Flight Attendant Weight Requirements and Title VII of the Civil Rights Act of 1964

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THE AIRLINE companies expect all their customer-contact employees consistently to present a favorable personal appearance. This is especially true of flight attendants, since they spend more time with customers than any other employee group. The airlines thus take an active role in regulating flight attendant appearance.¹ In so doing they usually prescribe that a flight attendant


Eastern Air Lines’ grooming regulations for women’s hair are typical of the industry practice:

Hair:
—An attractive business-like hair style in keeping with current trend.
—Hair must be clean, in good condition, and the style well maintained at all times.
—Keep hair trimmed and/or curled as frequently as the style demands.
—Hair may not fall forward or across the face when serving.
—Natural blow dried hairdos that have a tendency to bounce, fall or become messy looking with weather or cabin activity must be lightly sprayed to keep in place.
—Longer hair styles are permitted provided the hair is no longer than six inches below the shoulder and is kept curled and styled.
—Long straight hair must be pulled back.
—Hair longer than six inches below the shoulder must be worn up.
—All hair styles are subject to supervisory approval.

Hair Pieces: Must match hair color and be approved by your supervisor.

Wigs: To be natural looking and approved by your supervisor.

Hair Accessories:
—Plain tortoise and yellow gold hair accessories may be worn for hair maintenance and are subject to supervisory approval.
—Three-quarter inch blue or yellow grosgrain ribbon to match blouses or the blouse tie belt may be used to tie back/control long hair. When ribbon/tie belt are worn, they may not hang more than 5” from the knot.
—Uniform scarves and neck fillers may be worn as a hair band to secure long hair as long as they are folded so as not to exceed
may not exceed a certain weight which corresponds to his or her height and his or her sex. This comment examines whether those weight requirements, which impose different limitations for males than for females of the same height, unlawfully discriminate against women in violation of Title VII of the Civil Rights Act of 1964.

I. THE HISTORY OF TITLE VII

Legislative history indicates that the primary purpose of the Civil Rights Act of 1964 was to insure equality of employment opportunities by eliminating racially discriminatory practices. The

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two inches in width. They may also be worn to secure a G.W.
—Scarves/neck fillers tied about the head that give an Indian headband or peasant look whereby most of the head is covered are not permitted.
—No other hair accessories are permitted.

Hair Coloring:
When other than natural is subject to supervisory approval. General guidelines are:
—Well maintained (no roots).
—Color becoming to complexion.
—Extremes to the light or dark that cause an artificial look are unacceptable.
—Colored hair must meet all other hair regulations.


See, e.g., SOUTHWEST AIRLINES, HOSTESS MANUAL (1977); TRANS WORLD AIRLINES, INC., EMPLOYEE UNIFORM & APPEARANCE MANUAL; Eastern Air Lines Letter from the Vice President of In-Flight Services to All Flight Attendants (July 14, 1978); Braniff International Memo from the Director of Flight Attendant Services to All Flight Attendants (July 18, 1975).

For Southwest to achieve a superior appearance goal, we have found it necessary to establish and maintain rigid weight controls. It is mandatory that you comply with these regulations, or you can expect disciplinary action up to and including dismissal. Weights will be checked at the discretion of the Flight Attendant Office.

SOUTHWEST AIRLINES, HOSTESS MANUAL 3 (1977).
amendment adding "sex" to Title VII was something of an afterthought, offered as a floor amendment without any prior legislative hearing or debate one day before the House of Representatives approved Title VII of the Civil Rights Act. As a result, there is no historical reference to the intended scope of the "sex" amendment to Title VII which emerged from the limited floor discussion. The "sex amendment" was introduced by Representative Howard Smith of Virginia, who had opposed the Civil Rights Act, and was accused by some of wishing to sabotage its passage by his proposal.

Representative Smith said in introducing his amendment:

Mr. Chairman, this amendment is offered to the fair employment practices title of this bill to include within our desire to prevent discrimination against another minority group, the women, but a very essential minority group, in the absence of which the majority group would not be here today.

I want to read you an extract from a letter that I received the other day.

"The census of 1960 shows that we had 88,331,000 males living in this country, and 90,992,000 females, which leaves this country with an 'imbalance' of 2,661,000 females.

"Just why the Creator would set up such an 'imbalance' of spinsters, shutting off the 'right' of every female to have a husband of her own, is, of course, known only to nature.

"But I am sure you will agree that this is a grave injustice to womankind and something that Congress and President Johnson should take immediate steps to correct, especially in this election year.

"Up until now, instead of assisting these poor unfortunate females in obtaining their 'right' to happiness, the Government has on several occasions engaged in wars which killed off a large number of eligible males, creating an 'imbalance' in our male and female population that was even worse than before."

I read this letter just to illustrate that women have some real grievances and some real rights to be protected, I am serious about this thing.


7 110 CONG. REC. 2577, 2581, 2804-05, 14511, 15897 (1964). See Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); Developments, supra note 6; Employer Dress Codes, supra note 6.

8 110 CONG. REC. 2577, 2581, 2804-05, 14511, 15897 (1964). See Barnes v.
In light of this insufficient and inconclusive legislative history behind the inclusion of "sex" in Title VII, it has been held that Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications. The alternative view has been that although the last minute inclusion of "sex" has obscured the congressional intent, the amendment did survive intact, and from that fact it should be presumed that Congress intended to carry out its underlying policy, notwithstanding the political or tactical maneuvers which motivated the proponents of the amendment. Other attempts to modify Title VII by including age as an impermissible employment criterion or weakening the sex amendment by proscribing only discrimination based "solely" on sex failed, and such failure lends credence to the latter view.

When the 1964 Civil Rights Act was amended by the Equal Employment Opportunity Act of 1972 there was considerable discussion on the topic of sex discrimination. It then became evident that Congress was deeply concerned about gender-based


Id. at 2728.


The Report of the House of Representatives General Subcommittee on Labor stated:

Women are subject to economic deprivation as a class. Their self-fulfillment and development is frustrated because of their sex. . . .

Such blatantly disparate treatment is particularly objectionable in view of the fact that Title VII has specifically prohibited sex discrimination since its enactment in 1964. . . .

[Discrimination against women continues to be widespread, and is regarded by many as either morally or physiologically justifiable.

employment discrimination and intended to combat it as vigorously as any other type of forbidden discrimination.\(^\text{16}\)

II. THE BONA FIDE OCCUPATIONAL QUALIFICATION EXCEPTION

Title VII of the Civil Rights Act of 1964\(^\text{17}\) (Title VII) prohibits sex discrimination\(^\text{18}\) in any industry affecting commerce.\(^\text{19}\) The statute, however, makes an exception for what otherwise would be discriminatory in those instances where sex is "a bona fide occupational qualification reasonably necessary to the normal operation of . . . [the] business . . . .\(^\text{20}\)

The bona fide occupational qualification (BFOQ) exception has been narrowly construed,\(^\text{21}\) and the employer has the burden


\(^{18}\) 42 U.S.C. § 2000e-2 (1976) provides:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(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.


Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .


The Fifth Circuit Court of Appeals has stressed that the word "necessary" in the BFOQ exception means a business necessity, not business convenience, is
of proving its existence. Sex cannot be a BFOQ where either sex may perform any of the functions of a position. Sex can only be a BFOQ when an unbiased reasonable person would perceive the service offered by two employees as essentially different if the employees' sexes were different. The Equal Employment Opportunity Commission (EEOC) has determined this precludes sex as a BFOQ for the position of airline flight attendant.

Airline-imposed weight regulations which are different for male and female flight attendants do not appear justified under the BFOQ exception, since there is no valid occupational reason why women must weigh less than their male counterparts. While it may be true that passengers would prefer to see female flight attendants slimmer than males of the same height, the EEOC has generally determined that mere customer preference will not warrant the application of the BFOQ exception. A generally held, but stereotyped, assumption that women weigh less than men will not invoke the BFOQ exception.

Safety and efficiency arguably might demand that female flight attendants weigh less than male flight attendants. The bulk of the flight attendant's training and responsibility is devoted to safety, which requires that females be slim and in excellent physical con-

required. Only when the essence of the business operation would be undermined by the inclusion of both sexes can discrimination based on sex be valid. Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir.), cert. denied, 404 U.S. 950 (1971). See also Chastang v. Flynn & Emrich Co., 541 F.2d 1040 (4th Cir. 1976).

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

29 Developments, supra note 6, at 1181.


27 14 C.F.R. § 121.421 (1979); see also 14 C.F.R. § 121.427 (1979) (recurrent training).
In *Dothard v. Rawlinson,* however, the Supreme Court held that a correlation between weight and physical condition is too weak to justify application of the BFOQ exception. There the Alabama Department of Public Safety sought to justify height and weight requirements by claiming they were related to a necessary job qualification, namely strength. The Court viewed the employer's invocation of the BFOQ exception strictly and held that if the strength requirement is bona fide, the purpose can be achieved by adopting and validating a test for applicants that measures strength directly. Such a test, fairly administered, would fully satisfy the standards of Title VII because it would be one that measures the person for the job and "not the person in the abstract." From *Dothard* it is clear that since the disparate weight requirements for flight attendants cannot be sustained by the BFOQ exception, they are in violation of Title VII if it can be shown they discriminate on the basis of sex.

### III. DISPROPORTIONATE IMPACT CONSTITUTING DISCRIMINATION

Even though the statute protects men and women equally, determining when an employment practice discriminates on the basis of sex is not always clear. Generally, sufficient proof of a Title

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58 There is approximately one flight attendant for every 50 passenger seats. 14 C.F.R. § 121.391 (1979). As a team they must be able to evacuate all passengers in 90 seconds. *Id.* at § 25.803(c). It is arguable that a flight attendant who is slim and physically fit is more capable of performing these duties than a flight attendant who is not.


60 *Id.*

61 *Id.* at 331.

62 *Id.* at 332. Evidence of a test's validity should consist of empirical data demonstrating that the test is predictive of, or significantly correlated with, important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated. EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1978). *See also* Washington v. Davis, 426 U.S. 229 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Officers for Justice v. Civil Serv. Comm'n, 395 F. Supp. 378 (N.D. Cal. 1975).


65 As an example, employment discrimination based upon transsexuality was held outside the protection of Title VII. Holloway v. Arthur Anderson & Co., 566 F.2d 659 (9th Cir. 1977). Discrimination based upon homosexuality is not
VII violation is found when an employment practice is shown to have a substantially disproportionate effect upon a statutorily protected classification. In such a case a discriminatory purpose need not be proved. One way to demonstrate a disproportionate impact is through the use of statistics. In *Boyd v. Ozark Air Lines, Inc.* for example, the employer had a minimum height requirement of five feet seven inches for pilots. This requirement, according to statistics presented by the plaintiff-pilot and accepted as fact by the trial court, excluded 93% of the American females between the ages of eighteen and thirty-four, yet it excluded only 25.8% of the American males of the same age. Such a disproportionate impact made out a prima facie case of sex discrimination in violation of Title VII.

Flight attendants have challenged airline weight requirements on the ground that they also have a disproportionate impact upon the sexes. The courts, however, have not agreed. In *Jarrell v. Smith v. Liberty Mut. Ins. Co.*, 395 F. Supp. 1098 (N.D. Ga. 1975), aff'd, 569 F.2d 325 (5th Cir. 1978).


568 F.2d 50 (8th Cir. 1977).


568 F.2d at 52 n.1.

Id. at 52. The airline subsequently successfully maintained a minimum height requirement of five feet five inches as a bona fide occupational qualification. Id. at 54.


Eastern Air Lines, Inc. 44 the airline maintained weight maximums based on height that were different for male and female flight attendants. 45 According to the court's findings of fact, when the employer's requirements were applied to the general population of the United States between the ages of twenty-five and thirty-one a smaller percentage of American women than American men were able to comply. 46 Only 33.3% of the women in the United States could meet Eastern's weight requirements for females, while 43.5% of America's men could meet the male requirements. The court held that these statistical differences were not sufficient to establish a discriminatory impact upon women. 47 In Leonard v. National Airlines, Inc., 48 a similar result was reached. National Airlines' weight limitations for men were attainable by 30% of the male population, while its female standards could only be attained by 22% of America's women. 49 The court held this in-

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45 Eastern Air Lines had a formalized weight program enforced by the flight attendant's supervisor. 430 F. Supp. at 887-88. Weights were checked on a standard medical scale without shoes but with clothes according to the following table:

**HEIGHT—MAXIMUM WEIGHT CHART FOR FLIGHT ATTENDANTS:**
(Effective Nov. 1973)

<table>
<thead>
<tr>
<th>Height</th>
<th>Maximum Weight For Females</th>
<th>Maximum Weight For Males</th>
</tr>
</thead>
<tbody>
<tr>
<td>62&quot;</td>
<td>115 lbs.</td>
<td>—</td>
</tr>
<tr>
<td>63&quot;</td>
<td>119 lbs.</td>
<td>—</td>
</tr>
<tr>
<td>64&quot;</td>
<td>123 lbs.</td>
<td>—</td>
</tr>
<tr>
<td>65&quot;</td>
<td>127 lbs.</td>
<td>—</td>
</tr>
<tr>
<td>66&quot;</td>
<td>131 lbs.</td>
<td>—</td>
</tr>
<tr>
<td>67&quot;</td>
<td>135 lbs.</td>
<td>156 lbs.</td>
</tr>
<tr>
<td>68&quot;</td>
<td>140 lbs.</td>
<td>161 lbs.</td>
</tr>
<tr>
<td>69&quot;</td>
<td>145 lbs.</td>
<td>166 lbs.</td>
</tr>
<tr>
<td>70&quot;</td>
<td>—</td>
<td>171 lbs.</td>
</tr>
<tr>
<td>71&quot;</td>
<td>—</td>
<td>176 lbs.</td>
</tr>
<tr>
<td>72&quot;</td>
<td>—</td>
<td>181 lbs.</td>
</tr>
<tr>
<td>73&quot;</td>
<td>—</td>
<td>186 lbs.</td>
</tr>
<tr>
<td>74&quot;</td>
<td>—</td>
<td>191 lbs.</td>
</tr>
</tbody>
</table>

430 F. Supp. at 888-89.

46 430 F. Supp. at 889-90.

47 Id. at 892. See Roman v. ESB, Inc., 550 F.2d 1343 (4th Cir. 1976).


51 Id. at 275.
sufficient to prove a discriminatory impact.\textsuperscript{53}

The courts have been reluctant to hold that flight attendant weight limitations unlawfully discriminate against females because they are more difficult for women to meet than for men. This reluctance might be due in part to the fact that the flight attendant positions remain an overwhelmingly female-dominated field.\textsuperscript{53}

The weight requirements presently imposed by the majority of American air carriers have no greater statistical impact upon the United States population than those found to be non-discriminatory in Leonard and Jarrell. Taking a representative height of five feet seven inches the following chart shows the corresponding maximum weight presently required by various airlines:\textsuperscript{54}

\begin{center}
\begin{tabular}{|c|c|c|c|c|c|c|c|}
\hline
AIRLINE & FEMALE & MALE \\
\hline
Braniff & 136 lbs. & 155 lbs. \\
Eastern & 135 lbs. & 156 lbs. \\
TWA & 137 lbs. & 161 lbs. \\
Southwest & 130 lbs. & 160 lbs. \\
\hline
\end{tabular}
\end{center}

These industry requirements may be compared with United States Department of Health, Education, and Welfare (HEW) statistics of the average weights of Americans by age and height:\textsuperscript{53}

\begin{center}
\begin{tabular}{|c|c|c|c|c|c|c|c|c|}
\hline
HEIGHT & BRANIFF & EASTERN & TWA & SOUTHWEST \\
\hline
5' 2" & 115 & 130 & 115 & 117 & 136 & 105 & 135 \\
5' 3" & 119 & 135 & 119 & 121 & 141 & 110 & 140 \\
5' 4" & 124 & 140 & 123 & 125 & 146 & 115 & 145 \\
5' 5" & 128 & 145 & 127 & 129 & 151 & 120 & 150 \\
5' 6" & 132 & 150 & 131 & 133 & 156 & 125 & 155 \\
5' 7" & 136 & 155 & 135 & 137 & 161 & 130 & 160 \\
5' 8" & 140 & 160 & 140 & 141 & 167 & 135 & 165 \\
5' 9" & 145 & 165 & 145 & 145 & 170 & 140 & 170 \\
5' 10" & 150 & 170 & 151 & 149 & 174 & — & — \\
5' 11" & — & 180 & — & 176 & — & 179 & — \\
6' 0" & — & 190 & — & 181 & — & 184 & — \\
6' 1" & — & 200 & — & 186 & — & 189 & — \\
6' 2" & — & 210 & — & 191 & — & 194 & — \\
\hline
\end{tabular}
\end{center}

\textsuperscript{55} Id.
\textsuperscript{54} The following shows a more complete analysis for a wide range of heights:

\begin{center}
\begin{tabular}{|c|c|c|c|c|c|c|c|c|}
\hline
HEIGHT & BRANIFF & EASTERN & TWA & SOUTHWEST \\
\hline
5' 2" & 115 & 130 & 115 & 117 & 136 & 105 & 135 \\
5' 3" & 119 & 135 & 119 & 121 & 141 & 110 & 140 \\
5' 4" & 124 & 140 & 123 & 125 & 146 & 115 & 145 \\
5' 5" & 128 & 145 & 127 & 129 & 151 & 120 & 150 \\
5' 6" & 132 & 150 & 131 & 133 & 156 & 125 & 155 \\
5' 7" & 136 & 155 & 135 & 137 & 161 & 130 & 160 \\
5' 8" & 140 & 160 & 140 & 141 & 167 & 135 & 165 \\
5' 9" & 145 & 165 & 145 & 145 & 170 & 140 & 170 \\
5' 10" & 150 & 170 & 151 & 149 & 174 & — & — \\
5' 11" & — & 180 & — & 176 & — & 179 & — \\
6' 0" & — & 190 & — & 181 & — & 184 & — \\
6' 1" & — & 200 & — & 186 & — & 189 & — \\
6' 2" & — & 210 & — & 191 & — & 194 & — \\
\hline
\end{tabular}
\end{center}

See note 3 supra.

\textsuperscript{55} Although linear regression of weight on height was used, the relationship between weight and height is not strictly linear. The constants—regression coefficient (b) and \( Y \)-intercept (a)—in the regression equation \( Y=a+bx \) and the
AVERAGE WEIGHTS AND SELECTED PERCENTILES
BY HEIGHT

<table>
<thead>
<tr>
<th>HEIGHT</th>
<th>WOMEN</th>
<th>MEN</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Age Group In Years)</td>
<td>18-24</td>
<td>25-34</td>
</tr>
<tr>
<td>5' 7&quot;</td>
<td>190 lbs.</td>
<td>206 lbs.</td>
</tr>
<tr>
<td></td>
<td>180 lbs.</td>
<td>194 lbs.</td>
</tr>
<tr>
<td></td>
<td>168 lbs.</td>
<td>180 lbs.</td>
</tr>
<tr>
<td></td>
<td>144 lbs.</td>
<td>153 lbs.</td>
</tr>
<tr>
<td></td>
<td>120 lbs.</td>
<td>126 lbs.</td>
</tr>
<tr>
<td></td>
<td>108 lbs.</td>
<td>112 lbs.</td>
</tr>
<tr>
<td></td>
<td>98 lbs.</td>
<td>100 lbs.</td>
</tr>
</tbody>
</table>

(Source: HEW, ADVANCE DATA FROM VITAL AND HEALTH STATISTICS No. 14, WEIGHT BY HEIGHT AND AGE OF ADULTS 18-74 YEARS (1977)).

Figures in italics are the expected means. Those weights above and below the expected mean weight represent the standard error of the estimate covering the range of 60%, 80%, and 90% of the population around the mean, respectively. The first range is expected thus to identify 20%, 10% and 5% of the population of the specific height on either side of the range. Using women ages 18-24 as an example: the average weight is 144 pounds; 60% of the population weighs between 168 and 120 pounds;

standard error of estimate around these regression lines for twelve age-sex groups are shown below:

<table>
<thead>
<tr>
<th>SEX and AGE CORRELATION</th>
<th>a</th>
<th>b</th>
<th>Sy·x</th>
</tr>
</thead>
<tbody>
<tr>
<td>Men</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>18-24 years</td>
<td>.438</td>
<td>-172.63</td>
<td>4.842</td>
</tr>
<tr>
<td>25-35 years</td>
<td>.420</td>
<td>-168.67</td>
<td>4.941</td>
</tr>
<tr>
<td>35-44 years</td>
<td>.460</td>
<td>-187.49</td>
<td>5.277</td>
</tr>
<tr>
<td>45-54 years</td>
<td>.390</td>
<td>-131.83</td>
<td>4.454</td>
</tr>
<tr>
<td>55-64 years</td>
<td>.426</td>
<td>-173.99</td>
<td>5.069</td>
</tr>
<tr>
<td>65-74 years</td>
<td>.404</td>
<td>-131.64</td>
<td>4.385</td>
</tr>
<tr>
<td>Women</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>18-24 years</td>
<td>.259</td>
<td>-56.28</td>
<td>2.965</td>
</tr>
<tr>
<td>25-34 years</td>
<td>.263</td>
<td>-86.62</td>
<td>3.587</td>
</tr>
<tr>
<td>35-44 years</td>
<td>.270</td>
<td>-94.02</td>
<td>3.815</td>
</tr>
<tr>
<td>45-54 years</td>
<td>.246</td>
<td>-77.17</td>
<td>3.587</td>
</tr>
<tr>
<td>55-64 years</td>
<td>.249</td>
<td>-68.24</td>
<td>3.492</td>
</tr>
<tr>
<td>65-74 years</td>
<td>.285</td>
<td>-76.38</td>
<td>3.583</td>
</tr>
</tbody>
</table>

HEW, ADVANCE DATA FROM VITAL & HEALTH STATISTICS No. 14, WEIGHT BY HEIGHT AND AGE OF ADULTS 18-74 YEARS at 1 and 6 (1977) [hereinafter cited as HEW STATISTICS].

Since the relationship between height and weight is not strictly linear, the standard error of estimate is the measure which indicates the spread of the given points of a sampling around the line of regression.

HEW STATISTICS, supra note 55, at 7.
80% of the population weighs between 180 and 108 pounds; and 90% of the population weighs between 190 and 98 pounds.

For females in both age groups, the airlines' maximum standards are lower than the national mean, thereby excluding over 50% of the nation's women. But they are higher than the next weight value, thereby excluding less than 80% of the female population. For men in the 18-24 age group, the industry maximums are just somewhat higher than the national mean, thereby excluding less than 50% of the American men. For men in the 25-34 age group, the industry maximums are slightly less than the national mean, thereby excluding just over 50% of the nation's males. The present airline standards on weight for the height of five feet seven inches thus exclude approximately 50% of the nation's men from employment consideration. They exclude approximately 62% of the country's women. These percentages remain relatively the same throughout all heights. The ratio of females to males presently excluded is close to the ratios found non-discriminatory in Leonard and Jarrell. Thus, the present weight requirements imposed by the airline industry do not have a sufficiently disproportionate impact to prove a Title VII violation in the absence of proof of a discriminatory purpose.

IV. ANY DIFFERENCE IN TREATMENT CONSTITUTING DISCRIMINATION

Many cases, however, have not relied upon the disproportionate impact approach to find that the weight requirements violate Title VII. Instead they have held that any difference in treatment between males and females is per se discriminatory. These courts have drawn analogies to grooming codes which are merely cosmetic in nature to decide the issue of flight attendant weight requirements.

A survey of early decisions reveals that the lower courts were...
in conflict on cases in which employee grooming codes were alleged to be sexually discriminatory. Most of these decisions were with regard to grooming codes which required males to conform to certain appearance standards, but which did not require similar compliance on the part of female employees.

Some courts, holding that such grooming codes do not discriminate, found that rules which differ between the sexes with regard to minor details of appearance do not discriminate within the meaning of Title VII. In Baker v. California Land Title Co., for instance, the court found that a grooming code requiring shorter hair for male employees does not constitute discrimination within the meaning of Title VII. The court defined discrimination as "a failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored." The court went on to say, "custom and tradition have always recognized and accepted differing styles of dress and grooming based upon sex." The distinction was held to be reasonable. Such rules have also been found to be reasonable if developed in conjunction with management and labor, and if applied for the purpose of insuring a neat attractive work force. The Baker court further held that a private employer may make reasonable rules respect-

61 See, e.g., Dripps v. United Parcel Serv., Inc., 381 F. Supp. 421 (W.D. Pa. 1974), aff'd mem., 515 F.2d 506 (3d Cir. 1975) (an employment policy forbidding beards did not constitute sex discrimination when based upon a reasonable concern for safety); Boyce v. Safeway Stores, Inc., 351 F. Supp. 402 (D.D.C. 1972) (a grooming code requiring shorter hair for men is not sexually discriminatory where it is not an artificial or arbitrary standard); Stradley v. Anderson, 349 F. Supp. 1120 (D. Neb. 1972), aff'd, 478 F.2d 188 (8th Cir. 1973) (regulations governing the length and style of hair and mustaches for male police officers are not discriminatory where the purpose is to achieve the legitimate state interest of presenting a police force with a "neutral appearance"); Baker v. California Land Title Co., 349 F. Supp. 235 (C.D. Cal. 1972), aff'd, 507 F.2d 895 (9th Cir. 1974), cert. denied, 422 U.S. 1046 (1975) (a grooming code requiring shorter hair for male employees is not discriminatory); Dodge v. Giant Food, Inc., 3 Empl. Prac. Dec. 6590 (D.D.C. 1971), aff'd, 488 F.2d 1333 (D.C. Cir. 1973) (employer grooming rules which are different for males and females do not discriminate sexually where they are developed in conjunction with both management and labor, and are applied for the purpose of insuring a neat and attractive appearance).


63 349 F. Supp. at 238.

64 Id.

ing the grooming of his employees as a condition of employment, and the fact that the rules differ in minor detail between the sexes is not unlawful sex discrimination. 66

One court held that grooming standards are outside the intended application of Title VII because they do not represent any attempt by the employer to prevent the employment of a particular sex, nor do they pose a distinct employment disadvantage for one sex. 66 Continuing this line of reasoning, one could characterize the grooming regulation stereotype as involving political or ideological overtones rather than sexual ones. Not being a job-related stereotype it is therefore beyond the reach of Title VII. 68 These arguments advance the view that Title VII does not prevent an employer from making reasonable dress and grooming regulations for his employees, even though they result in a difference in treatment between men and women.

Other courts, however, have held that grooming codes which have different standards for the sexes represent an unlawful discrimination in violation of Title VII. 69 In Rafford v. Randle Eastern Ambulance Service, Inc., for example, discharging a man because of his failure to cut his hair was held to discriminate against him to the extent that females with equally long hair were allowed to work. The court in Rafford held that the Title VII test of sex discrimination is any dissimilar treatment of similarly situated men and women based on sex. 70 Such dissimilar treatment exists whenever there is a classification of employees on the basis of their sex. 71 This broad approach has been the position of the

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68 Id. at 1337.
69 Employer Dress Codes, supra note 6, at 977.
73 Roberts v. General Mills, Inc., 337 F. Supp. 1055 (N.D. Ohio 1971) (an illegal classification exists when the employer has a rule that all men must wear
Equal Employment Opportunity Commission (EEOC), which in several decisions involving employer grooming regulations which limit the length of male employees' hair without placing similar restrictions on female employees, has held that such employment practices violated Title VII.\textsuperscript{4}

This was the contradictory state of the law until the Fifth Circuit's opinion in \textit{Willingham v. Macon Telegraph Publishing Co.}\textsuperscript{7} influenced the lower courts. In \textit{Willingham} an applicant was denied employment as a copy layout artist on the defendant's daily newspaper because of his shoulder-length hair.\textsuperscript{8} The employer's grooming code required all employees who came into contact with the public to be neatly dressed and groomed in accordance with community business standards.\textsuperscript{9} Such local standards were interpreted by the newspaper's management to exclude the employing of long-haired men, but not long-haired hats while women may wear hairnets, and men are refused permission to wear a hairnet).

\textsuperscript{4} EEOC Decision No. 72-2179, [1972] 2 EMPL. PRAC. GUIDE (CCH) § 6,395 (an employment policy placing no restrictions on the hair length of female employees, but which prohibited similarly situated males from wearing their hair below the back of their collars violated Title VII); EEOC Decision No. 72-1931, [1968-1973 EEOC Decisions] 2 EMPL. PRAC. GUIDE (CCH) § 6,373 (the refusal to hire long-haired male applicants when long-haired females were hired constituted discrimination in the absence of a showing of business necessity); EEOC Decision No. 72-1380, [1968-1973 EEOC Decisions] 2 EMPL. PRAC. GUIDE (CCH) § 6,364 (a different hair length policy for male and female employees constituted sex discrimination); EEOC Decision No. 72-0979, [1968-1973 EEOC Decisions] 2 EMPL. PRAC. GUIDE (CCH) § 6,343 (a hair length policy which allowed females to wear their hair longer than males discriminated against males as a class and violated Title VII); EEOC Decision No. 71-2343, [1968-1973 EEOC Decisions] 2 EMPL. PRAC. GUIDE (CCH) § 6,256 (a hair length policy that only applied to male cargo handlers violated Title VII); EEOC Decision No. 71-1529, [1968-1973 EEOC Decisions] 2 EMPL. PRAC. GUIDE (CCH) § 6,231 (Title VII is violated by any refusal to hire long-haired male production workers where long-haired females are employed).

Dissimilar treatment based on sex need not be in conjunction with grooming standards but may also be extended to other aspects of personal behavior. In Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir.), \textit{cert. denied}, 404 U.S. 991 (1971), an employer's rule that female flight attendants could not marry, when there was no similar rule for males, was per se discriminatory. Similarly, in Pond v. Braniff Airways, Inc., 500 F.2d 161 (5th Cir. 1974), a male applicant was hired for a vacant position over a female employee on the assumption he was better able to do the job, and no objective test was given by the employer to determine the physical abilities of either applicant. The employer had to prove he was not engaged in unlawful sex discrimination. \textit{Id.}

\textsuperscript{7} 507 F.2d 1084 (5th Cir. 1975).

\textsuperscript{8} \textit{Id.} at 1087.

\textsuperscript{9} \textit{Id.}
women. The applicant brought suit alleging that the employer's grooming code unlawfully discriminated on the basis of sex in violation of Title VII. The Fifth Circuit Court of Appeals sitting en banc decided that it did not.

In its attempt to determine whether Congress intended sex discrimination to include grooming standards, the Fifth Circuit found Title VII's legislative history to be inconclusive at best. The court concluded by way of negative inference that "Congress . . . did not intend its proscription of sexual discrimination to have significant or sweeping implications." Congress only intended that the sexes have equal employment opportunities, which are secured, according to the court, when employers are prohibited from distinguishing between men and women on the basis of "immutable characteristics" or "fundamental right[s]." Hair length is neither immutable nor constitutionally protected, and the employee can comply with the regulation by subordinating his appearance preferences to his desire for employment. Such grooming codes are therefore more closely related to the employer's choice of how to run his business than to equality of employment opportunity.

78 Id.
81 Id. at 1090.
82 Id.
83 Id. at 1091.
84 Id. See, e.g., Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971); Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir.), cert. denied, 404 U.S. 991 (1971). In Phillips an employer refused to hire women with preschool age children, but had no such policy regarding males with pre-school age children. The Supreme Court in a short per curiam decision held that an employer could not have one hiring policy for men and another for women if the legislative purpose of giving people of like qualifications equal employment opportunity regardless of sex was to be effected. 400 U.S. at 542. In Sprogis the Supreme Court struck down as sexually discriminatory an airline rule that female flight attendants were not allowed to marry, while male flight attendants and other employees were so allowed. The court in Willingham distinguished the instant case by noting that the rights to marry and have children were fundamental and constitutionally protected. Further, the hiring condition in Phillips was based on having pre-school age children, an existing condition not subject to change. 507 F.2d at 1091. The court did not believe its decision was inconsistent with these opinions. Id.
85 507 F.2d at 1091.
86 Id.
Decisions following Willingham involving grooming codes which are dissimilar in treatment for males and females have consistently held that such regulations do not discriminate on the basis of sex.\textsuperscript{87} Instead, such regulations are deemed to discriminate on the basis of grooming standards.\textsuperscript{88} Citing Willingham, they conclude that mere difference in treatment is not unlawful sex discrimination when such difference is not based upon a fundamental right or immutable characteristic.\textsuperscript{89} A Title VII violation can only be found if the grooming code was established as a pretext to exclude one sex from employment,\textsuperscript{90} is enforced in an uneven manner against one sex,\textsuperscript{91} or actually affects the employment opportunity of one sex.\textsuperscript{92}

Courts faced with the issue of whether flight attendant weight requirements violate Title VII have looked to the line of grooming code cases. In Laffey v. Northwest Airlines, Inc.,\textsuperscript{93} decided prior to Willingham, the court found that the weight requirements for female flight attendants were in violation of Title VII.\textsuperscript{94} In this case, however, the employer imposed no weight requirements at all upon its male pursers.\textsuperscript{95} The weight program was found to be merely


\textsuperscript{88} See note 87 \textit{supra}.

\textsuperscript{89} Earwood v. Continental Southeastern Lines, Inc., 539 F.2d 1349 (4th Cir. 1976); Knott v. Missouri Pac. R.R., 527 F.2d 1249 (8th Cir. 1975).

\textsuperscript{90} Knott v. Missouri Pac. R.R., 527 F.2d 1249, 1252 (8th Cir. 1975) (a grooming and dress code for both sexes, but with hair length restrictions applicable only to males, is not discriminatory).

\textsuperscript{91} Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084 (5th Cir. 1975). According to Willingham a grooming code not based upon immutable characteristics cannot affect employment opportunities. No one is deprived of any employment position. Affected persons must simply order their priorities between personal appearance and the employment opportunity. \textit{Id.} at 1091.


\textsuperscript{93} \textit{Id.} at 790.

\textsuperscript{94} \textit{Id.} at 773-74. This case is thus distinguishable from the other cases in this
one aspect of the broader spectrum of unequal treatment practiced by the employer. Females had lower salaries and pensions, were provided less expensive layover accommodations, and did not receive the uniform cleaning allowance that was provided for males. Having found that the employer's weight control program violated Title VII, the court subsequently enjoined the airline from imposing it upon its female employees. The court enjoined the airline's suspension or termination of employment for weight reasons, unless the excessive weight was such as to render the flight attendant physically incapable of performing her duties.

Cases arising after *Willingham* have consistently held that airline weight control programs that impose different standards for males and females do not violate Title VII simply because of difference in treatment. These holdings have followed the *Willingham* approach that mere difference in treatment between the sexes is not illegal discrimination unless founded upon an "immutable characteristic" or a "fundamental right." comment in which the employer imposes some weight requirements for males, albeit different from those imposed upon females.

99 *Id.* at 790.

97 *Id.* at 789.

98 Laffey v. Northwest Airlines, Inc., 374 F. Supp. 1382 (D.D.C. 1974), aff'd, 567 F.2d 429 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978). On appeal the airline conceded that its practices constituted discriminatory conditions of employment, but sought to defend its conduct as inadvertent and unintentional. 567 F.2d at 454. The District of Columbia Circuit held that Title VII prohibits any discriminatory practice that was not merely accidental. *Id.* at 454-55. A general intent to do the discriminatory act is sufficient. *Id.*

99 374 F. Supp. at 1387. The court also ordered affected past employees reinstated with back pay and system seniority intact. *Id.*


In Cox v. Delta Air Lines, Inc., a female flight attendant maintained she was unable to reduce her weight to the employer's allowable maximum because of inherent female characteristics, and therefore the weight requirements discriminated on the basis of sex (1965). The Court has viewed the Constitution as guaranteeing these "fundamental rights": the right to privacy, see generally Griswold v. Connecticut, 301 U.S. 479 (1965); the right to vote, see generally Hill v. Stone, 421 U.S. 289 (1975); Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); the right to travel, see generally Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969); the right to procreate, see generally Skinner v. Oklahoma, 316 U.S. 535 (1942); the right to marriage, see generally Boddie v. Connecticut, 401 U.S. 371 (1971); Loving v. Virginia, 388 U.S. 1 (1967); and the right of access to the criminal justice system, see generally Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956). The Court has refused to label as "fundamental," rights involving: housing, see generally Lindsey v. Normet, 405 U.S. 56 (1972); welfare, see generally Dandridge v. Williams, 397 U.S. 471 (1970); education, see generally San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); or economic regulation, see generally New Orleans v. Dukes, 427 U.S. 297 (1976).

A classification that results in different treatment for various groups of people does not necessarily violate the equal protection clause. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). Unless the classification is suspect, the Supreme Court requires only that the classification be reasonable, and rationally related to a valid legislative purpose. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172 (1972); McDonald v. Board of Elections Comm'r, 394 U.S. 802, 809 (1962). See Developments, supra note 6, at 1082. This rational relationship test is historically applied to classifications resulting from regulation in the areas of social welfare or economics. Dandridge v. Williams, 397 U.S. 471, 485 (1970) (state aid for families with dependent children). When the classificatory scheme is suspect, the Court will view such legislation with "strict scrutiny." See J. Nowak, R. Rotunda, & J. Young, HANDBOOK ON CONSTITUTIONAL LAW 522 (1978); Gunther, The Supreme Court 1971 Term, Foreward: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972); Developments, supra note 6. This standard of review was first employed to eliminate classification based on race. Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 192 (1964). The Supreme Court has considered the following classifications suspect: race, see generally Hunter v. Erickson, 393 U.S. 385 (1969); Loving v. Virginia, 388 U.S. 1 (1967); and alienage, see generally In re Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971). But see Foley v. Connelie, 435 U.S. 291 (1978). While classifications based on sex have not been held to be suspect, the Supreme Court has stated they must have a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. Reed v. Reed, 404 U.S. 71, 76 (1971). See also Craig v. Boren, 429 U.S. 190 (1976); Stanton v. Stanton, 421 U.S. 7 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973).


103 The plaintiff asserted her need to take birth control pills and the fact that females have a singular physiological constitution. 14 Empl. Prac. Dec. at 4962.
in violation of Title VII. For the purpose of ruling upon a motion for summary judgment the court accepted her arguments as true. Analogizing these weight restrictions to hair length restrictions the court held, on the authority of Willingham, that Title VII does not protect classifications which result from grooming standards.

In Jarrell v. Eastern Air Lines, Inc., flight attendants unsuccessfully attempted to show that the airline's weight control program was disproportionate in its impact on the sexes. They also argued that the weight regulations were invalid because any difference in treatment of the sexes is per se discriminatory. Relying upon the hair length cases the court held that weight, like hair, is a characteristic subject to the reasonable control of most individuals. The court did not cite Willingham, but instead relied upon an appellate decision from its own circuit which held that sex differentiated grooming standards do not constitute discrimination under Title VII. The court also noted that there was unanimity among the circuit courts that an employer may impose reasonable grooming standards upon its employees which need not be identical for males and females.

In Leonard v. National Airlines, Inc., the court upheld the defendant's weight policy on the authority of Willingham, Jarrell, and Cox. Title VII is not intended to interfere with an employer's right to determine how best to run his business. It only prohibits artificial and arbitrary barriers to employment that operate on the basis of an impermissible classification. Analyzing the classifica-
tion as one based upon weight, not sex, the court held that weight is not an impermissible classification because it is not "immutable."

Finally in *Equal Employment Opportunity Commission v. Delta Air Lines, Inc.*, both the airline's weight standards for males and females and its maternity leave policy were challenged under Title VII. The court dismissed the challenge to the defendant's weight program in a cursory paragraph. On the basis of *Cox* and *Willingham*, they found that "under no set of facts can plaintiff recover on the legal theory she urges. This is so because weight is neither an immutable characteristic nor a constitutionally protected category." It would appear that the law in this area is settled. Flight attendant weight requirements which impose different weight maximums upon males and females do not discriminate on the basis of sex merely because of difference in treatment. Faithfulness to the *Willingham* approach should be tempered, however, by the recent Supreme Court decision in *City of Los Angeles v. Manhart*.

V. Possible Effect of Manhart

In *Manhart* the Los Angeles Department of Water and Power required its female employees to make larger contributions to its pension fund than its male employees. The larger contribution was required because on the average women live longer than men. The Supreme Court noted the parties accepted this statistical difference as unquestionably true but nevertheless held such disparate treatment to be in violation of Title VII.


120 Id. at 627.

121 Id.


123 435 U.S. at 704.

124 Id. at 705. The employer's assertion that on the average women live longer than men was based on a study of mortality tables and the employer's own experience. Id.

125 Id. at 707.

126 Id. at 711.
In commenting upon the effect of Title VII upon employment discrimination, Justice Stevens, writing for the majority in Manhart, noted that before its enactment an employer could base his policies on assumptions about the differences between men and women, regardless of whether such assumptions were valid. The Justice stated that it is now well recognized that Title VII precludes employment decisions based upon mere stereotyped impressions about the characteristics of males and females. Manhart, however, did not involve a fictional difference, rather a true generalization that women as a class live longer than men. The issue was whether Title VII allowed disparate treatment for men and women based upon statistical differences between the classes.

Justice Stevens began his analysis by noting that it is true that not all individuals in a class share the characteristics of that class, therefore what is fair treatment for the class may nonetheless be unfair for the individual. The Court held that Title VII's focus on the individual is unambiguous: the statute makes it unlawful to discriminate against any "individual . . . because of such individual's . . . sex . . ." This precludes treatment of individuals as simply components of a sexual class. While the employer argued that to require equal pay contributions from males and females would be unfair to its class of male employees, the Court held that the question of fairness to various classes affected by the statute is essentially a matter of policy for the legislature, and Congress has decided that classifications based on sex, like those based on national origin or race, are unlawful. In dissent, Chief Justice Burger, with whom Justice Rehnquist joined, argued that it is only rational to permit employers to rely on statistically

117 Id. at 707.
119 435 U.S. at 707.
120 Id. See Developments, supra note 6.
121 435 U.S. at 707-08.
122 Id.
124 435 U.S. at 708.
125 Id. at 709.
126 Id.
sound and proven disparities in longevity between men and women. They believe it to be irrational to assume that Congress intended to outlaw the use of such facts. While the Court never addressed the subject of flight attendant weight regulations, it seems its decision in Manhart could have a profound effect upon what appeared to be settled law. Its language speaks directly to the issues that are involved in the weight regulation cases, namely may an employer prescribe different requirements for male and female employees, even when the requirements are based upon valid statistical differences? The majority opinion in Manhart answers the question in the negative.

VI. Conclusion

Until Manhart, it appeared that the legality of flight attendant weight requirements, which imposed different standards for males than for females, was settled under Title VII. The airline companies were unable to justify their weight requirements under Title VII's BFOQ exception because they could not show a valid occupational reason why their female flight attendants had to weigh less than their male counterparts. Customer preferences are not sufficient under the statute, and any assumed correlation between weight and physical condition is too tenuous under Dothard v. Rawlinson. Therefore, if plaintiffs could prove the industry weight standards discriminated on the basis of sex, such standards would be struck down under Title VII.

Plaintiffs who attempted to prove sex discrimination by showing that flight attendant weight requirements had a disproportionate statistical impact upon the ability of the general public to comply were unsuccessful. While in most cases a smaller percentage of American women than American men were able to meet the flight attendant weight requirements, the courts held these statistical differences were not large enough to establish a dis-

137 Id. at 726.
138 Id.
139 See notes 25-33 supra, and accompanying text.
140 See notes 25-26 supra, and accompanying text.
141 See notes 29-33 supra, and accompanying text.
142 See notes 44-52 supra, and accompanying text.
In other cases, however, it was argued that the flight attendant weight requirements were illegal because Title VII prohibited any class-based disparate treatment, where the classification was based on sex. Courts faced with this argument looked for precedent to the cosmetic "grooming code cases" where the same argument was made. Because the grooming code cases were in conflict, plaintiffs often successfully argued that the weight requirements were illegal because Title VII prohibited any difference in treatment between the sexes. In Willingham the Fifth Circuit resolved the conflict in the grooming code cases by holding that Title VII does not prohibit employers from distinguishing between men and women unless the distinction is based upon an "immutable characteristic" or a "fundamental right." Since Willingham, courts have consistently upheld employer grooming regulations. Since Willingham, plaintiffs challenging flight attendant weight requirements have also been unsuccessful. In the weight requirement cases, the courts have followed the Willingham analysis and upheld the requirements because a person's weight is neither "immutable" nor a "fundamental right." The legality of disparate weight requirements thus seemed settled, because the courts refused to hold that Title VII prohibited any difference in treatment between the sexes, and plaintiffs were unable to show a sufficiently disproportionate statistical impact.

The Supreme Court's opinion in Manhart casts doubt upon the continuing validity of the Willingham analysis in both the grooming code and weight regulation cases. While men do weigh more than women, any weight control programs which rely upon class-based statistics are violative of Title VII's "individual" focus. It is now irrelevant that plaintiffs cannot prove the weight requirements have a disproportionate statistical impact because, under

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142 Id.
144 See note 59 supra.
146 See note 60 supra.
148 See note 59 supra.
147 See notes 75-86 supra, and accompanying text.
148 See notes 88-92 supra, and accompanying text.
149 See notes 100-121 supra, and accompanying text.
150 Id.
Manhart, Title VII precludes any sex-based difference in treatment, even when based on a valid statistical difference.

A flight attendant's weight maximum should be determined by his or her individual characteristics, including bone structure and frame size. Individually determined weight maximums will insure healthy, physically fit flight attendants even better than class-based statistics, and will not conflict with Manhart.