenges.

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[96] *See infra* notes 97-112 and accompanying text.
[97] *E.g.*, Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).
[98] *Id.* at 543-44.
[99] *Id.* at 544.
[100] Whitesides, *supra* note 13, at 203.

Second, courts used disparate treatment analysis to examine discrimination claims.[101] Disparate treatment occurred when an employer treated some people less favorably than others because of race, color, religion, sex, or national origin. Proof of motive was critical in this analysis, and the courts developed an order of proof to isolate improper motives.[102] In proving disparate treatment, the plaintiff had the initial burden of proof to show the discriminatory treatment. If the plaintiff fulfilled this initial burden, the burden then shifted to the defendant to show a neutral, non-discriminatory reason for the treatment. The plaintiff then could demonstrate that the neutral reason given was not the true reason for the treatment.[103] In some cases, facially different treatment itself implied intent.[104] For example, where a claim was based upon a policy that applied less favorably to one sex on its face, the plaintiff need not establish any other discriminatory intent.[105] The BFOQ exception was an accepted defense to a charge of disparate treatment.

Third, the courts used disparate impact to show that discrimination existed.[106] Disparate impact analysis differed from disparate treatment because the impact analysis involved practices that were facially neutral but fell more harshly on one group than another and were not justifiable under business necessity.[107] Moreover, proof of discriminatory motive was not required under disparate

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[101] *Phillips*, 400 U.S. at 543-44; Gerdom v. Continental Airlines, Inc., 692 F.2d 602, 608 (9th Cir. 1982), *cert. dismissed*, 460 U.S. 1074 (1983).

[102] *Gerdom*, 692 F.2d at 608.

[103] *Id.*

[104] *E.g.*, International Bd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

[105] *Gerdom*, 692 F.2d at 608.

[106] *See* Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971) (finding employer's use of educational requirements were facially neutral but had disparate impact on races); *Gerdom*, 692 F.2d at 611 (defining the theory as based on the analysis in Griggs v. Duke Power Co.); Barbara A. Norris, *Multiple Regression Analysis in Title VII Cases: A Structual Approach to Attacks of "Missing Factors" and "Pre-Act Discrimination*, 49 LAW & CONTEMP. PROBS. 63, 68 (1986) (demonstrating negative impact by statistical evidence).

[107] *Gerdom*, 692 F.2d at 611.

impact.[108] A plaintiff was required to demonstrate only that a policy had a larger impact on members of one group than another. The existence of a business necessity was an applicable defense to the disparate impact analysis.

The United States Supreme Court illustrated the disparate impact analysis in *Dothard v. Rawlinson*.[109] The plaintiff there claimed that statutory height and weight requirements to serve as a prison guard were facially neutral but disproportionately excluded women from employment. For example, the minimum height and weight requirements excluded 41.13 percent of the female population but less than one percent of the male population.[110] Since the plaintiff showed the discriminatory effect of the requirements, the burden shifted to the defendant to show a business interest.[111] In that particular case, the Court held that the defendants established a sufficient justification of the requirements.[112]

Again, defenses were recognized under Title VII. The most often used was the BFOQ.[113] The BFOQ exception allowed certain practices as long as they were reasonably necessary to the normal operation of that business or enterprise.[114] Thus, in all of the analysis based on sex-plus, disparate treatment, and disparate impact, the employer always had the opportunity to show that the treatment of certain groups was reasonably necessary. It is important to note, however, that the courts consistently held that a BFOQ should be defined narrowly.[115] They rejected cus-

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[108] *International Bd. of Teamsters*, 431 U.S. at 335-36; *Gerdom*, 692 F.2d at 611.

[109] 433 U.S. 321, 329 (1977).

[110] *Id.* at 329-39.

[111] *Id.*

[112] *Id.* at 331. "There was substantial testimony from experts on both sides of this litigation that use of women as guards in 'contact' positions under the existing conditions in Alabama maximum-security male penitentiaries would pose a substantial security problem, directly linked to the sex of the prison guard." *Id.* at 336.

[113] Civil Rights Act of 1964, § 703(a), 42 U.S.C. § 2000e-2(e) (1988); EEOC Dec. No. 71-1103, EMPL. PRAC. GUIDE (CCH) ¶ 6203 (EEOC 1971).

[114] 42 U.S.C. § 2000e-2(e).

[115] EEOC Dec. No. 71-1103, at ¶ 6203.

tomer preference[116] and held that a BFOQ must qualify as a business necessity.[117] Therefore, the business necessity test is a rather strict test to meet.

The EEOC has held that the burden of proof is on the employer to demonstrate that a BFOQ applies to a particular job.[118] Moreover, to rely on a BFOQ, the employer must prove that he had a factual basis for believing that all or substantially all people in a particular group are unable to perform the duties of a job efficiently and safely.[119] Relying on the Fifth Circuit opinion in *Weeks v. Southern Bell Telephone & Telegraph Co.*, the EEOC agreed that employers may not assume on the basis of sexual stereotypes that one group would be unable to perform the particular duties of a job.[120]

In addition, the Supreme Court held that the BFOQ exception was intended to be an extremely narrow exception in the case of sex discrimination.[121] The Court reached that decision based on the language of section 703(e) as well as the legislative history of the Act.[122] Moreover, the Court stated that it relied on the EEOC's consistent rulings that the BFOQ exception was meant to be extremely narrow.[123] The Court therefore denounced any stereotyping of the sexes and "romantic paternalism," but at the same time held that sufficient proof of safety or other necessary criteria were legitimate bases for holding that a particular requirement should fall within a

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[116] Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 388 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971).

[117] *Id.*; Wilson v. Southwest Airlines, Co., 517 F. Supp. 292, 299 (N.D. Tex. 1981).

[118] EEOC Dec. No. 71-1103, at ¶ 6203.

[119] *Id.*; Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235-36 (5th Cir. 1969).

[120] EEOC Dec. No. 71-1103, at ¶ 6203; *Weeks*, 408 F.2d at 235-36.

[121] Dothard v. Rawlinson, 433 U.S. 321, 334 (1977).

[122] *Id.*

[123] *Id.* "We are persuaded—by the restrictive language of § 703(c), the relevant legislative history, and the consistent interpretation of the Equal Employment Opportunity Commission—that the BFOQ exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex." *Id.*

BFOQ.[124]

Courts began to require employers to prove that hiring criteria are necessary to safe and efficient job performance.[125] Relying on *Weeks v. Southern Bell Telephone & Telegraph Co.*, the Supreme Court agreed that employers must show a factual basis that all members of a protected group would be unable to perform the duties of a job.[126] For example, the Supreme Court upheld a state prison requirement that guards be exclusively men because the prison presented evidence that the standard was based on concerns over safety and a woman's ability to maintain order in a maximum-security male prison.[127] The Court reached that decision exclusively because the prison demonstrated sufficiently that women could not perform the job.[128] Thus, the factual basis and proof were critical to a successful defense.

Courts also held that Title VII was enacted to provide equal opportunity, not to tell business owners how to conduct their businesses.[129] In *Willingham v. Macon Telegraph Publishing Co.* the court held that the Civil Rights Act should be narrowly construed in view of congressional purpose.[130] Keeping with that reasoning, the court said that equal employment opportunity could not be barred on the basis of immutable characteristics such as race and sex.[131] The court then articulated the difference between the historical challenges to discrimination and the new cases using Title VII to protect weight and appearance. The court said, "[A] line must be drawn between distinctions grounded on such fundamental rights as the right to have children or to marry and those interfering with the

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[124] *Id.* at 335.

[125] *Id.* at 333.

[126] *Id.* (citing Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969)).

[127] *Id.* at 335.

[128] *Id.*

[129] *E.g.*, Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084, 1092 (5th Cir. 1975).

[130] *Id.* at 1091.

[131] *Id.*

manner in which an employer exercises his judgment as to the way to operate a business."[132] The court stated that characteristics such as hair length are not immutable and do not enjoy constitutional protections. "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."[133] The statements in *Willingham* certainly seemed to delineate between the historical challenges to sex discrimination and the newer challenges most closely related to physical appearance and grooming. The statement also showed that similar reasoning could prevail against the newer challenges based on characteristics such as weight.

B. WEIGHT

1. Background

The most controversial and varied results occurred in cases challenging weight standards of the airlines.[134] The airlines unquestionably became more lenient in their weight policies over time. The first absolute weight limits of 115 pounds were changed and the airlines continued to increase the weight limits as they were challenged. The most recent case which involved American Airlines, however, showed that the airlines were reluctant to give up their weight standards altogether, and the courts did not force the airlines to forfeit them.[135]

American Airlines in particular was recently under fire for its weight limit policies. Specifically, its critics claimed that the weight limits were unfair because the limits were very strict for height categories and did not give special

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[132] *Id.*

[133] *Id.*

[134] *See* Whitesides, *supra* note 13, at 195 (arguing that weight restrictions are one of the last sexist areas remaining in the airline industry).

[135] Terry Maxon, *A Little Breathing Room: American Eases Weight Limits for Attendants*, DALLAS MORNING NEWS, Mar. 13, 1991, at 4D.

weight allowances for different age categories.[136] Critics claimed that American's policies were much stricter than weight charts developed in 1983 for Metropolitan Life Insurance Company's table of ideal weights for people of medium frame.[137] That criticism was in fact valid. For example, the weight limit for a 5 foot 2 inch female employed by American was 118 pounds compared to Metropolitan's ideal weight of 132 pounds, a difference of fourteen pounds. The difference between the two standards for a 5 foot 6 inch female was eleven pounds, and the difference for females 6 feet tall was five pounds.[138]

The critics' main argument was that the policies applied more strictly to women than to men in comparison with the Metropolitan standards.[139] Females at any height were required to weigh less than the Metropolitan standards, while men 5 feet 7 inches and taller could weigh more than the standards; in fact, males 6 feet tall could weigh 10 pounds more than the Metropolitan standards.[140] Critics argued that such weight policies were not only discriminatory but also dangerous to the health

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[136] Whitesides, *supra* note 13, at 195-96.

[137] *Id.* at 196.

[138] Amy Stromberg, *Weight Policy Protested*, DALLAS TIMES HERALD, Mar. 31, 1987, at C1.

Weight Limits for American Airlines Compared to Metropolitan Life Insurance Company

Height	AA Female	ML Female	Difference	AA Male	ML Male	Difference
5'2"	118	132	14	130	141	11
5'3"	121	135	14	135	143	8
5'4"	125	138	13	140	145	5
5'5"	129	141	12	145	148	3
5'6"	133	144	11	150	151	1
5'7"	137	147	10	155	154	(1)
5'8"	141	150	9	160	157	(3)
5'9"	145	153	8	165	160	(5)
5'10"	149	156	7	170	163	(7)
5'11"	153	159	6	175	166	(9)
6'0"	157	162	5	180	170	(10)

Id.

[139] Whitesides, *supra* note 13, at 195.

[140] *Id.* at 197.

of employees. For example, critics contended that studies showed the strict policies spurred eating disorders, diet pill addiction, and laxative abuse.[141] Studies claimed that many flight attendants experience these physical and psychological disorders in their constant attempt to remain thin.[142]

An important point to consider in the criticism of American Airlines in particular, was that the very weight standards criticized were the product of a settlement between the airline and Patricia McLoughlin from a suit filed in 1974.[143] The parties entered a consent decree that took effect in 1977 and created new weight standards,[144] while the airline denied at all times that its policies were discriminatory.[145] The plaintiff accepted the terms of the settlement and released all claims of discrimination against American.[146] American contended that the terms of the settlement required any future suit based on weight challenges to be heard and approved by the same court in New York which heard the *McLoughlin* challenge.

While critics attacked the fairness of weight limits, American at all times stated that weight policies were merely appearance standards.[147] For example, the airline revised the Flight Attendant Reference Manual following the 1974 weight challenge and subsequent settlement to read "[a] firm, trim silhouette, free of bulges, rolls or paunches, is necessary for an alert, efficient image."[148] Older arguments used by other parties, however, were that flight attendants over the weight limits could not "fit down the aisles" or operate emergency equipment.[149]

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[141] *Id.*; Mary Suh, *The Ms. Reporter: A Future Up in the Air*, Ms., Sept. 1989, at 83.

[142] Whitesides, *supra* note 13, at 197.

[143] McLoughlin v. American Airlines, Inc., No. 74C 1271/J, slip op. at 3 (E.D.N.Y. Dec. 19, 1977) (Order approving settlement) [hereinafter *1977 Settlement Order*].

[144] *Id.*

[145] *Id.* at 2.

[146] *Id.* at 14.

[147] Whitesides, *supra* note 13, at 198.

[148] *1977 Settlement Order*, *supra* note 143, at 2.

[149] *Id.*

Exceeding the weight requirements of the airlines did not qualify as obesity and did not automatically render flight attendants unable to perform their duties. In fact, the flight attendants are certified each year by the FAA.[150] Any flight attendant who cannot perform his or her duties properly is prohibited from flying.[151] This regular procedure is designed to determine whether an individual is capable of performing basic operational duties.

2. *Historic Success of Airlines*

The airlines were historically successful in defending weight discrimination suits, but the courts based their reasoning on several different theories. Some courts have based their decisions on the mutable characteristic argument.[152] For example, the court in *Jarrell v. Eastern Airlines* stated that there was no medical reason for a purported larger percentage of the American female population's inability to meet the weight requirements than the male population.[153] The court further stated that weight is subject to the control of the individual and is therefore a mutable characteristic.[154] This argument parallelled the *Willingham* rationale that only immutable characteristics were protected by Title VII and that mutable characteristics were under the control of the individual. Further, it is the responsibility of the individual to comply or take an-

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[150] 14 C.F.R. §§ 121.417, .421, .427 (1991). Flight attendants are trained in emergency procedures including first aid, evacuation, fire fighting, and hijacking procedures. *Id.*

[151] *Id.*

[152] *See* EEOC v. Delta Airlines, Inc., 441 F. Supp. 626, 627 (S.D. Tex. 1977) (holding that weight is a mutable characteristic), *rev'd on other grounds*, 619 F.2d 81 (5th Cir. 1980); Jarrell v. Eastern Airlines, 430 F. Supp. 884 (E.D. Va. 1977) (finding that weight is a mutable characteristic and not protected under Title VII), *aff'd*, 577 F.2d 869 (4th Cir. 1978); Peter B. Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U. CAL. DAVIS L. REV. 769 (1987) (arguing that weight, although considered a mutable characteristic by most courts, is not completely controllable and should not be so considered).

[153] *Jarrel*, 430 F. Supp. at 892.

[154] *Id.*; *cf.* Boyd v. Ozark Air Lines, Inc., 419 F. Supp. 1061, 1064-65 (E.D. Mo. 1976) (holding that height, unlike weight, is an immutable characteristic), *aff'd*, 568 F.2d 50 (8th Cir. 1977).

other job. Classifying weight as a mutable characteristic also destroyed the ability of the plaintiff to claim discrimination under Title VII using the sex-plus analysis.

Other decisions stated that no constitutional right was violated by the weight standards. According to these cases, Title VII was an expansion of the Fourteenth Amendment.[155] Without discussion, the court in *Cox v. Delta Air Lines* held that weight is not immutable nor protected under the Constitution.[156] The court in *EEOC v. Delta Air Lines, Inc.* reached the same decision.[157] Again, the argument parallelled the reasoning of the court in *Willingham* that weight is not an immutable characteristic and therefore not protected by the Constitution.[158]

Many courts have found no discrimination on the basis of the disparate impact and disparate treatment analysis.[159] Under the disparate impact analysis, the court in *Jarrell v. Eastern Airlines* found that 33.3% of the female population of the United States could meet the demands of the 1973 Eastern Airlines weight requirements while 43.5% of the males could meet them.[160] The court held, however, that this difference was merely a statistical phenomenon and did not represent any form of discrimination.[161] Moreover, the court held that although the percentage of females disciplined for exceeding weight limits exceeded that of males, that too was not sufficient enough to show legal significance.[162] The court did not place any significance on the fact that weight limits for the women were based on the small to medium frame limits

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[155] Cox v. Delta Airlines, Inc., EMP. PRAC. GUIDE (CCH) ¶ 7601 (EEOC 1976), *aff'd*, 553 F.2d 99 (5th Cir. 1977); EEOC v. Delta Airlines, Inc., 441 F. Supp. at 627.

[156] *Cox*, at ¶ 7601.

[157] EEOC v. Delta Air Lines, Inc., 441 F. Supp. at 627.

[158] *Willingham*, 507 F.2d at 1091.

[159] *Jarrell*, 430 F. Supp. at 892 (holding that statistical evidence shown was insignificant and did not prove discrimination); *In re* National Airlines, Inc., 434 F. Supp. 269, 275 (S.D. Fla. 1977)(holding statistics insufficient to establish discrimination).

[160] *Jarrell*, 430 F. Supp. at 889-90.

[161] *Id.* at 892.

[162] *Id.*

of the insurance charts while limits for men were based on the medium to large frame charts.[163]

Similarly, the Florida court in *In re National Airlines, Inc.* held that a claim that only twenty-two percent of the females in the country could meet the airlines weight limits while thirty percent of the males could was not statistically sufficient to show disparate impact or discrimination.[164] Moreover, the court held that the plaintiff failed to establish any other evidence of discrimination.[165] Beyond the statistical evidence, the court stated that the plaintiff faced a legal obstacle as well. The court quoted the language in *Willingham* that "distinctions between men and women on the basis of something other than immutable . . . characteristics do not inhibit employment opportunity in violation of [section] 703(a)."[166] Thus, the court implied that even if the airline applied different standards to men and women, it would be irrelevant to the analysis of discrimination because weight was not an immutable characteristic.

The court in *National Airlines* also discussed the commonplace argument regarding the ability of people of greater weight to perform job duties. The airline's expert pointed out that " 'tubbies' on airlines are less agile and agility is an important factor. . ."[167] The court concluded that the airline's weight program was designed to promote service and safety and did not constitute an artificial, arbitrary, or unnecessary barrier that Title VII was designed to eradicate.[168]

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[163] *Id.* at 889.

[164] *National Airlines*, 434 F. Supp. at 275.

[165] *Id.*

[166] *Id.* at 275.

[167] *Id.* at 274.

[168] *Id.* at 275.

> Plaintiff's statistics, standing alone, cannot support a claim of discrimination based on defendant's weight requirements, especially in the face of the clearly convincing evidence showing the fairness of the individual treatment of flight attendants—whether male or female . . . . National's weight program is designed to promote the twin objectives of safety and service.

Id.

3. Contrary Results

Weight standards did not always withstand pressure from flight attendants and judicial scrutiny, however. Various airlines abandoned or loosened their weight standards under pressure from women's groups and unions. For example, American Airlines twice made significant changes in the weight requirements due to pressure from its flight attendants. Those weight increases in 1977 and 1991 were both made in conjunction with settlement agreements. Time and expense of protracted litigation was a major factor in these settlements. Perhaps even more so, the airline wanted to avoid adverse publicity and salvage labor relations between the airline and the flight attendants and unions. Finally, there was the concern about the possible outcome of weight challenges. There was no guarantee that either side could prevail in a trial. Some of the airlines went even further than settlements; for example, Northwestern Airlines eliminated the use of weight standards altogether.[169]

In other cases, the courts invalidated the weight standards. Some courts held that both the standards applied to women only and the standards applied more strictly to women were discriminatory.[170] For example, the court in *Gerdom v. Continental Airlines, Inc.* held that the airline's weight program for exclusively female flight attendants constituted discriminatory treatment on the basis of sex.[171] The court rejected the argument that the weight standards were merely personal appearance standards outside of the Title VII analysis. The court did not sustain the defendant's arguments that the case was similar to those allowing different grooming standards for men and women.[172] The court based its decision on other cases holding that grooming rules did not deprive either

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[169] Suh, *supra* note 141, at 83.

[170] *Gerdom*, 692 F.2d at 610; Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 456 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

[171] *Gerdom*, 692 F.2d at 610.

[172] *Id.* at 606.

sex of employment opportunities and were applied evenhandedly to both sexes.[173] In the weight case, the court held that, unlike the grooming rules, there was a significantly greater burden of compliance on females.[174]

Some courts held that special appearance rules violated Title VII when applied to one sex and not the other.[175] In *Carroll v. Talman Federal Savings & Loan Association of Chicago*, for example, the employers required only female employees to wear uniforms. The court concluded that such a requirement was disparate treatment demeaning to women based on offensive stereotypes prohibited by Title VII.[176] The court found that the disparate treatment requiring only female employees to wear uniforms was demeaning. The court determined that "[w]hile there is nothing offensive about uniforms *per se*, when some employees are uniformed and others not 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."[177] Relying on this analysis as an example of policies applying to only one sex, the court in *Gerdom* agreed that weight policies should be viewed the same way. Thus, the court in Gerdom held that the claim did indeed fall within Title VII.[178]

More significantly, the *Gerdom* court refused to accept the airline's contention that its policy was not discriminatory because it applied to a glamorous position which both men and women sought.[179] The court discussed the harmful effects of occupational clichés and quoted the Supreme Court in *Mississippi University for Women v. Hogan*.[180] In *Mississippi University*, the Supreme Court cau-

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[173] *Id.*

[174] *Id.* "In those cases, unlike this case, no significantly greater burden of compliance was imposed on either sex; that is the key consideration." *Id.*

[175] *E.g.*, Carroll v. Talman Fed. Sav. & Loan Ass'n of Chicago, 604 F.2d 1028, 1032-33 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980).

[176] *Id.*

[177] *Id.* at 1033.

[178] *Gerdom*, 692 F.2d at 606.

[179] *Id.*

[180] 458 U.S. 718, 725 (1982).

tioned against permitting gender-based classification based on stereotypical notions of sex roles,[181] stating that the validity of gender-based classifications must not include notions concerning the traditional or stereotyped ideas of the roles of males and females.[182]

The *Gerdom* court actually reached its decision based on the disparate treatment analysis. The plaintiff sustained her initial burden of showing discriminatory policies of weight requirements of an all-female job classification. A facial examination of the evidence showed that the requirements were designed to apply only to female employees.[183] Where a claim was based on a policy which applied less favorably to one sex, the court stated that the plaintiff need not allege any discriminatory intent.[184] The court further held that the defendant, trying to use the customer preference argument to justify its policies, did not establish a non-discriminatory reason for the policies and thus did not discharge its burden.[185] Therefore, the plaintiff succeeded in showing disparate treatment.[186]

The court in *Gerdom* relied in part on the decision in *Laffey v. Northwest Airlines, Inc.*[187] In *Laffey*, the court held that the employer's preference for "trimness" could be effectuated only where males and females were treated

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[181] Justice O'Connor discussed the history of the exclusion of women from employment opportunities and noted that denying entry to men to certain professions helped to perpetrate the stereotypical view of women's work and probably depressed wages in those fields. *Id.*

[182] *Id.* at 724-25.

[183] *Gerdom*, 692 F.2d at 608.

[184] *Id.*

> The fact that this policy applied to an intentionally all-female job classification does not alter the analysis or make the policy less facially discriminatory. By Continental's own admission, the policy was enforced only against women because it was not merely slenderness, but slenderness of female employees which Continental considered critical.

Id.

[185] *Id.* at 609.

[186] *Id.* at 610.

[187] *Id.* at 606 (citing Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 457 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978)).

equally.[188] The court relied on an EEOC regulation that no employee selection policy could be used for a group of people who fell under Title VII and who, but for prior discrimination, would be able to qualify under less strict standards.[189] The holding stated, however, that as long as the company treated men and women equally, the court could not say that weight requirements were discriminatory or unreasonable.[190] Therefore, although *Laffey* was often cited in support of invalidating weight standards, the court made a rather definitive statement that its action was not to invalidate weight standards because they were in themselves discriminatory. In fact, the court reached its decision only because men and women were treated differently. The fact that airlines now apply strict standards to both men and women has made challenges on that basis of sex discrimination difficult.

An interesting contrast to the weight case was the challenge to height limits. Courts upheld height requirements for pilots as a business necessity.[191] In *Boyd v. Ozark Air Lines, Inc.*,[192] the plaintiff challenged the airline's minimum height requirement for pilots, charging that it had a disparate impact on women. The plaintiff's evidence showed that the policy had a disparate impact upon women. That proof shifted the burden to the airline to show neutral reasons for using such hiring guidelines. The airlines argued that the practice was a business necessity. A business necessity, which is a defense to a charge of discrimination, could show that the requirement "fosters safety and efficiency and is '*essential* to that goal.' "[193] The court held that the airline sustained its burden by showing

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[188] *Laffey*, 567 F.2d at 457. "Under the Act, practices, procedures or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Id.* (quoting Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971)).

[189] 29 C.F.R. § 1607.11 (1975).

[190] *Laffey*, 567 F.2d at 457.

[191] Boyd v. Ozark Air Lines, Inc., 419 F. Supp. 1061, 1064 (E.D. Mo. 1976), *aff'd*, 568 F.2d 50 (8th Cir. 1977).

[192] *Id.*

[193] *Id.* (quoting United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973)).

that pilots must have free and unfettered use of all the instruments in the cockpit. Although the airline required a minimum height of 5'7", the evidence showed that a requirement of 5'5" would be sufficient to insure the needed use of the instruments and reduce the disparate impact on women at the same time.[194]

The pilot case was arguably an easier or at least more logical one than flight attendant cases, because the airlines reasonably showed a business necessity of requiring that pilots be a certain height to operate the aircraft effectively. The argument of business necessity did not, however, translate logically to the case of the flight attendants. The plaintiff in *Smith v. Eastern Airlines, Inc.*[195] charged sex discrimination because the airline required female flight attendants to be 5'2" to 5'9" while it hired males 5'7" to 6'2". The plaintiff was unsuccessful in her challenge under the disparate impact analysis because she failed to introduce any statistics showing the facially neutral requirement's disproportionate effect on women.[196] Eastern's statistics showed an equal percentage of men and women were disqualified by the height requirements.[197]

Under the disparate treatment analysis, the court held that the plaintiff presented a prima facie case of discrimination by showing that a female 5'11" would be rejected as a candidate for employment while a male of the same height would not. However, the employer rebutted this presumption of discrimination by showing the history of the policy and the statistical basis for the differences.[198]

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[194] *Id.* The court lessened the requirement because it found that

> [t]he business purpose must be sufficiently compelling to override any . . . [sexual] impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential . . . [sexual] impact.

Id. (quoting Robinson v. Lorillard Corp., 444 F.2d 791, 798 (5th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (1971)).

[195] Smith v. Eastern Airlines, Inc., 651 F. Supp. 214 (S.D. Tex. 1986).

[196] *Id.* at 218.

[197] *Id.*

[198] *Id.* at 220.

In general, the court was not convinced that the policy was based on sex discrimination.[199] The court did not address arguments such as sex stereotypes to show that the airline was actually stereotyping the way men versus women should look.

4. Recent Innovations

Thus, the weight cases were not consistent or predictable. Although some courts stated that policies must treat men and women alike, other courts skirted the weight issue or classified it outside the Title VII analysis. The uncertainty in this area was demonstrated by the number of recent lawsuits ending in settlements. Lawsuits were lengthy and costly to both sides, and the law was unclear on the issue. Therefore, the opponents compromised with airlines changing standards to some degree but admitting no fault. While the changes were modifications of the standards opposed by the flight attendants, they were by no means complete repudiations of the weight policies.

The uncertainty in the area and the courts' seeming reluctance to classify weight policies as discrimination under Title VII did not quiet complaints in the industry. Flight attendants continued to maintain that the weight standards were directed primarily at women and were discriminatory. For example, flight attendants for Pan American World Airways instituted a suit against the airline in 1984 claiming that the airline did not enforce its strict weight policy against men and did not have any policies at all for ground agents who, like flight attendants, dealt with the public. Their claim was that "[t]he only people they were trying to keep slim, trim and stereotyped were the female flight attendants."[200]

The Independent Union of Flight Attendants, representing the Pan Am employees, filed suit after Pan Am adopted a weight policy which automatically classified fe-

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[199] *Id.*

[200] John Burgess, *Pan Am to Pay $2.35 Million to Settle Suit Over Weight; 116 Female Attendants to Share Payment*, WASH. POST, Sept. 1, 1989, at C4.

male flight attendants as "medium" body frames but classified men as "large" body frames in height-weight charts used to establish weight limits for employees.[201] The union claimed that the policy automatically allowed men to have higher weights but still meet the requirements.[202] The lawsuit was finally settled in 1989, with the airline agreeing to pay $2.35 million to flight attendants who were suspended, denied promotion, fired, or forced to resign because of the weight policy.[203] Under the settlement, all employees were classified as "medium" body frames, and both sexes received the opportunity to be reclassified if doctors determined that the employee had larger bone size.[204]

Pan Am was not the only airline that continued to be challenged on its weight standards. Flight attendants at American Airlines complained about weight requirements which they claimed were not only too strict but also discriminatory on the basis of sex and age. Sherri Capello, a 25-year flight attendant, was one of the employees fired because she failed to meet the 129-pound limit for a 5-foot-5 woman. Cappello claimed that ". . . the company is wrong to think that passengers want to return to that 50s and 60s image of, 'Fly me, I'm Sally.' "[205] She claimed that she never had a passenger refuse a meal tray because she was too fat and that " '. . . no one's going to refuse my help in jumping out of a burning airplane because I'm a little heavy.' "[206] American's flight attendants claimed that the weight policies show the industry's reluctance to shed the "coffee, tea, or me" image.[207]

This debate between the flight attendants and the air-

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[201] *Id.* at C1.

[202] *Id.*

[203] *Id.*

[204] *Id.*

[205] Marjie Lundstrom, *American's Fat Fight Brings Back 'Coffee, Tea or Me' Days*, GANNETT NEWS SERVICE, Apr. 15, 1991, (available in LEXIS, Nexis library, Gannett News Service file).

[206] *Id.*

[207] *Id.*

line has raged since the early 1970's. American's flight attendants would prefer to have no weight requirements. Association of Professional Flight Attendants president, Cheryle Leon, said that flight attendants were "safety professionals, not models" and that they "should be evaluated on their skills, capabilities and job performance, not their weight."[208] Airline officials maintained that they should have some control over personnel. That control included the right to "insist that our employees adhere to a grooming standard and also be presentable to the public."[209] Because the parties could not agree, the debate resulted in several lawsuits.

These suits by individuals, the EEOC, and the Association of Professional Flight Attendants (APFA) against American Airlines brought on the basis of its weight policies were consolidated and resulted in a settlement which made major changes in the weight standards for height categories as well as age categories.[210] American, which historically enforced the most strict standards, agreed to modify its requirements.[211] For example, American increased the weight allowances in most height categories and added the allowances for the age categories.

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[208] Maxon, *supra* note 135, at 4D.

[209] *Id.*

[210] *Id.*

[211] Whitesides, *supra* note 13, at 195; Maxon, *supra* note 135, at 4D.

WEIGHT LIMITS FOR FEMALE FLIGHT ATTENDANTS[212]

Maximum Weights for a 5 foot 5 inch Airline Flight Attendant

AGE	25	35	45	55
American, old limits	129	129	129	129
American, new limits	136	142	148	154
United	137	140	143	146
Delta	138	140	142	142
USAir	138	141	144	147
Pan Am, small frame	143	146	149	152
Pan Am, large frame	151	154	157	160

American's new standards were based on NHAMES II demographic tests of the standard sizes of the American population. American employed Bernard R. Siskin, Ph.D., an expert economist trained in advanced statistical techniques, to develop new weight standards to insure that an equal percentage of the population in each sex, height, and age category could meet the requirements.[213] Dr. Siskin worked closely with attorneys for the EEOC and the APFA to produce a final version of the weight tables which the settlement agreement stated were non-discriminatory.[214] The new standards were set so that forty percent of the general population met the standards. The spokesman for American Airlines stated that the new standards were based on statistical data, that they were neutral and non-discriminatory, and that both sides agreed to use them.[215] Each allowance for weight in each age bracket was determined in the same way. Thus, American claimed that its standards were not arbitrary as compared to some other airlines' standards. American claimed that some of its competitors merely added three pounds to each age bracket but did not base the increases on any data show-

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[212] Maxon, *supra* note 135, at 4D.

[213] Brief in Support of Settlement at 5, APFA v. American Airlines, Inc., (N.D. Tex. 1991) (CA No. 4-88-791E).

[214] *Id.*

[215] Maxon, *supra* note 135, at 4D.

ing the percentage of the population meeting the standards.

5. The Future in Weight Suits

The number of recent settlements signaled a trend toward the willingness of the airlines and the courts to relax weight standards. Success in weight suits, however, depended on whether the plaintiffs refined their arguments. For example, the Supreme Court held, based on the *Diaz* decision, that employers must prove that certain hiring standards were necessary in order to use them.[216] The Supreme Court has also adopted the position that it was not permissible to use stereotyped characteristics as a basis of hiring.[217] Thus, the flight attendants who contended that weight standards were applied more strictly to women than men could possibly argue that the airlines should have to prove that the weight standards were necessary in order to enforce them. Moreover, the flight attendants could argue that the airlines' use of stricter standards for women was based on the stereotyped notion of the way that a woman should look, which dates back to the use of the stewardess as a sex object and marketing tool. Because the courts defined BFOQ's very narrowly, the flight attendants could further argue that the airlines should not be allowed to claim that such weight requirements were a BFOQ because there is no evidence that a thin flight attendant is a business necessity. These arguments would only be useful, however, if the flight attendants succeeded in showing that either women were affected differently from men or if they succeeded in overcoming the argument that the weight standards were merely grooming requirements and not protected under Title VII.

As a completely different method of attack, flight at-

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[216] Dothard v. Rawlinson, 433 U.S. 321, 333 (1977).

[217] *Id.* at 334; Diaz v. Pam Am. World Airlines, Inc. 422 F.2d 385, 387 (5th Cir. 1971); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235-36 (5th Cir. 1969).

tendants could attempt to have weight classified as a disability or other handicap. The federal government established the Rehabilitation Act to create equal opportunity for the handicapped. The Rehabilitation Act of 1973 provides that, "[no] otherwise qualified individual with handicaps in the United States . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."[218]

The statute itself and the regulations used by the Department of Health and Human Services recognized physical impairment or handicap in three possible situations. The first situation included people who presently have an impairment which substantially limits a major life activity.[219] The second encompassed those who were so limited in the past.[220] The third covered people who were regarded by others as handicapped.[221]

Such a challenge based on weight as a handicap failed under state law in *Underwood v. Trans World Airlines, Inc.*[222] The plaintiff in Underwood claimed that her overweight status qualified her to be classified as a handicapped individual.[223] The plaintiff was suspended after her weight exceeded the company's weight limits. TWA's appearance program contained guidelines for appearance to ensure a "competent professional business look" in the company uniform.[224] Those standards included weight among eight different personal grooming basics such as uniform articles, accessories, footwear, jewelry, cosmetics,

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[218] 29 U.S.C. § 794(a) (Supp. 1988).

[219] 29 U.S.C. § 706(8)(B)(i) (Supp. 1992).

[220] *Id.* § 706(8)(B)(ii).

[221] § 706(8)(B)(iii); Tudyman v. United Airlines, 608 F. Supp. 739, 744 (C.D. Cal. 1984).

[222] 710 F. Supp. 78 (S.D.N.Y. 1989).

[223] The plaintiff contended that the weight program violated the handicap law because the law prohibited an employer from refusing to hire or discharging an employee because of disability. *Id.*

[224] *Id.* at 80.

nail polish, and hair styling.[225] The plaintiff contended that suspending her for her weight was handicap discrimination.

The New York law prohibited an employer from refusing to hire or discharging an employee because of a disability.[226] The court determined that the term disability included physical, mental, and medical impairments.[227] The court noted that a disability must manifest itself in one of two ways: "1) by preventing the exercise of a normal bodily function, or 2) by being 'demonstrable by medically accepted clinical or laboratory diagnostic techniques.' "[228] The court found that, in contrast to other cases where a plaintiff was clinically diagnosed as obese, the present case was one where the plaintiff, if overweight, nevertheless did not qualify and had not been diagnosed as obese.[229] Moreover, the plaintiff did not have any medical condition or impairment of bodily function. The plaintiff, therefore, did not fall within the protected class of handicapped under New York law.[230]

Similarly, a California district court rejected a claim of handicap discrimination for weight under the Rehabilitation Act of 1973 for two reasons.[231] First, the court held that because the applicant was a bodybuilder, his weight was within his control and was absolutely a mutable characteristic which was not protected.[232] Second, the court held that the applicant could not win a suit based on the handicap argument for denial of only one job.[233]

The court noted that the plaintiff's unique body composition was not a disorder, disfigurement, or loss. In fact, his condition was self-imposed and voluntary.[234] More-

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[225] *Id.* at 78, 80.
[226] *Id.* at 83.
[227] *Id.*
[228] *Id.* (citations omitted).
[229] *Id.* at 84.
[230] *Id.*
[231] *See Tudyman*, 608 F. Supp. at 746.
[232] *Id.*
[233] *Id.*
[234] *Id.*

over, the plaintiff had no impairment and was not limited in major life activities. As such, the plaintiff's claim was not meritorious. The court also found that the failure to meet requirements for a single job does not qualify as limiting a major life activity and therefore does not qualify as a handicap.[235]

The court suggested that a plaintiff could possibly use weight as a handicap if the weight problem resulted from a physical disorder such as a gland problem. Such a disorder could satisfy the definition of handicap in the statute.[236]

C. AGE

1. Historic Background

Another recent challenge to hiring and employment policies was on the basis of age. Historically, the courts invalidated airline policies that fired female flight attendants at younger ages than male airline employees. Many airlines had policies of grounding flight attendants between the ages of thirty-two and thirty-five.[237] These early policies did not affect most flight attendants because they married before these ages and were fired under marriage policies.[238] One of the goals of the flight attendant program was to have single women who were attractive to travelers. Being attractive to customers meant that some stewardesses eventually married customers. Airline executives believed that if a woman was around until the mandatory retirement age, the personnel department was not doing its job in selecting attractive women because a high turnover rate was a sign of success in the quality of the stewardesses hired.[239] One executive said that if tenure started to reach a certain point, "I'd know we were

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[235] *Id.*

[236] *See infra* notes 371-93 and accompanying text.

[237] Binder, *supra* note 43, at 1110. The corresponding retirement age for male stewards was 65 years of age. *Id.*

[238] *Id.*

[239] Whitesides, *supra* note 13, at 183.

getting the wrong kind of girl. She's not getting married."[240]

In several decisions the EEOC invalidated these mandatory retirement policies.[241] The EEOC found that airlines were using 65 as a retirement age for all employees except pilots and stewardesses. Pilots, of course, had a specific exception under FAA rules regarding retirement age based on safety concerns.[242] No similar reason existed in the FAA age-based retirement rules for flight attendants. Rather, the airlines themselves established ages thirty-two to thirty-five as retirement age for stewardesses and justified these retirement ages by contending that since the stewardess was the image of the industry showing its vitality and youth, the older employees would lose the enthusiasm required in their performance.[243] In challenges to the retirement policies, the EEOC held that age was not a BFOQ for stewardesses and that the retirement policies clearly violated Title VII because no similar retirement age was placed on male flight attendants.[244]

The airlines claimed that customers preferred young flight attendants in effect to bolster their BFOQ argument. The EEOC rejected that argument and further showed that the airlines could not support such claims.[245] The EEOC noted a 1965 survey by the Airways Club in which members stated that the age of the stewardess did not matter and that the airlines should not have age ceilings for flight attendants.[246] The court found that the results demonstrated that passengers did not prefer a

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[240] KANE & CHANDLER, *supra* note 2, at 103.

[241] Dodd v. American Airlines, Inc., EMP. PRAC. GUIDE (CCH) ¶ 6001 (EEOC 1968); Colvin v. Piedmont Aviation, Inc., EMP. PRAC. GUIDE (CCH) ¶ 6003 (EEOC 1968).

[242] *See infra* notes 274-79 and accompanying text.

[243] *Dodd*, EEOC Dec. ¶ 6001, at 4007. The airlines argued that senior stewardesses would lose the motivation necessary for the job and provide poor service which would result in the loss of business and goodwill for the airline. They further argued that the changes associated with menopause would interfere with the stewardess' performance. *Id.*

[244] *Id.* at 4009.

[245] *Id.* at 4008.

[246] *Id.* at 4008 n.17.

stewardess of a particular age group.[247]

2. *Age Discrimination in Employment Act*

Since those early decisions, the Age Discrimination in Employment Act (ADEA) made discrimination on the basis of age illegal.[248] The purpose of the ADEA was to promote employment of older people based on ability.[249] The legislation resulted from extensive Congressional findings regarding the effects of age discrimination.[250] The Act combatted discrimination by establishing broad

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[247] *Id.*

1965 Airways Club Survey

1. Do you think that the airlines should have age ceilings for stewardesses?

Yes	No	Don't Care
2436	3033	776

2. Would the age of the stewardess matter to you?

Yes	No	Don't Care
1533	3361	1091

3. Do you prefer a stewardess of a particular age group?

Yes	No	Don't Care
1693	2575	1342

4. If you answered yes to #3, which group do you prefer?

18-25	26-30	31-35	36-40	40-above
328	837	363	188	35

[248] Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1982 & Supp. 1988).

[249] *Id.* § 621(b).

[250] *Id.* Congressional findings included:

> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
> (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
> (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the young ages, high among older workers; their numbers are great and growing; and their employment problems grave;
> (4) The existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

Id.

prohibitions against certain hiring and employment practices.

The Act provided that employers may not use age as a basis for hiring. The act states: "It shall be unlawful for an employer (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age. . . ."[251] An employer was also prohibited from segregating or classifying employees in any way which would deprive them of opportunities on the basis of age and from reducing employee wages in order to comply with the Act.[252]

As it was originally adopted, the Act protected people in the forty to sixty-five age group.[253] Later the upper age limit was increased to seventy years of age.[254] Today the upper limit no longer exists.[255] The minimum age protected, however, is still forty.[256] In order to assert age discrimination, a claimant must show that he was in the protected age group, that he was able and qualified to perform the job, that he was discharged or treated adversely, and that the employer replaced him with a younger person or gave benefits to a younger person.[257] The employer then may rebut that prima facie case by showing a justifiable reason for the discrimination or by demonstrating that the decision was based on reasons other than age.[258]

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[251] *Id.* § 623(a).

[252] *Id.* § 623(a)(2), (3).

[253] ADEA Amendments of 1967, Pub. L. No. 90-202, § 12, 81 Stat. 602 (1967) (current version at 29 U.S.C. § 631 (1988)) (prior to the 1978 and 1986 amendments).

[254] ADEA Amendments of 1978, Pub. L. No. 95-256, § 3(9) 92 Stat. 189 (1978) (codified at 29 U.S.C. § 631 (1988)).

[255] 29 U.S.C. § 631(a) (Supp. V 1987).

[256] Cheryl Hammond Raper, Comment, *Age Discrimination in the Airline Industry: Is Age a Bona Fide Occupational Qualification for the Position of Pilot?*, 55 J. AIR L. & COM. 543, 553 (1989).

[257] *Id.* at 554 (based on McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1972)).

[258] Bittar v. Air Canada, 512 F.2d 582, 582-83 (5th Cir. 1975).

The BFOQ exceptions existed under ADEA and served as a justifiable reason for discrimination under the analysis in *Bittar v. Air Canada*.[259] Courts developed the BFOQ discussion by using Title VII standards by analogy.[260]

The first test was that an employer must show a rational basis for using age.[261] The Seventh Circuit in *Hodgson v. Greyhound Lines, Inc.* adopted the test from *Diaz v. Pan American World Airways, Inc.*,[262] a Title VII action.[263] The plaintiff in *Hodgson* challenged Greyhound's policy of refusing to hire drivers over the age of thirty-five. Greyhound claimed that age was a BFOQ for a position as a driver because hiring new drivers over the age of thirty-five resulted in a safety risk due to incomplete training and degeneration of abilities that occur with age.[264] The court, using the adopted Title VII rationale, held that "Greyhound must demonstrate that it has a rational basis in fact to believe that elimination of its maximum hiring age will increase the likelihood of risk of harm to its passengers."[265] The court also added that the company had to demonstrate only a "minimal increase in risk of harm" where saving just one person would justify the hiring limitations.[266]

In *Usery v. Tamiami Trail Tours, Inc.*,[267] the Fifth Circuit added a second requirement to the analysis used by the Seventh Circuit in *Hodgson*. In addition to the "essence of operations" test, an employer claiming that a particular requirement was a BFOQ must also show that all applicants of that age group would be unable to perform the

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[259] *Id.*

[260] Raper, *supra* note 256, at 558-59.

[261] Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388 (5th Cir. 1971).

[262] 442 F.2d at 385.

[263] *Hodgson*, 499 F.2d at 862.

[264] *Id.* at 863. Greyhound urged that the abolition of its hiring policy would increase the risk of driver failure and interfere with the company's safety efforts. *Id.*

[265] *Id.*

[266] *Id.*

[267] 531 F.2d 224, 235-37 (5th Cir. 1976).

job.[268] That requirement was adopted from the analysis in *Weeks v. Southern Bell Telephone & Telegraph Co.*[269] where the court said that an employer must show reasonable cause that it believes that all people in a group would be unable to perform certain duties effectively and safely or that the employer would be unable to analyze the members of the group individually.[270]

The Supreme Court later resolved the BFOQ issue by adopting a combination of these tests. The Court held in *Western Airlines, Inc. v. Criswell*[271] that an employer must show that the challenged age requirement was related to the essential operation of the business and must demonstrate that either there was a rational basis for believing that all members of a certain group would be unable to perform the duties or that it was impossible to evaluate all of the members of the group on an individual basis.[272] Therefore, the court settled the analysis used for age discrimination and BFOQs.[273] This analysis would also apply to flight attendants in a challenge for age discrimination. The airline would have to prove that the challenged age requirement was essential to performing the duties of a flight attendant and that all flight attendants of the challenged age would not be able to perform the duties or it would be impossible to evaluate all candidates individually. That burden seems to be a rather onerous one if the airline was trying to enforce an age limit such as forty years of age.

The airline industry in general is subject to special rules based on the safety analysis. These special rules apply because airlines are entrusted with thousands of lives every day.[274] One example of a use of a BFOQ in the age category is the case of pilots. This unique aspect of the airline

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[268] *Id.*
[269] Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969).
[270] *Id.* at 235.
[271] 472 U.S. 400 (1985).
[272] *Id.* at 416-17.
[273] Raper, *supra* note 256, at 562.
[274] *Id.* at 563.

industry is illustrated by the Federal Aviation Administration's (FAA) regulation which requires mandatory retirement for pilots of commercial aircraft.[275] That rule states that no certificate holder may use a pilot's services on aircraft under the regulation of the section if that pilot has reached the age of sixty.[276] Thus, pilots are effectively forced to retire at the age of sixty. Airlines do have different policies regarding the use of such pilots. While some enforce retirement, others move former pilots who have reached the age of sixty to positions as flight engineers.[277] Again, the justification for this policy is safety.[278] There are countervailing arguments that increased experience offsets any safety concerns.[279] No such safety analysis is justified for flight attendants. There are no arguments, however, that flight attendants should be forced to retire because they are unable to perform their duties as a result of age.

3. Current Criticisms

Despite the ADEA, problems still exist. One of the criticisms is that the airlines have used backhanded methods to continue to discriminate.[280] Commentators claim that

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[275] FAA Age Sixty Rule, 14 C.F.R. § 121.383(c) (1989).

[276] *Id.*

[277] *See Id.* § 121.383(c) (requiring pilots to meet certain medical requirements and limit activity to non-carrier positions or accept a demotion in cockpit position); *see also* Trans World Airlines v. Thurston, 469 U.S. 111, 116 (1985)(company required pilots approaching 60 to bid for flight engineer position but did not guarantee such a position and forced pilots who did not get the position to retire); Aman v. FAA, 856 F.2d 946, 948 (7th Cir. 1988) (noting that pilots must meet medical requirements and restrict activities or accept a demotion to flight engineer or flight instructor).

[278] Raper, *supra* note 256, at 567.

[279] *Id.* at 578-79. Some courts have argued that the physical effects of aging may be offset with the increased experience of the older pilot and that perhaps individual testing is a better way to gauge whether a pilot is physically unable to perform his or her job rather than having blanket prohibitions associated with age. *Aman*, 856 F.2d at 948, 948, 954-57. The FAA itself noted that "medical science may at some future time develop accurate, validly selective tests which would safely allow selected pilots to fly in air carrier operations after age sixty." 24 Fed. Reg. 9772 (1959).

[280] *Why Should You Care?*, SKYWORD, June 1989, at 7.

the airlines use weight restrictions as a disguised way to discriminate on the basis of age.[281] Critics also claim that the airlines discriminate on the basis of age because young flight attendants' salaries and benefits are much less expensive than those of their older, more experienced counterparts.[282] According to one critic, weight restrictions that do not make allowances for weight gain as flight attendants age are used to terminate older flight attendants and save the airlines labor costs.[283] Weight maximums disfavor older flight attendants who are more expensive to the airline because of their higher salaries, medical costs, and retirement costs.[284] This criticism is a source of contention between the airlines and flight attendants. Airlines such as American continue to argue that there is no physiological reason for people to gain weight as they age.[285] Moreover, the airline argues that people begin to lose weight at a certain point.[286] Others claim that age causes metabolic changes that cause weight gain.[287]

Some flight attendants at major airlines such as American, TWA, and Northwest see the intense competition in the industry, largely brought about by deregulation, as the cause of some of the age discrimination.[288] In particular, flight attendants complain about the two-tiered wage scales.[289] They maintain that replacing older "A" scale

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[281] *Id.*; Whitesides, *supra* note 13, at 197.

[282] Whitesides, *supra* note 13, at 177. Statistics show that new flight attendants are hired at half the cost of more experienced employees. *Id.* Newly hired flight attendants at American Airlines earn a monthly base of $1,055 while flight attendants with twelve years of experience earn $2,306 per month. Agreement Between American Airlines, Inc. and the Flight Attendants in the Service of American Airlines, Inc., Art. 3, 3a-1 (effective Dec. 29, 1987).

[283] Whitesides, *supra* note 13, at 177.

[284] *Id.* at 198.

[285] American has traditionally made no weight allowances for different age categories. Maxon, *supra* note 135, at 4D.

[286] *Id.*

[287] Whitsides, *supra* note 13, at 218; *Fear of Fat: The Medical Evidence*, CONSUMER REP., Aug. 1985, at 455.

[288] Marilyn Gardner, *Flight Attendants See Trouble in the Skies*, CHRISTIAN SCI. MONITOR, Mar. 9, 1988, at 3.

[289] *Id.*

workers with younger "B" scale workers is an attempt to reverse the trend toward long-term careers back to short-term jobs.[290] The flight attendants feel that the salary, benefit, and status gains of the 1960's and 1970's are being eroded by the departure of experienced employees who are being replaced by new hires at much lower pay scales.[291] A veteran TWA flight attendant complains that the airlines "don't want people like me at the highest pay scale who have long vacations and a retirement plan. They want a fast turnover of 20-year-olds."[292]

While the ADEA was designed to prevent discrimination, another criticism was that it did not protect some of the age groups that suffered under airline policies. For example, the airlines' original policies forced retirement between the ages of thirty-two and thirty-five. Although the EEOC and the courts held that those age requirements were discriminatory specifically because they were applied to women and not men, critics claim that the airlines still have that age cutoff in mind.[293] Therefore, women in their thirties may not be hired as flight attendants because of the airlines' bias toward younger flight attendants. Women in their thirties are not protected under the ADEA because its minimum protected age is forty.

Some attendants, however, were successful in attacking hiring practices based on age. For example, in a consent decree with Eastern Airlines, Eastern's employees obtained an affirmative action program in which the airline agreed to "hire flight attendants in the protected age group in proportion to their numbers in the applicant pool."[294] Moreover, the airline agreed to publicize its equal opportunity employer status and to include a photograph of a flight attendant within the protected age in

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[290] *Id.*

[291] *Id.*

[292] *Id.*

[293] Whitesides, *supra* note 13, at 197.

[294] EEOC v. Eastern Airlines, Inc., No. 81-2165-CIV-EBD, 1982 WL 284, at *6 (S.D. Fla. Mar. 26, 1982).

the recruitment brochures.[295] The airline amended its standards for hiring to include requirements that all candidates must be above-average in appearance for their age and a policy that non-distracting wrinkles, facial lines, and gray hair did not disqualify a candidate.[296] Piedmont Airlines announced a program to recruit older flight attendants, and other airlines reportedly followed suit.[297] The Association of Flight Attendants, a union representing thirty-eight percent of the 60,000 flight attendants nationwide, reported that forty-nine percent of its members were older than thirty-four.[298] Despite these facts, complaints remained about the treatment of older flight attendants and the lack of protection afforded under the ADEA.

4. Age-Related Appearance

Still another problem with the ADEA was that it did not prohibit discrimination based on age-related appearance. Some groups argued that age-related appearance was a *semi-immutable* characteristic and protected under Title VII standards.[299] As the guidelines in the Eastern consent decree indicated, age-related appearance was a factor in the decision to hire flight attendants in certain age groups. For example, only after the Eastern consent decree was the use of policies prohibiting the hiring of women with wrinkles and gray hair forbidden.[300] Thus, women were concerned that such discrimination would not be protected under the ADEA.

Recent suits have been based on age-related appear-

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[295] *Id.*

[296] *Id.*

[297] Mark Mayfield & Lori Sharn, *Move to Older Flight Attendants Takes Off*, USA TODAY, Jan. 31, 1989, at 3A.

[298] *Id.*

[299] Patti Buchman, Note, *Title VII Limits on Discrimination Against Television Anchorwomen on the Basis of Age-Related Appearance*, 85 COL. L. REV. 190, 198-99 (1985).

[300] EEOC v. Eastern Airlines, Inc., 1982 WL 284, at *6.

ance discrimination.[301] In the highly publicized case of Christina Craft, the plaintiff, a female newscaster, first claimed that she suffered from sex discrimination because she was subjected to a rigorous dress code and criticism of her appearance while male employees did not endure the same conditions.[302] The court found no merit in her claim and held that a company has the right to create an image by its employee's appearance.[303] The court held that employers can require grooming standards in order to maintain a professional appearance consistent with standards of the community.[304] Second, the plaintiff claimed that the defendant's reasons for removing her from her position were based on sex. The plaintiff alleged that her boss removed her because she was "too old, too unattractive, and not deferential enough to men."[305] The court found insufficient evidence to conclude that there was any discrimination.[306] Moreover, the court stressed the role that appearance plays in some jobs, stating that industries such as television demand a high quality of appearance that employers may regulate.[307]

A good analogy for the age issue as it relates to flight attendants is the case study involving television anchorwomen. In both fields, appearance is a major focus, and in both fields, women claim that they are subject to discrimination because of age-related appearance. For example, several years ago, there were few television

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[301] Craft v. Metromedia, Inc., 572 F. Supp. 868 (W.D. Mo. 1983); EEOC v. Eastern Airlines, Inc., 1982 WL 284, at *5.

[302] *Craft*, 572 F. Supp. at 876.

[303] *Id.* at 877. "Title VII 'was never intended to interfere in the promulgation and enforcement of personal appearance regulations by private employers.'" *Id.* (quoting Knott v. Missouri Pac. R.R. Co., 527 F.2d 1249, 1251-52 (8th Cir. 1975)). "[A] private employer may require male employees to adhere to different modes of dress and grooming than those required of female employees and such does not constitute an unfair employment practice within the meaning of 42 U.S.C. § 2000e-2(a)." *Id.* (citing Baker v. California Land Title Co., 507 F.2d 895, 898 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975).

[304] *Id.*

[305] *Id.* at 878.

[306] *Id.*

[307] *Id.*

anchorwomen over the age of forty.[308] There was evidence that networks believed that women over forty were "too old" or "too unattractive" to be anchorwomen.[309] Where men with gray hair and laugh lines were distinguished, women with such characteristics were just old.[310] Critics contend this differential treatment is clearly discriminatory on the basis of sex because it emphasizes a youthful appearance for women where no such policy exists for men.[311] Similarly, some flight attendants claim that only women are subject to age-related discrimination.

The courts would most likely use the sex-plus analysis in adjudicating age-related appearance discrimination suits. In addition to basing hiring decisions on sex, employers consider other characteristics, which discriminate against particular subgroups within the gender. In this case, the discrimination is based on age-related appearance of females. Title VII characteristics, which employers are forbidden to use, are immutable characteristics as well as fundamental rights.[312] Claimants under the age-related discrimination suits could allege that age-related appearance is analogous to other immutable characteristics such as race. In that argument, claimants could say that, like race, aging is an unalterable part of an individual.[313] One rebuttal to this allegation is that the aging process can be arrested with procedures such as plastic surgery. Even under this analysis, claimants may argue that age-related appearance is at least semi-immutable because requiring surgery is extreme, and therefore it should be included in the category with other immutable

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[308] *Id.* "[D]efendant merely acted to correct appearance problems which plaintiff was unable or unwilling to remedy. The actions taken by defendant in regard to plaintiff's appearance were not the result of any general animus toward women. . . ." *Id.*

[309] Barthel, *Network Newswomen Speak Out*, TV GUIDE, Aug. 13, 1983, at 10-11.

[310] Sally Smith, *Television Newswomen's Suit Stirs a Debate on Values in Hiring*, N.Y. TIMES, Aug. 6, 1983, at 44.

[311] Buchman, *supra* note 299, at 192.

[312] Whitesides, *supra* note 13, at 203.

[313] Buchman, *supra* note 299, at 197. "Aging, like race, is a virtually unalterable aspect of one's physical appearance." *Id.*

characteristics.[314]

It is important to note the difference in analysis between age and age-related appearance. Age is not protected under Title VII but is instead included in separate legislation of the ADEA.[315] Age-related appearance does not fall within the ADEA. Therefore, some argue that the proper place to address the issue is within Title VII. In the Title VII analysis, it could be viewed as an immutable characteristic as opposed to a grooming requirement which is easily changed and not protected.[316] Thus, that immutable characteristic should be viewed as a "plus" factor in the sex-plus analysis and should become an improper basis for employment decisions.[317]

Age-related appearance standards may make challenges on the basis of appearance easier to show. Appearance is hard to quantify, but with a factor such as age added, an employer would have to demonstrate that the age did not play a part in the determination to hire an employee. Moreover, wrinkles and gray hair are easier to identify and define than an unattractive nose or chin or uneven features. Thus, perhaps age-related appearance standards could provide a solid bridge into challenges based on physical appearance.

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[314] *Id.* at 198-99.

[315] *See supra* notes 248-58 and accompanying text.

[316] Buchman, *supra* note 299, at 200. Regulations distinguish between the sexes on the basis of mutable characteristics which are completely within the control of the individual and therefore have insignificant effects on opportunities for employment. *Id.*

[317] *Id.* at 203.

> [T]he requirement of a youthful appearance for female but not male anchors constitutes an impermissible 'plus' factor under section 703(a). As an immutable or semi-immutable physical characteristic, youthful appearance may not be imposed as an employment criterion on members of one sex to a far greater extent than on members of the other.

Id.

D. APPEARANCE

1. Appearance Requirements in the Industry

Appearance is another emerging basis for challenges under Title VII. Airlines have historically had very strict appearance requirements.[318] Candidates have alleged that they have not been hired because they did not have "Miss America Looks."[319] Indeed, the earlier use of the stewardess as what critics have called a "marketing tool" and "sex object" showed the rationale behind these strict appearance requirements. Flight attendants claim that airlines hire only beautiful women and then make them over to accommodate airlines' own idea about the ultimate woman. Many accomplish that goal through training programs.

Training programs were historically formulated to mold grooming habits and appearance into the airlines' ideals.[320] Flight attendants reported that in "stewardess college" they spent the majority of the time getting makeovers and changes in hair cuts, clothing, makeup, walk, and behavior, all for the purpose of maintaining an image of glamour.[321] Flight attendants spent about 20 percent of their training time learning safety aspects of the job and about 80 percent learning meal service techniques and grooming.[322] Thus, airlines historically used training as a time for teaching grooming standards and indoctrinating its employees to its expectations.

Today, there is still debate regarding the airlines influence over its employees' grooming habits. Continental Airlines fired a ticket agent who refused to wear makeup, and that action focused attention on grooming policies for female employees, which critics call examples of sex-

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[318] Underwood v. Trans World Airlines, Inc., 710 F. Supp. 78, 80 (S.D.N.Y. 1989).

[319] Smith v. Eastern Airlines, Inc., 651 F. Supp. 214, 216 (S.D. Tex. 1986).

[320] KANE & CHANDLER, *supra* note 2, at 35.

[321] *Id.*

[322] *Id.*

ism and outdated notions of femininity.[323] Women continue to challenge the employers' ability to require or pressure them to wear makeup, certain hairstyles, and certain uniforms or styles of clothing. The ticket agent, Teresa Fischette, claims that "Continental should not be mixing their perception of attractiveness with professionalism."[324] Continental, conversely, says that its policy of requiring female employees to wear makeup is part of the airline's larger effort to improve its image.[325]

2. Historic Protection of Grooming Standards

Most courts have held that grooming is not protected under Title VII because it is an employer's prerogative to set grooming guidelines.[326] For example, the courts have stated that, although Title VII's purpose is to protect equal employment opportunities on the basis of fundamental rights and immutable characteristics, its purpose is not to interfere with an employer's judgment on the manner to conduct business.[327] Courts have held that Title VII was not intended to interfere with appearance requirements.[328] For example, the Eighth Circuit, in *Knott v. Missouri Pacific Railroad Co.* held that the primary thrust of Title VII was to "discard outmoded sex stereotypes posing distinct employment disadvantages for one sex."[329] The court said that the legislative history of the Act clearly illustrated that intent to provide equal employment opportunity for both sexes.[330] The House Report

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[323] John E. Peterson, *Women Say Job Dress Codes, Makeup Policies Discriminate*, GANNETT NEWS SERVICE, May 15, 1991, (available in LEXIS, Nexis Library, Gannett News Service File).

[324] *Id.*

[325] *Id.*

[326] Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084, 1091 (5th Cir. 1974); Rogers v. American Airlines, 527 F. Supp. 229, 231 (S.D.N.Y. 1981); Cox v. Delta Airlines, Inc., EMPL. PRAC. GUIDE (CCH) ¶ 7601 (EEOC 1976), *aff'd*, 553 F.2d 99 (5th Cir. 1977).

[327] *Willingham*, 507 F.2d at 1091.

[328] Knott v. Missouri Pac. R.R. Co., 527 F.2d 1249, 1252 (8th Cir. 1975); Craft v. Metromedia, Inc., 572 F. Supp. 868, 877 (W.D. Mo. 1983).

[329] *Knott*, 527 F.2d at 1251.

[330] *Id.* at 1251 (citing H.R. REP. No. 92-238 *supra* note 44, at 2140-41).

discussing the legislation states:

> Women are subject to economic deprivation as a class. Their self-fulfillment and development is frustrated because of their sex. Numerous studies have shown that women are placed in the less challenging, the less responsible and the less remunerative positions on the basis of their sex alone. This Committee believes that women's rights are not judicial divertissements. Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination. The time has come to bring an end to job discrimination once and for all and to insure every citizen the opportunity for the decent self-respect that accompanies a job commensurate with one's abilities.[331]

The court also found that the Act was never intended to interfere with the personal appearance regulations that employers chose to enforce.[332] Thus, the court reasoned that a policy regarding hair length that applied to men but not to women was not discriminatory.[333] The court found that the policy was part of a comprehensive personal grooming code which applied to all employees.[334] Where the policies were reasonable and imposed on all employees in an even-handed manner, the court found that slight differences in the standards for men and women have only a negligible effect on opportunities for employment.[335] As such, grooming requirements, even if they differed for men and women, remained within the employer's prerogative and did not rise to the level of preventing the equal opportunity that Congress addressed.

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[331] *Id.* at 1252 n.2 (quoting H.R. REP. No. 92-238 *supra* note 44, at 2140-41).

[332] *Knott*, 527 F.2d at 1251-52. The legislative history makes clear that the legislation was to discard outmoded sex stereotypes which created disadvantages in employment but do not interfere in "personal appearance regulations by private employers." *Id.*

[333] *Id.* at 1252.

[334] *Id.*

[335] *Id.* "While no hair length restriction is applicable to females, all employees must conform to certain standards of dress." *Id.*

The court for the Ninth Circuit in *Baker v. California Land Title Co.*[336] used a similar line of reasoning in its decision to uphold different standards of hair length for men and women.[337] The court held that the intent of Title VII was to eliminate discrimination on the basis of immutable characteristics such as race, sex, and national origin, not personal modes of dress or cosmetic effects.[338] The objective of Congress, the court found, was to overcome barriers that operated to discriminate against identifiable groups.[339] Relying on the Supreme Court's analysis in *Griggs v. Duke Power Co.*, the court held that hair styles and styles of dress were characteristics over which an employee had complete control.[340] As such, these characteristics did not rise to the level of identifying characteristics protected under Title VII or to the level of characteristics an individual could not alter.[341]

Because the court found that the requirements fell under grooming standards, which were strictly under the control of an employer, the court did not proceed to arguments that such dress requirements could be justified as BFOQs.[342] In fact, no court could reach such analysis unless it finds that the grooming requirements do rise to the level of characteristics which are protected under Title VII. As long as the courts find that grooming is not protected, neither party will get to argue whether grooming is a BFOQ for particular jobs. Therefore, we do not have a study of whether such matters of appearance are bona fide occupational qualifications for certain jobs.

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[336] 507 F.2d 895 (9th Cir. 1974).

[337] *Id.* at 898. "We agree with the district court that a private employer may require male employees to adhere to different modes of dress and grooming than those required of female employees and such does not constitute an unfair employment practice within the meaning of 42 U.S.C. 2000e-2(a)." *Id.*

[338] *Id.* at 897.

[339] *Id.*

[340] *Id.*

[341] 507 F.2d at 897. "Obviously, it seems to us, the Court was not talking in terms of hair styles or modes of dress over which the job applicant has complete control. The Court was addressing itself to characteristics which the applicant, otherwise qualified, had no power to alter." *Id.*

[342] *Id.*

Thus, the cases have held that there may be different standards for male and female grooming requirements.[343] The main reason for such holdings is that grooming is a mutable characteristic. In perhaps the strongest statement of the employer's right to enforce certain grooming standards, the court for the D.C. Circuit in *Fagan v. National Cash Register Co.*[344] stated:

> Perhaps no facet of business life is more important than a company's place in public estimation. That the image created by its employees dealing with the public when on company assignment affects its relations is so well known that we may take judicial notice of an employer's proper desire to achieve favorable acceptance. Good grooming regulations reflect a company's policy in our highly competitive business environment. Reasonable requirements in furtherance of that policy are an aspect of managerial responsibility.[345]

The court for the D.C. Circuit in *Fagan*, in a challenge to a policy enforcing different hair length standards for men and women, held that such a policy was not discriminatory.[346] The *Fagan* court said that the employer required the plaintiff to conform to standards which the employer felt were necessary for his business.[347] An employer, under this decision, has the right to define those standards. That the employer expected differences in male and female grooming is not indicative of any sexual discrimination.[348] Such differences are based on mutable characteristics and reflect our society's perception of the gender differences in appropriate appearance in the business world.

The Seventh Circuit Court of Appeals in *Carroll v.*

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[343] *Id.* at 898.

[344] 481 F.2d 1115 (D.C. Cir. 1983).

[345] *Id.* at 1124-25.

[346] *Id.* at 1125-26. "[O]ne seeking an employment opportunity as in our situation where hair length readily can be changed, may be required to conform to reasonable grooming standards designed to further the employing company's interest by which that very opportunity is provided." *Id.*

[347] *Id.* at 1124.

[348] *Id.*

Talman Federal Savings & Loan Ass'n of Chicago said that it too was reluctant to determine whether personal appearance requirements were "reasonable" but "[s]o long as they find some justification in commonly accepted social norms and are reasonably related to the employer's business needs, such regulations are not necessarily violations of Title VII even though the standards prescribed differ somewhat for men and women."[349] In sum, employers, like employees, have rights.[350]

Some court decisions have classified weight restrictions as grooming requirements in order to leave them under the airlines' control.[351] In those cases, the courts have in essence held that requiring certain weights is the same as requiring certain lengths of hair or certain types of clothes. The airlines have continued to argue that they should have control over such grooming standards of employees because the employees represent the airline to its customers every day.

Conversely, critics oppose placing weight restrictions under grooming requirements. The critics argue that weight is not a mutable characteristic in the same way that hair length is. They argue that it is much easier to get a hair cut than to change one's weight.[352] These critics use two theories to support their contention that weight should not be considered a mutable characteristic. First, weight is predetermined, and second, it cannot possibly be analyzed in the same way as the grooming require-

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[349] Carroll v. Talman Fed. Sav. & Loan Ass'n of Chicago, 604 F.2d 1028, 1032 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980).

[350] *Fagan*, 481 F.2d at 1124.

[351] *See In re* National Airlines, Inc., 434 F. Supp. 269, 275 (S.D. Fla. 1977) (weight program is not arbitrary but the owners informed judgment on how to run a business); Jarrell v. Eastern Airlines, 430 F. Supp. 884, 891 (E.D. Va. 1977) (weight is part of personal appearance program), *aff'd*, 577 F.2d 869 (4th Cir. 1978); Cox v. Delta Airlines, Inc., EMP. PRAC. GUIDE (CCH) ¶ 7601 (EEOC 1976)(weight standards are part of grooming), *aff'd*, 553 F.2d 99 (5th Cir. 1977). *But see* Gerdom v. Continental Airlines, Inc., 692 F.2d 602, 605-06 (9th Cir. 1982) (weight standards are not the same as other "grooming" requirements because there is a greater burden of compliance on females), *cert. dismissed*, 460 U.S. 1094 (1983).

[352] Whitesides, *supra* note 13, at 218.

ments.[353] Nevertheless, courts have allowed weight policies under the category of grooming requirements.

The courts have also allowed employers to enforce certain dress codes and standards because grooming requirements do not violate Title VII.[354] Title VII protects employees only from policies that distinguish between the sexes on the basis of immutable characteristics or fundamental rights.[355] The courts have held that grooming requirements or dress codes are neither immutable characteristics nor fundamental rights; therefore, employers can regulate these aspects of an employee's appearance. The business function is critical in this power of the employer.[356] Thus, an employer may regulate such features that it considers necessary to a business or that maintain some sort of social norm.

3. Contrasting Grooming and Appearance

An important contrast to make in the analysis of allowing different grooming standards for men and women is that grooming is mutable while appearance, as an intrinsic part of an individual, is immutable.[357] Although grooming can certainly influence appearance, employees such as flight attendants complain that the appearance standards that their employers enforce include some classic ideal or definition of beauty which only certain women fit.[358]

Nevertheless, employers claim the absolute right to establish grooming standards for employees.[359] They do

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[353] *Fear of Fat: The Medical Evidence*, CONSUMER REPORTS, Aug. 1985, at 455. The fat-cell theory says that a childhood diet high in calories leads the body to produce excess fat cells which remain with a person for life. The set-point theory says that each person's body is "programmed" to be a certain weight. The body will defend itself against attempts to change that programmed weight. *Id.*

[354] *Willingham*, 507 F.2d at 1091-92.

[355] *Id.*

[356] Craft v. Metromedia, Inc., 572 F. Supp. at 877-78 (W.D. Mo. 1983); *Fagan*, 481 F.2d at 1124-25.

[357] *See* Bayer, *supra* note 152, at 837-39.

[358] *See* Whitesides, *supra* note 13, at 210.

[359] *Id.* at 176.

not distinguish between grooming and appearance.[360] The airlines claim the right to present a professional image of the company to customers. As long as grooming standards do not adversely affect one sex over another, the airlines maintain that they are fair and should be upheld. The airlines' arguments do not differ on the basis of mutable or immutable characteristics.[361]

There is some debate over what should actually be considered a mutable characteristic, which is not protected by Title VII. The courts have continued to protect characteristics they define as "mutable" including hair length, weight limits, and dress codes.[362] Critics argue that these distinctions between mutable and immutable characteristics are arbitrary and meaningless because Title VII's definition of discrimination includes any distinction based on sex.[363] These distinctions are prohibited because "Title VII was enacted not simply to follow, but to lead in the fight against arbitrary employment discrimination."[364] Under this analysis, the critics claim that the courts should respect the individual integrity of the plaintiff and his or her personality and choices.[365]

It is important in this discussion to distinguish grooming requirements from appearance. A different cause of action arises when individuals claim they were not hired because of their appearance rather than their grooming habits. For example, discrimination based on appearance typical of certain races is not permitted. The EEOC has ruled that discrimination based on traditional racial characteristics is illegal.[366] Where an employer made notes that the applicant, an African American, had "unattractive, large lips" and rejected the candidate, the EEOC

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[360] *Id.* at 212.

[361] *Id.*

[362] *See* Bayer, *supra* note 152 at 837-39.

[363] *Id.* at 838.

[364] *Id.* at 856.

[365] *Id.* at 858 (arguing that choices an individual makes are valuable and have much more than a negligible relation to the purpose of Title VII).

[366] EEOC Dec. No. 70-90, EMP. PRAC. GUIDE ¶ 6065 (CCH 1969).

found that a substantial factor in her rejection was a racial characteristic.[367] The EEOC therefore found reasonable cause to believe that the employer was guilty of discrimination based on race.[368]

New recommendations for hiring practices provide that employers should not request photographs of a job applicant, nor should they ask questions regarding appearance on job applications.[369] The recommendations say that employers should not require applicants to give physical descriptions or submit pictures. Questions regarding color of skin, eyes, and hair may reveal ethnic characteristics that cannot be used in making employment decisions.[370] These recommendations hint that employers have recognized, at least in the case of race, that characteristics affecting appearance are immutable and could be a basis of discrimination under Title VII. As suits continue against employers who require certain appearance standards, perhaps this delineation between mutable and immutable characteristics will develop and expand into a basis for serious consideration in the Title VII context.

4. Appearance as a Handicap

Other studies and commentators take a completely different stance to challenge appearance requirements. They argue that appearance, in some cases, should be considered a handicap.[371] Supporters of this view claim that immutable characteristics of a person which make him or her "unattractive" in the accepted sense should qualify as handicaps for the same reasons that certain physical or mental impairments qualify.[372]

Proponents of such a classification claim that the most

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[367] *Id.*

[368] *Id.*

[369] 45A AM. JUR. 2D *Job Discrimination* § 461 (1986).

[370] *Id.*

[371] Note, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035, (1987) [hereinafter *Facial Discrimination*].

[372] *Id.* at 2044-45.

physically unattractive people face extreme discrimination.[373] They also argue that "appearance, like race and gender, is almost always an illegitimate employment criterion, and . . . it is frequently used to make decisions based on personal dislike or prejudicial assumptions rather than actual merit."[374] The argument for the inclusion of "unattractive" appearance in the handicapped category is that the physically unattractive face the same types of burdens as handicapped people, minority groups, and other protected classes.[375] Physical appearance is an especially important part of employee selection, regardless of the type of job or the relevance of appearance to the job.[376]

Although there have not been any direct challenges to appearance discrimination, some cases present close arguments. For example, the EEOC case involving the applicant not hired because of her "unattractive, large lips" was held to be racial discrimination.[377] Therefore, the EEOC did not directly address appearance as a handicap. It merely held that racial appearance may not be used as a discriminatory guideline for hiring.[378] Weight challenges have also been litigated, but those challenges were based not on appearance discrimination but instead on the argument that weight should be viewed as a handicap under handicap discrimination law.[379] The courts have left open the question if indeed obesity is a handicap under the meaning of handicap legislation. Parties challenging appearance standards based on the handicapped argument would utilize the Rehabilitation Act.

The Rehabilitation Act of 1973 prohibits discrimination on the basis of physical handicaps.[380] If the courts find,

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[373] *Id.* at 2035.

[374] *Id.*

[375] *Id.* at 2037.

[376] *Id.* at 2040.

[377] EEOC Dec. No. 70-90, *supra* note 366, at ¶ 6065.

[378] *Id.*

[379] See *supra* notes 218-36 and accompanying text.

[380] 29 U.S.C. § 794(a) (Supp. 1992); *Facial Discrimination*, *supra* note 371, at 2043. The handicapped category includes a person with a physical or mental impairment which substantially limits one or more of such person's major life activi-

according to the definition of "handicapped" under the Rehabilitation Act, that appearance is an impairment or that a person is regarded by others as having an impairment because of his or her appearance, then the act would only slightly extend the Department of Health and Human Services regulations,[381] which define handicaps as including appearance-related factors such as cosmetic disfigurement, anatomical loss, and disfiguring scars.[382] Critics argue that there should be no distinction between a facial scar and a jutting chin or extremely large nose.[383] An important element of the analysis is the part of the statute which includes as a handicap category, people who are "regarded as having an impairment." This subjective standard seems helpful in light of the evidence that people are judged by their appearance and that people are subjected to prejudice due to their appearance.[384]

Under the Rehabilitation Act, the individual would have to show a substantial limitation in one or more life activities. An inability to find work is certainly a substantial limitation. In addition, the ability to find some different kind of work does not invalidate a claim. The court in *E.E. Black, Ltd. v. Marshall* found that a handicapped person who was unable to find work in his chosen field was substantially limited.[385] That court stressed the need to examine and focus on the impaired person as an individual, not just the impairment.[386]

Of course, the real problem is deciding which jobs are covered under the Act. In particular, the airlines will

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ties, a person who has a record of such impairment, and a person who is regarded as having such an impairment. 29 U.S.C. § 794(a). Therefore, there is a two-step test to prove a handicapped status. First, a claimant must show that he or she has an impairment or is regarded as having an impairment, and second, that the impairment substantially limits life activities.

[381] 45 C.F.R. § 84-3(j)(2)(i) (1985).

[382] *Facial Discrimination*, *supra* note 371, at 2044.

[383] *Id.* at 2045.

[384] *Id.*

[385] 497 F. Supp. 1088, 1099 (D. Haw. 1980).

[386] *Id.* The court rejected tests such as requiring the plaintiff to show that he was precluded from many or most jobs and requiring the plaintiff to show that his impairment would affect employability in general. *Id.*

probably continue to use their arguments that an employer has the right to maintain certain grooming standards, including appearance tests. Other employers who require a "front desk appearance" will have similar arguments. For example, the employers of receptionists, salespeople, and others who deal with the public and represent the employer to the public will probably argue that a certain type of appearance is a BFOQ for the position. One possible test "is whether a handicapped individual who meets all employment criteria except for the challenged discriminatory criterion 'can perform the essential functions of the position in question without endangering the health and safety of the individuals or others.' "[387] Another form of analysis is to utilize the earlier arguments of *Diaz* and *Wilson* which require a BFOQ to be a business necessity, not merely a business convenience.[388] Because the primary function of the airlines is to provide safe, efficient service, employees could argue that other attributes are merely tangential.[389] Similarly, employees could argue that a receptionist receives customers or clients and appearance does not affect the ability to answer phones or direct customers.

Proof, of course, will be the most difficult aspect of using appearance as a handicap. "Handicapped" is not an absolute definition or classification like race, sex, religion, and national origin. Instead, "handicapped" is a label imposed by society. The "normal" majority draws the line between "normal" and "handicapped."[390] A dictionary definition of handicapped is not a complete description because social judgment is a crucial factor in the mix.[391]

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[387] Prewitt v. United States Postal Service, 662 F.2d 292, 307 (5th Cir. 1981) (quoting 28 C.F.R. §§ 1613.702(f)-.703).

[388] *See supra* notes 50-64 and accompanying text..

[389] Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388 (5th Cir. 1971).

[390] Marcia P. Burgdorf & Robert Burgdorf, Jr., *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA L. REV. 855, 858 (1975). The authors argue that such social judgment is discriminatory and that the handicapped should be afforded equal protection under the 14th Amendment. *Id.* at 899.

[391] *Id.* at 857.

Of course, the employer will always have the opportunity to say that it made hiring decisions based on other reasons. It will always be up to the plaintiff, who is generally the party with the least amount of information about the decision, to show the discriminatory reasons. Cases will be easiest to prove where there are "smoking guns" such as interview reports and evaluation sheets.[392] The fact that physical appearance is a significant factor in employee selection will continue to make the appearance controversy a debated issue.[393]

E. Sexual Lifestyle

A final area in which the courts have not found sex discrimination is in the area of sexual lifestyle. The courts have held that sexual lifestyles, proclivities, and practices are not protected under Title VII. "Nonconforming" sexual lifestyles were not considered when Title VII was enacted.[394]

Homosexuals, bisexuals, and transsexuals who have undergone sexual reassignment surgery are not protected.[395] In *Ulane v. Eastern Airlines, Inc.*, the Seventh Circuit held that transsexuality was not protected under Title VII.[396] Karen Ulane, formerly Kenneth Ulane, sued Eastern for its termination and refusal to reinstate her to flight status after gender reassignment surgery. The court held that Title VII did not protect transsexuals because the prohibition of discrimination based on "sex" was not synonymous with "sexual preference" or "sexual identity."[397]

The meaning of "sex" was given its common and ordinary meaning.[398] Discrimination based on sex means discriminating against women because they are women or

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[392] *Facial Discrimination, supra* note 371, at 2047.
[393] *Id.*
[394] EEOC Dec. No. 76-67, Empl. Prac. Guide (CCH) ¶ 6493 (EEOC 1976).
[395] 742 F.2d 1081, 1087 (7th Cir.), *cert. denied*, 472 U.S. 1017 (1984).
[396] *Id.* at 1084.
[397] *Id.* at 1084-85.
[398] Perrin v. United States, 444 U.S. 37, 42 (1979).

men because they are men. It does not encompass a broader meaning. The court reinforced its decision by showing congressional attempts to amend Title VII to prohibit discrimination based on sexual orientation.[399] All of these attempts failed; therefore, the court said that these checked efforts indicated that discrimination based on sex should be viewed in the traditional and narrow sense.[400] The plaintiff would have stated a claim only if she had shown that the airline considered her as a female and discriminated against her on that basis.

V. ANALYSIS

A. TITLE VII ARGUMENTS FOR CHANGE

The Supreme Court has denounced persistent stereotyping of females.[401] Such a statement could have strong implications on the hiring practices of the airlines. For example, critics of airline hiring standards argue that the policies are based particularly on the male stereotype of the "ideal woman." These stereotypes include weight limitations and appearance ideals. Employers argue that they have the right to set certain guidelines for employees.

The Supreme Court has stated that there must be a balance between employee rights and employer prerogatives.[402] The Court made that statement in the context of a sex discrimination suit brought by a woman who was not

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[399] *Ulane*, 742 F.2d at 1085 n.11. *See, e.g.*, H.R. 166, 94th Cong., 1st Sess. (1975); H.R. 2667, 94th Cong., 1st Sess. (1977); H.R. 5452, 94th Cong., 1st Sess. (1975); H.R. 451, 95th Cong., 1st Sess. (1977); H.R. 775, 95th Cong., 1st Sess. (1977); H.R. 2998, 95th Cong., 1st Sess. (1977); H.R. 4794, 95th Cong., 1st Sess. (1977); H.R. 5239, 95th Cong., 1st Sess. (1977); H.R. 8268, 95th Cong., 1st Sess. (1977); H.R. 8269, 95th Cong., 1st Sess. (1977); H.R. 2074, 96th Cong., 2d Sess. (1980); H.R. 1454, 97th Cong., 2d Sess. (1982).

[400] *Ulane*, 742 F.2d at 1084.

[401] *See supra* notes 181-182 and accompanying text.

[402] Price Waterhouse v. Hopkins, 490 U.S. 228, 242 (1989). Although the purpose of Title VII is to protect the rights of the employee, the statute is also designed to protect the employer's remaining freedom of choice. Thus, the employer is not liable if, even if it had not taken gender into account, it would have reached the same decision regarding a prospective employee. *Id.*

made a partner in an accounting firm. The plaintiff in *Price Waterhouse v. Hopkins* was not made a partner the first year she was considered, and then the partners refused to bring her up for reconsideration in subsequent years. The plaintiff was apparently competent and successful, but her aggressiveness was viewed as abrasive by some of her co-workers. The partners characterized her as "macho", overcompensating "for being a woman," and needing to take "a course at charm school."[403] In the policy board's advice to the plaintiff to improve her chances for making partner, the review advised that she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[404] The plaintiff charged that based on this evidence, she was the victim of sex discrimination that is forbidden under Title VII.

The Supreme Court held that employers may not use gender in a decision, and employers have the burden of proof in any challenge.[405] To say that an employer may not use gender as a basis for decisions, however, does not end the analysis. The employer still has the remaining freedom of choice protected by the statute.[406] The Court held that this protection means that the employer has the opportunity to show that the decision was not based solely on the gender reasons, but that it would have made the same decision even if it had not used gender.[407] In the Civil Rights Act of 1991,[408] however, Congress directly overruled the *Price Waterhouse* holding and classified as discriminatory any use of gender as a hiring factor.[409]

The rationale for the holding in *Price Waterhouse* as well as the new legislation is based on the original intent of Title VII. That intent, according to the comanagers of Ti-

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[403] *Id.* at 235.
[404] *Id.*
[405] *Id.* at 239.
[406] *Id.* at 242.
[407] *Id.*
[408] Civil Rights Act of 1991, 42 U.S.C. § 1981 (Supp. 1991).
[409] *See infra* notes 429-32 and accompanying text.

tle VII, is to have employers focus on the qualifications of an employee rather than a protected category of sex, religion, race, or national origin.[410] The comanagers stated that:

> To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 703 are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin. Any other criterion or qualification for employment is not affected by this title.[411]

Therefore, while employers are not permitted to take gender into account for the basis of an employment decision, they are still free to decide against a person of a certain sex based on other reasons. An actual focus on qualifications of an employee rather than stereotyped characteristics based on sex could solve the airline hiring problems. As flight attendants have contended for years, weight and appearance may not be determinative of a person's ability to serve refreshments and assist passengers in an emergency.

An employer's decision to act on the belief that a woman cannot be aggressive or that as a woman she should not be aggressive is based on sex stereotyping.[412] Such stereotyping violates Title VII.[413] An employer cannot make employment decisions based strictly on stereotyped impressions about the difference in male and female characteristics.[414] Moreover, its decision cannot be based even in part on sex stereotyping. The courts have discussed and warned parties about the harmful effects of using occupational cliches.[415] The fact that certain

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[410] *Price Waterhouse*, 490 U.S. at 243. "The intent to drive employers to focus on qualifications rather than on race, religion, sex, or national origin is the theme of a good deal of the statute's legislative history." *Id.*

[411] 110 CONG. REC. 7213 (1964).

[412] *Price Waterhouse*, 490 U.S. at 250.

[413] *Id.*; Los Angeles v. Manhart, 435 U.S. 702 (1978).

[414] *Manhart*, 435 U.S. at 707.

[415] Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982); Gerdom

appearance requirements for flight attendants still exist hints that some stereotyping is prevalent in the airline industry. There is still an attitude that women should look a certain way. The problem with challenging this attitude under Title VII is that the airlines apply the same or similar requirements to male flight attendants. Perhaps the Supreme Court's statements about stereotyping, new legislation, and the pervasive opposition to the standards by employees signal a slow willingness to modify hiring practices of the airlines.

B. CIVIL RIGHTS ACT OF 1991

Congress has recognized that difficulties remain for challengers under Title VII. In fact, the Civil Rights Act of 1991 addressed several areas in which the Supreme Court retracted protection of employees under Title VII.[416] Congress found that the 1991 legislation was necessary to provide additional protection against employment discrimination and to overrule court decisions that weakened both the scope and effectiveness of civil rights laws.[417] The purposes of the Act included providing appropriate remedies, codifying the concept of "business necessity," confirming guidelines for suits based on disparate impact, and providing adequate protection for employees against discrimination.[418]

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v. Continental Airlines, Inc., 692 F.2d 602, 607 (9th Cir. 1982), *cert. dismissed*, 460 U.S. 1074 (1983).

[416] Civil Rights Act of 1991, 42 U.S.C. § 1981 (Supp. 1991).

[417] 137 CONG. REC. S15,482 (daily ed. Oct. 30, 1991) (statement of Sen. Robert Dole).

[418] Civil Rights Act of 1991, § 3, 105 Stat. at 1071. The purposes of this Act are:

> (1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace; (2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in other Supreme Court decisions prior to Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989); (3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); and (4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights stat-

In signing the Civil Rights Act of 1991, President Bush stated that one of the most crucial areas of the Act resolved controversies involving the law of disparate impact, but not in a way to encourage quotas or unfair preferences in hiring.[419] In fact, the Act was instrumental in clarifying the law in the area of disparate impact. The Act overruled the Supreme Court's 1989 decision in *Wards Cove Packing Co. v. Antonio*.[420] In *Wards Cove*, the Supreme Court placed the burden to show that hiring practices were not business necessities on employees claiming job discrimination.[421] This holding contradicted the rule stated in the Court's 1971 decision in *Griggs v. Duke Power Co.*, where the employer had the burden to show that a challenged hiring policy was in fact a business necessity.[422]

Subsection 703(k)(1) is intended to overrule the *Wards Cove* decision and restore the rule stated in *Griggs*.[423] Thus, an employer's showing of business necessity will again function as an affirmative defense to a claim of discrimination. The provision of the Act will probably not have a significant effect on the outcome of any challenges by flight attendants because the Act simply returns to the rule used in most of the challenges based on disparate impact. Continuing to use the *Wards Cove* rule, however,

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> utes in order to provide adequate protection to victims of discrimination.

Id.

[419] Statement of President Bush Upon Signing S. 1745, 27 WEEKLY COMP. PRES. DOC. 1701 (Nov. 25, 1991).

[420] 490 U.S. 642 (1989).

[421] *Id.*

[422] 401 U.S. 424 (1971).

[423] H.R. REP. No. 102-40(II), 102d Cong., 1st Sess., at 6 (1991). Subsection 703(k)(1)(A) provides:

> An unlawful employment practice based on disparate impact is established under this title only if (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity . . . .

Civil Rights Act of 1991, § 105, 105 Stat. at 1974.

could have negatively affected challenges by placing an additional burden on the employees claiming discrimination.

The House Report on the 1991 Act states that the practical reasons for placing the burden of proving a business necessity on the employer are obvious.[424] Those reasons include the employer having control over the employment and hiring practices and having information about the costs and benefits of using such practices.[425] One final provision in Subsection 703(k)(1) which could be of some help to the flight attendants' claims is the codification of the "lesser discriminatory alternative" doctrine.[426] This doctrine provides that if a defendant shows that a practice is a business necessity, the plaintiff can still prevail by showing that other practices with less disparate impact would serve equally well.[427] This doctrine was announced by the Supreme Court in the 1975 decision *Albemarle Paper Co. v. Moody*.[428]

A second important change in the Act is the codification of the rule that any reliance on prejudice in making employment decisions is illegal.[429] This rule was codified in response to the Supreme Court's ruling in *Price Waterhouse v. Hopkins* that an employment decision made in part for a discriminatory reason does not violate Title VII if the employer would have made the same decision based on non-

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[424] H.R. REP. No. 102-40(II), *supra* note 423, at 12.

[425] *Id.*

[426] *Id.* at 26.

[427] *Id.*

[428] 422 U.S. 405, 425 (1975). The Court held that: "If an employer does then meet the burden of proving that its tests are 'job-related' it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" *Id.* Thus, Subsection 703(k)(1) shows that there is a three stage process to prove disparate impact. First, the plaintiff has the burden to show the discriminatory impact of an employment practice. Second, the defendant must demonstrate that the practice is required by business necessity. Finally, if the defendant meets that burden, the plaintiff may still show that other practices have less disparate impact.

[429] H.R. REP. No. 102-40(II), *supra* note 421, at 4.

discriminatory reasons.[430] The new subsection 703(1) provides that an unlawful employment practice is established when an employer uses sex, race, color, religion, or national origin as a contributing factor for any employment practice, even though additional factors also contribute to the practice.[431] Congress felt that the *Price Waterhouse* decision undercut the prohibitions of the Civil Rights Act of 1964 and responded by rejecting the Supreme Court's analysis of the issue.[432] Thus, to establish liability under the Act, a claimant must show that discrimination was a contributing factor in an employment policy or decision. This clarification could be somewhat helpful in flight attendant claims in that it makes claims of discrimination easier to prove than under the *Price Waterhouse* formulation.

A final aspect of the 1991 Act which could affect the flight attendant suits is the codification of certain rules affecting consent decrees. Such rules could be very important to flight attendants considering the growth in the number of suits culminating in consent decrees. The new subsection overrules the Supreme Court's decision in *Martin v. Wilks*.[433] In *Martin*, the Court held that Title VII did not bar parties who failed to intervene in a discrimination suit ending in a consent decree from challenging decisions made pursuant to that decree.[434] The Court noted, however, that Congress had the power to create special remedial schemes to foreclose successive litigation.[435]

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[430] *Price Waterhouse*, 490 U.S. at 242.

[431] Civil Rights Act of 1991, § 107, 105 Stat. at 1075. Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by sections 105 and 106) is further amended by adding at the end the following new subsection: "(m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." *Id.*

[432] H.R. REP. No. 102-40(II), *supra* note 423, at 4.

[433] 490 U.S. 755 (1989).

[434] *Id.* at 761-62.

[435] *Id.* at 762 n.2.

That power is precisely the one Congress exercised in the new subsection 703(n) which precludes challenges on constitutional or civil rights grounds to employment practices in the scope of a consent judgment or order resolving a claim of discrimination.[436] Litigants are prohibited from challenging these decrees if they had actual notice, a reasonable opportunity to present objection to the judgment, or interests which were adequately represented by the previous challenge.[437] Therefore, while Congress stated that its goal was to expand protection from employment discrimination, it also made clear that it was emphasizing the effect of consent decrees and judgments on later challenges. Such a statement could possibly preclude repeated challenges by flight attendants on heavily contested policies such as weight standards.

C. LIMITATIONS OF TITLE VII

Thus, even with the new civil rights legislation, it is not clear that Title VII can adequately address all of the concerns of flight attendants about hiring standards. Most recent challenges have been unsuccessful in arguing that hiring practices are discriminatory under Title VII. However, there has been an increased focus on discriminatory

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[436] Civil Rights Act of 1991, § 108, 105 Stat. at 1075.

[437] *Id.*

> (n)(1)(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or federal civil rights laws—
> (i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had—
> (I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and
> (II) a reasonable opportunity to present objections to such judgment or order; and
> (ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

Id.

practices as evidenced by the 1991 legislation. Clarifications in the burdens of proof, definitions, and other changes may provide at least some advantage to challengers.

The developing BFOQ analysis may also affect hiring policies. The BFOQ analysis for Title VII and for ADEA are intricately related and seem to be moving in the same direction. This analysis includes the requirement that a standard must relate to the essence of the job.[438] There also must be a factual basis for believing that a person would be unable to perform the job.[439] Finally, it must be impossible or impracticable to deal with members of the excluded class on an individual basis.[440] In the abstract, these forms of analysis could give the airlines and the flight attendants something to think about in their continued use of some of these hiring standards.

The flight attendants could argue, and have done so in the past, that hiring standards based on weight, age, and appearance are truly discriminatory in that they rely on sexual stereotypes of women and have no relation to the ability of any person to perform the duties of the job. None of these forms of analysis will be helpful if the challenges are not truly challenges based on Title VII categories. Courts have managed to keep the challenges based on age, weight, and appearance out of Title VII by classifying them under other statutes and grooming standards. In fact, using the traditional definitions of the courts, the challenges based on age, weight, and appearance appear to best fit under other forms of analysis.

For example, challenges to age fit best under the ADEA. The only way that age challenges could fall under Title VII is if an airline applies different age requirements

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[438] *See* Western Airlines, Inc. v. Criswell, 472 U.S. 400, 416-17 (1985) (applying the essence requirement to age discrimination under the ADEA); Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 388 (5th Cir. 1971) (applying the essence test in Title VII cases), *cert. denied* 404 U.S. 950 (1971).

[439] Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235-26 (5th Cir. 1969); EEOC Dec. No. 71-1103, EMPL. PRAC. GUIDE (CCH) ¶ 6203 (EEOC 1971).

[440] *Western Airlines*, 472 U.S. at 416-17.

to males and females. The airlines litigated and lost this type of discrimination suit. Current age discrimination is hard to prove and is not truly protected for employees under forty, as required by the ADEA. Pressure from employees and unions, however, has caused some airline recognition and compromise. Age-related appearance, however, is not protected under ADEA. Perhaps there will be new challenges based on age-related appearance as an immutable characteristic under Title VII. Such challenges will only occur, however, if there is airline resistance to hiring policies or a perceived effort on the part of the airlines to force early retirement through appearance requirements or perhaps weight requirements. True progress in age discrimination challenges occurred under Title VII and the sex-plus analysis. Airlines could not require female flight attendants to be younger than males.

Weight challenges remain a problem for the flight attendants because the courts are reluctant to recognize any disparate treatment or disparate impact of these policies. The cases that did recognize discriminatory treatment did so because the weight standards were applied only to female flight attendants. With the increase in statistically based weight standards and the increasing number of court approved settlements in these big cases, there is a decreasing basis for claims of discrimination. Moreover, weight has continued to be protected in many cases under grooming standards. Such a classification removes weight standards totally from the Title VII analysis. Perhaps the future in weight suits will be in the area of handicap discrimination and in continuing arguments that weight should not be classified as a grooming standard because it is not a mutable characteristic. These arguments will depend on medical evidence and theories on the body's ability to set certain weights and resist change. Appearance challenges continue to be difficult because it is a very hard category to define. Appearance will probably continue to be lumped in with grooming rather than treated as the separate standard it really is. Grooming requirements will

probably continue to be protected as a long-standing tradition and a tribute to the ability of the businessperson to define acceptable standards that are reasonably necessary to the operation of the business. However, the growing trend may be to stress appearance as a distinct and immutable characteristic that should actually be classified as a handicap.

Diversification in all of these categories has occurred most likely from the gradual wearing down of the system and the growing opposition to using flight attendants as "sex objects" and "marketing tools". Flight attendants are older because of the invalidation of mandatory retirement rules based on age and the invalidation of the mandatory retirement for married flight attendants. There is a lower turnover rate in the field than in the 1970's, and the airlines have stopped considering the job as temporary. The ADEA, of course, has increased attention on the hiring practices related to age.

In the area of weight standards and appearance requirements, there has certainly been a decrease in the use of flight attendants as sexy marketing tools. Flight attendants have gained more respect as professionals rather than cocktail hostesses or sex objects. Although there is still an appearance component in the airlines' focus on grooming standards, the emphasis is certainly not the same as the "Miss America" one formerly used. Weight limits have continued to increase and become geared to statistical data. The majority of the American population would not meet the requirements of the airlines, but the requirements have certainly become more reasonable than they were in the strict 115 pound limit days.

Important factors in the changes between the parties are the growing power of the employees through unions and other groups and the cost of protracted litigation brought by unions, employees, or the EEOC. Employee relations are important to the airlines, and continued good will is crucial to that relationship. Also, adverse publicity is costly to the airlines and counteracts the ef-

forts and millions of dollars in advertising budgets that the companies spend each year in the increasingly competitive market. The cost of litigation as well as the adverse publicity generated make long cases prohibitive. Airlines have become much more interested in settling cases as the emphasis on arbitration and settlement has grown. Although the flight attendants and the airlines probably are resigned that they will never completely agree on hiring practices and the role of the employees' interests versus the role of the employers' businesses, they have come to terms with the fact that they must work together to minimize conflict over these issues.