



Commonwealth of Pennsylvania
Office of the Treasurer
Harrisburg

17120

CATHERINE BAKER KNOLL
TREASURER

January 31, 1995

Mr. Bruce Reed
Deputy Assistant to the President
for Domestic Policy
The White House
Old Executive Office Building, Room 216
Washington D.C. 20500

Dear Mr. Reed:

It was a pleasure talking with you in Hilton Head during the Renaissance Weekend. A lot has happened in the last month for both of us. On January 26, 1995, I issued my 1994 Annual Shareholders Report for the Pennsylvania Treasury Short-Term Investment Pool. Again, we have outperformed the comparable private sector benchmark for the sixth consecutive year, while generating more than \$180 million in investment earnings for taxpayers during calendar year 1994.

As State Treasurer, I have also worked very hard on welfare reform that would identify more efficient benefit delivery systems and eliminate fraud and waste through the increased use of new technologies. I strongly believe that technological reforms, such as the electronic delivery of government benefits through Electronic Benefits Transfer (EBT) are critical to Pennsylvania and the nation. Historically, Pennsylvania has been a leader and innovator in EBT for over 10 years. While other states and federal agencies have proposed or promised programs, Pennsylvania has made them happen.

- The first EBT program in the nation started in Reading, Pennsylvania, in October 1984.
- In 1993, the Commonwealth issued 1.7 million (EBT) Pennsylvania ACCESS Cards for medical assistance; with the technical ability to add other state and federal benefits on this single EBT card.
- The Commonwealth is completing a procurement to **add** Cash Grants and Food Stamps to the existing Pennsylvania ACCESS Card. I have worked closely with the Governor's agencies in making Pennsylvania the only state in the nation to deliver all three (3) major public assistance benefits on a single EBT card.

I have continued to offer your Federal EBT Task Force the proven expertise of my office in developing a new, more cost-effective EBT system. That offer of assistance is apparently not needed or required. On November 13, 1994, I thought **Jack Radzikowski**, Task Force Executive Director, had in fact invited me to join the State/Federal EBT Work Group. I have attached a copy of my acceptance letter to Mr. Radzikowski. My Deputy Treasurer, Larry A. Olson, was later told verbally that the offer was never made. I still have not received a response from my November 18th letter. **The offer is still good if the Administration wants the benefit of our expertise.**

Mr. Bruce Reed, page 2.

As I mentioned earlier, my office is working closely with the Governor's Department of Public Welfare (DPW) in our statewide EBT expansion. I am very proud of the achievements we have accomplished on their behalf.

- I have successfully pre-negotiated the financial services for DPW's procurement, giving Pennsylvania's new program the lowest Automated Teller Machine (ATM) and Point of Sale (POS) network transaction costs in the nation. These pre-negotiations alone will save the Commonwealth over \$ million on the proposed 5 year contract.
- In September, we formed a nine state EBT Alliance in the northeast. This regional group promotes the establishment of national EBT operating rules, while allowing states freedom to respond to their own unique needs and problems. Unfortunately, the Federal EBT Task Force is aggressively supporting a national EBT procurement and a new federal board, which could significantly reduce state flexibility through new federal mandates or regulations.
- I have also established a national EBT Forum on the Internet for use by local, state and federal representatives to interactively share information. I have enclosed a copy of a recent announcement for your review.

Again, it was a pleasure meeting you in Hilton Head. I have asked my Deputy Treasurer, Larry A. Olson (voice: 717/787-1792 or e-mail: vm031087@ptreas0.cmic.state.pa.us) assigned to this area to contact you **directly** about how we can support your efforts and plans. I look forward to working with the Administration on a national EBT system and other new technological solutions to existing government operations that will benefit the taxpayers of Pennsylvania and the nation.

Respectfully yours,



CATHERINE BAKER KNOLL
State Treasurer

enclosure



Commonwealth of Pennsylvania
Office of the Treasurer
Harrisburg

CATHERINE BAKER KNOLL
TREASURER

17120

November 18, 1994

Mr. Jack Radzikowski, Executive Director
Federal Electronic Benefits Transfer Task Force
300 7th. Street SW, Room 501
Washington DC 20024

Dear Mr. Radzikowski:

Your NASACT presentation last Sunday was very informative. As I mentioned to you, the Pennsylvania State Treasury is very willing to work closely with all federal agencies to develop standard EBT operating specifications. This standardization will benefit all of us. As you know, we have attended every EBT meeting that we were invited to and several of which we were not notified.

I was very pleased that you suggested to Larry Olson, my Deputy Treasurer for Fiscal Operations, that I become a member of the Federal/State EBT Work Group. I gladly accept your offer. I feel our involvement will help in bringing issues important to Path B States to the Federal EBT Task Force's attention. I also appreciate your offer to assist EBT planning efforts through the special discretionary fund at the U. S. Treasury. We will be developing an outline estimate and will send it to you soon.

As you know, EBT started in Pennsylvania ten years ago last month. We have also been the catalyst in forming the new State EBT Partnership in our region. National EBT is a top priority to the Commonwealth, and to show my commitment to this program I am willing to dedicate one hundred percent of Mr. Olson's time to it, if needed.

I look forward to working with you and the other members of the Federal/State EBT Work Group. If I can be of any assistance, please call. I also hope you accept our offer and sign up on the EBT Forum (EBTNET-L) on the Internet.

Respectfully yours,

CATHERINE BAKER KNOLL
State Treasurer

LAO/nn

cc: The Honorable Seymour C. Heyison
The Honorable R. Dean Stiteler
The Honorable Larry A. Olson



DANE COUNTY

Richard J. Phelps
County Executive

December 14, 1994

The Honorable Leon Panetta
Chief of Staff to the President
The White House
Washington, D. C. 20500

Dear Mr. Panetta:

I was pleased to see that President Clinton is convening a work group on welfare reform. The initial newspaper reports indicated that governors and mayors would be included.

I write to request participation on this work group on behalf of the National Council of Elected County Executives. As with governors and mayors, county executives are the chief elected officials of their jurisdictions. Even more to the point, counties share with states the direct operation of the nation's welfare systems.

In Wisconsin, the administration of welfare to families, AFDC, as well as General Assistance for individuals is a county responsibility. We also administer human services support programs for children and families, including child abuse prevention programs, family counseling, child care, specialized transportation, drug and alcohol abuse programs. Additionally, counties operate employment training and placement programs as well as child care related to moving people from welfare to work.

As First Vice Chair of the National Council of Elected County Executives, I have represented the nation's county executives in our efforts to support the President's health care reform efforts and have gone on record supporting the overhaul of welfare programs. As County Executive, I have implemented a highly successful "Everybody Works" program for General Assistance which has lowered our caseload and moved a record number of recipients to full-time employment. We have successfully reorganized our employment and training services into a Job Center jointly occupied with state employment services. There is much more creative work that can be done in cooperation with federal and state governments.

Thank you for any consideration you can give to my request. I hope to have the opportunity to work with you as you work on issues of great importance to county governments across the country.

Sincerely,

Richard J. Phelps
Dane County Executive

RJP:tg

Leon Panetta . --
December 14, 1994
Page 2

cc: Harold Ickes
Carol Rasco
Marcia Hale
Bruce Reed ✓
John Hart
Senator Herb Kohl
Senator Russ Feingold
NCECE

FACSIMILE COVER PAGE

To: MR. BRUCE REED, DOMESTIC POLICY ADVISOR
From: Robert Cohen
Date: 10:20 EST 30-Jan-95
Subject: SUGGESTION RE WELFARE REFORM

Transmitting 1 page in addition to this cover page.

Delivered by CompuServe Mail (950130152003 70412.3303 CHV93-3)

Dear Mr. Reed:

Here is a suggestion as to an important ingredient of welfare reform:

Continuation of--or initial approval of--AFDC payments to a welfare mother should be contingent on her agreement to adopting a fail/safe method of contraception.

Note that such a compact would be somewhat analogous to the voluntary choice of farmers who want to receive federal agricultural subsidies for not growing crops. In their case, the farmers are agreeing to birth control for plants, not themselves.

Please consider this suggestion as a basis for further elaboration by you and your colleagues.

Sincerely,

Robert Cohen

1410 Sunshine Canyon Drive
Boulder, Colorado 80302-9725

Internet: r.cohen@ieee.org
Telephone: (303) 443-4884

January 29, 1995

Mr. Bruce Reed
White House Domestic Policy Advisor
White House
Pennsylvania Avenue
Washington, DC 20500

Dear Mr. Reed:

Saw you yesterday on C Span as the network was covering the Governor's meetings on Welfare. Yes, we do need to reform the system, we do need to change behavior, and yes, everyone needs to take part.

Unfortunately, it appears, the one segment of our society which could stop unwanted pregnancies before they ever happen, is not being addressed. The laws we are all considering putting into practices, Personal Responsibility Act, leaves out the very cause of pregnancy - irresponsible male sexuality. One condom is all it takes to stop the pregnancy. It's cheap, easily accessible, and yet, ignored because of Machoism. So sad that men have lead youthful males to believe that getting females pregnant is a divine right of passage. Our congress would rather go after the females, the one who elected to carry the child, rather than the one who created the human being.

Mr. Reed, when will this male dominated society come to accept, the fifties are dead. They were a horrible time for everyone except white males. The white males had it made; only had to send home the pay check. The parents of today are a result of the failed parenting of the fifties. Subjecting one half of the population to a subservient role, left a disgust in our mouths for the double standards that only benefited one half of us - males.

If you truly want females and minorities to return to the Democratic party, start showing real concern. Where is the equality you promised us; the banishment of the glass ceilings, same wages as males? Where is the promise you made to us to rid us of the double standards? How about tax credits to Corporations to reward them for reaching 50/50 in the management structure. Even a national honor's list of companies on the forefront of 21st century thinking, i.e. family friendly, would be great public relations. A presidential dinner to honor the CEO's of forward thinking companies would do a lot to enhance corporate relations for the party.

To win back anger males, the Democratic party should do more than espouse catachresis of family values - define them. Start with taking the work started by the National Fatherhood Initiative. I noted with interest in reading the Wall Street Journal this date, that Ms. Heather Higgins (Newt's social whisper) actually provided the first \$100,000 to Don Eberly to found the

National Fatherhood Initiative. This organization realizes that fathers should take an active role in raising their children, from taking them to the doctors, to coaching their soccer games. Fatherhood isn't about being dominant and mastering, it's about loving, teaching and being an equal partner. Not just a sperm donor like the Republicans advocate. Recently in the Atlanta Journal Constitution, Gayle White advocated that Ralph Reed was a good father because he gave up going to a Washington party in order to go on a hayride with his children. Well, if this is the Republican's idea of what a father is, the Democrats should be able to cream these fools in 1996. My husband wrote to Ms. White to let her know that Ralph Reed is no father if all he can do is show up for an occasional hayride (probably to see what his kids even look like).

And, one more thing, where did you get the airheads who answer the phones at the headquarters of the Democratic party. It is so maddening, frustrating and down right disgraceful the low level of competence shown by these females. Nice voice, head full of air. When we phone in, they don't know anything, don't know who to pass you to, give you that darn voicemail line that tells you "We don't have time for your call". What an image they project for the party. Would you want to join the Party after attempting a sub-intelligent conversation with dumb and dumber?

Contrast this with the way people address you when you phone in to **People for the American Way**. They are knowledgeable, pleasant, and will return your call. How novel. Instead of sending my 1995 renewal money to the DCCC, I sent it to **People for the American Way**. They listen to me, answered my questions, even put an attorney on the phone when I had a legal question the regular staff couldn't answer.

Mr. Reed, so much is at stake. Our personal liberties are being subjugated and Bill can't seem to get that message out to people. You have radio talk shows, such as Mike Malloy on AM WSB 750, and yet, no-one from the party uses him as an outlet, except Hillary went on for eight minutes once and then vanished.

What is wrong with this picture?

Regards,

A. Shimandle
3616 Zoar Road
Lithonia, GA 30058

CC: Mr. William Galston
White House Aide to President Clinton

December 22, 1994

Mr. Bruce Reed, Co-chairman of the White House Welfare Reform Task Force
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20530

Re: Welfare Reform Proposals/Grants/Governmental Funding

Dear Mr. Reed:

I have enclosed herewith three newspaper articles detailing for profit & non-for-profit business ventures which are effectuating social change and providing hope for the poor & hopeless of our nation:

- 1) New York jobs company puts welfare recipients to work
Chicago Tribune - January 30, 1994
- 2) Milwaukee project injects 'new hope' for poor
Chicago Tribune - March 13, 1994
- 3) Spirited training program gives birth to dreams
Chicago Tribune - March 20, 1994

I strongly desire to serve those who are without hope in our society

1) The Poor

Homeless
Welfare Recipients
Abused Children
Unwed Mothers
Troubled Jueveniles

2) The Imprisoned

Federal
State
County
Male/Female
Adult/Juevenile

I have enclosed herewith a MISSION STATEMENT for your review; it addresses each of the hopeless classes enumerated above! My resume (enclosed) evidences that I possess the organizational, administrative, job training, recruiting, jobs placement & business skills to effect hope for the hopeless & to assist our government at effectuating social change among the poor and imprisoned of our society.

Please advise me of the available governmental programs/grants/fundings etc. to facilitate the goals of the MISSION STATEMENT including but not limited to the following areas:

- | | |
|--|------------------------------------|
| 1) Welfare Reform | 2) Jobs Training |
| 3) Jobs Placement | 4) Education |
| 5) Day Care Centers | 6) Urban/Community re-development |
| 7) Abused children | 8) Food Banks/Distribution |
| 9) Boot Camps | 10) Community Correctional Centers |
| 11) Housing for Homeless | 12) Work Cadres - Prisoners |
| 13) Drug & Alcohol Abuse
Centers/counseling | 14) Re-Employment Act |

Please also advise me concerning new programs/grants/fundings proposed under the new Crime Bill.

Please also send to me copies of Welfare Reform Proposals which have been awarded governmental grants/funding!

December 22, 1994

Mr. Bruce Reed, Co-chairman of the White House Welfare Reform Task Force

I also request your assistance pertaining to information which I seek and is highlighted in each of the aforementioned and enclosed newspaper articles as follows:

- 1) New York: jobs company puts welfare recipients to work:
 - a) The State of New York has funded the project; I seek information as to whether said funds are apportioned by: the Federal Government and the procedure for making application therefor.
 - b) "America Works gets federal tax credits during the probation period. In addition, the program receives state 'diversion grants' that reflect a portion of the savings in welfare payments." — Please provide me information concerning the Federal/State tax credits & the 'diversion grants'.
- 2) Milwaukee project injects 'new hope' for poor:
 - a) "...The Department of Health & Human Services announced it would give New Hope \$750,000 & the U.S. Department of Labor promised another \$250,000." Please provide me with a copy of the grant/funding proposals which successfully won the awards!
 - b) "...New Hope to use about \$6 million in Medicaid & Aid to Families with Dependent Children (AFDC) benefits that would otherwise go to participants. Please provide information as to how such a program is approved and operates.
 - c) "...New Hope's subsidy, which includes Federal/State earned income tax credits..." Please provide information as to the Federal/State earned income tax credits etc.
- 3) Spirited training program gives birth to dreams:
 - a) Please provide to me information on the Re-employment Act.
 - b) "...the Clinton administration's retraining proposal will cost as much as \$13 billion over five years. Please provide information concerning the funding/grants for such moneys.
 - c) "...Detroit's Employment & Training Department, which approved the federal & state job-training funds..." Please provide information on the programs which funded the federal/state jobs training programs.
 - d) "...the government expects to spend a total of \$22.3 million on education and training at the facility." I desire information on the programs, proposals & grants.

December 22, 1994

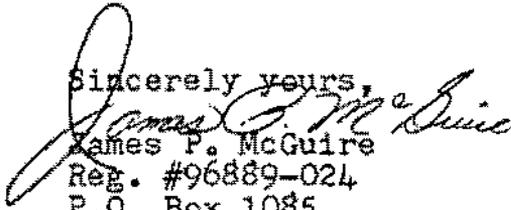
Mr. Bruce Reed Co-chairman of the White House Welfare Reform Task Force

- e) "Finally, last fall it set up a six year work-study program heavily financed by the Federal Government.."
Please provide information on said programs, proposals and governmental grants.

I thank you for your time and consideration!! I look forward to working with the Clinton Administration to effect social change and to provide hope to the hopeless poor and imprisoned of our nation!

I anxiously await receipt of the information requested aforesaid.

Sincerely yours,


James P. McGuire

Reg. #96889-024

P.O. Box 1085

Oxford, Wisc. 53952-1085

JAMES P. MCGUIRE
P. O. Box 1085
Oxford, Wisconsin 53952-1085

EXPERIENCE

Accountants On Call (Adia, Inc.) 1989- Present
Ninth Largest Search/Placement Firm Worldwide

Consultant/Recruiter

- Runner up "Rookie of the Year Award", 1989/90 - Billed \$90M
- President's Club Member - 1992/93
- "Personnel Consultant of the Year, President's Award" - 1992/93
- "Top Biller of the Year Award" - 1992/93 Billed - \$190M
- Achieved placement fees 90% greater than the national average
- Developed numerous local and four national Fortune 200 relationships

Ferrel Group Companies 1980-1988
Largest Industrial Mechanical/Nuclear Contractor In Detroit/Toledo

Secretary/Treasurer & Chief Financial Officer

- Purchased a 50% equity interest in a sole function, belt maintenance contractor serving the utility industry; Revenues of \$300M & a Positive Cash Flow of \$25M
- Achieved Gross Annual Revenues of \$65MM & a Positive Cash Flow of \$2M
- Diversified, evolving into a full service mechanical/nuclear maintenance contractor serving Fortune 500 companies in the utility, automotive, steel, chemical, packaging, oil & multi-purpose manufacturing industries
- Detroit's fifth largest non-automotive employer (2,100)

Sears Bank & Trust Company 1975-1980
Total Assets \$425MM

Vice President & Department Head Commercial Finance Group

- Reported to Senior Vice President & Chief Lending Officer
- Initiated formation of the Commercial Finance/Asset Based Lending Group
- Produced and administered a \$65MM asset based loan portfolio
- Achieved the Bank's highest rate of return on assets
- Hired, trained and supervised a staff of 25
- Board member Frontenac Capital - Chicago's largest venture capital enterprise

Exchange National Bank of Chicago 1969-1975
Total Assets \$650MM

Assistant Vice President

- Reported to Senior Vice President Commercial Finance Group
- Asset based loan portfolio of \$110MM
- Performed and ultimately supervised (20 people) various departments
 - Phone, mail and new business solicitation
 - Loan documentation - legal/client interface
 - Loan control, trend analysis and liquidation

EDUCATION

Northwestern Graduate School of Business (Kellogg) 1969
M. B. A. - Finance, 3.0 GPA

De Paul University 1967
B. S. C. - Finance, 2.9 GPA

MISSION STATEMENT

Create an emotionally secure Christian environment (shelter, clothing, food, counseling, religious programming, jobs training & placement) which would foster a successful re-integration of offenders (male & female, Federal & State) back into society based upon appropriate counseling & financial security that would predispose offenders to make correct moral choices in their future lives; rehabilitation through a moral renewal.

FUNDING SOURCES

A) Federal, State & Municipal Governmental Programs:

- 1) U.S. Labor Dept. - Employee Training/Job Placement
 - 2) U.S. Justice Dept./B.O.P. - Rehabilitation/Halfway Residency
 - 3) " Dept. of Housing & Urban Devel. - Real Estate Rehabbing
 - 4) " " Education - Jobs Training/Re-employment Development
 - 5) " " Health & Human Services - Day Care Programs
 - 6) Fed'l. Home Loan Mortgage Corp. - Inner City Redevelopment/Urban Bliz
- Numerous other Governmental Depts. & Agencies

B) Foundations:

- 1) Charitable Orientation
- 2) Social Change Orientation

C) Philanthropists

D) Private Investors/Venture Capital

II)

ENVIRONMENT

Halfway residences staffed by Christian professionals possessing the skills to implement the envisioned vehicles and to provide the necessary counseling to meet the goals of the Mission Statement.

III)

VEHICLES

A) Counseling - Transitional Living Programs:

- 1) Religious/Moral/Social Orientation
- 2) Jobs Training/Placement/Career Development
- 3) Abuse Counseling (Alcohol, Drug, Child etc.)

B) Jobs Training - Jobs Placement:

1) Work Cadres:

- a) Community Redevelopment - rehabbing homes, apartments, commercial properties etc. in major urban centers.
- b) Property Development & Management - creation of affordable housing (condominiums, lofts, apartment buildings & single room occupancy apartments.)
- c) Day Care Programs - currently, 9 million children are receiving day care outside their homes.
- d) Temporary Personnel Pools For Manual Labor/Office Personnel - employment resources for community services and/or private enterprises.

VEHICLES

B) Jobs Training - Jobs Placement:

1) Work Cadres: Continued:

- e) Commercial Maintenance/Cleaning Services
- f) " / Residential Landscape Maintenance/Snow Removal
- g) Packaging/Shipping Services
Etc. etc.

2) Skill Development - Based upon public/private market demands

- a) Technical Trades- plumbing, electrical, carpentry, heating/
air conditioning, welding etc.
- b) Keypunch/Data Entry
- c) Stenography
- d) Nurses Aids/Medical Coding/Claims Analysis
- e) Phone Solicitation/Marketing Surveys etc.
- f) Painting/Decorating
- g) Job Coaches for Americans With Disabilities Act
- h) Electrical Repairs (consumer appliances, computers, copy
equipment, fax machines etc.
- i) Word Processing
- j) Cooking Apprenticeship

3) Education - Facilitate educational advancement - high school, technical trade school, Jr. College & College placement

- a) Identifying the correct institution and program which meets
an individuals career goals.
- b) Identifying funding sources and effectuating enrollment.

4) Job Placement:

- a) Resume Preparation
- b) Interview Techniques/Presentation Skills (Social Amenities &
Appearance Workshops)
- c) Employment Documents - Social Security, Drivers License etc.
- d) Credit Bureau Reports - "Clean up" and correct the reports.
- e) Employee Introductions & Placement
- f) Upward Career Counseling Programs

5) Prison Industries - Development of manufacturing/packaging pro- cesses which can be operated "behind the fences" producing products/services to be sold to governmental agencies and private enterprise

IV)

SOCIAL & ECONOMIC BENEFITS

A) Reduced Construction, Incarceration and Corrections Costs:

- 1) Lower level of recidivism - focus is on rehabilitation & moral
renewal first and on punishment second.
- 2) "Release valve" for prison overcrowding; work cadres facilitate
a prisoner's rehabilitation and release to a job training/place-
ment program for a period upto 2 years before the M/R Date.
- 2) Jobs/Wages provide a vehicle for restitution to the victim and
the community.

SOCIAL & ECONOMIC BENEFITS

- A) Reduced Construction, Incarceration and Corrections Costs: Cont.
- 4) Private enterprise can effectuate rehabilitation, jobs training and placement via community/market demands utilizing tax payer dollars more efficiently than governmental buruauarcy.
- B) Work Cadre Programs such as Real Estate Rehabbing/Development & Day Care when coupled with Jobs Training/Placement can provide a vehicle to address a multitude of other social/economic ills of the United States:
- 1) Welfare Reductions - Currently a \$23 Billion annual expenditure.
 - 2) Jobs Training/Placement serves to stem the deterioration of family units (single parent households - out-of-wedlock births etc.)
 - 3) Child Abuse Reductions - Counseling/Family & Jobs Training/Placement
 - 4) Reduction in Aid To Families With Dependent Children - 10 million of the 14 million people presently served are children (Child Abuse annual expenditures alone total \$9 Billion)
 - 5) Real Estate Rehabbing/Development will increase local real estate tax revenues, reduce urban blight, crime and neighborhood decay
 - 6) Real Estate Rehabbing/ Development - Conversion of vacated commercial properties to Shelters for the Homeless thereby reducing attendant health and social costs associated with America's homeless. Creation of affordable housing such as Single Occupancy apts.
- C) Social Benefits:
- 1) Socially/Morally rehabilitated offenders become productive, tax paying citizens.
 - 2) Revitalized neighborhoods through rehabbing and jobs placement creates a catalyst for other community development and social consciousness.
 - 3) Jobs placement and affordable housing stems the erosion of the family unit.
 - 4) Redeployment of real estate vacated by a declining industrial sector to affordable housing, shelters etc.
 - 4) Re-training and re-deployment of personnel from the industrial/manufacturing sectors to service industries.
 - 5) Reduction in Child Abuse stemming the generation after generation ills attendant to child abuse and its far reaching social effects.
 - 6) Self sufficiency of offenders and the nations poor through jobs will result in a responsible society reducing the expenses of alcohol and drug abuse.
 - 7) Reductions in impoverished communities and public housing through family counseling, jobs placement and revitalized communities.

New York jobs company puts welfare recipients to work

By Mike Dornig
TRIBUNE STAFF WRITER

NEW YORK—In a nation that has grown impatient with expanding welfare rolls, one note in President Clinton's State of the Union address was sure to resonate with most Americans: the promise of welfare as a second chance, not a way of life.

In New York City, where more people are on public assistance than at any time since the Great Depression, local government has turned to a profit-making corporation to do just that.

America Works, the product of a partnership between an anti-poverty activist, a sociologist and a retired tallow manufacturer, leads welfare recipients through a short, intense course on the world of work. Then it matches them with paying jobs in private companies.

Like an employment agency, America Works gets paid only when its service works. It receives its entire \$5,400-per-person fee after the participant completes a four-month tryout with the new employer and has spent another three months on the job.

On average, the people the company successfully places in jobs have been on public assistance almost five years.

Adrienne Wimbush, 31, who enrolled in the program last week, has spent 14 years on the dole.

Wimbush has three children; the oldest is a teenager. "I don't want my children to fall in the rut," she said. "I want to go out and set an example, that just because public assistance is there doesn't mean that it's the only way."

Elected on a campaign that included his own promises of work for those on welfare, Mayor Rudolph Giuliani, in one of his first official acts, this month gave America Works a city contract.

New York City's public assistance rolls, which include children of welfare recipients, cover more than 1.1 million people, almost a sixth of the population.

Giuliani's decision to invest money has permitted the doubling—to a still modest 300 participants a year—of a pilot project the state government has funded for America

SEE WORK, PAGE 16



Photo for the Tribune by China Joriny/AP

After 14 years on welfare, Adrienne Wimbush sees America Works as a way out.

Section 1 Chicago Tribune, Sunday, January 30, 1994

om Page 1

Work

CONTINUED FROM PAGE 1

orks-in-New-York-City-since,

America Works also has a program in Hartford, Conn., and has opened programs in Indianapolis and Albany, N.Y. It is negotiating with welfare officials in Los Angeles and the state of Florida.

To date, more than 5,000 people in New York City and Hartford have been placed in jobs. In New York, 85 percent of the welfare recipients who completed the four-month employment tryout were still at work a year later and 30 percent of them had been promoted, according to an 18-month audit that ended Sept. 30, 1993.

The success rate in New York has drawn the attention of the Clinton administration, which is trying America Works along with other programs as it compares the welfare reform plan that will be presented to Congress in spring.

Our welfare reform proposal will try to encourage states to do what America Works does—either

by hiring companies like America Works or by restructuring their welfare offices to do what America Works does," said Bruce Reed, a presidential aide and co-chairman of the White House's welfare reform task force.

Of course, the approach has critics. America Works' emphasis on swift placement of welfare recipients into private jobs rather than long-term training programs "can't be seen as a sole way, or even a principal way, of dealing with welfare reform," said David R. Jones, president of the Community Service Society, a New York advocacy group for poor people.

"The economy has fewer and fewer jobs for unskilled workers, a trend that will become more pronounced as the nation increases trade with low-wage foreign countries," Jones said.

"You're dealing with people of all colors who are coming out of an educational system that has failed them miserably," he said.

The philosophy at America Works is that without the tangible rewards that come with a productive paying job, the usefulness of most training programs is diminished anyway.

"We say jobs first, training second," explained Lee Bowes, 42, the sociologist who is one of the firm's founders.

America Works starts with a one-week course that might have come out of collaboration with Dale Carnegie, Emily Post and a boot camp drill instructor.

Show up to class late once and you're out. And don't think about wearing jeans or sneakers either. Participants must appear every day in "work attire"—jackets and ties for men, dresses or skirt and blouse for women. Pant suits are acceptable.

"Presentation, first impressions, are lasting impressions," Maria Simone lectured a class of 13 women and one man last week, as she distributed instructions for job interviews such as "shake interviewer's hand in a natural way." Thank you letters should be typed and mailed the same day as the job interview, she added.

Participants undergo a five-week course that includes office skills as well as, in some cases, remedial English and spelling. They continue receiving welfare until they get their first paycheck.

Most of the participants, accord-

ing to the America Works, are placed in entry-level, minimum-wage clerical positions such as data entry operator, filing clerk, receptionist, mailroom staff.

The program markets its workers through sales representatives who are paid bonuses based on their placement record. An America Works representative visits the participant and job supervisor once a week to iron out any problems that develop at the work site.

The worker stays on America Works' payroll during the four-month probationary period, allowing wary employers to initially save on benefits and delay the commitment of hiring.

America Works gets federal tax credits during the probation period. In addition, the program receives state "diversion grants" that reflect a portion of the savings in welfare payments.

America Works is paid 10 percent of its \$5,400 fee when a participant completes the training. The balance is paid in increments—21 percent after the worker completes the probationary period and the remaining 11 percent after seven months on the job.

All of the jobs include health insurance. In his State of the Union message last Tuesday, Clinton said 1 million people are on welfare solely because they need the health coverage for their children.

BonHomme Shirtmakers hired five of the nine workers America Works sent to its New York headquarters, where president Al Goodman was sold on the probationary period. "You can observe just what type of people they are," he explains.

Maria Clemente, 31, started with Goodman three years ago as a file clerk and today is a production assistant. Though modest by some standards, she says her \$15,200 a year salary is good money compared to the \$45-a-week welfare benefit she once received.

She travels by subway from the Bronx to work on the 63rd floor of the Empire State Building, where pictures of her daughter and grandson are on the wall of her cubicle. The view is across the Hudson River.

"I'm on my own," Clemente said. "It feels good to get up in the morning and do something for myself, instead of sitting at home all day."

Milwaukee project injects 'new hope' for poor

By Rogers Worthington
TRIBUNE STAFF WRITER

MILWAUKEE--Ed Riebe's friends are of two minds on his taking "the offer."

"Some say, 'Wow, that's great.' Others say 'It's a hand out,' 'You're white trash.' They have mixed emotions," said Riebe, 30, a married father of four who, as one of America's working poor, is but a paycheck or two away from qualifying for welfare.

The "offer" includes free health care, child care if needed and a monthly wage supplement of about \$450, which lifts him and his family above the federal poverty level.

And if he should lose his job--he earns \$7 an hour plus benefits as a warehouse laborer--he would get a stop-gap community service job until he finds another.

In exchange for this guarantee--a lift above poverty and a job to fall back on if all else fails--the one thing he has to do in return is work, one way or another.

Riebe is one of 52 people involved in Project New Hope, a 2-year-old private, non-profit experiment overseen by a board of Milwaukee business executives, public officials, and professionals.

It seeks, among other things, to remove the disincentives to leaving welfare. It is being closely watched

across the nation by policymakers and analysts seeking to reform welfare, now costing the federal government an all-time high of \$23 billion a year.

Last week, as a sign of the Clinton's administration interest, the Department of Health and Human Services announced it would give New Hope \$750,000 and the U.S. Labor Department promised another \$250,000.

The money is dependant on approval of long bottled up measures in Congress that would allow New Hope to use about \$6 million in Medicaid and Aid to Families with Dependent Children (AFDC) benefits that would otherwise go to participants.

"Many of the things they're doing are making their way into our vision of national welfare reform," said an HHS official.

Adding to the interest is Wisconsin's decision to abandon its current welfare system by 1999.

New Hope in its entirety is not likely to be a model. Republican

SEE WELFARE, PAGE 16

Section 1 Chicago Tribune, Sunday, March 13, 1994

3m Page 1



Photo for the Tribune by Chris Loran/Wire/AP
Ed Riebe, 36, was on welfare all her adult life until last year when he got a full-time job thanks to Milwaukee's Project New Hope.

Welfare

CONTINUED FROM PAGE 1

iv. Tommy Thompson has his own welfare reform projects in 7 works. But even Thompson needs New Hope may help provide direction.

By June, Project New Hope will expand to 600 randomly selected people, making the same offer to others on AFDC and the unemployed as it does to the working poor, like Ed Riebe.

But it is expected to appeal most to welfare recipients. They account for about 70 percent of the original \$2 in the pilot project.

The premise behind New Hope is that poor and unemployed people want to work and will leave public assistance to do so if they have assurances they will not be even poorer and lose their health-care benefits.

A total budget of \$19.7 million, half from corporations and foundations and half from the public sector, is projected for the three years that New Hope will run.

In essence, the unique New Hope "offer" is "work, and you will not be poor."

For Ed Riebe, who married his high school sweetheart, Veronica, and began having children at an early age, New Hope has been invaluable.

He had lost an \$8-an-hour job and had no health care when he signed up. His job, which he got on his own after enrolling in the project, leaves him at 22 percent below the federal poverty level for a family with four children.

New Hope's subsidy, which includes federal and state earned-income tax credits, takes him from his wages of \$13,440 up to more than \$18,300, which is 3 percent above the poverty level.

Meanwhile, Veronica Riebe is in nursing school. When she graduates, Ed plans to go through masonry training, which would prepare him for jobs that pay up to \$21 an hour.

"It gives you a chance," said Riebe, who to survive has had to juggle bills, cope with disconnected telephones, make use of food pantries and see his wife seek public assistance.

"It keeps the family together... If a person wants to do something with themselves, this is the program to do it... If I get laid off again, New Hope is there to get me going again," he said.

A friend told Idella Rice about New Hope. She signed up for it, and now at 38, Rice, an AFDC mother her entire adult life, has been working for almost a year at the first full-time job she has ever had.

"Because I knew they were behind me, it encouraged me," she

Rice earns \$10,752 a year. She receives a wage supplement of \$330 a month.

The more she earns as a nursing home aide, the less she gets in a wage supplement. When salary raises take her up beyond the \$17,000 federal poverty level for her family, her supplement will stop.

Rice's incomes now and before she entered the New Hope program are illustrative of the disjointed economic logic that lies between state and federal welfare programs and the going wage for entry level unskilled jobs.

Her nursing home salary actually is less than the total she was receiving in AFDC and food stamp payments a month: \$708, plus \$265, for a total of \$11,676 a year.

"If it wasn't for this program, I don't think I'd work. Not at \$5.60 an hour," she said.

Rice did not take advantage of New Hope's offer to pay for child care since an adult child is living at home. This was true of other participants as well, a surprise across the board to the New Hope staff since lack of child care long has been considered a major deterrent to leaving welfare for an entry-level job.

"We found that providing child care was not as important an element as anticipated, and that the supplement is even more important than anticipated," said Sharon Schulz director of Project New Hope.

New Hope differs from most other plans, including those being considered by the Clinton administration and Thompson's soon-to-be-implemented pilot program, "Work Not Welfare." These programs emphasize job training first, then cut off benefits after two years, when the recipient is expected to be in a job of one kind or another.

Also, New Hope puts people to work immediately, either in a job they go out and find, or in a minimum wage community service job. For example, some participants work in churches and neighborhood organizations. Their benefits do not begin until they work a minimum of 32 hours a week.

"New Hope, to some extent, rests on the notion that you should connect people to work right away," said David Riemer, Mayor John Norquist's chief of staff, and a board member and founding father of Project New Hope. "And it argues that as long as people remain connected to work, they should receive help."

In Diane Suggs' case, the single mother of a 10-year-old son no longer needs a wage supplement because she landed a job as a medical claims worker for a manufacturer that pays \$300 a week.

Earlier, what she did need was a community service job until she found a full-time job.

"You get what you need from New Hope," Suggs said. "At the time I didn't need cash assistance. What I needed was employment."

Project New Hope found her a community service job in the office of neighborhood organization. She learned how to use a computer, a skill that contributed to her getting the medical claims job.

How, and how often, participants used the community service jobs was another surprise.

The expectation, Riemer said, was that participants would begin in community service and gradually look for private sector jobs.

"What happened was someone would start in a private sector job, would lose hours, or get laid off, and they would need a community service job," Riemer said. "They began to figure out ways to make the community service jobs fill in the difference."

Entry-level jobs historically are short-lived, with the worker wanting to move on to something better, or not working out in the job. One of the goals of New Hope is to learn just how frequently that guarantee of a fallback community service job is going to have to be delivered with the expansion to 600 participants in June.

"Are there enough jobs out there that are accessible to the inner city poor?" asked Michael Wiseman, a New Hope board member and an economist at the La Follette Institute for Public Affairs at the University of Wisconsin in Madison.

No one knows. Community service jobs, which the Clinton welfare reform task force is considering, are a national policy issue because they could have an immense public cost.

Those connected with New Hope concede the pre-pilot project, since it drew on volunteers, may have attracted the cream of the crop of people on welfare—those who were attractive to employers and were motivated to seek work and support their families.

But the 600 participants will be selected at random, and the evaluators—Manpower Research Demonstration Corp., which will be paid \$1.9 million—will be just as interested in who turns down the offer, and why.

Spirited training program gives birth to dreams

First in an occasional series on job training in America and what it will take to make such programs work.

By Michael Arndt
and Stephen Franklin
TRIBUNE STAFF WRITERS

DETROIT—Before, said Enrique Luna emphatically and with a steady gaze, there was nothing.

Before, there were mindless, short-term \$6-an-hour factory jobs. Before, he scrounged for money and never had enough to move out of his parents' home or buy a car or fully pay his child support.

And there was this awful fear that he could escape only by ending his young life. He was terrified of being nothing, of becoming nothing, and winding up on the streets.

Now, those fears are memories.

Today, Luna, 24, brags about how he has learned to become a skilled machinist, and how he has the confidence to make a life for himself and his 6-year-old child when he lands a job likely to pay twice what he earned before.

A lot has gone wrong with job training in the U.S., but this is not about the failures. This is about the kind of success hundreds of job-training programs pray for and the very unusual, high-energy job-training program that gave Luna a new start. It's called Focus:HOPE.

For the Clinton administration,



Two graduates of Focus:HOPE's machinist training program visit the Detroit agency's Center for Advanced Technologies, which has Pentagon backing.

which is hooked on job training as a salvation for workers and the economy, Focus:HOPE offers some, but not all, of the answers.

Indeed, when he toured Focus:HOPE's sprawling facilities here last week during the jobs conference with officials from the major

industrial powers, President Clinton gushed with praise.

"If we can do this here, we can do it anywhere," the president declared. "If it can happen here in these few square blocks of Detroit, my fellow Americans, can it not happen throughout our country? I believe it

Training for tomorrow

can."

Spreading the success of projects such as Focus:HOPE is what the administration hopes will take place as a result of its recently introduced Re-employment Act.

Considered too costly and ambitious by some, and not far-sweeping enough by others, the Clinton administration's retraining proposal will cost as much as \$13 billion over a five-year period.

One could also say Focus:HOPE was driven by its ambitions. But they mostly have been met. From its meager roots at a small Catholic church, Focus:HOPE now covers most of one street.

One building houses a five-day-a-week, 12-hour center that cares for as many as 180 infants and children of employees and trainees. Another is a federally-sponsored food-distribution center that feeds 80,000 women and children monthly.

Three job-training programs, which handle several hundred trainees, and an accelerated education program are scattered through another six buildings, most of which were once factories. The Center for Advanced

SEE TRAINING, PAGE 4

Training

CONTINUED FROM PAGE 1

Technologies, for example, was a Ford Motor Co. parts plant.

Today, the high-tech center, which has only a handful of students because it is new, is a gleaming, state-of-the-art facility that seems as if it fell from space onto West Side Detroit, a place where desolation rolls for miles.

What can others glean from Focus:HOPE?

First, passion and commitment.

"Everybody involved has to have a passion that this will succeed," said Rev. William Cunningham, 63, Focus:HOPE's director from its start 26 years ago in the ashes of Detroit's race riots.

Father Cunningham, a gritty, gravel-voiced Catholic priest known for his penchant for powerful motorcycles and good cigars, was teaching English literature at a Detroit seminary at the time. His goal then was simply to foster racial harmony in riot-torn Detroit.

Within a few years, however, the program began to feed women and children and elderly from federal supplies. Now, it is the nation's largest food-supplement pro-

gram.

Like much else with Focus:HOPE, job training happened along the way. Given the chance to buy an empty factory nearby on Detroit's West Side, Cunningham took on the factory in 1961. Then he learned how to set up a job-training program and how to train people as machinists.

"It took them two years to convince us that this was the right way to go [with machinist training]," recalled Willie Walker, director of Detroit's Employment and Training Department, which approved the federal and state job-training funds for the machinist classes.

Despite the pressure for quick results from the federal job-training funding, Focus:HOPE was able to convince Detroit officials to back the one-year machinist-training program.

Recently, Focus:HOPE became a partner with its neighborhood elementary school, helping to pay for the cost of running the school 12 months a year. It also has agreed to set up a job-training program for food-stamp recipients.

The second piece of Focus:HOPE's strategy has been to determine the demand for the job and then tailor its training to the market's needs.

For those unable to tackle complex manufacturing work, Focus:HOPE also set up a program that teaches basic production skills. To make sure these workers have jobs, it set up several small companies and found work to keep the companies going.

Finally, last fall, it set up a six-year work-study program heavily financed by the federal government and backed by six universities. As a result, someone could go through all of the job-training steps at Focus:HOPE and wind up with a master's degree.

In the fourth part of its approach, Focus:HOPE has relentlessly beat its own drum as it has searched for financial support, well-connected friends in politics and industry, committed staffers willing to sometimes accept less-than-competitive pay and volunteers.

Recruiting Lloyd Reuss as the dean of its high-tech manufacturing center is an example of this. Reuss, who stepped down last year as General Motor's president, works as a volunteer.

The Center for Advanced Technology is a vast investment by the state and federal governments, something relatively rare considering the hard times in recent

years and stingy federal spending policies.

Focus:HOPE got \$20.87 million for the facility's preparation, and most of the money came from federal agencies. By 1997, the government expects to spend a total of \$22.3 million on education and training at the facility.

All of its equipment, which is made in the U.S., was paid for by the Defense Department. So far, \$72 million has been spent and future federal budgets will provide \$55 million more for equipment.

To be sure, the new facility would not exist without federal money. Of the \$97.3 million that the center has thus far received, \$89.4 million came from the federal government, or 92 percent.

The federal government also is expected to pick up most of the tab on the \$95.75 million in funding planned from now through 1997. Of that, \$79 million, or 82 percent, is from the government.

Focus:HOPE convinced the Pentagon to spend so much money on its program by portraying it as a laboratory for testing how to shift advanced production from military to peacetime uses.

Unfortunately, Focus:HOPE's model is not easily copied.

Not every program can generate the same political clout. Not every

Pinpointing a dearth of machinists, especially women and minority machinists, Focus:HOPE narrowed one training program to machinery skills. The placement rate has been running at 100 percent, and the starting wage ranges from \$8.50 to \$10 an hour. Most graduates move up to \$14 an hour within a few years.

Getting through the program is not easy. More than half drop out in the first five weeks, but nearly all of those remaining at that point finish the program, according to Joanna Woods, the program's director. The program now has about 170 students.

"A lot of companies are having a hard time finding people and it seems these people [from Focus:HOPE] have a good background in training," said Ken Savage, an official at Weldmation Corp. in suburban Madison Heights.

In the third aspect of its strategy, the organization did not lower its standards for its high-quality, top-of-the-line job programs.

When it couldn't find enough qualified workers for its machinist classes, it set up the Fast Track program in 1990 to provide three years of math and related workplace learning within seven months.

program can cut through government rules and paperwork the way Focus:HOPE officials say they have.

"The principals are replicable," said Labor Department Secretary Robert Reich. "But the federal government cannot create Focus:HOPEs all over America because, sadly, there isn't enough money in the federal budget to do so. But Focus:HOPE can serve as a model to the private sector, to state and local governments and to the federal government."

Such talk of national models matters little to Enrique Luna, who, until six months ago, was bouncing from one factory job to another in Flint, forever perplexed about his future.

After hearing about Focus:HOPE as the only agency of its kind nearby, he was fearful of coming by himself to Detroit because of the city's crime image.

But he was also terrified of doing nothing.

Now, when he goes home on visits, he is convinced his family and friends look at him differently. And this has made him feel differently about himself.

"You get this addiction to success," he said, "and you want more and more of it."

August 24, 1994

U.S. Department of Health and Human Services
Administration for Children and Families
Washington, D.C. 20447-0001

RECEIVED
1994 AUG 30 PM 12:00
EXECUTIVE SECRETARIAT
ADMINISTRATION FOR CHILDREN & FAMILIES

Attn: Ms. Mary Jo Bane
Assistant Secretary
for Children & Families

Bruce Reed
Deputy Assistant
to the President
for Domestic Policy

David Ellwood
Assistant Secretary
for Planning &
Evaluation

RE: WELFARE REFORM

I would like to take the opportunity to thank you for sending me updates on services pertaining to children and families. My associates and I are very interested in all these updates. We would like the opportunity to comment.

As we read through the Welfare Reform: Work document, there were several items we did not agree with and would like to comment on those items.

ONE. We think that independence is the way to go, but once trained, where will these people find work. There are so many American's out of work at this time.

Question: Once trained and that additional expense has been made, what happens, if they cannot find work?

Question: Where will the government get the additional money for training these people?

Comment: I personally and everyone I know resent paying any more money out of their pockets to assist the majority of these people.

Suggestions:

FIRST: Welfare should figure out a way to weed out all the falsifiers, there are plenty of them. With that action alone, the government would save millions of dollars.

SECOND: Welfare should be part of unemployment benefits, veteran benefits and retirement benefits (for people over the age of 65 who depend solely on their social security check for support).

TWO. Personal Employability Plan

Question: Are additional case workers going to be employed for this process?

Question: Why two years?

Suggestions:

FIRST: Why should young mothers on welfare be given the opportunity by the government to receive free job training when the young mothers not on welfare do not receive the same opportunity.

All young women have the same choices, there are those who make the choice to have children and live off other hardworking Americans, and then you have those who chose to have children and work to support their children, along with fighting the system so that the child's father will supplement their income with child support.

The system is encouraging young women to chose the welfare way, this way they will be offered a free ride on the expense of those young women who work their butts off to support their children.

Question: Tell me what is wrong with this picture?

SECOND: If non-custodial parents were forced to pay their child support, less custodial parents would need government assistance.

THIRD: Everyone presently on welfare should be given 120 days to find work and after that period welfare should be stopped.

THREE: Limited exemptions and deferrals

Suggestion:

FIRST: Mothers with disabilities and mothers who care for disabled children, older people, are some of the groups who could be considered for employment by the government to provide child care for single parents or low income families at discounted rates. This way they will be contributing to America's future and not just taking from it.

SECOND: Mothers with newborns should be assisted for only 3 months regardless of whether its the first, second or third child. Mothers who are not on welfare only get 1 to 3 months off work with no guarantee that their job will be there when they return to work.

The Let States Reward Work is a good idea.

The Earned Income Tax Credit is also a good idea.

Health Care Reform, I am not to convinced on that one.

FOUR: Parental Responsibility

Non-custodial parents should be forced to meet their parental responsibilities. The law does not assist us; therefore, the government needs to step in and change the rules.

Our non-custodial parent owes my children and I over 10,000 just in child support, not to mention Health Insurance. He has not provided health insurance since the case was opened and nothing has happened to him. I have a child who is diabetic, my insurance does not cover all the items my son needs to control his diabetes and I do not have the money to pay for it out-of-pocket. I blame the non-custodial parent along with the laws if my son becomes seriously ill, as a result of neglect. The government will not help me, because I have a job. Its NUTS.

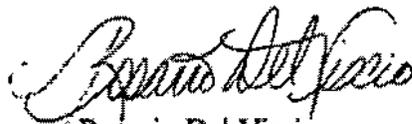
Our non-custodial parent has been served uncounted times with summons to appear in court and has totally neglected them and the law has done nothing to him. They know where he lives. How long do we have to wait for action?

Tell us what we have to do to assist with passing the Child Support Assurance program, throughout the country, and we will do it. We do not want our children to go through the same battles on child support when their turn arrives.

The welfare system has to implement some strict guidelines. Take a closer look at the welfare system's present employees. Make some true changes. I know changes are needed throughout government, but we have to start somewhere.

Where do we go from here?

Concerned citizen



Rosario Del Viscio
ACES Chapter Coordinator
Harris County
6511 Vera Jean Drive
Houston, Texas 77088

THE WHITE HOUSE
WASHINGTON

DATE: 1/27/95

TO: Bruce Reed

FROM: Marvin Krislov
White House Counsel
Room 128, OEOB, x7900

- FYI
 - Appropriate Action
 - Let's Discuss
 - Per Our Conversation
 - Per Your Request
 - Please Return
 - Other
-

MARY KAY GREEN
Attorney at Law

St. Thomas More Legal Center
1432 S. 13 St. - Omaha, Nebraska, 68108
402-342-5937

Dear Members of Congress, friends in the Media, and Champions of the Rights of Children Everywhere,

Here is my "Pelican Brief" to Congress adding my contribution to the welfare reform and "unwed motherhood" debate.

Share it widely with all the members of Congress most efficiently and with the greatest speed by publishing it in the Congressional Record, and then send it out to all the Members, the media, and all the social welfare agencies in America. Let my small but strong voice be heard. I claim no copyright, I give you my life story and my legal research and that of my fellow attorneys totally in love for the children of America, their parents, and for the future of our great nation. We must remain both compassionate and just.

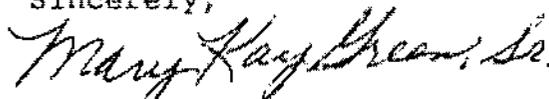
I am just "sittin and waitin" to be "flung in that briar patch" we call the American Legal System if Congress violates the Constitution in its welfare reform plans. (A reference to the Disney movie Song of the South, and Disney makes so much money off the souls of children).

St. Thomas More by the way was the lawyer for God who was beheaded for opposing King Henry VIII's divorce plans. It is appropriate that society now treats single motherhood with the same opprobrium that divorce was once treated.

I want to pay tribute to four lawyers who have assisted me in this research: my much loved Irish twin brother J. Patrick Green, Professor of Law, Creighton (Jesuit) Law School, 2500 California Street, Omaha, Ne 68183 (402-280-2872), Edward F. Fogarty, 700 Service Life Building, Omaha, Ne 68102 (402-341-3333) my friend for thirty two years and my college sweetheart, and co-counsel on Crystal Chambers v. Omaha Girls Club, Edward Diedrich, Attorney At Law, #205, 261 E. Lincoln Hwy., DeKalb, Ill 60115 (815-758-4441) and co-counsel on Chambers v. Omaha Girls Club et al, and Sheri Long, Deputy City Attorney, City of Omaha, Civic Center, Omaha, Ne 68183, and counsel on the companion case Pamela Simmons v. Omaha Girls Club.

May God be with you in this debate, and may the children of America be the winners.

Sincerely,



MARY KAY GREEN, SR.

MARY KAY GREEN
Attorney at Law

St. Thomas More Legal Center
1432 S. 13 St. - Omaha, Nebraska, 68108
402-342-5937

Member of the United States Congress
Washington, D.C.

Re: UNWED MOTHERHOOD AND ILLEGITIMACY DISCRIMINATION
AND EMPLOYMENT BASED WELFARE REFORM

Dear Member of Congress,

I am writing to you on four issues: 1). Newt Gingrich's proposals to deny welfare to teenage mothers and to place all of their children in orphanages, 2). President Clinton's plan to deny ADC to any children born while their mothers are on welfare, a plan he clearly announced as being aimed to eliminate illegitimacy, and 3). the need for Congress to protect the Constitutional Rights of American-Phillipine Children born to American GI's and their Phillipine sweathearts and 4) the need for worked based welfare reforms.

My name is Mary Kay Green, Sr. I will introduce myself in the Twelve Step Tradition. My name is Mary, I was named after and consecrated to the Blessed Virgin Mary at birth by my Catholic parents as were my five sisters all also named Mary, I am a survivor of childhood sexual abuse by a stranger in the Omaha Orpheum Theater, a codependency survivor, a survivor of bulimia, a survivor of bi-polar illness (like actress Patty Duke and media mogul Ted Turner of CNN and TNT, Turner Broadcasting) bi-polar illness is a biochemical illness and a protected class under the ADA, a never married single pregnant mother of twenty-five year old twin daughters (protected from invidious discrimination under the 1st, 9th and 14th Amendments to the Constitution), a Civil Rights lawyer (an endangered species), and a former elected member of the Omaha, Nebraska, City Council (1977-1981), an attorney since 1977, a former employee for the U.S. Department of Justice Civil Rights Division (1965, the year the 1964 Civil Rights Law was implemented) under Deputy Attorney General John Doar (also of the Senate Judiciary Committee Watergate fame), a former social welfare caseworker of the Douglas County, Nebraska, Assistance Bureau, a former staff member in these august halls of Congress for U.S. Senator Harold E. Hughes of Iowa (1970 and 71)(Senator Hughes often applauded my decision to give birth to and raise my own children), and a former employee of the Robert F. Kennedy Memorial, a social justice foundation and my first employer

as an "unwed mother." I had worked on Robert Kennedy's presidential campaign, I knew him personally from my days at the Justice Department because a close friend Helen Abdouch along with Jack Rosenthal of The New York Times and John Siegenthaler of USA TODAY worked for him and I saw him nearly daily after my job was done. He was a close friend of my family. My father was state chairman for Bobby's presidential campaign.

My opposition to the Gingerich and Clinton Plans is simple. Both plans violate the 1st amendment freedom of speech and freedom of religion clauses, the equal protection clause of the 14th Amendment with illegitimacy a protected class, and the 9th Amendment right to privacy provision of the United States Constitution. The 9th Amendment privacy provision also protects the right of married people to reproductive information and devices, i.e. birth control, the right of single people to the same information and devices, and the right to abortion. And yes, it also protects the decision to procreate and give birth to and to raise one's own children regardless of marital status and age and sex.

Let me tell you that in 1969 I became the non-marital, never married mother of twin daughters. Their father, a childhood sweetheart and a close family friend, abandoned me and denied paternity. It took me years to heal from this tragedy.

I originally became sensitized to the issue of discrimination against "illegitimate," non-marital children (please refer to these children as non-marital and not as "bastards" or "illegitimate children," only the law is a bastard) and their nonmarital mothers when I was a caseworker in 1966-1968 at the Douglas County Nebraska Assistance Bureau.

One of the worst incidents happened when I was required to take a new application for ADC of a young woman living in the home of her older sister. The sister's caseworker was present and conducting the interview. He viciously and abusively attacked this young woman for giving birth out of wedlock. The young woman was visibly shaken and destroyed. He left the room and I tried to comfort her. I told her that we were hired by the state to help people in trouble not to condemn or judge them.

After that incident I went to the director of the agency Michael Healey like me an Irish Catholic to complain about the conduct of Elo Limas, an Hispanic Catholic. Mr. Healey refused to discipline Mr. Limas stating: "Most Catholics cannot tolerate illegitimacy."

My experience with family members over the birth of my children and my decision to keep them was even more devastating. My older brother whom I loved as a twin, an Irish twin since we were only a year apart, told me he would see me and my children

starve to death if I kept them. He has since recanted and has been good to us. He is a professor of law for twenty years and has taken at least one case to the U.S. Supreme Court. He gave us assistance in the Girls Club Case. I am enclosing a brief he helped us distill for the Supreme Court. My beloved sister just next to me announced that she would not touch my children because they are illegitimate. She too recovered from this discrimination and she has given the most emotional and financial assistance to my children especially the year I was unable to work due to disabling grief over the death of three friends the same month, one my soul-mate and mentor, one my civil rights mentor, and the other one of my daughter's god-father who committed suicide in a deep biochemical depression.

In 1970 when I was working for now Georgetown Law Professor Peter Edelman at the Robert Kennedy Memorial in Washington, D.C., I was denied auto insurance. Peter had me call a Mr. Sharp in Senator Phil Hart's subcommittee on Insurance. Mr. Sharp told me they denied me insurance because I was a single mother but that I needed to realize that all women alone whether widows or divorced women were treated alike. He showed me that what I was dealing with was systemic sex discrimination. I followed his instructions and threatened to sue. I settled my first case of practicing law without a license and received my insurance, but my life was never the same. I recommitted myself to going back to law school (my late father's dream for me) and to fighting discrimination as I was previously inspired by John Doar and the heroic lawyers of the civil rights division.

I left the Kennedy Memorial for better pay and with Peter Edelman's letter of recommendation, I landed a choice job with Senator Harold E. Hughes from Iowa who shortly thereafter announced his candidacy for the Presidency. Senator Hughes in addition to being an outstanding law maker is a healer. He now spends all of his time healing people of drug and alcohol addictions in Des Moines, Iowa. He helped to heal me of the stigma of "illegitimacy" discrimination. He continually told me I was blessed to have such wonderful and beautiful children when he passed my desk to the back office as he picked up and looked at a picture of my young daughters on my desk.

Senator Hughes and his legal counsel for the Senate Armed Services Committee subcommittee on drug and alcohol use in the military went on a fact finding trip to Vietnam. At one base the commander was so audacious as to tell the Senator that there was no drug or alcohol problem on his base because of the ready availability of local women. The Senator found out that this commander was abusing local women by having them "service" the men on his base without regard for the health or welfare of those women. The Senator and Wade came to me immediately to tell me this incident and about their shame and outrage about this exploitation of non-American women. The same U.S. military

refused to give the children and girl friends of American G.I.'s any information as to their whereabouts in this country. The Pearl Buck Foundation was constantly fighting this discrimination by the military. You must now deal in a humane and non-discriminatory manner with the American-Phillipine children left behind by their GI fathers.

In 1971, I returned to Omaha and got a job as director of Court Services to two Catholic Judges of the Douglas County Juvenile Court. Then the local newspaper, The Omaha World Herald, tried to pressure the judges into firing me as a "negative role model" for the young people who come to the Court. The judges resisted, I hired a lawyer, then City Council Member Monty Taylor, and we had a show down with the editors. We argued that their discrimination against unwed mothers was inconsistent with their then anti-abortion position (they are now pro-abortion and still anti-non-marital mothers). Instead of doing an expose on me the paper did a full page article on the new employees of the Court. In the feature on me they still reported that: "Ms. Green the mother of twins has never been married." I again vowed to go to law school with the committment of the tortured Jewish survivors of Naziism: "Never again, never again."

Two years later I went to law school. Three years later I graduated and won a seat on the Omaha City Council simultaneously and four months later I was admitted to the Nebraska Bar Association.

While in law school, I had a deep romantic affair with Allan Lozier, President of Lozier Corporation, a Fortune 500 corporation. Allan and I were extremely compatible in many ways, but he had a cruelty streak that had nearly destroyed his first wife, and he refused to get help at my urging. He also suffered from the social disease of irrational and unconscious prejudice against "unwed mothers" and their illegitimate children. Allan cared deeply for my children as well and the girls and I stayed with him often in his posh McKinley Road home with its indoor swimming pool.

Allan took me out in public often until one day we ran into my close friend now Channel 7 ABC anchor woman Carol Schrader who had recently interviewed Allan, a president of Planned Parenthood. After that lunch, Allan never took me out in public again. It was clear that he could not deal with his irrational prejudice against "unwed mothers" inspite of the fact that he clearly cared for me individually. We broke up. But I required counselling to heal from the devastation of his cruelty and mistreatment of me. Allan and I remained friends, and he was a major financial supporter in my City Council race.

In 1981, I was defeated for re-election by a wealthy, more

liberal (yes, there are people more liberal than I and proudly so) owner of an electrical company hiring union workers and he had lived in the district 30 years compared to my four years (I had engineered the passage of district elections with Senator Ernest Chambers after I had been elected at large). As a result two of my black law classmates, one female Brenda Warren Council and one male, Fred Conley, were elected to the City Council. Brenda Warren Council may be elected Mayor of the City of Omaha, Tuesday, December 13, 1994. She will be the first woman and the first black to be elected mayor of our city.

While I was on the City Council, I dealt with discrimination, but one form of it was a surprise. At nineteen I was a postulant of the Sisters of Mercy, a semi-cloistered order of nuns. When I was elected at no time did the order honor me at my high school Mercy High or at the College of St. Mary's even though to date I am the only elected official to attend either school, and even though I followed the Catholic proscription against abortion and even though I was a social justice advocate taught to be so by the Sisters of Mercy. At the same time my friend Congressman John Cavanaugh was honored by the Jesuits at a formal dinner held in his behalf. But the Poor Clare Nuns remained steadfast to me in their prayers and support and as recent as three years ago, three of their nuns asked me to join their order. And I have done legal work for them.

One of the most heart ripping experiences for me with "illegitimacy" discrimination involved an Omaha Public School teacher for my daughter Elizabeth at Fontenelle School. This young teacher, a Roman Catholic, had just returned from Des Moines Iowa to see the current Pope. When she returned she began a campaign of extreme emotional cruelty against my daughter. I knew what was going on but I had to confirm it in person. I used the school open door policy for parents and spent the day in my daughter Elizabeth's fifth grade classroom. The teacher's disease was so out of control that she viciously and repeatedly attacked my daughter in my very presence. I went home desparate and called Sr. M. Helen of the Sisters of Mercy and the Eighth grade teacher who had spent months after school with me tutoring me because I had been physically ill for months and had missed school. She wanted me to get a scholarship so I could attend Mercy High School and with her help, I did.

When I heard Sr. Mary Helen's voice I broke into hysterical sobbing unable to tell her what was the matter. When I finally gained control of myself and told her the story she ordered me to get my daughter immediately out of that classroom. She told me what to tell the principal. I went the next morning to see Jim Freeman who had marched with Martin Luther King in the South for civil rights. He asked me what he could do and I told him to place Elizabeth in the classroom with her sister

in spite of the rule against twin joint placements and to show her her I.Q. another violation of school policy. The teacher had removed Elizabeth from the challenge program for bright students and had told her she was stupid. Her grades dropped from A's to D's in a few weeks time.

Mr. Freeman met both requests immediately. Elizabeth was placed with Mary Kay in Mrs. Scheerer's classroom with her consent. Elizabeth's grades immediately soared within a week. Unfortunately that brilliant teacher who so helped both of my daughters died of cancer the following year. She was well loved.

My life battling "unwed motherhood" and "illegitimacy" discrimination was so hard that my dear, dear friend attorney and then State Senator Vard Johnson told me one day that he advises all of his single pregnant clients to place their children for adoption so that they don't have to face a life like mine.

I was so shocked that I couldn't speak. Instead I wrote him a letter asking him if he tells his Jewish clients to raise their children in gentile homes so that they don't face discrimination, does he tell his black clients not to have children because they will face racial discrimination. So why don't you battle sex discrimination rather than deny your single pregnant clients the option of raising their own children. I can't imagine my life without my daughters or grandson, who by the way was born on St. Patrick's day a special gift from God. Vard and I have remained very close friends. He is a former director of Legal Aid and as a senator he championed the rights of welfare mothers and their children.

After my defeat, I took a civil rights case entitled Crystal Chambers v The Omaha Girls Club, The Omaha World Herald, and the Nebraska Equal Opportunity Commission et al (see the three federal court decisions attached). Three young black single female staff members became pregnant. The two who indicated that they intended to give birth and raise their own children were fired. The other young woman who announced she would and did obtain an abortion was allowed to keep her job. The Club adopted a "negative role modelling" policy that grounds for discharge was single pregnancy. I found out after I was retained by Crystal Chambers that my former lover Allan Lozier, former president of Planned Parenthood of Omaha, and President of Lozier Corporation, a Fortune 500 corporation was the principal architect of the negative role modelling" policy and that he and his best friend American billionaire Warren Buffett, ABC principal stockholder, part owner of the Washington Post, and a principal contributor of the Girls Club and a director of the Omaha World Herald were involved behind the scenes. (Buffett had made his friend Lozier a multi-millionaire by investing money for him and by giving him free financial advice on the

growth and development of his shelving manufacturing firm according to Lozier's own pillow talk.)

The Omaha World Herald president Harold Andersen's wife was a board member of the Club who enacted the policy. Andersen got his editorial staff to write an editorial denouncing the two single mothers who elected birth and raising their own children. Buffett's public silence was uncharacteristic because he had given television interviews to ABC Channel 7 's Carol Schraeder stating that he did not begrudge the small ADC payments to poor mothers but that he objected to welfare for the rich. Yet in two positions of great influence as a contributor to the Club and as a director of the paper, he remained silent. Crystal Chambers tried to commit suicide after the newspaper denounced her. She is now married to the father of her child and is completing her college degree in social work.

During all of this, I wrote to Warren Buffett my neighbor and acquaintance since 1961 when we both sponsored foreign student visitors under the People to People program. I told him that I thought television and movies contributed to the crucial problem of premature parenthood, and that I thought the networks were negligent in not running birth control ads. He sent me an ABC study that indicated the ads would begin in two years. That was in 1985. To date the ads do not run on any network cable or commercial but the graphic sexuality continues. Warren Buffett is a major national contributor to Planned Parenthood of America. That project and eliminating nuclear war are his top public service projects. Buffett supported Allan Lozier's "negative role modelling" policy by action or by silence. Warren Buffett like Allan Lozier is a liberal Democrat suffering the social illness of irrational and unconscious prejudice against "unwed mothers" and their "illegitimate" children and such prejudice like racial and ethnic and religious prejudice is unconstitutional.

In the Girls Club trial our expert witness was Dr. Harriet McAdoo, Ph.D. of Howard University, and advisor to the Roman Catholic Pope, and every major religion including the Jewish religion on the issue of encouraging the prevention of premature pregnancy and on including the single parent family in the religious and total community. Her seven point plan included education, job training, day care, health care, transportation, housing, and jobs and societal support.

The judge dismissed the case without letting it go to the jury. His harsh, punitive, unconstitutional attitude reflected in his opinion on Title VII is the precursor for the outrageous proposal of Newt Gingrich. The Judge was a personal friend of the President of the Omaha World Herald and of the former Governor Charles Thone who was a defendant in the case. Thone and Andersen were roommates at the University of Nebraska at

Lincoln and lifelong friends of each other as was the judge.

We were featured on National Public Radio, Donahue, The New York Times, Newsweek, The New York Daily News and other publications. The societal and media support was all positive.

This is contrasted to the attitude of Lozier, Buffett and Gingerich and Anderson. I fear we will see the constitution and the spirit of the Pregnancy Discrimination Act and of Title IX of the Equal Education trampled by these mean spirited, punitive, social engineers.

I warned the three judge panel of two conservative Republican appointees and one Democrat that in a free and democratic society the decision to give birth to and raise one's own child was a constitutionally protected activity, and that we had to take heed lest we become another Russia where women were denied birth control except for unlimited abortion and China where women are forced to abort any pregnancy past the first, or Germany with "The Jewish Solution" so ably documented by Stephen Spielberg in "Shindler's List."

And to my horror my forcast has come true. The poor and the black are to have their children ripped from them and put into orphanages or denied food and medical care if they are born on welfare. And less restrictive alternatives like birth control ads, a more effective birth control delivery system, job training, jobs, quality subsidized day care and universal health care are not even tried.

During the trial United States Senator Bob Kerrey was Governor. He did not speak out against the Girls Club policy even though the State was a defendant. He was living openly at the time in the Governor's mansion in an unmarried liaison with actress Debra Winger who left his bed and got pregnant by Timothy Hutton out of wedlock.

No newspaper in the country denounced Bob Kerrey for being a negative role model for his open violation of society norms or was it a violation. Yet Crystal Chambers was denounced in the Omaha World Herald because she was black it said. Bob Kerrey was the best man and college roommate of the then vice president now president of the Omaha World Herald John Gottshalk. And no national paper ever denounced Kerrey during his presidential bid either. Allan Lozier bragged openly about the number of women he had as lovers--not quite as impressive a number as Wilt the Stilt Chamberlan. Warren Buffett lives openly with Astrid a woman not his wife who herself lives in San Francisco and has for nearly fifteen years. Why is it that white male multi-millionaires and billionaires who openly defy society's norms can do whatever they want without question while engineering the lives of the poor but the poor and especially

the poor black who are merely trying to eak out a life with a little love and affection are condemned from the once considered sacred halls of Congress. I thought I lived in America the land of the free and home of the brave. America, America, God shed His light on thee.

SOME SUGGESTED SOLUTION:

I offer solutions to the problems as well as criticism. First I propose mobile birth control units at every high school on a rotating schedule. Take the medical care to the kids but keep it out of school.

Second every city of a certain size has to provide day care centers in at least one public high school so that the number of teen mothers without diplomas is reduced.

I propose co-parenting open adoptions as a legal form of adoption with the birth and adoptive parents able to negotiate visitation, child support, and other issues just like both parties in a divorce do.

I propose a national Parenting Act like the Nebraska Act enclosed and enacted by the Nebraska legislature to keep both male and female parents totally involved in the life of the child regardless of the marital status of the parents unless said parent(s) rights are terminated.

The best experimental programs in working with teenagers and teen parents should be made available to other communities.

Curriculums on parenting, child psychology, child development, and effective parenting relationships should be required in every junior high and high school.

All television networks should be required to run tasteful contraceptive ads (This is a more acceptable alternative to sexual censorship of movies and television.)

All forms of birth control should be funded by the United States government including the safe, now efficient and reliable Catholic form of Birth Control which the Clinton administration refuses to fund.

The first amendment absolutely protects non-child pornography. Should not the right to bear and raise one's own child receive equal constitutional protection and or statutory protection.

In all child support cases a visitation schedule must be worked out and ordered as part of the paternity action and child support determination and or collection action. Poor fathers cannot afford attorneys to initiate separate visitation schedule trials.

Full direct tax deductions for the working poor who can barely afford day care. The scale should be established by the number of persons in the family and the family income. And day care subsidies for women who cannot even afford to pay day care.

The law must state that the fact a parent works cannot disqualify them for custody unless they cannot provide good day care for the child in their absence. Also poverty cannot be used as a criteria for lack of custody when child support orders can equalize the income of the parents to protect the child.

IMPERMISSIBLE SEGREGATION:

In his dissent to the refusal of the entire Eighth Circuit to take and hear the Girls Club case or appeal by Crystal Chambers, Judge Donald Lay called the "negative role modelling" policy impermissible segregation [like slavery and segregation laws in the South]. Judge Lay's decision reflects the true interpretation of the constitution and the law.

Ironically President Clinton's own Supreme Court appointees are predicted to uphold the law as did Judge Lay while President Clinton and his Republican counter part Newt Gingrich propose to violate it.

THE CALL FOR A WORKING POOR:

There is a certain irony in the move to turn the social welfare system into an employment system, and I applaud just that for physically and mentally able individuals as long as the efforts and results are humane and just.

The irony is that welfare was created in the thirties during the Great Depression for widows and orphans because women were not allowed to work in our society. Yes systemic societal discrimination against women in the work place mandated the welfare system.

Now sex discrimination in the form of education and wage discrimination keeps too many on welfare, although the majority of welfare recipients only use welfare as a temporary way station between dependency either marital or parental dependency and the work place. These women need education, job training, quality subsidized day care, decent jobs and transportation, and health care. When I was raising my children as a single mother, I always prayed to God for a good education, good jobs, quality day care, good health, a good car and a good, honest mechanic. I only prayed for a good man last because I knew I could live without a good man (even though I desperately wanted one), but I could not survive without the rest.

The dilemma for most mothers raising their children alone regardless of the cause of their single parenthood is the fact that women are still subjected to systemic societal wage discrimination. I live in a town only second to Hartford, Connecticut for the insurance industry. The insurance industry earns unconscionable profits off of the backs of their predominantly low paid predominantly female workers.

You will take the easy route of reforming the welfare system and providing subsidies rather than take on the systemic, discriminatory wage structure of American business, industry and government. Welfare reform is the easy way out, and the poor are so easy to blame, when every breath they take is regulated. Since you are going to take the easy route especially with a conservative Republican majority, at least put something in the law that states: This Congress recognizes that the poor in our country do not choose to be poor and that poverty is not a life sentence. This Congress is committed to helping the poor out of poverty by extending the ladder of compassion, job training, jobs, quality day care, quality health care and housing and a decent standard of living for all Americans.

You or your predecessors showed that compassion and understanding when you passed the Pregnancy Discrimination Act, 42 USC 2000(e) (k) and Title IX of the Equal Education Act.

Bring a fact finding Congressional group to Omaha. The Boys Town that Newt Gingrich wants to turn into a national model is in fact a national model for teen pregnancy. It funds an alternative school Flanagan High after its founder Father Flanagan which maintains a full time day care for the students children. The Public School system has failed to follow its lead. And space is limited, but it is a successful role model. Nationally 25% of pregnant teens drop out of school. A figure we cannot tolerate.

Dr. McAdoo, our Girls Club expert, says teen agers are getting pregnant because they want someone to love. I suggest that pregnancy by the young may be a response to a lack of hope for the future, lack of any reason to delay having a family because there is no future. And for young black women, there are no eligible men to have a future with. The death rate among young black men is so alarming that they should be declared an endangered species given the same financial and other protection as the whooping crane. And have you looked at the unemployment figures for young black teenagers especially young black males lately. What hope of a future do we give these young people. The only economic opportunity we give them is either welfare or crack distribution. And too many young black youngsters are going to work for the MacDonal'd's of crack cocaine. They get to choose their hours, and the pay is better than anything you can imagine.

The process server in too many teen age paternity cases has to go to the grave yard or the jail to serve the papers. We are ignoring the fathers in our push for welfare reform. We made Japan and Germany wealthy nations with our Marshall Plan and the disarmament of those nations. Why can't we have an inner city Marshall Plan for our young. These young people were never our enemies. Why can't we treat them with compassion and caring and financial input like we did the Japanese and the Germans. Where is Harry Truman when we need him now.

There is another irony in your effort to reform the welfare system into a work or employment system. Conservative judges are taking away children from working mothers and giving them into the care of non-working step mothers or grandmothers giving the message that working and mothering are inconsistent. Your law will have to state national policy that the fact that a parent works cannot be used against them in a custody battle unless they fail to provide for good day care in their absence at work or school

IN PRAISE OF RICHARD NIXON:

People forget in the memories of Watergate that Richard Nixon was one of the most compassionate presidents with regard to dealing with the problems of the poor. It was his administration that successfully experimented with negative income tax. Nixon was never able to propose these plans as universal plans because of his involvement with Watergate, but the Congressional Record was filled with pages of the success of these trials in New Jersey and other states. Politically the concepts and programs may not be timely, but let history record that the president who came out of abject poverty never lost his compassion for the poor. And maybe the day will come when his creative and innovative poverty programs will be enacted.

I am willing to come to the halls of Congress to spread my message if you think it would be useful. I am willing to address any committee of Congress. I am willing to help you in any way possible, and I have done your legal research for you Pro Bono. You may publish my material freely and openly in the Congressional Record or distribute it to the media. My message is straight from the cross, from Ghandi, and Budha and the God of Abraham and Mohammed: when you do this for the least of them you do it for Me.

In writing to you I am fulfilling a promise I made to God that if He would help me keep and raise my own children inspite of the refusal of my family to, I would do everything in my power to help other young women who chose to bear and raise their own children. God in the form of my dear friend Helen Abdouch

and her husband George gave me \$1,000.00 to live on until I could go to work and my saintly aunt Jeanie and Uncle Ed Furay of Cinnaminson, New Jersey let me stay with them until I had recovered from my C-Section to allow me to go back to work.

It was fitting that my first job was with Robert F. Kennedy's Memorial since his kindness and compassion to one of his personal staff members who was black, single and pregnant gave me some of the courage I needed to live this difficult life. As an Irish Catholic, I believe that God has kept me single so that I could fulfill my promise to Him to be an advocate for the rights of single mothers and their non-marital children. Maybe when I have fulfilled my promise He will let me marry - in the nursing home no doubt.

May God be with you in your efforts.

Sincerely,



MARY KAY GREEN, SR.

I want to acknowledge the assistance from the following lawyers:

J. Patrick Green (my Irish twin brother) Professor of Law, Creighton (Jesuit) University Law School, 2500 California Street, Omaha, Nebraska 68178 (Pat is an applicant for the Episcopal priesthood). (402-280-2872)

Edward F. Fogarty, Attorney at Law, 700 Service Life Building, Omaha, Nebraska 68102 (402-341-3333) (my friend of 32 years and co-counsel on Chambers).

Edward Diedrich, Attorney at Law, #205, 261 E. Lincoln Hwy., DeKalb, Ill 60115 (815-758-4441) and co-counsel on Chambers.

Sheri Long, Deputy City Attorney, City of Omaha, Civic Center, Omaha, Ne 68183 (402-444-7000) counsel in companion case of Pamela Simmons v. Omaha Girls Club.

PROFESSIONAL BIOGRAPHY OF MARY KAY GREEN, ATTORNEY

EDUCATION: Creighton University, 1965 BA (History/Psychology), 1977 J.D. Doctor of Law, University of Nebraska at Omaha, 1966-68 1/3 of the hours to earn a MS in Psychology

1977 - 1981 Elected member of the Omaha City Council sponsoring Affirmative Action Ordinances, Contract Compliance Ordinances, Scattered Site Low Income Housing Ordinances, Historic Preservation Ordinances, Planning, Liquor License, Zoning and Labor Contract negotiations and Ordinances. I opposed the award of the cable franchise to Cox of Atlanta and the instant millionaire cable schemes (Omaha's own Warren Buffett likewise opposed these schemes). I appeared on David Brinkley's Journal, an hour long national television news show in opposition to the instant millionaire cable scheme.

Private attorney since 1977. One third of my cases have been civil rights cases, one third personal injury and one third have been domestic and family related cases. I also did misdemeanor criminal cases.

Sample Discrimination Settlements:

I cannot give the names of the parties due to the confidentiality of the settlement terms, but I can give some of the facts.

A major Omaha medical center. I represented a female nurse aid fired for taking one sip of beer when male doctors brought cases of wine on the floor during the same holiday period and served the wine to the doctors and nurses on duty. The case settled in two weeks and the hospital paid for me to fly to Tennessee to take the check and documents to my client who moved back home after her illegal discharge.

A national cancer center. The director maintained a minority lab and a white lab for histo-technologists. I was able to secure other employment for my clients outside of the center and to obtain a cash settlement for them.

A national insurance company with ties to the federal government. My client was the only female executive in the company whose employees consisted of mainly low paid female workers (typical of all insurance companies). She made \$80,000.00 per year and her job was discriminatorally eliminated. The settlement took a few weeks.

A Southern headquartered national waste disposal company who maintained one black and one white company in Omaha. When the black company lost its contract with the City of Omaha, all the white managers from the black company were hired by the white company. I represented the two black managers who were

not hired by the white company. It took thirty days to settle. The law firm for the Defendants had a partner who was a major Watergate prosecutor.

A major railroad headquartered in a Southern city discriminated in job classifications by race. The Defendants settled with my black client in a few months after I filed suit in federal court.

After my term on the City Council I represented several city workers and was able to secure full time employment, promotions, cash and or both for them. My clients were discriminated white females, black females and black males.

These are a few of my discrimination settlements.

The following are some of the cases I filed and got verdicts and or post filing settlements.

Rudy Avila v. The City of Omaha, U.S. District Court for Nebraska. Mr. Avila received cash and attorneys fees. He was a discriminated Hispanic supervisor.

Avis Linstrom v. The City of Omaha. Avis was given a promotion to 911 supervisor by the jury and judge. The City settled with her for half the cash and for the promotion and half of the attorney fees without appeal. The union appealed and won on a technicality. Mrs. Linstrom used another attorney on the union appeal because I was unavailable.

Crystal Chambers v. The Omaha Girls Club. Crystal did not have a fair trial. The Judge was personal friends with two of the defendants and had been the lawyer for the governor defendant and his transition chief. When I challenged his conflicts of interest he tried to get me disbarred. Two of his friends on the eighth circuit upheld his decision to dismiss the case, ignored his conflicts, and denied his attempt to censure me. My client and I were on National Public Radio, The Phil Donahue Show, in The New York Times, Newsweek, Newsday and for three weeks were daily in The Omaha World Herald Newspaper.

When the Judge was up for a position on the Eighth Circuit, I presented all three decisions to the United States Senate Judiciary Committee. This case among others was used by the Congress to amend Title VII of the 1964 Civil Rights Act to mandate jury trials and to take these decisions away from the Reagan Bush judges who were selected for their specific hostility to civil rights plaintiffs. Crystal Chambers has a degree in social work, and is happily married to the father of her daughter. She was a black single pregnant female when she was discriminated against by the Girls Club and the bench.

Barbara Hayes v. Nebraska Methodist Hospital. The case was appealed by me successfully on a jurisdictional claim, and we settled shortly. The case involved race discrimination against a black female. The hospital maintained a segregated work force.

McCarty v. The City of Omaha. We won a race discrimination case against the Omaha Fire Division who operated a nearly all white work force of relatives and friends of existing fire men. In a subsequent case by another attorney, women were included in the Fire Division.

Georgianna Frey v. The Omaha World Herald Newspaper. The paper maintained a segregated work force with blacks concentrated in the lowest job classifications and women nearly non-existent in the paper's workforce. My client was a black female. I prepared all the pleadings and all the discovery, but I was ill at the time of trial. I did however talk four to five times a day with the young attorney who tried it for me and I assisted him with his post trial brief and other work. The title VII decision was upheld, the jury verdict in excess of \$100,000 was appealed. The paper settled before the case went before the Eighth Circuit en banc.

I also got the first sexual harassment decision in Nebraska against the Parking Authority of America. And other decisions. Discrimination cases have been about one third of my caseload for eighteen years of practice.

I successfully innovated the combination of civil rights claims with state common law tort or personal injury claims in Nebraska

One non-discrimination case must be mentioned. I represented the Communication Workers of America in their challenge of a \$60 million rate increase before the Nebraska Public Service Commission against then Northwestern Bell, now U.S. West. I successfully exposed the "alleged AT & T National Survey" offered to support the rate increase as a complete fraud. The "study" was drawn up by two Omaha workers who called names from the phone book. It was not a scientifically developed survey conducted by professionals as the company officials testified. As a result Bell was denied a rate increase for nearly ten years.

Training in Civil Rights:

John Doar, Deputy Attorney General for Civil Rights, U.S. Department of Justice (and later counsel for the Senate Judiciary Committee Watergate Committee) 1965-66, the year the 1964 Civil Rights Act was put into effect. I investigated the operation of the docket room for him, and he implemented all of my recommendations for change.

The late Judge Benjamin Wall, Harvard graduated Omaha Civil Rights Attorney, and the only civil rights attorney in the area for years. I was his law clerk in his private practice for nearly three years, and he was my friend for life. He helped finance my city council race by keeping me on payroll while I ran for office never stepping foot in the office.

The late Bennett Hornstein a member of the lawyers committee of the American Civil Liberties Union. Bennett was a constant source of information and encouragement.

The late Arthur O'Leary prominent personal injury and criminal defense attorney. Mr. O'Leary acted as my mentor and friend from 1972 until his death in 1981. He constantly advised me on my cases, and referred cases to me.

Robert Spire, former Attorney General of Nebraska and former private attorney. Bob served as a one man cheering section in all my civil rights cases, civil rights activities on the city council and in my efforts for the inclusion of women and minorities in the Bar and the Bar Association. He died this year.

Harold E. Hughes, former United States Senator from Iowa, former Governor of Iowa, and former Presidential Candidate. I was his Senate caseworker for the Justice Department, The Selective Service, and all branches of the Military. Hughes was running for President at this time (1971-72) and Omaha billionaire Warren Buffett was his finance chairman and traveled extensively with him.

Robert F. Kennedy, former Attorney General of the United States and former U.S. Senator from New York. I learned from Robert Kennedy from his example. But I was privileged to spend alot of time with him and in his office because my lifetime friend Helen Abdouch from Omaha was on his personal staff. I went to their office every night after work where I also got to meet and know Jack Rosenthal now editor of the New York Times, got to meet John Siegenthaler of USA Today and the Nashville Tennessean, Ed Guthman of the Los Angeles Times and of course my own boss John Doar.

To former Senator Harold E. Hughes, retired Judge Joseph Moylan and the people of Omaha who hired me for employment going against societal discrimination over the fact that I am a never married single mother of twin daughters. Judge Moylan risked his job as did his associate Judge Colleen Buckley when they were threatened by the Omaha World Herald to fire me as a "negative role model." To Robert F. Kennedy who showed so much compassion and caring to the young single pregnant member of his staff as Attorney General reassuring her of her continued employment.

Former Girls Club Staff Members Appear on the Phil Donahue Show

Crystal Chambers, the former Omaha Girls Club staff member who was fired after she became pregnant out of wedlock, appeared Friday on the Phil Donahue television show in New York with two of her attorneys and another former club employee.

They were among guests who discussed the effects of pregnant, unmarried teachers on students.

Attorneys Mary Kay Green of Omaha and Edward Diehrich of LaGrange, Ill., who represented Ms. Chambers during her lawsuit against the Girls Club in U.S. District Court in Omaha, and Pamela Simmons, another unmarried former club member who was dismissed after she became pregnant, were joined in the discussion by two unmarried public school teachers who had become pregnant. The teachers were from elsewhere.

The audience was asked whether schools should allow unmarried, pregnant teachers to continue teaching during their pregnancies and whether their

conditions influence students. 4-4-86

Ms. Chambers, who was a part-time arts and crafts teacher, her attorneys, and Ms. Simmons criticized the Girls Club for dismissing both employees. The Girls Club allowed another unmarried parent to remain on the staff, Ms. Green said.

The club did not send a representative to participate in the program but submitted a statement read by Donahue. The club said it adopted a policy against unmarried, pregnant staff members because officials believe they are negative role models and counter the club's aim of preventing pregnancies among its young members.

The lawsuit filed for Ms. Chambers resulted in a decision upholding the Girls Club policy against unwed pregnancies. The decision by Chief U.S. District Judge C. Arlen Beam of Omaha has been appealed to the 8th U.S. Circuit Court of Appeals.

MAR 30 1986

UNIVERSAL Photo Credits: AP/Wide World

Omaha Asks Whether an Unwed Mother Can Be a Fit Role Model for Teen-Agers

By LENA WILLIAMS
Special to the Omaha Star

WASHINGTON, March 28 — To the officers of the Omaha City Club, it was a question of propriety. They let Miss Chambers, a part-time secretary and a mother, work out on a 2,000-mile route for teenage members because the brochure program put off wedding. So they dismissed her.

To Miss Chambers it was a question of discrimination. She contended that, as a black woman, she was unfairly dismissed by the club's predominantly white board. So she filed a constitutional lawsuit against the club alleging that her civil rights had been violated.

The City Club, a private, unincorporated group founded in 1925, serves about 15,000 girls, most of them black, at two centers in Omaha. Twenty of 100 members of the club's staff is black.

Miss Chambers said that until a few days ago there was a national debate over teenage pregnancy. The issue was raised when the Federal

district judge in Omaha ruled that the club had acted against the rights of the teenage Miss Chambers.

"The evidence had shown that the City Club did not unambiguously discriminate against the plaintiff and that the policy in relation to the City Club's central purpose of lowering growth and maturity of young girls," wrote Judge C. Allen Baum.

On Wednesday attorneys for Miss Chambers filed an appeal in the United States Court of Appeals for the Eighth Circuit.

One lawyer's experience

The case has already divided Omaha. Federal Judge Baum and those of locally famous City Club members who are Miss Chambers' supporters have two years of action and was scheduled at the time of her dismissal, as a part-time role model.

Chambers left the club amid a national debate over teenage pregnancy. The issue was raised when the Federal

district judge in Omaha ruled that the club had acted against the rights of the teenage Miss Chambers.

One of Miss Chambers' lawyers is Mary Kay Green, a former City Council member who helped found the City Club in the early 1970's. She said she chose to represent Miss Chambers because of the discrimination she herself faced years ago when seeking entry into the club.

"Our First Responsibility"

"No one is saying teen should be pregnant," Miss Green said in a telephone interview from her office in Omaha. "But rather than protecting those who do, we should be finding ways to help them."

Miss Green noted that, according to national projections, nearly 70 percent of black women will have become out of wedlock. Judge Baum's decision, she said, had the effect of weakening Federal legislation barring discrimination in employment, as it applies to black women.

There were 2,000 babies born to teenagers in Omaha in 1983, the latest year for which figures are available, representing 10 percent of all births in Nebraska. Twenty-four percent of the teenagers giving birth that year were non-white.

The City Club adopted its so-called "negative role model" policy in 1982. Miss Chambers was the first to be dismissed under it and there has been one other.

"We considered the impact the policy would have on employees," said Mary King, executive director of the club. "But we felt our first responsibility was to the club's members. Many of these teenagers look up to our staff and want to learn the advice and direction. What message are we sending out, if we don't see a proper model for them?"

But some charges that the club refused to consider the consequences of its policy.

Dr. Matthew McClellan, a professor of

psychology at Howard University who was a trial witness for Miss Chambers, argued that the policy was merely meant to reduce the rate of teenage pregnancy and, if anything, would have helped such as Miss Chambers and others. The only reason for these women, she asserted, was abortion.

Depending on whether

"It's a girl's choice program. The only way to keep her out will be having an abortion," said Dr. McClellan. "The only other solution was for the girl to bring down her life and go on welfare to support herself and her child."

Those who oppose Miss Chambers' case at court, however, say one of the club's most respected members at the club here and elsewhere has worked on pregnancy and has loved openly all decisions to prevent.

Miss King, who described herself as a feminist, said she didn't want to be a role model and she had carefully considered the consequences of the policy and intended to stick by it.

Report by Lena Williams, the Omaha Star

psychology, said he has found that young women that the Chambers case could be viewed as a conflict of interest. While Miss Chambers did not actively promote the view that out-of-wedlock pregnancies were acceptable for such her actions did that.

"The message it is about with the club's mission," said Mr. Justice.

"When the message conflicts with the treatment of employees' rights, then the rights of the employees come first."

A Question of Role Models

The good news, the Omaha Girls Club told Crystal Chambers, was that she would become a full-time, arts-and-crafts instructor. The unmarried 21-year-old part-timer was elated—she was pregnant and needed the extra money. The bad news came shortly after. Supervisor Bobbi Kerigan notified Chambers that she would be dismissed two months later when her pregnancy began to "show." The club provides a variety of programs for 3,000 mostly black teenagers. But alarmed by the high rate of teen pregnancies and anxious to provide proper role models, the club vowed to dismiss any staffer pregnant out of wedlock—one month before Chambers admitted she was pregnant.

Now, four years later, Chambers's million-dollar discrimination suit is in federal district court—and the case has left Omaha bitterly divided. Feminists and minority activists are torn between Chambers's civil rights and the club's desire to offer guidance to the daughters of low-income working mothers. The case poses a variety of legal and social dilemmas, and it has frustrated mediation efforts for four years. Even the Nebraska Equal Opportunity Commission was badly split in 1982 when it rejected Chambers's claim that she had been the victim of discrimination.

"Wrong message": Witnesses who testified at a court hearing last week were equally at odds. Some insisted that the club's policy was simply aimed at protecting teens "at a vulnerable age." Dana (Woody) Bradford, president of the club's board of directors when the rule was adopted, said bluntly that Chambers's pregnancy "sent the wrong message"—that a staff member pregnant out of wedlock implicitly "said it was OK, that it was not going to affect your life in a great way." Others felt that teenagers might read a very different message. Harriette McAdoo, a Howard University sociologist, argued that one club's policy was hardly likely to reduce the rate of teen pregnancies and that if a pregnant woman retained her job, she could be "a positive role model, maintaining herself in a difficult situation."

One of Chambers's lawyers is Mary Kay Green, a former city councilwoman who helped found the club in the early 1970s. Green says she chose to represent Chambers because of the discrimination she herself faced after bearing twin daughters out of wedlock. The all-white jury of two men and four women is expected to rule in the case in the next few weeks. Whatever the decision, lawyers on both sides expect appeals before the issue is resolved.

page
19

News week
1-27-86

CLASS OF SERVICE
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WESTERN UNION TELEGRAM

SYMBOLS
 DL=Day Letter
 NL=Night Letter
 LT=International Letter Telegram

W. P. MARSHALL, President

1201

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APPRECIATE YOUR HELP IN SETTING UP THE MEETING FOR TED SORENSEN AND BOB WALLACE OF MY STAFF. I KNOW THIS INVOLVES MUCH TIME AND EFFORT AND I AM DEEPLY GRATEFUL TO YOU=

JOHN F KENNEDY=

ADV. AT 3171
James Green
 WC 1218P CA
Mail

LEGISLATIVE BILL 629

Approved by the Governor May 25, 1993

Introduced by Ashford, 6; Abboud, 12; Bohlke, 33; Bromm, 23;
Hillman, 48; Landis, 46; Rasmussen, 20; Will, 8;
Preister, 5

AN ACT relating to families; to amend section 42-120, Reissue Revised Statutes of Nebraska, 1943, and section 42-364, Revised Statutes Supplement, 1992; to adopt the Parenting Act; to change provisions relating to decrees concerning marriage validity, divorce, and legal separation; to harmonize provisions; to provide an operative date; and to repeal the original sections.

Be it enacted by the people of the State of Nebraska,

Section 1. Sections 1 to 19 of this act shall be known and may be cited as the Parenting Act.

Sec. 2. The Legislature finds it is in the best interests of a minor child to maintain, to the greatest extent possible, the ongoing involvement of both parents in the life of the minor child. The Legislature further finds that parents should maintain continued communications to make as many joint decisions in performing such parenting functions as are necessary for the care and healthy development of the minor child.

In any proceeding between parents under Chapter 42 involving a minor child, the best interests of the minor child shall be the standard by which the court adjudicates and establishes the individual parental responsibilities. The state presumes the critical importance of the parent-child relationship and the child-parent relationship in the welfare and development of the minor child and that the relationship between the minor child and both parents should be fostered unless otherwise inconsistent with the best interests of the minor child. The best interests of the minor child are served by a parenting arrangement which best serves a minor child's emotional growth, health, stability, and physical care.

The Legislature further finds that the best interests of the minor child are ordinarily addressed when both parents remain active and involved in parenting. It is the policy of this state to assure the right of children, when it is in their best interests, to frequent and continuing contact with parents who have shown the ability to act in the best interests of the children and to encourage parents to share in the rights and responsibilities of raising their children after divorce or separation.

Sec. 3. For purposes of the Parenting Act:

(1) Minor child shall mean a child under the age of nineteen years;

(2) Parenting functions shall mean those aspects of the parent-child relationship in which the parent makes fundamental decisions

and performs fundamental functions necessary for the care and development of the minor child. Parenting functions shall include, but not be limited to:

(a) Maintaining a loving, stable, consistent, and nurturing relationship with the minor child;

(b) Attending to the ongoing needs of the minor child, including feeding, clothing, physical care and grooming, supervision, and engaging in other activities appropriate to the healthy development of the minor child within the social and economic circumstances of the family;

(c) Attending to adequate education for the minor child, including remedial or other special education essential to the best interests of the minor child;

(d) Assisting the minor child in maintaining a positive relationship with both parents and other family members;

(e) Assisting the minor child in developing and maintaining appropriate interpersonal relationships; and

(f) Exercising appropriate support for social, academic, athletic, or other special interests and abilities of the minor child within the social and economic circumstances of the family;

(3) Parenting plan shall mean a plan for parenting the minor child in consideration of the parenting functions, which plan may be incorporated into any final decree or decree of modification in an action (a) for dissolution of marriage, (b) concerning the validity of a marriage, or (c) for legal separation; and

(4) Remediation process shall mean the method established in the parenting plan which provides each parent a means to resolve future circumstantial changes or conflicts regarding the parenting functions or the parenting plan and which minimizes relitigation and utilizes judicial intervention as a last resort.

Sec. 4. (1) In any proceeding under Chapter 30, 42, or 43 in which the parenting of minor children is in issue except any proceeding under the Revised Uniform Reciprocal Enforcement of Support Act, subsequent to the initial filing or upon filing of an application for modification of a decree, the parties shall receive from the clerk of the district court information regarding the divorce process, a divorce timeline, parenting during and after divorce, the parenting plan, the mediation process, and resource materials, as well as the availability of mediation through the conciliation office, other court-based programs, or the state mediation centers as established through the Office of Dispute Resolution. Development of these informational materials and the implementation of this subsection shall be accomplished through the State Court Administrator.

(2) Mediators shall be trained to recognize domestic violence. Screening guidelines and safety procedures for cases involving child abuse, spouse abuse, or both shall be devised by the State Court Administrator. If the case is determined not to involve child abuse, spouse abuse, or both and both parties voluntarily agree to mediation, the case may be scheduled for future mediation sessions.

Sec. 5. (1) A mediator under the Parenting Act may be a court-based conciliation court counselor, a court-based mediator, a state mediation center mediator as established by the Office of Dispute Resolution, or a mediator in private practice. To qualify as a mediator, a person shall have a minimum of thirty hours of basic mediation training and thirty hours of family mediation training and shall have served as an apprentice to an experienced mediator as defined in section 25-2903.

(2) A mediator who performs mediation in family matters shall also meet the following standards:

(a) Knowledge of the court system and procedures used in contested family matters;

(b) General knowledge of Nebraska family law, especially regarding custody, visitation, and support;

(c) Knowledge of other resources in the state to which parties and children can be referred for assistance; and

(d) General knowledge of child development, clinical issues relating to children, the effects of marriage dissolution on children, parents, and extended families, and the psychology of families.

(3) No mediator who represents or has represented one or both of the parties or has had either of the parties as a client may mediate the case. If such services have been provided to both participants, mediation shall not proceed unless the prior relationship has been discussed, the role of the mediator has been made distinct from the earlier relationship, and the participants have been given the opportunity to fully choose to proceed. All other potential conflicts of interest shall be disclosed and discussed before the parties decide whether to proceed with that mediator.

Sec. 6. With the consent of both parties, a court may refer a case to court-based mediation, at no cost to the parties, and may state a date for the case to return to court, but such date shall be no longer than ninety days from the date the order is signed unless the court grants an extension. If the court refers a case to such mediation, the court may, if appropriate, order temporary support in order to meet the Nebraska Supreme Court rules for expedited process or case progression.

Sec. 7. The mediator shall facilitate the mediation process. The mediator shall inform the parties of the factors the court will consider. The mediator shall be impartial and shall use his or her best efforts to assist both parties in the development of a parenting plan. The mediator shall assist the parties in assessing their needs and those of the minor child involved in the proceeding and may include the minor child in the mediation process if necessary or appropriate.

Sec. 8. Mediation under the Parenting Act shall be conducted in private. The mediator shall advise the parties that they should consult with an attorney. Any disclosure of abuse made during the mediation process shall be confidential, except that reports of abuse or neglect as defined in section 28-719 made during the mediation process shall be timely reported to the district judge and an in camera hearing shall be held to determine whether a report should be made pursuant to

section 28-711 and if further investigation is merited.

No records, notes, or other documentation, written or electronic, of the mediation process, except the contents of a final agreement between the parties, shall be examined in any judicial or administrative proceeding. Any communications made confidential by the act which become subject to judicial or administrative process requiring the disclosure of such communications shall not be disclosed.

Sec. 9. (1) The mediator may terminate mediation if one or more of the following conditions exist:

(a) There is no reasonable possibility that mediation will promote the development of an effective parenting plan;

(b) Allegations are made of direct physical or significant emotional harm to a party or to a minor child that have not been heard and ruled upon by the court. Prior to the commencement of mediation, the parties to mediation shall be notified by the mediator that evidence of abuse or neglect as defined in section 28-710 shall be reported to the district judge who shall hold an in camera hearing to determine whether a report should be made pursuant to section 28-711 and if further investigation is merited; or

(c) Mediation will otherwise fail to serve the best interests of the minor child.

(2) If mediation is not appropriate pursuant to subsection (1) of this section, the mediator shall so inform the court. Any additional statements shall not be prejudicial to either party.

(3) Either party may terminate mediation at any point in the process.

Sec. 10. Any agreement reached by the parties as a result of mediation shall be reported to the court and to counsel for the parties by the mediator prior to the day set for hearing or at such time as is designated by the court. If the parties do not reach agreement as a result of mediation, the mediator shall report that fact to the court on or before the reporting date established by the court.

Sec. 11. The costs of the mediation process shall be paid by the parties on an equal-share basis according to each party's ability to pay or on a sliding fee scale. If a court refers a case to court-based mediation, there shall be no fee.

Sec. 12. At a minimum, the purpose and scope of the parenting plan shall be to:

(1) Assist in developing a satisfactorily restructured family that meets the needs of all the members;

(2) Provide for the minor child's physical care;

(3) Maintain the minor child's emotional stability;

(4) Provide for the minor child's changing needs as he or she develops, in a manner which minimizes the need for future modifications to the parenting plan;

(5) Set forth the authority and responsibilities of each party with respect to the minor child;

(6) Minimize the minor child's exposure to harmful

parental conflict;

(7) Encourage the parties, when appropriate, to fulfill their parenting responsibilities through agreements in the parenting plan rather than by relying on judicial intervention;

(8) Encourage mutual appropriate participation by both parties in the minor child's activities;

(9) Provide both parties equal access to the minor child's medical, dental, and school records;

(10) Encourage remediation prior to litigation; and

(11) Assist both parties to articulate a visitation schedule which would be acceptable if the other party is awarded custody of the minor child.

Sec. 13. The parenting plan shall contain custody and visitation arrangements, apportionment of time with each party, and provisions for a remediation process regarding future modifications to such plan as provided in sections 14 to 16 of this act. The parenting plan shall address only issues regarding parenting functions. Other issues, including, but not limited to, property division and financial issues or child support, shall be specifically excluded from the parenting plan.

Sec. 14. The parenting plan shall encourage mutual discussion of major decisions regarding the minor child's education, health care, and religious upbringing. Regardless of the allocation of decisionmaking in the parenting plan, either party may authorize emergency medical procedures in situations affecting the immediate health of the child.

Each party shall establish procedures for making decisions regarding the day-to-day care and control of the minor child while the minor child is residing with that party.

Sec. 15. (1) The parenting plan shall include a schedule which designates in which party's home the minor child shall reside on given days of the year, including provisions for specified religious and secular holidays, birthdays of family members, vacations, and other special occasions.

(2) In the development of a parenting plan, consideration shall be given to the minor child's age and developmental needs and provision of a healthy relationship between the minor child and each party.

(3) The minimum court-ordered time the minor child shall spend with each parent shall be specified, including, but not limited to, specified religious and secular holidays, birthdays, vacations, and other special occasions.

(4) The decree shall include the parenting plan developed by the parents through mediation and approved by the court pursuant to the Parenting Act.

Sec. 16. When mutual decisionmaking is agreed upon in the parenting plan but cannot be achieved, the parties shall make a good faith effort to resolve the issue through the remediation process. The remediation process shall minimize the minor child's exposure to parental

conflict and encourage mutual agreement without judicial intervention.

Sec. 17. When the parenting plan is agreed to by both parties, it shall be submitted to the parties' legal counsels who shall submit it for inclusion in the decree under section 42-120 or 42-364. The court may, after a hearing and based on the best interests of the minor child, approve the plan, modify and approve the plan as modified, or reject the plan and order the parties to develop a new plan.

Sec. 18. The State Court Administrator shall develop rules to implement the Parenting Act which are consistent with the Dispute Resolution Act. Such rules shall include training and evaluation of mediators used by state mediation centers.

Sec. 19. The Parenting Act shall not apply in any action filed by a county attorney or authorized attorney pursuant to his or her duties under sections 42-358, 43-512 to 43-512.18, and 43-1401 to 43-1418, the Income Withholding for Child Support Act, and the Revised Uniform Reciprocal Enforcement of Support Act for purposes of the establishment of paternity and the establishment and enforcement of child and medical support. A county attorney or authorized attorney shall not participate in the development of or court review of a parenting plan under the Parenting Act.

Sec. 20. That section 42-120, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

42-120. When the validity of any marriage shall be is denied or doubted by either of the parties, the other party may file a bill or petition, in the manner aforesaid provided in section 42-119, for affirming the marriage, and upon due proof of the validity thereof it shall be declared valid by a decree or sentence of the court. Such ~~and such~~ decree, unless reversed on appeal, shall be conclusive upon all persons concerned. A parenting plan developed pursuant to the Parenting Act may be incorporated into such decree if appropriate.

Sec. 21. That section 42-364, Revised Statutes Supplement, 1992, be amended to read as follows:

42-364. (1) When dissolution of a marriage or legal separation is decreed, the court may include a parenting plan developed under the Parenting Act, if a parenting plan has been so developed, and such orders in relation to any minor child and the child's children and their maintenance as are justified, including placing the minor children child in the custody of the court or third parties or terminating parental rights pursuant to subdivision (5) of this section if the welfare best interests of the children so requires minor child require such orders. Custody and visitation of minor children time spent with each parent shall be determined on the basis of their the best interests of the minor child with the objective of maintaining the ongoing involvement of both parents in the minor child's life. Subsequent changes may be made by the court after hearing on such notice as prescribed by the court.

(2) (1) In determining with which of the parents the children or any of them shall remain custody arrangements and the time to be spent with each parent, the court shall consider the best interests of

the children minor child which shall include, but not be limited to:

(a) The relationship of the children minor child to each parent prior to the commencement of the action or any subsequent hearing;

(b) The desires and wishes of the children minor child if of an age of comprehension regardless of their chronological age, when such desires and wishes are based on sound reasoning; and

(c) The general health, welfare, and social behavior of the children minor child.

(3) (2) In determining with which of the parents the children or any of them shall remain custody arrangements and the time to be spent with each parent, the court shall not give preference to either parent based on the sex of the parent; and no presumption shall exist that either parent is more fit to have custody of the children or suitable than the other.

(3) The (4) Regardless of the custody determination of the court, (a) each parent shall continue to have full and equal access to the education and medical records of his or her child unless the court orders to the contrary and (b) either parent may make emergency decisions affecting the health or safety of his or her child while the child is in the physical custody of such parent pursuant to a visitation order entered by the court.

(5) After a hearing in open court, the court may place the custody of a minor child with both parents on a shared or joint custody basis when both parents agree to such an arrangement. In that event, the parents each parent shall have equal rights to make decisions in the best interests of the minor child in their his or her custody. The court shall not may place a minor child in joint custody without after conducting a hearing in open court and specifically finding that joint custody is in the best interests of the minor child regardless of any parental agreement or consent.

(6) (4) In determining the amount of child support to be paid by a parent, the court shall consider the earning capacity of each parent and the guidelines provided by the Supreme Court pursuant to section 42-364.16 for the establishment of child support obligations. Upon application, hearing, and presentation of evidence of an abusive disregard of the use of child support money paid by one party to the other, the court may require the party receiving such payment to file a verified report with the court, as often as the court shall require requires, stating the manner in which such money is used. Child support paid to the party having custody of the minor child shall be the property of such party except as provided in section 43-512.07. The clerk of the district court shall maintain a record, separate from all other judgment dockets, of all decrees and orders in which the payment of child support or spousal support has been ordered, whether ordered by a district court, separate juvenile court, or county court sitting as a juvenile court. Orders for child support in cases in which a party has applied for services under Title IV-D of the Social Security Act, as amended, shall be reviewed as provided in sections

43-512.12 to 43-512.18.

(7) (5) Whenever termination of parental rights is placed in issue by the pleadings or evidence, the court shall transfer jurisdiction to a juvenile court established pursuant to the Nebraska Juvenile Code unless a showing is made that the district court is a more appropriate forum. In making such determination, the court may consider such factors as cost to the parties, undue delay, congestion of dockets, and relative resources available for investigative and supervisory assistance. A determination that the district court is a more appropriate forum shall not be a final order for the purpose of enabling an appeal. If no such transfer is made, the court shall ~~forthwith~~ appoint an attorney as guardian ad litem to protect the interests of any minor ~~children~~ child. The court may terminate the parental rights of one or both parents after notice and hearing when the court finds such action to be in the best interests of the ~~children~~ minor child and it appears by the evidence that one or more of the following conditions exist:

(a) ~~Such children have~~ The minor child has been abandoned by one or both parents;

(b) One parent has or both parents have substantially and continuously or repeatedly neglected the ~~children~~ minor child and ~~have~~ refused to give such ~~children~~ minor child necessary parental care and protection;

(c) One parent is or both parents are unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs, illegal possession or sale of illegal substances, or repeated lewd and lascivious behavior, which conduct is found by the court to be seriously detrimental to the health, morals, or well-being of the ~~children~~ minor child; or

(d) One parent is or both parents are unable to discharge parental responsibilities because of mental illness or mental deficiency and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period.

(8) Whenever termination of parental rights is placed in issue, the court shall ~~forthwith~~ inform a parent who does not have legal counsel of ~~that~~ the parent's right to retain counsel and ~~shall further inform such parent~~ of the parent's right to retain legal counsel at county expense if such parent is unable to afford legal counsel. If such parent is unable to afford legal counsel and requests the court to appoint legal counsel, the court shall immediately appoint an attorney to represent the parent in the termination proceedings. The court shall order the county to pay the attorney's fees and all reasonable expenses incurred by the attorney in protecting the rights of the parent. At such hearing, the guardian ad litem shall take all action necessary to protect the interests of the minor ~~children~~ child. The court shall fix the fees and expenses of the guardian ad litem and tax the same as costs but may order the county to pay on finding the responsible party indigent and unable to pay.

Sec. 22. This act shall become operative September 1, 1994.

Sec. 23. That original section 42-120, Reissue Revised

Statutes of Nebraska, 1943, and section 42-364, Revised Statutes Supplement, 1992, are repealed.

The Fourteenth Amendment Rights Of Children Born Out Of Wedlock

Edward Poll



Edward Poll received his B.S., J.D. and M.B.A. degrees from the University of Southern California. He is a member of the Beverly Hills, Los Angeles County and the American bar associations and the State Bar of California.

The Fourteenth Amendment to the United States Constitution sets forth basic rights which provide the family lawyer with the means to pursue benefits on behalf of the child born out of wedlock and his or her family. These benefits may otherwise be denied under state and federal law on account of the child's status as illegitimate. Many state and federal statutes in such areas as intestate succession rights, parental support obligations and the related issue of the statute of limitations to prove paternity, social security and welfare benefits, and the right to name or change the name of a child are conditioned on the basis of the child's status as legitimate or illegitimate. The status distinction based on disapproval of illegitimate children, protection of the family unit and protection of the best interest of children, has come into conflict with the contemporary realities of modern society including vastly expanded numbers of unmarried couples with children and the financial crises facing state governments. In tandem with these increasing societal tensions, the United States Supreme Court has promulgated and consistently maintained that classifications on the basis of the marital status of a child's parents at the time of his or her birth are subject to a heightened standard of review. Many states have modified statutes which premise rights and benefits on the basis of the child's status in response to the tensions in mores and economics and in conformity to the Supreme Court's interpretation of the Equal Protection Clause under the Fourteenth Amendment. Many statutes still exist which, on their face or in application, may unjustifiably deny the child born out of wedlock and his or her family benefits to which they have a right. Wherever a classification exists that denies his or her client some benefit or right, the family lawyer must subject the statute to a Fourteenth Amendment Equal Protection Clause analysis to determine if such rights and benefits are being denied unjustly and what legal action is warranted.

The Equal Protection Clause of the Fourteenth Amendment As Tool

Section one of the Fourteenth Amendment to the Constitution of the United States provides, in relevant part, that: "... nor shall

any state . . . deny to any person within its jurisdiction the equal protection of the laws."

The judicial gloss on the Equal Protection Clause is legion. The clause does not require that all persons be treated alike, nor that all discriminatory practices be eliminated; it does, however, require that persons similarly situated be treated similarly. 'The prohibition of the Equal Protection Clause of the Fourteenth Amendment applies only to state action in its various manifestations,' while the Due Process Clause of the Fifth Amendment has been held to prohibit the federal government to deny to any person equal protection of the laws.'

The Supreme Court evaluates Equal Protection Clause claims by weighing the respective interests of the parties. In general, the state interest must be a permissible one and the means used to implement it must bear some rational relationship to its accomplishment. Where the classification is premised on the status of the child as legitimate as compared with born out of wedlock or illegitimate, the Court tips the scale in favor of the child born out of wedlock following from an application of the principles restated in *Plyer v. Doe*, _____ U.S. _____, fn. 14, 102 S. Ct. 2382, 72 L.Ed. 2d 786 (1982). Where state action has resulted in a classification based on the child's birth out of wedlock, the Court will let the state action stand only if it furthers an important state interest in a way which is substantially related to that interest.* A minority of justices also require that the state action have no alternative recourse that would be less restrictive.* This standard is sometimes referred to as an intermediate standard of review.*

Though not as penetrating as the strict scrutiny standard of review, the intermediate standard of review provides family lawyers with a significant tool for assessing and attacking the validity of state statutes and other state actions which deny benefits or rights to the child born out of wedlock and his or her family. If the attorney can convince the court that the state interests involved are not important ones or that the classification of children by the marital status of their parents at the time of birth is not a substantially related means of furthering a particular state interest, then the classification will be held to be unconstitutional. Any state action taken with reference to the classification would be invalidated.

The following sections illustrate the application of the Equal Protection Clause in attempts by counsel to invalidate state action premised upon a variety of state and federal statutes. This state action classified children by the marital status of their parents at the time of their birth and denied the children and their kin certain rights and benefits.

Case Illustrations

A. Intestate Succession Cases

On three occasions in recent history, legal counsel attacked su

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intestate statutes which discriminated against children born out of wedlock before the United States Supreme Court on the basis that the statute denied the child's right to equal protection of the laws. In two of the cases, *Labine v. Vincent*, 401 U.S. 532, 91 S. Ct. 1017, 28 L.Ed. 268 (1970), and *Lalli v. Lalli*, 439 U.S. 259, 99 S. Ct. 518, 58 L.Ed. 503 (1978), the state statute in question was upheld. In the other case, however, *Trimble v. Gordon*, 430 U.S. 762, 97 S. Ct. 1459, 52 L.Ed. 2d 31 (1976), the state statute was declared unconstitutional and the relevant state action invalidated.

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The Louisiana statute at issue in *Labine* precluded a child born out of wedlock from taking property by intestate succession even when the deceased father of the child had legally acknowledged that he was the child's natural father.⁴ Justice Black wrote for the majority of the Court that Louisiana had the power to make rules to establish, protect and strengthen family life. The state further had the power to regulate the disposition of property and that, absent any specific constitutional guarantee that was being violated, the state would have the final word in this matter. The father could have left the daughter property by will (up to one-third maximum per Louisiana law) and he could have legitimated the child by marrying the mother.⁵

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In Justice Brennan's dissent, he stated that inherent in the Louisiana statute were the moral prejudices of bygone times. Brennan was joined by Justices Douglas, White and Marshall. The justices did not quarrel with the state's power to regulate, but instead focused upon the invidious and clear discrimination against illegitimate children. They indicated that an expression of state interest was absent and there was no indication that the legislation would in any way promote marriage or benefit the family unit. The court opinion, said the dissent, punishes illegitimate children for the misdeeds of their parents, and that it is unusual and unfair to punish one who is disadvantaged on the basis of factors over which he or she has no control, i.e., ancestry.

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The *Lalli* case involved a New York statute which allowed a child born out of wedlock to take property by intestate succession only if a judicial paternity order had been entered during the father's lifetime. Legitimate children were not subject to the same requirement. The single requirement at issue in the case was seen by the Court majority to be an evidentiary one. The Court therefore focused its inquiry narrowly — to decide whether the discrete procedural demands that the New York statute placed on illegitimate children bore an evident and substantial relation to the particular state interests the statute was designated to serve.⁷

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In so doing, the Court found the substantial state interests are namely, the orderly and just disposition of property at death, accuracy in the determination of paternity, and the protection of reputation rights in the process of determining paternity. The Court further stated that the requirements imposed by the statute were substantially

related to the important state interests the statute was designed to serve.¹⁰

The dissent written by Justice Brennan argued that the statute was not substantially related to the state's interests. In addition, less restrictive alternative means for achieving the interests existed. Brennan explained, that as a practical matter, the statute makes it virtually impossible for acknowledged and freely supported children born out of wedlock to take property by intestate succession because the social welfare agencies, the children, and the children's fathers and mothers would be unlikely to bring an affiliation lawsuit when the children were already acknowledged and were being supported. Brennan further explained that less restrictive alternatives were available to the state, such as a more vigorous standard of judicial proof of paternity following the death of the father, or notice and a short statute of limitations to prove paternity following the death of the father.

The case of *Trimble v. Gordon* involved the Illinois Probate Act. The act allowed children born out of wedlock to take property by intestate succession only from their mothers, but allowed children born to married parents to take property by intestate succession from both their mothers and fathers. The court made it clear that a difference exists between the rights of children born out of wedlock and the rights of the estates of their mothers and fathers. Discriminating against the children based upon the marital status of their parents at the time of their birth was unrelated to the permissible purpose of promoting family relationships and was an ineffectual and unjust way of deterring the parents.¹¹ The Court also rejected what it deemed to be a more substantial justification; the State's interest in establishing a method of property disposition, because the statute excluded categories of illegitimate children unnecessarily.

The three United States Supreme Court cases discussed above illustrate that counsel may obtain benefits in the area of intestate succession on behalf of the child born out of wedlock and his or her family through assertion of the client's right to equal protection under the Fourteenth Amendment within certain factual parameters. A Court majority which affirmed a state's power to classify children on the basis of their parent's marital status to protect and strengthen family life present in the 1970 *Labine v. Vincent* decision gave way to a Court majority unwilling to embrace such a state interest an even more significant procedural justifications present in the 1976 *Trimble v. Gordon* decision under the onslaught of equal protection claims by counsel. In cases such as *Lalli v. Lalli* where the classification is made, but the issue under consideration has been cast in a way in which the classification is largely irrelevant or too remote, for example, paternity is not disputed because the father has acknowledged the child, but the method of acknowledgement is in issue, the assertion of equal protection right may fail. In cases such as *Trimble v. Gordon*, where the classification was made relating to the rights of the child born out of

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...wedlock, for example, the differing inheritance rights between children born out of wedlock and legitimate children, the equal protection intermediate standard of review will apply and the opportunity to benefit the client is most likely to be realized.

B. Parental Support and Statutes of Limitation to Prove Paternity

There have been three United States Supreme Court cases in recent history wherein the equal protection rights to parental support of children born out of wedlock and to a reasonable opportunity to prove paternity to obtain parental support were adjudicated. These cases are *Gomez v. Perez*, 409 U.S. 535, 93 S. Ct. 872, 35 L.Ed. 2d 56 (1972), *Mills v. Habluetzel*, 456 U.S. 91, 102 S. Ct. 1549, 71 L.Ed. 2d 770 (1982), and *Pickett v. Brown*, 462 U.S. 1, 103 S. Ct. 2199, 76 L.Ed. 2d 372 (1983). In each of these cases, the state statute in question was found by the Court to be unconstitutional because it violated the Fourteenth Amendment equal protection rights of the child born out of wedlock.

The Texas statute under scrutiny in the *Gomez* case, provided that the natural father of a legitimate child had the primary and continuing obligation of supporting that child. The statute, however, was silent on the obligation of the natural father with respect to the child born out of wedlock.¹⁴ The Court interpreted the statute's silence to mean that, with respect to children born out of wedlock, Texas common law was to apply. According to Texas common law, natural fathers had no legal obligation to support their children born out of wedlock. Thus, the statute was construed to classify children by the marital status of their parents at the time of their birth to the disadvantage of children born out of wedlock. In stating that the natural father had a continuing and primary obligation to support the child born out of wedlock, the Court explained that Texas had shown "... no sufficient reason" for denying the judicially enforceable right of parental support "merely because the natural father did not marry the natural mother."

In the *Mills* case, the Texas statute in question provided that the child born out of wedlock would be barred from obtaining a judicially enforceable parental support order if an action to prove paternity had not been commenced within one year after the child's birth. In contrast, the statute provided legitimate children with the unfettered right to parental support until they reached the age of eighteen.¹⁵ The Court recognized a classification based upon the marital status of the child's parents at the time of his or her birth which disadvantaged the child born out of wedlock. The promulgated state interest justifying the classification was the need of the state to prevent the loss or diminution of evidence to prove paternity and to decrease the vulnerability of its citizenry to fraudulent claims of paternity.¹⁶ The

Court responded that the statute of limitations must be sufficiently long to present a real threat of loss or diminution of evidence, or increased vulnerability to fraudulent claims and that the short statute of limitations in question was not nearly so long.¹⁸ The Court overturned the statute concluding that it was not substantially related to the state's interests.¹⁹

In her concurring opinion in the *Mills* case, Justice O'Connor explained that the justification for use of a short statute of limitations as a means to further the state's interest was also undermined by the countervailing interests of the state. These interests included seeing genuine claims satisfied, reducing the welfare roles and increasing reliability of blood tests.²⁰

In the case of *Pickett v. Brown*, the Court overturned on constitutional grounds a Tennessee statute which required the filing of paternity and support actions within two years after the birth of the child born out of wedlock (with some exceptions).²¹ The state interests advanced were similar to the interests advanced in the *Mills* case.²² The Court's analysis and conclusion in *Pickett* was also similar to its analysis and conclusion in *Mills*; greater emphasis was placed in *Pickett*, however, upon advances made in the reliability of blood tests.²³ In conclusion, the *Pickett* Court stated that the relationship between the short statute of limitations and the state's interests was too attenuated to withstand judicial scrutiny under the Equal Protection Clause.²⁴

Gomez, Mills and *Pickett* each illustrate a successful assertion by counsel of the equal protection rights under the Fourteenth Amendment of the child born out of wedlock to obtain parental support benefits otherwise denied under state law.

C. Federal Benefits Cases

Three United States Supreme Court cases pertaining to the denial of Federal benefits to children born out of wedlock appear to be the instructive cases. These cases are *Mathews v. Lucas*, 427 U.S. 49, 96 S. Ct. 2755, 49 L.Ed. 2d 651 (1976), *Califano v. Boles*, 443 U.S. 20, 99 S. Ct. 2767, 61 L.Ed. 2d 541 (1979), and *United States v. Clark*, 44 U.S. 23, 100 S. Ct. 895, 63 L.Ed. 2d 171 (1980). In the first two of these cases, *Mathews* and *Boles*, the statutory provisions in question withstood equal protection rights scrutiny. In the third case, *Clark*, the Court arrived at a construction of the statute to provide relief to the appellant, thereby avoiding the need to subject the statute of Equal Protection Clause scrutiny and upholding its validity.

The *Mathews* case involved sections of the Social Security Act providing benefits to dependent children under the age of twenty-two years. The statute differed in its treatment of legitimate children and children born out of wedlock. Legitimate children were deemed to be dependent. Children born out of wedlock were deemed to be dependent

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only if any of a limited set of statutory conditions were satisfied. The
allowed interest furthered by the classification was the administrative
convenience of determining when a child born out of wedlock was in-
deed dependent was a permissible interest.²⁶ The Court held that the
statutory distinction was permissible because it was reasonably related
to the likelihood of dependence at death. While the Court
acknowledged that the relevant level of scrutiny was not a toothless
one "in this realm of less than strictest scrutiny," it left the burden of
demonstrating the insubstantiality of the relation to the appellees, a
burden they did not carry.²⁶

The dissent in that case, written by Justice Stevens, argued
that the interest of the state must be mightier than administrative
convenience given that the classification was premised on the marital
status of the parents at the time of the child's birth.²⁷ Justice Stevens
explained further that a more precise statement of the classification in
issue would be those "children depending upon their fathers" and
those "children not depending upon their fathers."²⁸ He concluded by
arguing that classifying the children by their parent's marital status at
the time of their birth was not a means substantially related to serving
the now-clarified state interest. Furthermore, he asserted, less restric-
tive alternatives were available in the form of both written affirm-
ations of paternity by the father and rules set forth in the respective
state intestancy laws.²⁹

The *Boles* case involved the Federal Aid to Dependent Mothers
Act and, in particular, benefits to unwed mothers. The act classified
mothers as married and divorced or unwed for purposes of determining
their eligibility to receive benefits.³⁰ Instead of focusing its attention
on the child's status as either legitimate or born out of wedlock, which
the district court decided was inherent in the statutory classification
based upon the mother's marital status, the Court focused its review
on the mother's status, alone.³¹ Since unwed mothers are not within
any of the protected classes enumerated by the Court, the Court ap-
plied a rational basis standard of review. It concluded that the state's
interest in administrative convenience was permissible and the
classification of mothers by their marital status was rationally related
to furthering that interest.

The *Clark* case involved construction by the Court of the phrase
"living with" in the Civil Service Retirement Act with regard to the
entitlement of a child born out of wedlock to a survivor's annuity, even
though the child was recognized by his or her natural father. The
statute provided that a legitimate child did not have to be living with
his or her natural father at the time of the father's death to be deemed
"living with" the father for purposes of entitlement to a survivor's an-
nuity, but a child born out of wedlock had to be living with his or her
natural father at the time of his death to be deemed "living with" him
to receive benefits. A classification on the basis of the parents' marital
status at the time of the child's birth had been made. The Court avoid-

ed deciding the equal protection claim which had been raised on account of the classification by construing the phrase "living with" to encompass a child born out of wedlock and not living with the father at the time of his death, but recognized as the natural child of the father. By asserting the equal protection rights of the child born out of wedlock, legal counsel in this case may well have prompted the Court to broadly construe the act in a way which benefited his client.

Where federal acts are concerned, the Court appears to be more reluctant to find a violation of the illegitimate child's right to equal protection under the Due Process Clause of the Fifth Amendment. The three cases showed that none of the equal protection claims asserted were embraced by the Court. In *Mathews*, the court found that the act withstood equal protection claims. In *Boles*, the Court restated the issue in such a way that it was able to apply and validate the act under the rational basis standard of review. And, in *Clark*, the Court achieved its result without ever getting to the equal protection claim.

Despite this apparent reluctance on the part of the Court, there can be no question that the interests of the client are well served by counsel's assertion of the client's equal protection rights where federal acts are in issue. This conclusion is supported by Justice Steven's vigorous dissent and a light-handed application of the intermediate standard of review in *Mathews*, the fact that *Boles* was determined by application of the rational basis standard through a narrow restatement of the issue, and the positive result achieved in *Clark* for the child born out of wedlock through construction of the phrase in issue to avoid the equal protection claim asserted by counsel. In addition, different sets of facts that those present in these three limited cases would warrant a direct, intermediate standard of review analysis by the court with positive results to the child born of wedlock.

Conclusion

Wherever the law distinguishes between legitimate children and children born out of wedlock to the detriment of children born out of wedlock, the family lawyer should carefully scrutinize the law for violations of the client's equal protection rights under the Fourteenth Amendment. Such distinctions have been prevalent in statutes pertaining to intestate succession, parental support and statutes of limitation to prove paternity and in federal benefits acts, though the realm of statutes wherein such distinctions are drawn is certainly more expansive. As a result of a conflict between old mores disapproving of illegitimate children and protecting the family unit through law and the new realities of state fiscal crises and unmarried couples with children, courts are more disposed to protect the rights to equal protection under the law of children born out of wedlock. This disposition is reflected in a tougher, intermediate standard of review applied by the courts to cases involving statutes which classify a child according to

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his or her parents' marital status at the time of the child's birth. Cases before the United States Supreme Court in the three areas alluded to illustrate that the Equal Protection Clause under the Fourteenth Amendment is an effective and often necessary tool with which the family lawyer may pursue benefits for the child born out of wedlock and his or her family that may otherwise be denied under state and federal law. ■

ENDNOTES

1. *Mills v. Habluetzel*, 456 U.S. 91, 97, 71 L.Ed. 2d 770, 776-777, 102 S. Ct. 1549 (1982); J. NOWAK, CONSTITUTION OF LAW, 520 (1976 & Supp. 1982).
2. U.S. CONST. amend. XIV §1.
3. *Id.* amend. V; see cases analyzed in Section III C.
4. *Mathews v. Lucas*, 427 U.S. 495, 510, 49 L.Ed. 2d 651, 663, 96 S. Ct. 2755 (1976), burden on appellees to demonstrate insubstantiality of relation.
5. *Lalli v. Lalli*, 439 U.S. 259, 275, 99 S. Ct. 518, 58 L.Ed. 2d 503, 517-518 (1978).
6. The intermediate standard of review applied in cases concerning classification of children based upon their parents' marital status at birth is less strict than the "strict scrutiny" standard of review applied by the courts in cases where classifications are premised on race, for example. The strict scrutiny standard will let stand state action only if it is to further a compelling state interest in a manner that is necessary and any less restrictive alternative means of accomplishing the alternative are absent.
7. *Labine v. Labine*, 401 U.S. 532, 533-534, 91 S. Ct. 1017, 28 L.Ed. 2d 298, 290-291 (1970), referencing the Louisiana Civil Code of 1970, Art. 206 and Art. 919.
8. 401 U.S. at 538-539.
9. *Lalli v. Lalli*, 439 U.S. 259, 267-268, 99 S. Ct. 518, 58 L.Ed. 2d 503, 510-511 (1978).
10. 439 U.S. at 275.
11. 439 U.S. at 278-279.
12. *Trimble v. Gordon*, 430 U.S. 762, 769, 97 S. Ct. 1459, 52 L.Ed. 2d 31, 38-39 (1976).
13. *Gomez v. Perez*, 409 U.S. 535, 536, 93 S. Ct. 872, 35 L.Ed. 2d 56, 58 (1972), referencing Tex. Rev. Civ. Stat., art. 4639a (Supp. 1972-1973).
14. 409 U.S. at 536.
15. 409 U.S. at 537.
16. *Mills v. Habluetzel*, 456 U.S. 91, 94, 102 S. Ct. 1549, 71 L.Ed. 2d 770, 775 (1982), referencing Tex. Fam. Code Ann. §13.01 (Supp. 1982).
17. 456 U.S. at 92.
18. 456 U.S. at 99.
19. 456 U.S. at 99.

20. 456 U.S. at 102.
21. *Pickett v. Brown*, 462 U.S. 1, 103 S. Ct. 2199, 2201, 76 L.Ed. 2d 372 (1983), referencing Tenn. Code Ann. §36-224(1) (1977).
22. 103 S. Ct. at 2207.
23. 103 S. Ct. at 2208.
24. 103 S. Ct. at 2209.
25. *Mathews v. Lucas*, 427 U.S. 495, 509, 96 S. Ct. 2755, 49 L.Ed. 2d 651, 663 (1975).
26. 427 U.S. at 510.
27. 427 U.S. at 516.
28. 427 U.S. at 521.
29. 427 U.S. at 522.
30. *Callifano v. Boles*, 443 U.S. 282, 285, 99 S.Ct. 2767, 61 L.Ed. 2d 541, 546 (1979), referencing Section 2021(g)(1) of the Social Security Act as amended, 42 U.S.C. §402(g)(1).
31. 443 U.S. at 304.
32. *United States v. Clark*, 445 U.S. 23, 24, 109 S.Ct. 895, 63 L.Ed. 2d 171, 175 (1980), referencing the Civil Service Retirement Act, 5 U.S.C. §§8341(e)(1) and 8341(e)(3)(A).
33. 445 U.S. at 33.

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nied. The findings of the magistrate, whose recommendation the district court adopted, support the conclusion that the stop was not illegal and those findings are not clearly erroneous.

The conviction and sentence are affirmed.



Crystal CHAMBERS, in her own behalf
and in behalf of her minor daughter,
Ruth Chambers, Appellant,

v.

The OMAHA GIRLS CLUB, INC., a
Nebraska Corporation, et al.
Appellees.

No. 86-1447.

United States Court of Appeals,
Eighth Circuit.

Feb. 25, 1988.

Prior report: 834 F.2d 697 (1988).

ORDER DENYING PETITION FOR REHEARING EN BANC

The petition for rehearing en banc has been considered by the court and is denied by reason of the lack of majority of active judges voting to rehear the case en banc.¹

LAY, Chief Judge, with whom
HEANEY and McMILLIAN, Circuit
Judges, join, dissenting.

I dissent from the denial of rehearing en banc. This case presents one of the most important issues we have faced in several

1. Circuit Judge C. Arlen Beam did not participate in the vote for rehearing en banc.
2. The PDA amended Title VII of the Civil Rights Act of 1964 by clarifying that sex discrimination in employment includes discrimination based on pregnancy. See Pub.L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (1982)).
3. That the Girls Club's "role model" rule operates only against single pregnant women is irrel-

years. It is clearly one of "exceptional importance" under Fed.R.App.P. 35(a). Because a majority of the active judges has failed to vote to hear this case en banc, I file this dissent.

The Omaha Girls Club's termination of its arts and crafts teacher because of her pregnancy is the most blatant form of sex discrimination that can exist. In my judgment the Girls Club's pregnancy-based discrimination constitutes a per se violation of Title VII of the Civil Rights Act of 1964. See 42 U.S.C. §§ 2000e(k), 2000e-2(a)(1) (1982). The proffered reasons for the discharge of Crystal Chambers are entirely inconsistent with Congress' avowed intent to "ensure that working women are protected against all forms of employment discrimination" and with its "unmistakabl[e]-reaffirm[ation] that sex discrimination includes discrimination based on pregnancy." H.R.Rep. No. 948, 95th Cong., 2d Sess., reprinted in 1978 U.S.Code Cong. & Admin.News 4749, 4751 (emphasis added). The action of the Girls Club is contrary to the letter of the law under the Pregnancy Discrimination Act of 1978 (PDA),² the spirit of equal treatment for pregnant women intended by Congress under that Act, and decisions both of this court and of the Supreme Court of the United States.

I respectfully submit that the panel has erred in affirming the judgment of the district court. The analysis utilized by the district court was improper in a case of per se sex discrimination. The district court found that Chambers "was fired solely because of her pregnancy," *Chambers v. Omaha Girls Club*, 629 F.Supp. 925, 946 (D.Neb.1986), but did not discuss the enactment of the PDA in 1978. Even prior to passage of the PDA such a finding was sufficient in this circuit to establish a prima facie violation of Title VII.³ See *Holthaus*

evant. As the EEOC guidelines state: "It does not seem to us relevant that the rule is not directed against all females, but only against [un]married females, for so long as sex [here, pregnancy] is a factor in the application of the rule, such application involves a discrimination based on sex." 29 C.F.R. § 1604.4(a) (1987).

v. Compton & Sons, Inc., 514 F.2d 651, 653 (8th Cir.1975) ("it is a prima facie violation of Title VII to discharge employees because of pregnancy") (citing EEOC guidelines on employment policies relating to pregnancy, now codified at 29 C.F.R. § 1604.10 (1987)). The district court nevertheless applied the burden of proof method established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973), for disparate treatment claims, finding that Chambers had succeeded in identifying herself as a member of a protected group, "a black female." 629 F.Supp. at 947 (emphasis added).

The district court found that the Girls Club had articulated a neutral reason for its rule barring single pregnant workers: to provide positive role models for the teenagers with whom the Girls Club worked. The court then shifted the burden back to the plaintiff to show that "the rule was a pretext for discriminating against black women or single black women." *Id.* (emphasis added). The difficulty I have with this analysis is that when a court finds as a fact, as the district court did, that a plaintiff was fired "solely" because of membership in a protected class, the inquiry should be ended, unless the employer can establish that non-membership in the protected class is a BFOQ. See, e.g., *Carney v. Martin Luther Home, Inc.*, 824 F.2d 643, 648 (8th Cir.1987); *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079, 1086 n. 8 (8th Cir.) (overtly and facially discriminatory employment practice violates Title VII unless there is a BFOQ reasonably necessary to the normal operation of the particular enterprise), *cert. denied*, 446 U.S. 966, 100 S.Ct. 2942, 64 L.Ed.2d 825 (1980). There can be no issue of pretext—whether an alleged nondiscriminatory reason masks a discriminatory reason—when the employer openly admits the reason for the discharge was solely because of the employee's membership in a protected class. The issue of pretext is not involved. See *Carney*, 824 F.2d at 648.

In *Carney*, despite the employer's admission that it placed the employee on unpaid

leave solely due to a condition arising out of her pregnancy, the district court applied the *McDonnell Douglas* burden-shifting analysis. The panel stated:

[W]e find that the district court erred in applying the *McDonnell Douglas* test under these circumstances. See *TWA, Inc. v. Thurston*, 469 U.S. 111, 121-22 [105 S.Ct. 613, 621-22, 83 L.Ed.2d 523] (1985). Our reading of the statute is consistent with the EEOC Guidelines which state:

A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy, childbirth or related medical conditions is in prima facie violation of Title VII.

29 C.F.R. § 1604.10(a). The Home admits its decision was based on the condition that plaintiff not lift or push without assistance, a condition directly arising from her pregnancy.

Id. A district court's failure to apply the proper burden of proof in employment discrimination cases can vitally affect its fact-finding and legal conclusions, as it did here. To overlook this failure simply because this court perceives that the district court's findings support the same result under the proper test is error in itself. With all due respect, when this occurs we mistakenly substitute our judgment for that of the district court and attempt to make such judgment under standards the district court did not even consider.

In its discussion of Chambers's disparate impact claim, the district court stated that because the Girls Club "met [its] burden on the basis of business necessity, it [was] not necessary to determine whether the evidence would satisfy a bfoq, although presumably it would." 629 F.Supp. at 951 n. 51. Nonetheless the panel decides, based on the district court's findings with respect to the business necessity defense, that a BFOQ was shown. The Girls Club raised the business necessity defense to Chambers's race discrimination claim, however, which was based on the disparate impact of

the Girls Club role model rule on blacks.⁴ I respectfully submit that a business necessity defense to a race-based disparate impact claim is simply not equivalent to a BFOQ defense to a sex-based disparate treatment claim; the factual findings relevant to one defense are not necessarily relevant to or sufficient to sustain the other defense.

I also respectfully submit that there are fundamental differences between the business necessity and the BFOQ defenses. The defenses are distinguishable, they are to be utilized under different circumstances, and can dictate totally different results in Title VII cases. See generally, Wald, *Judicial Construction of the 1978 Pregnancy Discrimination Amendment to Title VII: Ignoring Congressional Intent*, 31 Am.U.L.Rev. 591 (1982).

First, it is well-settled that the business necessity defense applies in cases in which facially neutral requirements or policies of an employer have a disparate effect on a protected class. See *Dothard v. Rawlinson*, 433 U.S. 321, 331, 97 S.Ct. 2720, 2727-28, 53 L.Ed.2d 786 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971). Any rule that explicitly discriminates on the basis of sex, however, must satisfy the statutory requirement that it be a BFOQ "reasonably necessary" to the normal operation of that particular business. 42 U.S.C. § 2000e-2(e).

Moreover, the inquiry a court must make when evaluating a BFOQ defense is different from the business necessity inquiry. The BFOQ exception "was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the

basis of sex." *Dothard*, 433 U.S. at 334, 97 S.Ct. at 2729; see also *Wright v. Olin Corp.*, 697 F.2d 1172, 1185 n. 21 (4th Cir. 1982) (business necessity defense is "obviously wider" than narrow BFOQ exception); *Harriss v. Pan Am. World Airways, Inc.*, 649 F.2d 670, 676 (9th Cir.1980) (although related, the two defenses are not identical and must be distinctly applied); Wald, *supra*, at 597 n. 47.⁵ As we pointed out in *Carney*, the employer seeking to sustain a BFOQ defense must prove, inter alia, "that the job requirements in question [are] 'reasonably necessary' to the essence of the employer's business." *Carney*, 824 F.2d at 649 (emphasis added). We added:

In each case, an objective analysis of plaintiff's actual physical capabilities and the employer's job requirements is necessary, *Levin v. Delta Air Lines, Inc.*, 730 F.2d [994] at 998-99 [5th Cir.1984]; an employer's good faith or subjective beliefs will not save an otherwise discriminatory decision. See *EEOC v. Old Dominion Security Corp.*, 41 F.E.P. Cases 612, 617-68 (E.D.Va.1986).

Id.

The BFOQ defense in a pregnancy discrimination case thus invokes only an extremely narrow inquiry: (1) what are the requirements of the particular job in question; and (2) is there objective and compelling proof that the excluded woman is unable to perform the duties that constitute the essence of that job because of her pregnancy. Despite the narrowness of the requisite inquiry, however, a more searching examination of the facts and circumstances was essential here before finding that non-pregnancy is a requisite qualifica-

4. The district court found, and the panel affirmed, that the facially neutral rule banning employment of pregnant single women had a disparate impact on blacks, reasoning that more black women would be affected by the rule because of the higher "fertility rate" among black women. See 629 F.Supp. at 949 and n. 45. I question whether the district court meant what it said. The evidence supporting the finding of disparate impact against black women was simply that more black teenagers in the Omaha area became pregnant than did white teenagers. I respectfully submit that such proof does not demonstrate that black women are more "fertile" than white women.

5. As the Supreme Court noted in *Dothard*, the EEOC has consistently adhered to the principle that "the [BFOQ] as to sex should be interpreted narrowly." See *Dothard*, 433 U.S. at 334 n. 19, 97 S.Ct. at 2729 n. 19 (quoting 29 C.F.R. § 1604.2(a)). The only situation stated in the EEOC's guidelines as one in which sex would be considered a BFOQ is when "it is necessary for the purpose of authenticity or genuineness * * * e.g., an actor or actress." 29 C.F.R. § 1604.2(a)(2) (1987).

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THE CITY OF OMAHA

tion for an arts and crafts counselor.⁶ Here, we endorse an employer's subjective beliefs without any proof whatsoever that Chambers was unable to satisfactorily perform her duties as an arts and crafts instructor.⁷ In my view this holding is a significant departure from both the letter and the spirit of the PDA.

The PDA and its legislative history contain numerous indications that Congress intended pregnancy to be a relevant consideration in an employer's decision to fire a worker only when the pregnancy affects the woman's physical capabilities such that the employer would fire *anyone* who was similarly physically affected. The language of the PDA itself suggests that Congress so intended:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including

6. Thus, in the present case the examination should be whether: (1) being a "role model" was part of the essence of an arts and crafts counselor's job; and (2) non-pregnancy was a necessary component of the desired role model. With respect to the latter question, the Fifth Circuit has consistently held in the negative, finding that school districts' bans on employing unwed mothers have no rational relation to the schools' objective of instilling moral values in their students. See *Avery v. Homewood City Bd. of Educ.*, 674 F.2d 337, 341-42 (5th Cir.1982), cert. denied, 461 U.S. 943, 103 S.Ct. 2119, 77 L.Ed.2d 1300 (1983); *Andrews v. Drew Mun. School Dist.*, 507 F.2d 611, 617 (5th Cir.1975), cert. dismissed, 425 U.S. 559, 96 S.Ct. 1752, 48 L.Ed.2d 169 (1976). As the *Andrews* court stated, "the likelihood of inferred learning that unwed parenthood is necessarily good or praiseworthy, is highly improbable, if not speculative." 507 F.2d at 616 (quoting district court opinion, 371 F.Supp. 27, 35 (N.D.Miss.1973)).

7. It seems to me an essential issue to be discussed is why non-pregnancy is a reasonably necessary occupational qualification for an arts and crafts instructor, when the statutory requirement is that the qualification be one that is "reasonably necessary to the normal operation of that particular business." 42 U.S.C. § 2000e-2(c). See *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 122, 105 S.Ct. 613, 622, 83 L.Ed.2d 523 (1985) ("the 'particular business'

receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work * * *).

42 U.S.C. § 2000e(k) (1982) (emphasis added). Its use of the terms "related medical conditions" and "affected by" suggests that Congress thought of pregnancy as a physical condition that, like gender, is unrelated to job capabilities except in the narrowest of circumstances.

Moreover, by requiring employers to treat pregnant employees the same as other employees "not so affected but similar in their ability or inability to work," Congress must have been referring to *physical* ability to work; there is no other ability-to-work basis on which all pregnant women as a class can be compared to all non-pregnant persons. Congress clearly stated that pregnant women must be treated the same as those similarly situated, which presupposes that there are other workers who are in some sense similarly situated. Yet by treating pregnancy as a distasteful compo-

to which the statute refers is the job from which the protected individual is excluded"; interpreting same phrase in Age Discrimination in Employment Act, 29 U.S.C. § 623(f)(1)); see also *Lorillard v. Pons*, 434 U.S. 575, 584, 98 S.Ct. 866, 872, 55 L.Ed.2d 40 (1978) (substantive provisions of ADEA "were derived *in haec verba* from Title VII"). Although the Supreme Court has not provided much guidance on Title VII's BFOQ defense, it has consistently examined whether the qualification at issue is inextricably connected to the essence of a particular job. See *Dothard*, 433 U.S. at 335, 97 S.Ct. at 2730 (analyzing whether "[t]he essence of a correctional counselor's job [—] to maintain prison security"—would be undermined by not hiring males exclusively) (emphasis added); cf. *Thurston*, 469 U.S. at 122, 105 S.Ct. at 622. Here, however, the district court neglected even to discuss the particular functions of an arts and crafts counselor at the Girls Club. It is inconceivable that the district court could have determined whether the "excluded class [single pregnant women] is unable to perform the duties that constitute the essence of the job" when it failed to consider what those duties were. *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543, 1549 (11th Cir.1984); cf. *EEOC v. City of St. Paul*, 671 F.2d 1162, 1165-66 (8th Cir.1982) (analysis of BFOQ defense to ADEA claim requires examination of specific duties performed by individual employee to determine whether age is a BFOQ).

ment of a negative "role model" rather than as a physical condition that may or may not affect one's ability to work. The employer here has relegated pregnant women to a class by themselves, incapable of being "similarly situated" to anyone. Such segregation is exactly the type of invidious discrimination that Congress intended to eradicate when it enacted the PDA.⁸

As one commentator has stated:

"[A]ccidents of the body," such as one's female sex and thus one's capacity to become pregnant, are not to be criteria for differentiation. Instead all employees, regardless of bodily differences, shall be judged on their ability to perform on the job. That the cause of disability is pregnancy becomes, like one's race or eye color, irrelevant to how one is treated.

Note, *Sexual Equality Under the Pregnancy Discrimination Act*, 83 Colum.L. Rev. 690, 695 (1983) (footnotes omitted). I fear, however, that under the panel's holding, employers' subjective feelings about pregnancy, and therefore about sex, will become permissible considerations in the workplace. Needless to say, this outcome is contrary to previous holdings of this court and of the Supreme Court, and demands scrutiny by the entire court. I

8. Many statements made in the congressional reports and during debates on the PDA also suggest that only physical capabilities and job requirements should be considered when deciding whether non-pregnancy is a BFOQ. See, e.g., H.R. Rep. No. 948, 95th Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. & Admin. News 4749, 4750 (Committee's view was that EEOC guidelines rightly implemented Title VII's ban on sex discrimination; those "guidelines require employers to treat disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth and recovery therefrom as all other temporary disabilities"); *id.* at 4753 ("The 'same treatment' may include employer practices of transferring workers to lighter assignments, requiring employees to be examined by company doctors or other practices, so long as the requirements and benefits are administered equally for all workers in terms of their actual ability to perform work"); 123 Cong. Rec. 29662 (Sept. 16, 1977) ("Under S. 995, the treatment of pregnant women in covered employment must focus not on their condition alone, but on the actual effects of that condition on their ability

therefore dissent from the denial of rehearing en banc.



UNITED STATES of America, Appellee,

v.

Ralph MASTERS, Appellant.

UNITED STATES of America, Appellee,

v.

Donald ROBERSON, Appellant.

UNITED STATES of America, Appellee,

v.

Donald BROWN, Appellant.

UNITED STATES of America, Appellee,

v.

James BROWN, Appellant.

87-1006, 87-1023, 87-1124 and 87-1125.

United States Court of Appeals,
Eighth Circuit.

Submitted Oct. 12, 1987.

Decided Feb. 29, 1988.

Rehearing Denied April 1, 1988.

Defendants were convicted in the United States District Court for the Eastern

to work. Pregnant women who are able to work must be permitted to work on the same conditions as other employees—and when they are not able to work for medical reasons they must be accorded the same rights, leave privileges, and other benefits as other employees who are medically unable to work.") (statement of Sen. Cranston, co-sponsor); *id.* at 29654 ("We do not want pregnancy discriminated against, as contrasted with a broken leg or a strep throat or appendicitis or some other basis for disability.") (statement of Sen. Javits); *id.* at 29387 (Sept. 15, 1977) ("The bill requires equal treatment when disability due to pregnancy is compared to other disabling conditions.") (statement of Sen. Javits); *id.* at 29386 ("The purpose of the bill is to insure that women who are disabled by conditions related to pregnancy are compensated fairly * * * in relation to their fellow employees who are disabled by other medical conditions.") (statement of Sen. Williams, chief sponsor); *id.* at 29385 ("The key to compliance in every case will be equality of treatment.") (statement of Sen. Williams.)

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APPENDIX II—Continued

Incumbents who have served continuously for one year prior to the effective date hereof, and who have been provisionally promoted during such time shall be granted permanent competitive status in the position to which they have been promoted. Persons whose classification appeals have been granted shall receive permanent competitive status in the title awarded if they have served in the position for such year.

§ 3. For the purposes of promotion and layoff, persons who attain permanent status by virtue of this act shall have the seniority theretofore held by them as among themselves.

§ 4. This act shall apply to employees of the unified court system working in the tenth judicial district only.

§ 5. This act shall take effect immediately.

APPENDIX III

New York State Constitution
(McKinney 1983)

Art. 5, § 6

§ 6. [Civil service appointments and promotions; veterans' preference and credits]

Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive; provided, however, that any member of the armed forces of the United States who served therein in time of war, who is a citizen and resident of this state and was a resident at the time of his entrance into the armed forces of the United States and was honorably discharged or released under honorable circumstances from such service, shall be entitled to receive five points additional credit in a competitive examination for original appointment and two and one-half points additional credit in an examination for promotion or, if such member was disabled in the actual performance of duty in any war,

is receiving disability payments therefor from the United States veterans administration, and his disability is certified by such administration to be in existence at the time of his application for appointment or promotion, he shall be entitled to receive ten points additional credit in a competitive examination for original appointment and five points additional credit in an examination for promotion. Such additional credit shall be added to the final earned rating of such member after he has qualified in an examination and shall be granted only at the time of establishment of an eligible list. No such member shall receive the additional credit granted by this section after he has received one appointment, either original entrance or promotion, from an eligible list on which he was allowed the additional credit granted by this section.

Adopted Nov. 8, 1949; amended Nov. 3, 1964, eff. Jan. 1, 1965.

APPENDIX IV

64 N.Y.2d 663

LEIF BIRKELAND, as President of the Court Officers Benevolent Association of Nassau County, et al., Appellants, v STATE OF NEW YORK et al., Respondents, and VINCENT P. MALLAMO et al., Intervenors-Respondents.

Argued November 14, 1984; decided
December 11, 1984

APPEARANCES OF COUNSEL

Beth J. Goldmacher and *Joseph A. Faraldo* for appellants.

Robert Abrams, Attorney-General (*Arnold D. Fleischer*, *Peter H. Schiff* and *Howard L. Zwickel* of counsel), for State of New York, respondent.

Paula E. Kennedy and *Michael Colodner* for Herbert B. Evans, as Chief Administrative Judge of the State of New York, respondent.

Richard M. Gada for Vincent P. Mallamo and others, intervenors-respondents.

Stephen J. Wiley for Civil Service Employees Association, Inc., Local 1000,

Chc no 029 F Supp. 925 (D.Neb. 1986)

APPENDIX IV—Continued
AFSCME, and others, intervenors-respondents.

OPINION OF THE COURT
MEMORANDUM.

The order of the Appellate Division should be affirmed, with costs, for the reasons stated in the opinions of Justice Sol R. Dunkin, Supreme Court, Queens County, and Justice William C. Thompson at the Appellate Division.

We would emphasize that the Legislature's enactment of chapter 846 occurred in the aftermath of the reorganization of the New York State court system and was parallel with similar legislation applicable, State-wide, to the other State judicial districts. In view of this particular situation and the express finding by the Legislature that the normal competitive procedures would greatly disrupt the functioning of the State court system, the statute cannot be said to offend the constitutional mandate (NY Const. art V, § 6).

Judges JASEN, JONES, WACHTLER, MEYER, SIMONS and KAYE concur; Chief Judge COOKE taking no part.

Order affirmed, with costs, in a memorandum.



Crystal CHAMBERS, Plaintiff.

v.

OMAHA GIRLS CLUB, et al.,
Defendants.

No. CV 83-L-38.

United States District Court,
D. Nebraska.

Feb. 11, 1986.

Unmarried employee of private social club for girls brought action on various

theories following her discharge under club's "negative role model" policy prohibiting continued employment of unmarried staff members who either became pregnant or caused a pregnancy. The District Court, Beam, Chief Judge, held that: (1) former employee failed to show claimed conspiracies; (2) former employee failed to show intentional discrimination in violation of Title VII; and (3) employer showed that the unique mission of club permitted the policy despite disproportionate impact.

Dismissed.

1. Jury ¶14(1.5)

Remedies under Title VII are deemed to be equitable and not within the province of the jury. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

2. Civil Rights ¶13.5(1)

Lack of direct involvement by any federal official in discharge of former employee of private club precluded claims under First, Ninth and 14th Amendments. U.S. C.A. Const. Amends. 1, 9, 14.

3. Civil Rights ¶13.13(3)

Unmarried black female terminated by private social club for girls under "negative role model policy" after she became pregnant failed to show she was treated differently because of her race, that racial animus existed or was in any way a factor in termination decision, in light of her failure to make such a claim during state Equal Opportunity Commission investigation and evidence refuting racial motive, including organization's articles of incorporation, affirmative action plan and fact that claimant's position was filled by a black staff person. 42 U.S.C.A. § 1981.

4. Conspiracy ¶7.5

Allegations by former employee of private club, in action under 42 U.S.C.A. § 1985(3), that member of board of directors who was married to newspaper executive conspired with wife of another newspaper executive who was appointed to

state Equal Opportunity Commission which investigated claim and that newspaper published editorial in favor of policy under which claimant was discharged were not sufficient to show conspiracy involving newspaper or its employees to deny equal protection of laws or equal privileges and immunities.

5. Conspiracy ¶7.5

Lack of individual acts of malfeasance by officers or staff of private social club for girls precluded finding of intracorporate conspiracy to deprive unmarried black staff member of her civil rights following her discharge under "negative role model" policy after she became pregnant. 42 U.S.C.A. § 1985(3).

6. Conspiracy ¶7.6

42 U.S.C.A. § 1985(3) prohibiting conspiracy to deprive private individuals of civil rights does not embrace a cause of action for due process violation.

7. Conspiracy ¶19

Evidence failed to show conspiracy in violation of 42 U.S.C.A. § 1985(3) to deprive former employee of private social club for girls of civil rights by discharging her after she became pregnant, due to violation of "negative role model" policy, even if member of club's board was socially acquainted with member of state Equal Opportunity Commission which investigated claim, absent indication that any other commissioner knew anyone from club or that there was any contact between representative of club and commission.

8. Conspiracy ¶19

Evidence failed to show conspiracy violation of 42 U.S.C.A. § 1985(3) to deprive former employee of private social club for girls of civil rights in her discharge after violation of "negative role model" policy when she became pregnant on theory that "tentacles" of conspiracy reached various "affinity" groups which allegedly agreed to endorse policy as part of alleged coverup absent any evidence of an agreement between the club and a nonparty.

9. Conspiracy ¶19

Evidence which was insufficient to create a jury question as to racial discrimination under 42 U.S.C.A. § 1981 was, therefore, also insufficient to provide substantive basis for claim of conspiracy in violation of 42 U.S.C.A. § 1985(3).

10. Conspiracy ¶7.6

Sex-based discrimination claim addressing an allegedly unlawful employment practice covered by Title VII could not be brought as a claim under 42 U.S.C.A. § 1985(3). Civil Rights Act of 1964, § 701, as amended, 42 U.S.C.A. § 2000e.

11. Conspiracy ¶7.6

Both women and blacks are cognizable classes under *Griffin* test to bring action under 42 U.S.C.A. § 1985(3).

12. Conspiracy ¶19

Evidence of adverse impact of policy requiring a termination of unmarried employees of private social club for girls who became pregnant or caused a pregnancy upon women, blacks, black women or single black women was irrelevant to finding of conspiracy under 42 U.S.C.A. § 1985(3) absent evidence of agreement, understanding or intent to invidiously discriminate against any such group.

13. Conspiracy ¶19

Facts insufficient to show conspiracy in violation of 42 U.S.C.A. § 1985(3) were also insufficient to establish common-law conspiracy under Nebraska law.

14. Civil Rights ¶9.14

Black female was within the subclass of women in a combination analogous to a "sex plus" theory of discrimination for purposes of an action under Title VII; in absence of clear expression by Congress that it did not intend to provide protection against discrimination directed especially toward black women as a separate and distinct class, court could not condone result that leaves black women without viable Title VII remedy. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

Cite as 629 F.Supp. 925 (D.Neb., 1986)

15. Civil Rights ¶9.10, 9.14

Articulated reason for rule of private social club for girls requiring termination of unmarried employees who became pregnant or caused a pregnancy, i.e., to provide positive role models in attempt to discourage teenage pregnancies, was a legitimate nondiscriminatory reason for discharge of unmarried black female who became pregnant. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

16. Civil Rights ¶44(1, 5)

Black female, former employee of private social club for girls who was discharged under rule prohibiting unmarried employees from becoming pregnant or causing a pregnancy in order to eliminate "negative role models" and discourage teenage pregnancy, failed to establish pretext to show intentional discrimination in light of evidence showing that staff members were not questioned unless there was reasonable belief of violation, alternatives were considered, statistics were not sufficient to show discriminatory effect and ratification of rule was in accord with normal corporate practice. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

17. Civil Rights ¶9.10, 9.14

Impact of rule of private social club for girls requiring discharge of unmarried staff members who became pregnant fell more harshly on black women of child bearing age in light of their greater fertility rate; however, rule was necessary and adequately related to club's unique purpose of providing girls with exposure to greatest number of available positive options in life, and thus permissible, when to allow such an employee to remain might be viewed as "tacit" approval by club of teenage pregnancies. Civil Rights Act of 1964, § 701 et

seq., as amended, 42 U.S.C.A. § 2000e et seq.

18. Civil Rights ¶9.10

In order to establish business necessity for a policy which has disproportionate impact, close nexus between policy and substantial end goal of employer must be shown. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

19. Civil Rights ¶44(1, 3)

Empirical data was not required to validate job relatedness of rule prohibiting unmarried employees of private social club for girls from remaining in employment after becoming pregnant adopted for purpose of eliminating "negative role models." Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

Mary Kay Green, Richard J. Bruckner, Omaha, Neb., Edward Diedrich, DeKalb, Ill., Edward Fogarty, Omaha, Neb., for plaintiff.

Roland Mullin & Walsh, Robert D. Mullin, Jr., A. Stevenson Bogue, McGrath, North, O'Malley & Kratz, Omaha, Neb., for defendants.

BEAM, Chief Judge.

[1] This matter is before the Court for decision after trial to the Court of Title VII claims and trial to a jury of claims brought under 42 U.S.C. § 1981 and 42 U.S.C. § 1985(3).¹ Because the facts and issues of this case are so intertwined the Court originally planned to permit the jury to hear all of the evidence, notwithstanding the fact that only the Court would be deciding the Title VII matters.² However, after the plaintiff rested, the defendants moved for a directed verdict which was argued and granted with respect to the claims under 42

1. Remedies under Title VII are deemed to be equitable and not within the province of the jury. See, e.g., *Equal Employment Opportunity Comm'n v. Detroit Edison Co.*, 515 F.2d 301, 308 (6th Cir.1975), *vacated on other grounds*, 431 U.S. 951, 97 S.Ct. 2688, 53 L.Ed.2d 287 (1977) (back pay considered form of restitution).

2. At one point in the proceedings (conference in chambers—January 13, 1986) Judge Beam indicated he was considering asking the jury for advisory findings on some of the Title VII issues. Of course, this was not appropriate after the jury was excused part way through the trial.

U.S.C. §§ 1981 and 1983(3). The jury was excused and the Title VII issues were then tried to the Court.

GENERAL FACTS

In February of 1980, the plaintiff, Crystal Chambers, a twenty-two year old unmarried black female was employed by the defendant, Girls Club of Omaha. The Girls Club is a private, non-profit, tax exempt corporation that serves girls in the Omaha community between the ages of eight and eighteen. The Girls Club has a facility located in North Omaha which serves approximately 1500 members. There is also a Girls Club site in South Omaha which benefits about 500 members. In addition, approximately 1000 young women (non-members) per year make occasional visits to the Girls Club and another 6000 children participate in community wide programs. The membership of the North Omaha Girls Club is approximately ninety percent black and the membership at the South Omaha Girls Club is approximately fifty percent to sixty percent black (testimony Mary Heng-Braun and Exhibit P-38-3). The total number of staff employed by the Girls Club is thirty to thirty-five persons. The non-administrative personnel employed is 100% black at the North Omaha Girls Club and fifty percent to sixty percent black at the South Omaha Girls Club (testimony Mary Heng-Braun).

The Girls Club provides structured educational, vocational, and social programming and a variety of other unstructured opportunities, all designed to help young girls reach their full potential. The Girls Club's stated purpose is to provide behavioral guidance and to promote the health, education, and vocational and character development of girls, regardless of race, creed or national origin (Articles of Incorporation of Girls Club of Omaha, as amended, 1975, Exhibit P-19-3; and By-Laws of Girls Club of Omaha, as amended, 1980, Exhibit P-19-4). Specifically, its mission is to "provide a safe alternative from the streets and to help girls take care of themselves" (testimony Mary Heng-Braun).

Stated another way, the role of the Girls Club is to maximize "life opportunities" for the greatest number of girls (testimony Mary Heng-Braun).

The Girls Club maintains that it is an organization which can be differentiated from schools and other youth programs because of the all girl population it serves, and the high staff to member ratio. In addition, the Girls Club maintains that the extensive contact and the close relationships which often develop between the staff and the members as a result of the open, comfortable atmosphere at the Girls Club differentiates it from schools and other youth programs (one staff person for every ten members physically present at the Girls Club) (testimony Mary Heng-Braun, Bobbie Kerrigan-Rawley and Marta Nieves). Those closely associated with the Girls Club contend that because of the unique nature of the Girls Club's operations, each activity, formal or informal, is premised upon the belief that the girls will or do emulate, at least in part, the behavior of staff personnel. Each staff member is trained and expected to act as a role model and is required, as a matter of policy, to be committed to the Girls Club philosophies so that the messages of the Girls Club can be conveyed with credibility (testimony Eileen Wirth, Mary Heng-Braun).

One such philosophy embraced by the Girls Club is that teenage pregnancy limits life's options for a young woman (see, e.g., testimony Marian Andersen, Dana Bradford, Mary Heng-Braun). The record is replete with evidence that teenage pregnancy is, without a doubt, a major social problem that exists nationally as well as within the Omaha community. It is uncontested that the problems associated with teenage pregnancy cut across racial, social and economic lines, but that the number of teenage pregnancies among blacks is presently much higher than among whites (testimony Dr. Harriette Pipes McAdoo and Kenneth Goe). Teenage pregnancy often deprives young women of educational, social and occupational opportunities, creat-

ing serious problems for both the family and society (testimony Dr. McAdoo).

In response to the problems associated with teenage pregnancies and the potential impact upon its members, the Girls Club of Omaha has endeavored to develop and maintain programs aimed at pregnancy prevention. The executive program director of the Girls Club, Marta Nieves, testified that in 1980-1981 the Girls Club of Omaha had seven formal programs that related to pregnancy prevention.³

In 1981, in response to the pregnancies of at least two unmarried staff members, a rule was formulated by the Girls Club executive director, Mary Heng-Braun, that single persons who become pregnant or cause a pregnancy would no longer be permitted to continue employment at the Girls Club.⁴ Bobbie Kerrigan-Rawley, the Girls Club's deputy director, announced the policy at a staff meeting October 31, 1981. The rule was formally ratified by the Board of Directors on March 15, 1982. This policy was later to be referred to as both rule 11 and the Negative Role Model Policy.⁵

At some point, approximately three months after The Negative Role Model Policy was announced, during an evaluation conference, the plaintiff notified her supervisor, Bobbie Kerrigan-Rawley, that she was pregnant. Thereafter, on February 22, 1982, the plaintiff received a letter from the executive director, Mary Heng-Braun, notifying her that she would be terminated as of April 15, 1982, because of her pregnancy. (Exhibit P-30). Within six days of her termination the plaintiff, with the assistance of Nebraska Equal Opportunity Commission investigator, Timothy Butz,

3. (1) Career Awareness; (2) On Becoming A Young Woman; (3) Cat and Mouse; (4) Health Research; (5) Our Bodies Ourselves; (6) Girl Power; (7) Family Counseling.

4. Girls Club of Omaha insists that the rule applied to both sexes from its inception; even though, there was, apparently, no discussion of the application of the rule to male employees on October 31, 1981.

5. The rule states "Negative role modeling for Girls Club Members to include such things as

filed charges of discrimination based upon her sex and marital status with the Nebraska Employment Opportunities Commission (NEOC) and the federal Equal Employment Opportunity Commission (EEOC) (testimony Timothy Butz; Exhibits P-61-1 and P-61-1A). On July 9, 1982, the NEOC held a determination proceeding regarding the plaintiff's charges of discrimination and made a finding that there was no "reasonable cause" to believe that the plaintiff had been discriminated against. The plaintiff made a timely appeal of the NEOC determination to the EEOC in Denver, Colorado, and while the appeal was pending the plaintiff filed this suit in United States District Court for the District of Nebraska in Lincoln, Nebraska.⁶

PROCEDURAL HISTORY

This action was filed on January 24, 1983, against the NEOC and its officers; the Omaha Girls Club, Inc., its director, deputy director and its officers; the Omaha World-Herald, Harold W. Andersen, Woodson Howe, John Gottschalk, Governor Charles Thone and Attorney General Paul Douglas (first complaint, filing 1). In her first complaint the plaintiff alleged violations of the first,⁷ fifth, ninth, and fourteenth amendments of the Constitution of the United States, violations of the Civil Rights Act 42 U.S.C. §§ 1981, 1983, 1985, 1986 and 1988, and pendant state violations including: bad faith discharge, defamation, invasion of privacy, intentional infliction of emotional distress, and conspiracy to deprive her of a right to a livelihood (filing 1). In March of 1983, each defendant filed a motion to dismiss or, in the alternative, a motion for a more definite statement and to

single parent pregnancies." (Girls Club of Omaha Personnel Policy, Exhibit P-20-10.)

6. The case was originally filed by Crystal Chambers and her minor daughter, Ruth Chambers. Ruth Chambers was dismissed as a party plaintiff without prejudice, when the Court determined she did not have standing (filing 250).

7. On November 15, 1984, plaintiff voluntarily dismissed her freedom of religion claim (filing 136).

strike (filings 21, 22, and 23). The plaintiff responded by filing an amended complaint on May 10, 1983, that was identical to the first complaint (amended complaint, filing 28). The plaintiff further amended her petition by filing a complaint under 42 U.S.C. § 2000e against the Girls Club and its affiliated defendants on August 18, 1983 (filing 41).

On October 20, 1983, Judge Urbom dismissed the NEOC, its officers, Governor Charles Thone, Attorney General Paul Douglas, the claim under 42 U.S.C. § 1983, the pendant state claims of libel, slander, bad faith discharge, intentional infliction of emotional distress and invasion of privacy (filings 52 and 53). The Court specifically found that the NEOC and the Commissioners named in the complaint had absolute immunity (filing 52, at 4). The Court further found that the Girls Club could not be charged under Section 1983 which requires state action as there was no evidence of a sufficiently close nexus between the Girls Club (a private club) and the state, a link which is necessary to treat the Girls Club as an arm of the State; nor did the Court find evidence that the Girls Club was exercising traditional state powers. *Id.* at 3-4, citing *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946); *Briscoe v. Bock*, 540 F.2d 392, 395-96 (8th Cir.1976).

Subsequent to the October 20, 1983, order (filings 52 and 53) the plaintiff moved the Court for leave to file a second amended complaint (filing 60). The Court denied leave to file the second amended complaint because the plaintiff had failed to bring the proposed second amended complaint into conformance with the order of October 20, 1983, (plaintiff attempted to again name the NEOC and individual NEOC members as defendants as well as again pleading the dismissed state claims) (filing 65). The plaintiff was directed to file a third amended complaint in conformance with the October 20, 1983, order. *Id.* The plaintiff's

1. The active members of the Omaha Girls Club Board, not individually named were dismissed (filing 117). Richard Kizer was never properly served process he will be dismissed from this action. *Id.*

third amended complaint (filing 68) again sought to reinstate parties and claims which had been dismissed on October 20, 1983. The plaintiff was again directed to file an amended complaint which satisfied the Court's earlier orders (filing 90).

On May 17, 1984, a fourth amended complaint was filed naming: The Omaha Girls Club, Inc., Mary Heng-Braun, director; Bobbie Kerrigan-Rawley, deputy director; Mrs. Harold Andersen, Allan Lozier, Clarence Barbee, N.P. Dodge, Jr., Dennis R. Woods, Dana Bradford III, Richard Kizer, Kermit Brashear II, Eileen Wirth, and active members of the Omaha Girls Club Board (filing 97). To the extent parties were not properly named in the fourth amended complaint, they were dismissed as were the claims of conspiracy to commit libel, slander and invasion of privacy (filing 117).⁸

On November 26, 1984, the plaintiff sought the recusal of Judge Urbom (filing 141). That motion was granted on December 31, 1984, (filing 150). The case was transferred to Judge Schatz (filing 150) and, subsequently transferred to Judge Beam (filing 164). In a memorandum opinion dated November 7, 1985, Judge Beam granted summary judgment on the conspiracy issues in favor of the Omaha World Herald, Harold W. Andersen, G. Woodsen Howe and John Gottschalk (filing 197). The Court found that there were insufficient facts to create even an inference that the Omaha World Herald and the associated individual defendants agreed with anyone to deprive the plaintiff of her rights.

[2] The case went to trial on January 6, 1986, almost three years after the first complaint was filed. At the time of trial the issues included: (1) conspiracy to deprive the plaintiff of a federally protected right, 42 U.S.C. § 1985(3); (2) common law conspiracy; (3) intentional racial discrimination, 42 U.S.C. § 1981; (4) sex/pregnancy

Judge Urbom notes in the slip opinion filed July 6, 1984, (filing 117) that the plaintiff failed to amend her fourth complaint to include the amount of wages and insurance benefits as requested by his order of May 7, 1985.

discrimination, (Title VII) 42 U.S.C. §§ 2000 et seq. Pretrial Orders (filings 151, 187, 191 and 192).⁹

As noted above, at the close of the plaintiff's case, the jury was excused and verdict directed in favor of the defendants on the claims under Sections 1981 and 1985(3). In *Craft v. Metromedia*, 766 F.2d 1205, 1218 (8th Cir.1985), the Eighth Circuit set forth the following standard for submitting issues to a jury:

The standard of review as to the submitability of (the plaintiffs) case is the same under both federal and Missouri law. *Crues v. KFC Corp.*, 729 F.2d 1145, 1148 (8th Cir.1984). We may find for (the defendants) only if 'all the evidence points one way and is susceptible of no reasonable inferences sustaining the po-

9. Plaintiff's proposed pretrial order indicates that there are also issues of intimidation or intentional infliction of emotional distress. Judge Urbom stated in filing 52 that a cause of action for intentional infliction of emotional distress requires that the defendant "intentionally" have caused the plaintiff mental or emotional distress. He correctly stated that the law requires that a defendant's conduct be "outrageous." Failing to find the necessary conduct, Judge Urbom dismissed this claim over two years ago. Furthermore in the same opinion (filing 52) Judge Urbom indicated that he was not sure if a cause of action exists for intimidation. *Id.* at 8. The defendant, Girls Club of Omaha has represented that it is unable to identify such a cause of action (second revised pretrial order dated October 17, 1985, at 2, filing 187 at 2). And, although the plaintiff continues to assert claims of intimidation and conspiracy to intimidate, she has provided no authority for such a cause(s) of action. In her trial brief, the plaintiff states "with respect to Plaintiff's claims that Defendants intimidated her, the undisputed facts clearly demonstrate that these claims have been proven." Plaintiff's Trial Brief, Section III, at 8. This conclusory statement is the only reference made in her brief to such claim of intimidation and it obviously contains no reference to specific facts, case law, or statutory authority. Absent any finding that such a claim exists in Nebraska, this Court will dismiss the claim for intimidation.

Furthermore, the plaintiff's claims under the first, ninth and fourteenth amendments are not cognizable as independent claims in this case for the reason that in order to find a violation of such constitutional amendments there must be federal or state involvement. Where illegal acts are committed "under color of state law" a

sition,' of (the plaintiff). *Id.* (quoting *Dace v. ACF Industries*, 722 F.2d 374, 375 (8th Cir.1983)) (quoting *Decker-Ruhl Ford Sales v. Ford Motor Credit Co.*, 523 F.2d 833, 836 (8th Cir.1975)). Furthermore, we must resolve direct factual conflicts in favor of (the plaintiff), assume as true all facts in (her) favor which the evidence tends to prove, and give (her) the benefit of all reasonable inferences. We may not find for (defendant) if the evidence so viewed would 'allow reasonable jurors to differ as to the conclusions that could be drawn.' See *Crues*, 729 F.2d at 1148 (quoting *Dace*, 722 F.2d at 375).

Id. It was this test which this Court applied before the determination was made to direct a verdict and dismiss the jury.¹⁰

remedy is available under 42 U.S.C. § 1983. But, as noted by Judge Urbom, no state involvement exists in this matter. And, although there is no comparable statutory scheme for violations by federal officials, the courts have allowed individuals to redress constitutional violations occasioned by federal officials by authorizing suits to be brought directly on the constitution. See *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 397, 91 S.Ct. 1999, 2005, 29 L.Ed.2d 619 (1971). In the present case no claim may be brought directly under the Constitution because there is no evidence of involvement by any federal official.

10. Subsequent to the Court's ruling on the directed verdict, plaintiff's counsel, Mary Kay Green, sought to ameliorate the effect of the Court's action by filing a motion requesting that the Judge recuse himself (filing 255). In her motion, Ms. Green alleged, among other things, (1) that the Judge's wife was an NEOC Commissioner during the investigation (by the NEOC) of (this) case, (2) that the Judge indicated that he would have the jury instruct him even on the Title VII issues, and (3) that the Judge in his private practice had been a personal attorney to Governor Charles Thone, the Governor who appointed all the Commissioners who allegedly held the illegal ex parte hearing at the NEOC at the special request of the defendants and, therefore, that he (the Judge presumably) had (has) an interest in the case. None of these allegations were, in terms of relevancy to this action, accurate (filing 256). And, "reasonable inquiry" by Ms. Green as required by *Fed.R.Civ.P.* 11 would have disclosed such a state of facts. The Court finds that the signature of Mary Kay Green appears to constitute a violation of *Fed.R.*

RACIAL DISCRIMINATION, 42
U.S.C. § 1981

[3] Section 1981 is commonly used to redress racial discrimination in employment.¹¹ See, e.g., *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459, 95 S.Ct. 1716, 1719-20, 44 L.Ed.2d 295 (1975) (aggrieved individual may sue for employment discrimination under 42 U.S.C. § 1981); *Greenwood v. Ross*, 778 F.2d 448, 455 (8th Cir.1985) (retaliatory discharge is cognizable under Section 1981); see also, *Choudhury v. Polytechnic Institute*, 735 F.2d 38, 42 (2d Cir.1984) (retaliatory discharge). Congress imposed within Section 1981, a broad proscription against private racially motivated conduct. See *Jones v. Alfred H. Mayer*, 392 U.S. 409, 423, 427, 88 S.Ct. 2186, 2194-95, 2197, 20 L.Ed.2d 1189 (1968) (private discrimination in the rental or sale of property prohibited (Section 1982)). Remedies and procedures for employment discrimination under Section 1981 are not co-extensive with the coverage of Title VII; each provides an independent avenue of relief.¹² *Johnson v. Railway*

Exp. P. 11 and that a hearing should be set at which time Ms. Green shall show cause why the Court should not impose sanctions as contemplated by the rule. A separate order shall be entered contemporaneously with this opinion.

11. 42 U.S.C. § 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

12. There are differences between Section 1981 and the statutory scheme of Title VII. For example, under the specific terms of Title VII: (1) it is inapplicable to certain employees, 42 U.S.C. §§ 2000e(b); (2) assistance in investigation conciliation may be available, Section 2000e-5(b); (3) costs, attorneys fees may be available, Section 2000e-5(k), *Johnson v. Railway Express Agency, Inc.*, 421 U.S. at 460, 95 S.Ct. at 1720; (4) procedures are more complex, Section 2000e-5; (5) no jury, Section 2000e-5(f); *Craft v. Metromedia, Inc.*, 722 F.2d at 1209 n. 3; (6) no compensatory damages for humiliation or

Express Agency, Inc., 421 U.S. at 460, 95 S.Ct. at 1720. Unlike Title VII, Section 1981 only provides a remedy for employment discrimination where an employment decision is racially motivated; it may not be used to redress sexual discrimination. *DeGraffenreid v. General Motors*, 558 F.2d 480, 486 n. 2 (8th Cir.1977).

In order to make out a case under Section 1981 purposeful or intentional discrimination must be shown.¹³ *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 383 n. 8, 102 S.Ct. 3141, 3146 n. 8, 73 L.Ed.2d 835 (1982), *aff'd*, *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 104 S.Ct. 2576, 2590 n. 16, 81 L.Ed.2d 483 (1984); *Washington v. Davis*, 426 U.S. 229, 244-48, 96 S.Ct. 2040, 2050-52, 48 L.Ed.2d 597 (1976). Evidence of adverse or disparate impact alone is not sufficient under Section 1981 to show intentional discrimination. *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. at n. 8, 102 S.Ct. at n. 8. However, when evidence of disparate impact is combined with other circumstantial evidence

emotional distress, *Mudrew v. Anheuser-Busch, Inc.*, 728 F.2d 989, 992 (8th Cir.1984).

On the other hand, under 42 U.S.C. § 1981 equitable and legal relief, including compensatory and, in some cases, punitive damages may be available. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. at 460, 95 S.Ct. at 1720. The procedural scheme for filing a complaint is less complicated and the period of limitation is less restrictive.

13. Because the source of power for Section 1981 is the fourteenth amendment, proof of intentional discrimination is required just as such a showing is necessary to establish a violation of the equal protection clause. The Supreme Court in *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. at 382-85, 102 S.Ct. at 3145-47 reviewed the legislative history of both Section 1981 and the fourteenth amendment. The Court noted that the Civil Rights Act of 1866, from which the operative language of Section 1981 evolved, was the "initial blueprint" of the fourteenth amendment, and that the Enforcement Act of 1870 which was passed pursuant to the fourteenth amendment contains the language that now appears in Section 1981. The Court stated that Section 1981 and the Fourteenth Amendment are "legislative cousins." *Id.* at 389, 102 S.Ct. at 3149. They consequently require the same type and standard of proof.

such as departure from procedural norms or a history of discriminatory actions, a case of intentional discrimination may be made. See *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-68, 97 S.Ct. 555, 362-65, 50 L.Ed.2d 450 (1977).

The principles of order and allocation of proof are the same under Section 1981 as they are for Title VII claims of disparate treatment. *Kenyatta v. Bookey Packing Co.*, 649 F.2d 552, 554 (8th Cir.1981). However, it is not necessary to address how the proof should be ordered in this case because the plaintiff did not present sufficient evidence from which a jury could have inferred a discriminatory motive. See *King v. University of Minnesota*, 774 F.2d 224, 228-29 (8th Cir.1985) (discharged tenured professor failed to make prima facie case under Section 1981 and the Court notes that the District Court could have directed a verdict for the defendants on the Section 1981 claim, had the case been tried before a jury).

In the eight days of presentation of evidence by the plaintiff in her case-in-chief, almost all of the facts adduced which related to race were those dealing with the general impact of the Negative Role Model Policy upon black women or single black women (testimony Dr. Harriette McAdoo and Kenneth Goe).¹⁴ And, the Court, for the purposes of its ruling upon the motions for directed verdict, assumed that such impact was relevant and material to a determination of the plaintiff's Section 1981 claim.¹⁵ There was evidence that the plaintiff is a single black woman; that the membership of the Girls Club of Omaha includes many young black women; that many of the members of the Omaha Girls Club are from households headed by a single black woman; that the neighborhood near the north unit of the Omaha Girls Club is inhabited by significant numbers of blacks; that the executive director of the

Girls Club of Omaha, a married white woman, was given a paid maternity leave in 1983 and/or 1984; that another black woman, Pamela Simmons, was terminated under this policy; and that in 1983 the unit director of the north unit of the Girls Club, a then single white woman, may have resigned her position three or four weeks after becoming pregnant, and now, after being married, does volunteer and contract-consulting work for the Girls Club. However, the plaintiff failed to adduce evidence that she was treated differently because of her race, that racial animus existed on the part of the staff or any board member, that the Club deviated from its normal procedures, or that race was in anyway a factor in the termination decision, or the decision not to rescind the policy.

In fact, the evidence establishes that the plaintiff herself did not believe at the time she was terminated that she had been discriminated against because of race. Mr. Timothy Butz, investigator for the NEOC, testified that Ms. Chambers never alleged, during the entire course of the investigation, that she believed that she had been discriminated against because she was black. Mr. Butz testified that it was his normal practice to "inquire as to why" a complainant feels that he or she has been discriminated against and to specifically inquire as to whether race or national origin was a factor. Mr. Butz could not specifically recall this questioning of the plaintiff but indicated that his routine was almost certainly followed in this case (testimony Timothy Butz). The plaintiff, with the aid of Mr. Butz, filed complaints with the NEOC (Exhibit P-61-1) and the EEOC (Exhibit P-61-1A) which allege discrimination on the basis of sex and marital status. Mr. Butz also testified that he uncovered no facts in his investigation which were, in his view, consistent with racial discrimination. He also stated that he had the authority and the obligation under Nebraska law to

14. For a discussion of the impact of the plaintiff's statistics see *infra* at 45.

15. Impact may be evidence of discriminatory motive and statistics alone may suffice to prove

intent where there is a gross disparity in the treatment of workers. See *Page v. U.S. Industries*, 726 F.2d 1038, 1046 (5th Cir.1984).

amend a complaint on his own if, while investigating, he discovered facts in support of additional discrimination. No amendments were made. In addition, the plaintiff testified that she believed Mr. Butz was competent, knowledgeable and did an "excellent" job in his investigation and recommendations.

As indicated, the plaintiff did not produce any evidence of intentional racial discrimination. On the contrary, both the documentary and testimonial evidence which the plaintiff presented refutes the existence of racial motives. The plaintiff offered the Articles of Incorporation, as amended 1975, which state that the Girls Club's purpose is to serve girls without regard to race, creed or national origin (Exhibit P-19-1, para. 3). In addition, the plaintiff offered the Affirmative Action Plan for Girls Club of Omaha, adopted on October 28, 1981, designed to "correct the effects of past discrimination." (Exhibit P-7-7). The plaintiff's claim of discrimination is also dramatically discredited by the fact that the north unit of the Girls Club was purposefully located to better serve a primarily black population¹⁴ (testimony Marty Schukert, Exhibit P-328); and by the fact that the plaintiff's position was filled by a black staff person who in turn was replaced by a new employee who was also black.

The testimony also shows that the staff, and in particular, Bobbie Kerrigan-Rawley, the Girls Club's white former unit director

16. Although racial composition of the Girls Club's work force could not be considered for the ruling on the motion for a directed verdict because it was not put in evidence until the defendants' case, the Court notes that the work force at the Girls Club is approximately sixty-five percent black (testimony Mary Heng Braun). There are also numerous other documents acknowledging the Girls Club's goal of eliminating discrimination. These were put into evidence by the plaintiff during the defendants' case. (See, e.g., Girls Club of Omaha 1979 Goals and Objectives, Goal 1, Exhibit P-7).

17. 42 U.S.C. § 1985(3) reads as follows: If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indi-

has continuously acted with great sensitivity for the problems of all staff members regardless of race. For example, Ms. Kerrigan-Rawley provided considerable support to Melanie Wells, a single black staff member who had a child while working at the Club. She loaned Ms. Wells money, drove her to work and to her babysitter, and helped her with the care of her baby (testimony Melanie Wells).

There is absolutely no evidence of any specific instance that a negative racial attitude or comment, from which discrimination could be inferred, has ever been shown or expressed by Girls Club personnel or a member of its board of directors. Based upon the evidence presented, it was simply not possible for a jury to find racial discrimination. Accordingly, the law required that the verdict be directed on the Section 1981 claim. See *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1978); *Arlington Heights v. Metropolitan Housing Corporation*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977).

CONSPIRACY

The defendants in this case have been charged with conspiracy under 42 U.S.C. § 1985(3). This section has its origin in the Civil Rights Act of 1871 and was designed to provide for recovery against those who conspire to deny a person equal protection of the laws or equal privileges and immunities of the law.¹⁵ The statute has been

repealed, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or

Cite as 629 F.Supp. 925 (D.Neb. 1986)

construed to reach conspiracies involving private parties. *Griffin v. Breckenridge*, 403 U.S. 88, 101, 91 S.Ct. 1790, 1797-98, 29 L.Ed.2d 338 (1971). However, the reach of the statute has been limited by the Supreme Court. It cannot be used to litigate general tort claims in a federal forum. *Id.* at 101-02, 91 S.Ct. at 1797-98. The limitation makes the statute applicable only to conspiracies that are motivated by a dislike for a protected class of people. *Id.* Under the *Griffin* analysis there are four elements that must be established in order to prove a conspiracy: (1) that the defendant(s) had an agreement with at least one other person and participated or caused something to be done in furtherance of the agreement; (2) that the agreement was to deprive the plaintiff of a protected right; (3) that the defendant(s) were motivated by a dislike or hateful attitude toward a specific class of people and that the plaintiff was a member of that class; and (4) that the conspiracy caused deprivation or injury to the plaintiff. *Id.* at 103-04, 91 S.Ct. at 1798-99.

cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of hearing and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Id.

15. In *Griffin* race was used to define the class while freedom of travel was the right to be protected. Note, *The Scope of Section 1985(3) since Griffin v. Breckenridge*, 45 Geo.Wash.L.Rev. 239 (1977); Comment, *Private Conspiracies to Violate Civil Rights*, 90 Harv.L.Rev. 1721 (1977).

19. The plaintiff alleged a series of facts in support of her Omaha World-Herald conspiracy theory. The Court considered, for purposes of ruling on the motion for summary judgment, the following facts:

1. That Harold W. Andersen is the President of the Omaha World-Herald, and that G. Woodson Howe and John E. Gotschalk are each a Vice President of the Omaha World-Herald.

2. That Marian Andersen, the wife of Harold W. Andersen, was a member of the Board of the Girls Club of Omaha at the time of the plaintiff's termination, and that she later voted to ratify

Section 1985 is a remedial statute; it does not confer any substantive rights. *Griffin v. Breckenridge*, 403 U.S. at 99-101, 91 S.Ct. at 1796-98; *Great American Federal Savings & Loan Ass'n v. Nowotny*, 442 U.S. 366, 372, 99 S.Ct. 2345, 2349, 60 L.Ed.2d 957 (1979). The plaintiff must, therefore, allege violation of an independent right that is protected under the statute. *Griffin* makes a distinction between protected classes and protected rights. *Griffin v. Breckenridge*, 403 U.S. 102-06, 91 S.Ct. 1798-1801. However, exactly which classes and rights are protected is not altogether clear.¹⁶

(4) The facts adduced by the plaintiff regarding the conspiracy claim were intended to establish, at least circumstantially, that persons throughout the Omaha community agreed to deprive the plaintiff of her constitutional rights. Upon a motion for summary judgment, the conspiracy allegations with respect to the Omaha World Herald were carefully considered prior to trial and rejected by the Court (filing 196).¹⁹ However, the Girls Club was

the "single parent negative role modeling" policy.

3. That Marian Andersen brought the pregnancy policy to the attention of Harold Andersen some time in early to mid-1982.

4. That on June 28, 1982, Carmen Gottschalk, wife of Omaha World-Herald Vice President John Gottschalk, was appointed by Governor Charles Thone to the Nebraska Equal Opportunity Commission.

5. That at no time did the Omaha World-Herald, Commissioner Gotschalk or Marian Andersen publicly disclose the fact that Commissioner Gotschalk was the wife of the Vice President of the Omaha World-Herald newspaper.

6. That at no time did the Omaha World Herald or Marian Andersen or Commissioner Gotschalk publicly disclose that Marian Andersen was a member of the Board of the Girls Club of Omaha or that Marian Andersen, Commissioner Gotschalk, Harold Andersen, John Gottschalk and G. Woodson Howe were personally acquainted.

7. That on July 9, 1982, the NEOC made a determination that there was "no reasonable cause" to believe that the plaintiff had been discriminated against, and that such determination was appealed to the federal EEOC within thirty days thereafter.

8. That on July 26, 1982, the Girls Club of Omaha fired Pamela Simmons, its Program Di-

not dismissed from the conspiracy claim and the claim, therefore, remained an issue for trial. The crux of the conspiracy issue, the plaintiff contends, is that representatives of the Girls Club agreed with one or more individuals or groups to validate a policy designed to condemn all black single mothers as immoral (fourth amended complaint, filing 97, para. III. 6.)

The plaintiff attempted to prove that the Girls Club conspired with members of the NEOC in order to obtain a favorable determination, which the plaintiff believes had the effect of enhancing the credibility of the policy. The plaintiff also attempted to show that the Girls Club engaged the aid of various non-parties, the City of Omaha, Metro Area Right to Life, and the Black Ministerial Alliance, for the purposes of: (1) intimidating the plaintiff; (2) drawing out the proceedings so that the plaintiff would drop her charges; (3) covering up the real intent [discriminatory] of the policy; (4) preventing the community agencies from helping the plaintiff; and (5) engaging in a massive public relations campaign in support of the policy (fourth amended complaint, filing 97, para. 23-56; conference in chambers January 13, 1986).

It would normally be up to a jury to decide whether a conspiracy existed, or a right was violated, or whether class-based animus motivated the conspiracy. However, given the benefit of all reasonable inferences, the jury could not have found

rector, on the sole grounds of her single pregnant status. Miss Simmons is a black female.

9. That on November 25, 1982, the NEOC sent notice that the Simmons case would be considered at its December 10, 1982, meeting.

10. That Harold W. Andersen brought the pregnancy policy to the attention of G. Woodson Howe some time in early to mid-1982.

11. That G. Woodson Howe assigned a reporter to investigate the matter and suggested the subject matter of the policy to his editorial page editors as a possible editorial.

12. That on December 1, 1982, the *Omaha World-Herald* newspaper published an article pertaining to the challenges by plaintiff and her co-worker Pamela Simmons of the Girls Club of Omaha "negative role modeling" policy.

13. That on December 10, 1982, the *Omaha World-Herald* newspaper published an editorial supporting the Girls Club's discharge of the

from the evidence presented that an agreement existed between the Girls Club and any other group or person which was designed to deprive the plaintiff of a protected right. It is also questionable, as a matter of law, whether a protected right has been alleged which is cognizable under Section 1985(3). A discussion of each element follows:

1. Agreement

The threshold requirement for a Section 1985(3) cause of action is some proof of concerted action or agreement between two or more persons. *Griffin v. Breckenridge*, 403 U.S. at 102, 91 S.Ct. at 1798. The plaintiff theorized that the defendants' actions were part of both an intra-corporate conspiracy and a conspiracy with outside individuals and organizations.

[5] At the outset, the Court finds that an intra-corporate conspiracy did not exist within the Girls Club. The general rule with respect to intra-corporate conspiracies is that a corporation cannot conspire with itself. *See Runs After v. United States*, 766 F.2d 347, 354 (8th Cir.1985) (Indian tribal council); *Cross v. General Motors Corp.*, 721 F.2d 1152, 1156 (8th Cir.1983), *cert. denied*, 466 U.S. 980, 104 S.Ct. 2364, 80 L.Ed.2d 836 (1984) (corporation); *Baker v. Stuart Broadcasting*, 505 F.2d 181, 183 (8th Cir.1974); *see also Applicability of 42 U.S.C.S. § 1985(3), Providing Remedy to One Injured by Conspiracy to Deprive*

plaintiff and her co-worker and the "negative role modeling" policy.

14. That Marian Andersen and Commissioner Gotschalk did not know that the news story and editorial were being planned until they were published by the newspaper.

15. That Harold Andersen was not specifically aware of the news story or the editorial or their contents until he read them in the newspaper on the day of publication.

The foregoing assertions comprise all of the facts that were conceivably material to the plaintiff's allegations. Whether one believes or disbelieves all or any part of them, they simply do not establish, directly or by inference, any genuine issue of material fact which supports the existence of a conspiracy involving the newspaper or its employees. Accordingly, the *Omaha World-Herald* and associated defendants were dismissed.

Him of Civil Rights, To Activity of Single Corporation or to Concerted Activity of Its Directors, Employees, Agents, and the Like, 52 A.L.R.Fed. 106 (1981); *cf. Great American Federal Savings & Loan Ass'n v. Notovny*, 442, U.S. 366, 372 n. 11, 99 S.Ct. 2345, 2349 n. 11, 60 L.Ed.2d 957 (1979). The theory is that if the challenged act(s) are the act(s) of a single entity, the fact that two or more agents participated is of no consequence. *See Weaver v. Gross*, 605 F.Supp. 210, 214-15 (D.D.C.1985) (rejects theory that continuing violations by single corporation may provide basis for conspiracy).

The law, however, is not without exception. Where individual defendants are named and those individuals acted outside the scope of their employment or for personal reasons, then an intra-corporate conspiracy may be actionable under Section 1985(3). *Cross*, 721 F.2d at 1156. *See Hodgkin v. Jefferson*, 447 F.Supp. 804, 807 (D.Md.1978) (unauthorized acts in furtherance of a conspiracy may state a claim under Section 1985(3)); *Rackin v. University of Pennsylvania*, 386 F.Supp. 992, 1005 (E.D.Pa.1974) (tenured members of English department deprived plaintiff of opportunity to teach certain courses, estab-

20. The evidence presented primarily focused on the NEOC and Metro Right to Life Committee. The plaintiff called Marty Shukert, City Planning Director, in order to prove: (1) that he was a member of the Board of Directors of the Girls Club; and (2) that he caused City rules and procedures to be violated in order for the Girls Club to obtain grant money for a new gym floor. No evidence of irregularity was established. In fact the witness demonstrated that normal procedures were followed with respect to the grant application. The plaintiff did not pursue this course further.

As to the Black Ministerial Alliance no evidence was put forward regarding any involvement in a conspiracy although, there was evidence that the Alliance was contacted by a representative of the Girls Club for the purpose of permitting the Girls Club to explain rule 11.

21. The plaintiff established the following facts at trial to support her charge that the plaintiff's due process was violated: (1) the plaintiff went to the NEOC on the advice of a lawyer; (2) Timothy Butz, an NEOC investigator, helped the plaintiff file a charge; (3) Mr. Butz investigated

lished unprecedented requirements for tenure, denied plaintiff tenure and discharged her; *Coley v. M & M Marx, Inc.*, 461 F.Supp. 1073, 1076 (M.D.Ga.1978) (continuing harassment by individual defendants). The actions of Girls Club staff members and Girls Club board members individually named in this suit just do not fit within the exceptions. There is simply no evidence of individual acts of animus or harassment.

With respect to agreements by the Girls Club with individuals or organizations outside of the group, the plaintiff points to the NEOC, the Black Ministerial Alliance, the City of Omaha, and the Metro Right to Life Committee.²⁴

The plaintiff alleges that NEOC agreed with the Girls Club to find against the plaintiff on her discrimination charge in order to cover up the discriminatory motive of the Girls Club and to enhance the credibility of the policy. *White v. Bloom*, 621 F.2d 276, 281 (8th Cir.), *cert. denied*, 449 U.S. 995, 101 S.Ct. 533, 66 L.Ed.2d 292 (1980) (conspiracy with an immune defendant is cognizable). Specifically, the plaintiff alleges that the NEOC violated the plaintiff's right to due process when it employed unfair procedures in arriving at its decision.²⁵

the plaintiff's claim and that the claim was fairly investigated according to the plaintiff: (4) Mr. Butz sent a letter to the plaintiff informing her that the information from the investigation would be forwarded to the NEOC for a determination and that she would be notified of their decision (Exhibit P-327); (5) Mr. Butz informed the Girls Club attorney, Mr. Bogue, that he was leaning in favor of the plaintiff; (6) Mr. Bogue inquired of Mr. Butz if there were rules regarding a party's right to be present at a hearing and Mr. Butz told him that it was the existing policy of the NEOC to notify a requesting person of the hearing date (Mr. Butz stated there was no written policy on notice. NEOC Rules and Regulations Exhibit P-317-1); (7) Mr. Bogue requested notice; (8) Mr. Butz jotted a "speed note" to the Commission Secretary, Thelma Riggs, requesting that Mr. Bogue be notified of the hearing date; (9) Mr. Bogue was notified; (10) the plaintiff informed the NEOC on approximately June 22, 1982, that she had a change of address; she did not specifically request notice of the hearing date; (11) Mr. Bogue, Mr. Heng-Braun and Mr. Barbee attended the hearing, asked to be heard and were heard; (12) the plaintiff was not in-

[6.7] This Court does not need to pass upon the constitutionality of the procedures employed by the NEOC, because, even assuming all of the plaintiff's facts to be true and assuming that a due process violation did occur, the plaintiff failed to produce even a shred of evidence from which a jury could infer that such a violation was part of a plan to deprive the plaintiff of her rights. Even if the NEOC procedure was lacking, there is no evidence whatever that it was motivated by discriminatory design. *Dunn v. Gazzola*, 216 F.2d 709, 711 (1st Cir.1954) (failure to give notice to woman plaintiff charged with child neglect does not provide a basis for a Section 1983(3) cause of action).²²

The only purported links between the Girls Club and the NEOC are Carmen Gottschalk and Marian Andersen who are acquainted with each other through their respective husbands. Mrs. Andersen testified that she did not know that Mrs. Gottschalk was a member of the NEOC until after this case was filed in early 1983. Mrs. Gottschalk testified that she did not know Mrs. Andersen was on the board of the Girls Club at the time she was appointed to the NEOC. Mrs. Gottschalk testified that she did not know anyone who appeared on behalf of the Girls Club at the hearing; and that she did not speak to anyone about this matter, including her spouse, before or after the July 9 hearing. Assuming, arguendo, that a jury were to disbelieve all of the evidence presented by the plaintiff with regard to Ms. Andersen, Commissioner Gottschalk and their knowl-

formed of the hearing date and did not attend; (13) Mr. Butz did make a recommendation of "reasonable cause;" (14) the NEOC found no "reasonable cause;" (15) the NEOC had never before turned down a Butz recommendation of "reasonable cause;" and (16) the federal EEOC later found "reasonable cause" for discrimination on the basis of sex and marital status.

Mr. Butz made a recommendation that the NEOC find reasonable cause to believe the plaintiff had been discriminated against on the basis of sex and marital status (Exhibit P-67). In the report issued by Mr. Butz he made a finding that rule 11 was not formally in place at the time the plaintiff was fired. At trial he testified that he believed that finding to be in error if the common practice of the Girls Club

edge of or communications with each other, there still is no evidence in the record which supports the plaintiff's burden of proof that a conspiracy was formed. There is no evidence that any other Commissioner knew anyone from the Girls Club, or that there was any contact between any representative of the Girls Club and the NEOC, other than as Mr. Butz testified (see footnote 20).

The failure of proof on this crucial evidentiary point precluded any inference by a jury that an agreement between the NEOC and the Girls Club could have existed. The Court recognizes that it is not necessary that an agreement be express and that it may be inferred from circumstantial evidence. However, it is simply not reasonable to allow a jury to speculate that two women, acquainted through spousal business activity, may have been conduits through which an unlawful conspiracy flowed. The plaintiff had the duty to present facts, not bare allegations.

[8] The plaintiff also claims that the "tentacles" of the conspiracy reached various "affinity" groups in the community and that these groups also agreed with the Girls Club to endorse the policy as part of the alleged cover up. Any evidence of an agreement between the defendant Girls Club and a non-party would also have been sufficient to create a question for the jury. However, there was no such evidence presented. The evidence shows that the vice chairman of the Metro Right to Life Committee, Peter Bataillon, was contacted,

was to permit the director to implement policies which were later ratified. He was not asked whether his recommendation would have been different if he had believed the policy to have been in effect at the time of termination.

Mr. Butz also testified that the EEOC determination was based wholly upon his report (which contained his belief that the policy was not in effect).

22. Section 1985(1) does not embrace a cause of action for due process violation. *Oaks v. City of Fairhope*, 515 F.Supp. 1004, 1045 (S.D.Ala.1981); *Weiss v. Reiner*, 318 F.Supp. 580, 583 (E.D.Wis.1970); *Whittington v. Johnson*, 201 F.2d 810, 811 (5th Cir.), cert. denied, 346 U.S. 867, 74 S.Ct. 103, 98 L.Ed. 377 (1953).

sometime after the NEOC hearing, by a board member of Girls Club to see if the Girls Club could have an opportunity to respond to comments made within the community about the policy and to present its position with respect to the policy. The request was honored, the Girls Club's position was presented, and the Metro Right to Life Committee was satisfied with the explanation (testimony Peter C. Bataillon). No further action was taken.²³

Regardless of whether the Metro Right to Life Committee agreed or disagreed with the policy, and regardless of whether the Committee understood or misunderstood how the policy was applied, there is absolutely no evidence that the Committee agreed with the Girls Club to deprive black women or single black women or the plaintiff, in particular, of any rights whatsoever. And an endorsement of the Girls Club policy, if any, by the Metro Area Right to Life Committee, fails to provide even the weakest circumstantial evidence of an agreement to violate the plaintiff's rights or to cover up discrimination.

The plaintiff points toward two other actions to buttress her claim of conspiracy. First, she argues that rule 11 was not effective at the time she was fired, and, that after she was fired, the board of directors officially adopted the policy to cover up the Girls Club's discriminatory actions. Second, the plaintiff points to evidence which shows that after the July 9, 1982, NEOC hearing, the Girls Club had approximately twenty-four internal meetings, i.e., board of directors and staff gatherings, where the policy was discussed. These acts, even if shown to be evidence of

23. The plaintiff alleges that application of the policy was misrepresented to the Committee by members of the Girls Club; that based upon the misrepresentation the Committee endorsed the policy; and, that as a result of the endorsement decision, the Committee did not financially contribute to the plaintiff's lawsuit. Mr. Bataillon indicated that even if he had supported the plaintiff's position, the Committee had no money available for such purpose.

24. Paragraph 41 of the fourth amended complaint (filing 97, para. 41) states:

a conspiracy, are only relevant to the intra-corporate theory which the Court has already determined could not exist as a matter of law in this case since no individual acts of malfeasance were alleged or established. Therefore, a discussion of these allegations and theories is not necessary with respect to the conspiracy claim (see Title VII findings of fact, *infra*).

2. Deprivation of a Protected Right

In order to fully and fairly examine the plaintiff's claims, the Court assumed, for the purposes of the defendants' motions to dismiss made at the close of plaintiff's case-in-chief, that plaintiff could, arguendo, establish that an illicit agreement or understanding was reached. Even then, plaintiff's claim fails.

As stated earlier, Section 1983(3) does not confer any substantive rights. It is merely a statutory channel through which a plaintiff may vindicate alleged violations or deprivations of constitutional rights. *Goble v. Crestwood School District*, 609 F.Supp. 972, 978 (M.D.Pa.1985). In order for a plaintiff to establish a claim for relief under Section 1983(3), there must be proof that some cognizable, federally protected, predicate right has been violated. *Griffin v. Breckenridge*, 403 U.S. at 103-04, 91 S.Ct. at 1798-99.

Giving the plaintiff the benefit of the most liberal interpretation of her claims, the Court construes the fourth amended complaint (filing 97) as alleging a violation of equal protection or privileges and immunities as a result of discrimination on the basis of race, privacy and gender.²⁴ The

That the acts of the officials of the Omaha Girls Club in concert with the Commissioners of the Nebraska Equal Opportunity Commission and its executive director Lawrence Myers constituted a conspiracy to violate the civil rights of the plaintiffs protected by the 1st, 9th, 14th, amendments and 42 USC 1981 and were taken to deprive the plaintiffs of support, employment, reinstatement, health insurance and other benefits and that by adopting in secret a posture that single mothers particularly the black single mothers in the community served by the Club are "immoral per se" and subject to immediate dis-

Court assumes that the basis of the gender or sex-based claim is that the plaintiff believes that she was treated differently than males because of her sex. And, because the plaintiff has alluded to, but never briefed nor argued, a theory of "privacy," the Court will assume that by pleading violations of the first, ninth and fourteenth amendments that she intended to encompass a "right to privacy" violation. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

Lower courts have continued to struggle to determine which rights are protected under the statute.²³ The Supreme Court in *Griffin* suggested that the proper approach in determining the scope of Section 1985(3) is to examine, independently, the rights and classes which the statute protects. *Griffin v. Breckenridge*, 403 U.S. at 102, 106, 91 S.Ct. at 1798, 1800-01. This will be done.

a. Race

[9] For purposes of redressing conspiratorial discrimination based upon race, 42 U.S.C. § 1981 may serve as the substantive basis for a cause of action under Section 1985(3). *Thompson v. International Ass'n of Machinists and Aerospace Workers*, 580 F.Supp. 662, 667-68 (D.D.C.1984). However, the plaintiff was not able to establish sufficient evidence to create a jury

charge when their single parenthood becomes visibly perceivable through the gestation of the infant or fetus in the mothers abdomen and that said gestation is a negative role model for the girls served by the Club.

Id.

23. See, e.g., *Griffin v. Breckenridge*, 403 U.S. at 105, 91 S.Ct. at 1800 (right to travel); *Moans v. Wilson*, 522 F.2d 833, 838-39 (8th Cir.1975), cert. denied, 424 U.S. 958, 96 S.Ct. 1436, 47 L.Ed.2d 364 (1976) (right to vote in tribal elections); *Action v. Cannon*, 450 F.2d 1227 (8th Cir.1971) (right of religious freedom); *Coble v. Crestwood School Dist.*, 609 F.Supp. 972, 978 (D.Pa.1985) (right to equal protection—freedom from sexual harassment); Note, *The Scope of Section 1985(3) Since Griffin v. Breckenridge*, 45 Geo.Wash.L. Rev. 239 (1977).

question under Section 1981. Therefore, the evidence is not sufficient to provide the substantive basis for Section 1985(3) purposes.

b. Sex

[10] In order to address the plaintiff's claim of conspiracy to discriminate on the basis of sex, it must first be determined whether such a claim is legally cognizable under Section 1985(3). In *Great American Federal Savings & Loan Ass'n v. Novotny*, the Supreme Court held that employment discrimination claims which are covered by the statutory scheme of Title VII cannot be asserted through a Section 1985(3) claim, 442 U.S. at 378. The plaintiff's sex-based claim appears to address an allegedly unlawful employment practice covered by Title VII (pregnancy) and *Novotny*, therefore, bars the Section 1985(3) sex-based claim.

c. Privacy

It is the allegations involving the right to privacy that are more problematic. At the crux of the privacy argument is a belief held by the plaintiff that rule 11 is, in reality, a morality standard intended to discriminate against black females, (fourth amended complaint, filing 97, par. 15).²⁴ The plaintiff also argues that the policy was designed to promote abortion by making abortion a condition of employment.²⁵

26. The plaintiff argues that abortion is not a viable choice for black women because of cultural patterns (testimony Dr. McAdoo). Dr. McAdoo, the plaintiff's expert witness, provided no statistics on this point and those supplied by Mr. Kenneth Goc, employee of the Bureau of Vital Statistics of Douglas County, seem to indicate that such is not the case. Mr. Kenneth Goc stated that the abortion rate among blacks in Nebraska in 1978 was six percent of the total abortions performed in Nebraska, while the rate for whites was ninety-two percent of the total abortions. Since only approximately three percent (a fact of which this Court takes judicial notice) of the State's population is black, the abortion rate for blacks, even considering a higher fertility rate during child bearing years appears to be at least as high as that for whites.

27. In support of this claim the plaintiff points out that a Girls Club staff member, Joy Lewis

And, because a man can more easily conceal his involvement in an unmarried pregnancy, he is not subjected to similar treatment. In *Novotny* no substantive rights besides Title VII were alleged as the basis of Section 1985(3). The Court found it unnecessary to consider "whether a plaintiff would have a cause of action under § 1985(3) where the defendant was not subject to suit under Title VII or a comparable statute." *Great American Federal Savings & Loan Ass'n v. Novotny*, 442 U.S. at 370 n. 6, 99 S.Ct. at 2348 n. 6. Following *Novotny* it has been held that Section 1985(3) does provide a cause of action where Title VII has not been pled. See, e.g., *Skadegaard v. Farrell*, 578 F.Supp. 1209, 1218 (D.N.J.1984) (sexual harassment). In so holding the Court pointed out that the right which the plaintiff sought to protect was "independent" of those provided in Title VII and existed before the passage of Title VII. *Id.* at 1218.

The right of privacy would appear to be "independent" of any rights protected by Title VII.²⁶ The Court has been unable to find any case wherein the right of privacy has formed the substantive basis of a Section 1985(3) conspiracy.²⁷ And, although privacy may well provide a claim, it is not necessary for the Court to resolve the issue

had an abortion and kept her job, (Ms. Lewis is black). The testimony of Ms. Lewis shows that she told Bobbie Kerrigan-Rawley, her supervisor and friend, that she was pregnant and going to have an abortion so that she could play basketball. That Ms. Kerrigan-Rawley strenuously counseled Ms. Lewis against the abortion, that Ms. Lewis had the abortion anyway very shortly after the conversation.

Ms. Heng-Braun testified that she was not aware that Joy Lewis was pregnant or that she was going to have an abortion until Ms. Lewis was either at the doctor's office or had already had the abortion, and that the abortion was not a condition for keeping the job.

28. Whether the right of privacy has been held to encompass protection for a single person's right to bear children is unresolved. *Snyder v. Kuryer*, 767 F.2d 489, 497 (8th Cir.1985) (sexual conduct outside of marriage is not "basic unquestioned constitutional right" necessarily protected by privacy).

29. If coverage of the fundamental rights doctrine extends to single persons, such a right would most assuredly come within the gambit

here because the plaintiff has failed to adduce any evidence which creates a jury question under the third prong of the *Griffin* test requiring class-based animus.

3. Class Based Invidiously Discriminatory Animus

In addition to establishing that the defendants entered into an agreement to deprive the plaintiff of protected rights, the plaintiff was required to present some evidence that the defendants were motivated because the plaintiff was a member of a class that the defendants disliked or hated. *Griffin v. Breckenridge*, 403 U.S. at 102, 91 S.Ct. at 1798; *Shortbull v. Looking Elk*, 507 F.Supp. 917, 921 (S.D.1981), *aff'd*, 677 F.2d 645 (8th Cir.), cert. denied, 459 U.S. 907, 103 S.Ct. 211, 74 L.Ed.2d 168 (1982). There are two prongs associated with this element of the *Griffin* test. First, *Griffin's* language requires that the plaintiff be a member of, or associated with a protected class. *Griffin v. Breckenridge*, 403 U.S. at 102-03, 91 S.Ct. at 1798-99. Second, there is a requirement that there be a "mens rea" present, i.e., that the conspirators have a particular hatred of the protected group. *Shortbull v. Looking*

of protection afforded by Section 1985(3). See *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919, 925 (5th Cir.1977) (persons asserting fundamental rights are a cognizable "class" under Section 1985(3)). Assuming such protection would be available the question still remains whether the right of privacy is protected from purely private action. *Carceman v. Korman Corp.*, 456 F.Supp. 730, 732, n. 3 (E.D.Pa. 1978). There is a split among the circuits on this issue. The Eighth Circuit held in *Action v. Cannon*, 450 F.2d 1227 (8th Cir.1971) that religious rights secured by the first amendment and protected by the fourteenth amendment are protected from private as well as state conduct. *Id.* at 1232-33. However, since that ruling, the Supreme Court has indicated, without ruling on the matter directly, that without some state action, Section 1985(3) does not create a cause of action for "private violations" of the first or fourteenth amendments. *United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825, 831-34, 103 S.Ct. 3352, 3357-58, 77 L.Ed.2d 1049 (1983).

Elk, 507 F.Supp. at 921, quoting *Harrison v. Brooks*, 519 F.2d 1358 (1st Cir.1975).

[11] Not surprisingly both women and blacks are cognizable classes under *Griffin v. Life Insurance Co. of North America v. Reichardt*, 591 F.2d 499, 505 (9th Cir. 1979) (conspiracy against a class defined by sex); *Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (conspiracy against class defined by race). The plaintiff in this case is defined by both race and sex, alone or in combination. *Jeffries v. Harris County Community Action Ass'n*, 815 F.2d 1025, 1032-33 (5th Cir.1980) (class defined as black women). The class or classes of which the plaintiff is a member are clearly within the protection of the statute.

[12] It is the "invidiously discriminatory animus" requirement of the *Griffin* test where the plaintiff has failed. Evidence of adverse impact, if any, simply does not fulfill the mens rea requirement necessary to show irrational or invidious class discrimination. See *Shorttull v. Looking Elk*, 507 F.Supp. at 921.³⁰ The fact that the enforcement of the policy, initially or later, may have already impacted or perhaps will impact women, blacks, black women or single black women, more heavily is irrelevant. There is no evidence of an agreement, or understanding, or intent, to invidiously discriminate against any such group.

4. Injury or Deprivation

The final element for which the plaintiff was required to produce evidence is that the alleged act(s) in furtherance of the conspiratorial agreement caused her injury or deprivation. *Griffin v. Breckenridge*, 403 U.S. at 103, 91 S.Ct. at 1798-99. Unlike a criminal conspiracy the gravamen of a civil conspiracy is resulting damage. *Nalle v. Oyster*, 230 U.S. 165, 183, 33 S.Ct. 1043, 1048, 57 L.Ed. 1439 (1913). The plaintiff claims that she lost her job, incurred medi-

cal costs, and suffered emotional distress. Because the Court has concluded: (1) no agreement existed; (2) there may have been no cognizable right; and (3) no class-based animus was present, it is not necessary to examine the causal relationship between the alleged acts and the alleged harm.

COMMON LAW CONSPIRACY

[13] The plaintiff failed to establish sufficient facts to defeat the defendants' motion for a directed verdict on the issue of common law conspiracy. The elements which must be proven for common law conspiracy essentially mirror the requirement of 42 U.S.C. § 1985(3), with the exception that there need not be a showing of racial animus. *Dixon v. Reconciliation, Inc.*, 206 Neb. 45, 291 N.W.2d 230, 233 (1980).

Conclusion

In retrospect the foregoing analysis may seem overly detailed and unnecessarily analytical. However, the Court is very mindful that jury issues should be preserved for jury consideration. In fact, the admonition of the Court of Appeals to reserve ruling on issues of sufficiency of evidence until after a jury verdict is usually followed by this Court. Therefore, the sustaining of a motion to dismiss upon completion of the plaintiff's case-in-chief happens only after careful consideration of the evidence adduced. Nonetheless, this is a case in which such action was proper.

The plaintiff has sought, through a series of judgmental allegations and conclusory affidavits and statements, to spin a web of deceit, discrimination and conspiracy involving dozens, even hundreds, of individuals and organizations in the Omaha community. At some point, illusory conclusions and unsupported suspicions must give way to fact. Mere contentions which are

the plaintiffs" *Shorttull v. Looking Elk*, 507 F.Supp. 921, quoting *Harrison v. Brooks*, 519 F.2d 1358 (1st Cir.1975).

Cite as 629 F.Supp. 923 (D.Neb. 1986)

passed off as established fact must be held up to critical analysis. Otherwise, our system of justice becomes a vehicle for slander, intimidation, and character assassination.

Every law suit must be a search for truth. Here, the truth is that plaintiff, given the chance, failed to connect slightly related facts with anything relevant to the real issues of the case. Therefore, the dismissal is and was correct.

TITLE VII

The Title VII claims were not dismissed at the conclusion of the plaintiff's evidence. They were the subject matter of evidence from the defendants and rebuttal evidence from the plaintiff. Accordingly, the Court begins, anew, an analysis of the facts and law as they may be applicable to the Title VII issues.

31. The Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), *infra* note 33 treats discrimination on the basis of pregnancy the same as discrimination on the basis of sex.

32. The plaintiff checked the spaces provided on the NEOC form alleging discrimination on the basis of marital status and sex. The EEOC form does not provide for allegations of discrimination based upon marital status. She, therefore, only alleged sex discrimination on the EEOC form. The plaintiff indicated on both complaints that she believed the particulars of the discrimination to be:

I am a pregnant female who is unmarried. I was employed by the Respondent as the Arts and Crafts Coordinator from 2/80 until 4/15/82.

On Feb. 8, 1982 (approximate date) I informed my supervisor that I was pregnant. On Feb. 22, 1982, I was given a letter stating that I was terminated because I was pregnant and unmarried.

I believe that my termination was illegal discrimination based on my Sex (Pregnant Female) because:

1. The Respondent did not have a policy on unwed mothers prior to my informing them that I was pregnant;

2. My pregnancy did not interfere with my ability to perform my job;

3. I was performing my job in an adequate manner.

For the above reasons, I allege discrimination Sex (Pregnant Female) under Title VII of the Civil Rights Act of 1964, as amended.

This action presents a novel question: whether a private service organization, which by all accounts is dedicated to helping young girls reach their fullest potential, may, without being guilty of discrimination under the law, fire unmarried women who become pregnant? The ultimate issue in this case is whether the rule permitting the termination of single employees who become pregnant, or cause a pregnancy, unlawfully discriminates against the plaintiff, individually, or has an unlawfully discriminatory impact upon a class of women or black women, of which the plaintiff is a member.³¹

SCOPE OF THE CLAIM

[14] The charges which were originally filed by the plaintiff with the NEOC and EEOC alleged discrimination on the basis of sex and marital status (Exhibits P-61-1 and P-61-1A).³² The charges were investigated as sex and marital status violations.³³

The Court recognizes that discrimination based upon marital status is not specifically addressed within the language of Title VII. However, because Title VII does not specifically prohibit discrimination based upon marital status, Courts have construed marital restrictions as coming within the coverage of Title VII. See, e.g., *Sprogis v. United Airlines, Inc.*, 444 F.2d 1194 (7th Cir.), cert. denied, 404 U.S. 991, 92 S.Ct. 536, 30 L.Ed.2d 543 (1971) (no marriage rule for stewardesses invalid under 42 U.S.C. § 2000e-2(a)(1)); Sex Discrimination—Marital Status 34 A.L.R.Fed. 648 (1977). See Neb.Rev. Stat. § 48-1104 (Reissue 1984) which makes it an unlawful employment practice to discriminate on the basis of marital status.

33. Title VII prohibits discrimination on the basis of sex and pregnancy.

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.

42 U.S.C. § 2000e-2(a).

30. The requirement that the discrimination be "class-based" is not satisfied by an allegation that there was a conspiracy which affected the interests of a class of persons similarly situated with

The plaintiff now seeks to attack the rule on the basis of race and gender discrimination. The law permits the scope of the lawsuit to exceed the scope of the charges where the kind of discrimination which is alleged in the lawsuit is related to, or growing out of, the allegations made during the pendency of the case before the Commission. *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir.1970) (charge of harassment and discharge will support complaint alleging discrimination in promotion); see also *Johnson v. Nekoosa-Edwards Paper Co.*, 558 F.2d 841, 846 n. 11 (8th Cir.), cert. denied, 434 U.S. 920, 93 S.Ct. 394, 54 L.Ed.2d 276 (1977). The plaintiff alleges that "black single women" comprise the class adversely affected by rule 11. In essence, the plaintiff is alleging a combination of racial and sex-based discrimination.³⁴ This Court will address race

In addition, Title VII states:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

42 U.S.C. § 2000e(k).

34. The idea of combining statutory remedies was rejected in *DeGraffenreid v. General Motors*, 413 F.Supp. 142, 143 (E.D.Mo.1976), as creating a "super remedy" which would provide relief beyond what the drafters of the statute intended. The Eighth Circuit did not reach this issue but left the question open. Judge Bright stated, "We do not subscribe entirely to the district court's reasoning in rejecting appellants' claims of race and sex discrimination under Title VII." *DeGraffenreid v. General Motors*, 558 F.2d 480, 484 (8th Cir.1977).

This Court adopts the reasoning of the Fifth Circuit which treats black females as a subclass

discrimination only insofar as rule 11 may have an impact upon the class of black women. To the extent that the plaintiff seeks to independently address racial discrimination under Title VII, the claim is barred.³⁵

NATURE OF THE CASE

This case is neither a class action nor a "mixed motive" case.³⁶ It is also unclear whether plaintiff has sought to advance this case on a theory of disparate impact or disparate treatment, or both.

Often the distinctions between the theories are not clear.³⁷ It is not uncommon for a disparate treatment claim and disparate impact claim to arise in the same litigation from the same set of facts. See, e.g., *Jones v. International Paper Co.*, 720 F.2d 496, 499-500 (8th Cir.1983).³⁸

of women and analogizes the combination to a "sex plus" theory of discrimination. *Jefferies v. Harris County Community Action Ass'n*, 815 F.2d 1025, 1032-34 (5th Cir.1980). The Court stated, "In the absence of a clear expression by Congress that it did not intend to provide protection against discrimination directed especially toward black women as a class separate and distinct from the class of women and the class of blacks, we cannot condone a result that leaves black women without a viable Title VII remedy." *Id.* at 1032.

35. The Court's ruling on the claim under 42 U.S.C. § 1981 precludes a finding of discrimination on the basis of race under Title VII under the doctrine of collateral estoppel. *Larhin v. Iowa Dept. of Transp.*, 705 F.2d 1018, 1020 (8th Cir.1983).

36. Certification of a class was never sought.

The defendant does not contend that the plaintiff was fired for any reason other than the pregnancy (see termination letter, Exhibit P-30). Therefore, this case is not a mixed motive case and analysis under *Bibbs v. Block*, 778 F.2d 1318 (8th Cir.1985) would not be appropriate.

37. The Eighth Circuit has recently discussed both theories. *Eastley v. Anheuser-Busch, Inc.*, 758 F.2d 251 (8th Cir.1985); see also *Page v. U.S. Industries, Inc.*, 726 F.2d 1038 (5th Cir.1984). The Court analyzed the evidence under both theories.

38. When both theories are analyzed, a finding of no adverse impact carries no implication on whether or not there was disparate treatment.

Cite as 629 F.Supp. 925 (D.Neb. 1986)

Claims of disparate impact are often utilized for class actions where it is alleged that a facially neutral rule falls more harshly on one group than on another. See, e.g., *Reed v. Arlington Hotel Co.*, 476 F.2d 721, 723 (8th Cir.), cert. denied, 414 U.S. 854, 94 S.Ct. 153, 38 L.Ed.2d 103 (1973).³⁹ There are, however, situations where it is appropriate for an individual to proceed under a disparate impact theory. *Lasso v. Woodmen of the World Life Insurance Co.*, 741 F.2d 1241, 1245 (10th Cir.1984), cert. denied. — U.S. —, 105 S.Ct. 2320, 85 L.Ed.2d 839 (1985); *Rule v. International Ass'n of Bridge, Structural and Ornamental Ironworkers*, 568 F.2d 558, 566 (8th Cir.1977) (individual claims in the nature of a pattern and practice suit). Under the facts of this case, an analysis under both disparate impact and disparate treatment is proper.

FINDINGS OF FACT

The Court adopts the findings of fact set forth in its earlier discussions.⁴⁰ The Court further finds as follows:

(1) The Girls Club employed approximately 132 different persons between 1975 and 1982. The work force at all relevant times was approximately sixty-five percent black and has never been less than fifty percent black. The work force is and has always been primarily female; there were sixteen males employed between the years 1975 and 1982.

(2) At the time that rule 11 was implemented there were ten staff members at

Royal v. Missouri Hwy. & Transp. Comm'n, 655 F.2d 159, 163 n. 4 (8th Cir.1981).

39. The Court in *Reed v. Arlington* allowed a black person who had been terminated, to bring a class action "As a black and a former employee, the plaintiff was subject to the same racial discriminatory policies as other members of the class." 476 F.2d at 723. Here, as noted above, the plaintiff did not seek certification to represent the class of black women.

40. A summary of such facts include: (1) plaintiff is a black single woman; (2) membership in Girls Club of Omaha includes large numbers of black women, many of whom are from single parent families; (3) the neighborhood where the north unit of the Girls Club is located is inhabit-

ed by black residents; (4) the executive director is a married white woman; (5) the executive director was given a six-week paid maternity leave; (6) another black single woman was fired pursuant to the policy after the plaintiff; (7) Ms. Kerrigan-Rawley, the white deputy director provided emotional support for many black staff members and in one case provided financial help; (8) Ms. Kerrigan-Rawley became pregnant while single and resigned very shortly before or very shortly after she knew of the pregnancy. Ms. Kerrigan-Rawley was married prior to the birth of her child and prior to returning to Girls Club of Omaha as a volunteer and paid consultant.

the North Omaha Girls Club (nine were single and female, one was married and female);

(3) The Girls Club of Omaha has been actively engaged in a comprehensive program to reduce teenage pregnancies for at least five years;

(4) Rule 11 was developed by the executive director, Mary Heng-Braun, after two single staff members, Melanie Wells and Jody Price, became pregnant in 1981;

(5) The rule was also adopted in response to the reaction of a fourteen year old Girls Club member (Sheila Brown) stating that she wanted to have a baby as cute as Marchese (Melanie Well's baby) and that shortly thereafter Ms. Brown did become pregnant. And, the rule was adopted in response to the reaction of another member, Sue Miller, who became upset when she learned of Ms. Price's pregnancy;

(6) Ms. Heng-Braun discussed the policy with several staff members, and her personal attorney before she decided to promulgate the rule;

(7) The Girls Club of Omaha considered the alternatives of transferring the duties of a single employee who becomes pregnant to areas away from the girls ("non-contact areas"), and of providing for a leave of absence. It was concluded that to transfer duties to a "non-contact area" during the time that the pregnancy "shows" is not possible since there are no jobs at the Girls Club where an employee would not be in contact with the girls. It was also concluded that a

ed by black residents; (4) the executive director is a married white woman; (5) the executive director was given a six-week paid maternity leave; (6) another black single woman was fired pursuant to the policy after the plaintiff; (7) Ms. Kerrigan-Rawley, the white deputy director provided emotional support for many black staff members and in one case provided financial help; (8) Ms. Kerrigan-Rawley became pregnant while single and resigned very shortly before or very shortly after she knew of the pregnancy. Ms. Kerrigan-Rawley was married prior to the birth of her child and prior to returning to Girls Club of Omaha as a volunteer and paid consultant.

leave of absence from the time the girls would be able to discover (or see or find out about) the pregnancy until after the baby is born (approximately five to six months) would disrupt the close relationships which the girls develop with staff members and would not be workable;

(8) Ms. Kerrigan-Rawley announced the policy at a staff meeting on October 31, 1981;

(9) The plaintiff was at the October 31, 1981 meeting and heard Ms. Kerrigan-Rawley announce the rule;

(10) The Girls Club was acting pursuant to its normal procedure when the policy was announced and that the policy was effective from the date announced, October 31, 1981;

(11) The ratification of the policy by the Board of Directors on March 15, 1982, was in the normal course of business;

(12) After the plaintiff knew of the policy and before she became pregnant, she attended at least one fertility class at St. Joseph Hospital and kept a temperature chart to ascertain when it would be most likely that she could become pregnant;

(13) The plaintiff was well liked by the staff and the girls at the Girls Club;

(14) The plaintiff was fired solely because of her pregnancy; not because of premarital sexual activity and not because of inferior work;

(15) After the plaintiff was fired offers were made by staff members and board members to help the plaintiff find employment but the plaintiff did not avail herself of these offers;

(16) The plaintiff's NEOC and EEOC complaints were never amended to include claims of racial discrimination;

(17) Abortion is no more or no less probable in Nebraska for a black female than a white female (see supra note 26);

(18) Joy Lewis, a single black staff member, had an abortion after rule 11 was in effect in order to play basketball, not to keep her job;

(19) There is no evidence that the policy promotes abortion.

DISPARATE TREATMENT

Disparate treatment occurs when an employer treats some person less favorably than others because of race, color, religion, sex or national origin. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335-36 n. 15, 97 S.Ct. 1843, 1854-55 n. 15, 52 L.Ed.2d 396 (1977) (pattern and practice case of racial discrimination). Proof of discriminatory motive is critical, although in some situations it can be inferred from differences in treatment. *Id.*

The Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) established a method for allocating the burdens of production in a disparate treatment case.⁴¹ By its own terms *McDonnell Douglas*, did not establish an exclusive method for the order and allocation of proof. *Id.* at 802, n. 13, 93 S.Ct. 1824, n. 13. The ultimate inquiry in a disparate treatment case, however fashioned, is whether the defendant intentionally discriminated against the plaintiff. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715,

These burdens have been adapted to discharge cases and promotion cases. See, e.g., *Worthy v. United States Steel Corp.* 616 F.2d 698 (3rd Cir. 1980), *Davis v. Lambert of Ark. Inc.*, 781 F.2d 658 (8th Cir.1986) (failure to recall discharge); *Royal v. Missouri Hwy. and Transp. Comm'n*, 655 F.2d 159, 163 (8th Cir.1981); But see, *King v. Yellow Freight*, 523 F.2d 879, 882 (8th Cir. 1975), (the Eighth Circuit indicated that the allocation of burdens has doubtful application in a discharge case).

103 S.Ct. 1478, 1481-82, 75 L.Ed.2d 403 (1983). In a disparate treatment case the burden of showing intentional discrimination remains with the plaintiff. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089, 1095, 67 L.Ed.2d 207 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. at 805-06, 93 S.Ct. at 1825-26. As a practical matter, a disparate treatment case comes down to whether the plaintiff can meet her burden of proving that the defendants' articulated non-discriminatory reason is not the real reason she was terminated.

[15] The plaintiff: (1) having identified herself as a member of a protected group under Title VII, a black female; (2) being qualified for the job; (3) being discharged from the job because of pregnancy; and, (4) having been replaced by a single non-pregnant black woman, made out a prima facie case of intentional discrimination. *Zuniga v. Kleberg County Hospital*, 692 F.2d 986, 991 (5th Cir.1982) (discrimination on the basis of pregnancy is prima facie evidence of a violation under Section 703(a)(2) of Title VII).⁴² This worked to shift the burden of production to the Girls Club to explain clearly the non-discriminatory reasons for its actions. *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 255-56, 101 S.Ct. at 1094-95. The defendants' burden is not a heavy one. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. *Id.*

The Court believes that the defendants' articulated reason for the rule, i.e., to provide positive role models in an attempt to discourage teenagers from becoming preg-

nant, is a legitimate, nondiscriminatory reason that was clearly explained. The Court finds, therefore, that the defendants have successfully rebutted the plaintiff's prima facie case. Finding this to be so, the burden shifted back to the plaintiff to show that the Girls Club's proffered reason for the rule was a pretext for discriminating against black women or single black women.

[16] The plaintiff's evidence of pretext generally tries to establish that the rule is a cover up for the Girls Club's "morality standard" which disapproves of black single mothers. To that end, the plaintiff tried to prove: (1) that the rule required intrusion into the staff members' private lives; (2) that less restrictive alternatives were available such as a leave of absence or transfer of duties; (3) that the rule is applied in an irrational manner, i.e., it applies to single pregnant women but not to single mothers; (4) that the rule promotes abortion and abortion is not a viable option for black women; (5) that the rule impacts black women more harshly; and (6) that ratification of the rule by the board of directors was an attempt to cover up animus toward the plaintiff.

The defendants' evidence was responsive to the plaintiff's claims of pretext and rebutted any suggestion of discriminatory intent on the part of the Girls Club. See *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 580, 98 S.Ct. 2943, 2951, 57 L.Ed.2d 957 (1978) (proof that employer's work force was racially balanced or contained disproportionately high percentage of minority employees is relevant to the issue of intent).⁴³ The plaintiff has failed

41. To establish a prima facie case on a disparate treatment claim the plaintiff has the burden of production to show: (1) membership in a protected group; (2) qualification for the job; (3) rejection; and (4) that the employer continued to seek applicants. *Id.* 411 U.S. at 802, 93 S.Ct. at 1824. The burden of production then shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* at 802, 93 S.Ct. at 1824. If the defendant carries its burden, the burden of production shifts back to the plaintiff to show that the defendants' stated reason was pretextual.

42. The defendants contend that the plaintiff was not qualified for the job because she was single and pregnant and that her job did not remain open but was filled with another black woman. The Court recognizes that the *McDonnell Douglas* formulation is not perfectly suited to this situation, but also notes, that the burden is quite light for a plaintiff in attempting to make a prima facie disparate treatment case. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 at 253, 101 S.Ct. 1089 at 1093-94, 67 L.Ed.2d 207 (1981).

43. The defendants proved the following: (1) The staff members were not questioned about a possible pregnancy unless there was a reasonable belief that the staff person was pregnant, and, the private lives of staff members was not a concern of the Girls Club; (2) For a discussion of alternatives, see Finding of Fact No. 7. See *Roller v. City of San Mateo*, 399 F.Supp. 358, 364 (N.D.Ca.1975), *aff'd*, 572 F.2d 1311 (9th Cir. 1977) (defendant's showing he had no light work available held sufficient to avoid a finding of discrimination). (3) The statistics do provide some evidence of discriminatory effect which

to meet her ultimate burden of establishing intentional discrimination.

DISPARATE IMPACT

The Supreme Court first applied the disparate impact theory in a sex discrimination case in *Nashville Gas Co. v. Satty*, 434 U.S. 136, 98 S.Ct. 347, 54 L.Ed.2d 356 (1977) (effect of neutral policy denying seniority to women returning from pregnancy leave).

Ostensibly, claims of disparate treatment require proof of discriminatory intent, while claims of disparate impact require only proof of discriminatory effect. *Teamsters v. United States*, 431 U.S. at 336 n. 15, 97 S.Ct. at 1854-55 n. 15. However, the distinction may be elusive. *Washington v. Davis*, 426 U.S. 229, 254, 96 S.Ct. 2040, 2054, 48 L.Ed.2d 597 (1976) (Stevens, J. concurring) (class-wide claim of disparate impact). To establish a prima facie case of disparate impact

[P]laintiffs must show that a facially neutral employment practice has a significantly adverse impact on a protected group. Once that showing is made, the burden shifts to the employer to demonstrate that the practice has a manifest relationship to the employment in question and is justified by business necessity. If the employer meets this burden, the plaintiffs may then show that other practices, which lack a similarly discriminatory effect, would satisfy the employer's legitimate interests. Such a showing would be evidence that the employer was using the practice as a mere pretext for discrimination. See, e.g., *Connecticut v. Teal*, 457 U.S. 440, 446-47 [102 S.Ct. 2525, 2530-31, 73 L.Ed.2d 130] (1982); *Albermarle Paper Co. v. Moody*,

may be evidence of intent. However, in order to make a prima facie case of disparate treatment without more than statistics, the data must be very significant and show a gross disparity (which the plaintiff has failed to show.) See *infra* note 45. *Page v. U.S. Industries, Inc.*, 726 F.2d at 1046.

The Court also found that abortion is not less likely for black females. (Finding of Fact No. 17) (testimony of Kenneth Goc); that there is no evidence that the policy promotes abortion; and

422 U.S. 405, 425 [95 S.Ct. 2362, 2375, 45 L.Ed.2d 230] (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-32 [91 S.Ct. 849, 853-54, 28 L.Ed.2d 158] (1971).

Eastley v. Anheuser-Busch, 758 F.2d 251 (8th Cir.1985).

There are various methods of establishing the adverse impact of a purportedly neutral rule. It is the burden of a plaintiff to show that the policy at issue has a significant effect on the group in question. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 230 (1975) (test had greater impact upon black applicants). Adequate proof of adverse impact requires that a plaintiff direct the data toward those class members who are qualified for the job in the relevant labor market of the actual geographic area from which the defendant draws employees. *Donnell v. General Motors Corporation*, 576 F.2d 1292, 1297-98 (8th Cir.1978).

In *Green v. Missouri Pacific Railroad Co.*, 523 F.2d 1290 (8th Cir.1975), the Court identified three ways of establishing disproportionate impact. The plaintiff may attempt to determine: (1) whether blacks (or women or black women) as a class or at least blacks (or women or black women) in a specified geographical area are excluded by the suspect practice at a substantially higher rate than whites (or men); (2) the percentages of class member applicants [employees] that are actually excluded by the practice or policy; or (3) the level of employment of blacks (black women) by the employer in comparison with the percentage of blacks in the relevant labor market or geographic area. 523 F.2d at 1293-94.

Under the *Green* formulation, the plaintiff clearly cannot make a case of impact

that ratification of the rule was in accordance with normal corporate practice (Finding of Fact No. 11).

The Court notes that the policy may not resolve the entire problem, but the Court is mindful that the purpose of the rule is the resolution of a serious social problem. Cf. *Williamson v. Lee Optical*, 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563 (1950) (a problem may be resolved "one step at a time." *id.*).

Cite as 629 F.Supp. 925 (D.Neb. 1984)

under method three. The general population statistics indicate the geographic area surrounding Omaha is approximately twelve percent black and that the Girls Club of Omaha employs a staff which is approximately sixty-five percent black. The plaintiff's statistics are also of doubtful relevance under method two because there has been only three instances in which the policy has been applied since it was announced (two black women have been terminated and one white female voluntarily left as a result of becoming pregnant while single).

[17] Giving the plaintiff every benefit, the Court assumes that she has generally tried to prove up her claim under method one, i.e., that under the rule black females of child bearing age within the Douglas County, Nebraska, area (and in some cases Nebraska) would either not be hired or would be terminated at a substantially higher rate than white females in the same

44. The plaintiff's statistical data include: Nebraska 1978 Statistical Report of Abortions (P-45-1); Nebraska 1983 Statistical Report of Abortion (P-45-2); Percentage of Abortions of Whites As Compared to Blacks (P-45-3); Omaha Douglas County Birth Reports 1978 and 1979 (P-45-6 and P-45-7); Statewide 1978 Abortions Never Married (P-47-1); Nebraska Birth Order Out-of-Wedlock 1976 (P-47-7); Out-of-Wedlock Births as a Percentage of All Births (P-47-3); Teenage Birth—Douglas County (P-47-4); Adolescent Pregnancy in Nebraska (P-47-8); Summary of Statistics—Mr. Goc (P-318); Births to Unmarried Women—Unwanted Births—U.S. National Center for Health Statistics (P-49-1); Birth Statistics 1983 (P-49-7).

45. The testimony indicates that the Girls Club of Omaha has hired part-time personnel as young as sixteen. The statistics which were utilized include fifteen year old females. Since the age of employment at the Girls Club is not fixed by any particular policy, the Court has considered these statistics in reaching its conclusion that a prima facie case exists. (P-47-2).

The evidence shows: (1) that in 1981 the fertility rate for teenage whites in the Douglas County area was 36.2 per thousand (or 3.6 per hundred) as compared to 107.1 per thousand for non-white teenagers (or 10.7 per hundred) (testimony Kenneth Goc); with respect to teenagers (age fifteen to nineteen), the fertility rate of black teenagers is approximately 2 1/2 times greater than that of whites. With respect to the

area." The Court finds that because of the significantly higher fertility rate among black females the rule banning single pregnancies would impact black women more harshly.⁴⁴

The plaintiff thus having established disparate impact shifts the burden to the Girls Club to either refute the existence of disproportionate impact,⁴⁵ justify the policy as a business necessity (job related)⁴⁶ or establish the existence of a statutory bona fide job occupation qualification (bfoq).⁴⁸

[18] The defendants did not seriously attempt to rebut the statistical evidence put forward by the plaintiff. Rather, they focused on establishing the policy as a business necessity or a bfoq. In order for a defendant to establish business necessity, it must show a close nexus between the policy in question and a "substantial end goal" of the employer. *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir.

overall fertility rates, whites as a class are likely to become pregnant approximately seventy percent as often as blacks. The defendants did not rebut these statistics.

Given the fact that the defendants did not establish any special qualifications for employment at the Girls Club, the Court believes that the general population statistics for persons 16 and over may be used as a basis for comparison (general population of area shows 12.6% of population is black).

From these facts, it is possible, even in the absence of more specific data, to conclude that the impact of the rule would fall more harshly on black women of child-bearing age.

46. *Ramirez v. City of Omaha*, 538 F.Supp. 7, 22 (D.Neb.1981), *aff'd*, 678 F.2d 751 (8th Cir.1982) (rebuttal of prima facie case—court held failure to introduce records of white candidates resulted in failure to make prima facie case).

47. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971) ("If an employment practice which operates to exclude Negroes (black females) cannot be shown to be related to job performance, the practice is prohibited.")

48. The bfoq exception applies in those situations where "sex ... is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise" 42 U.S.C. § 2000e-2(c).

1971).⁴⁹ A defendant must show, at the very least, that there is a "positive relationship" between the rule or policy and the employer's program. *Washington v. Davis*, 426 U.S. at 250, 96 S.Ct. at 2052. Likewise, the burden on the defendant when asserting a statutory bfoq is essentially the same as that imposed under the business necessity test. The bfoq must be related and necessary to the operation of the defendant's business. *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079, 1087 (8th Cir.), cert. denied, 446 U.S. 966, 100 S.Ct. 2942, 64 L.Ed.2d 525 (1980) (no basis for bfoq defense where hiring women at prison would not undermine the administration); *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir.), cert. denied, 404 U.S. 950, 92 S.Ct. 275, 30 L.Ed.2d 267 (1971) (administrative necessity is required to satisfy bfoq).

Once it is shown that the employment policy is job related, the plaintiff may then show that the proffered explanation is not job related; rather, that it is pretext. The plaintiff may do this by showing that there are other methods which would serve the employer's interests without creating a similar discriminatory effect. *Robinson v. Lorillard Corp.*, 444 F.2d at 795.

The Girls Club has established by the evidence that its only purpose is to serve young girls between the ages of eight and eighteen and to provide these women with exposure to the greatest number of available positive options in life. The Girls Club has established that teenage pregnancy is contrary to this purpose and philosophy. The Girls Club established that it honestly believed that to permit single pregnant staff members to work with the girls would convey the impression that the Girls Club condoned pregnancy for the girls in the age group it serves. The testimony of board

members Woody Bradford, Marian Andersen and Eileen Wirth made clear that the policy was not based upon a morality standard,⁵⁰ but rather, on a belief that teenage pregnancies severely limit the available opportunities for teenage girls. The Girls Club also established that the policy was just one prong of a comprehensive attack on the problem of teenage pregnancy. The Court is satisfied that the defendants have met the burden of showing that a manifest relationship exists between the Girls Club's fundamental purpose and its single pregnancy policy.

In *Harvey v. Young Women's Christian Ass'n*, 533 F.Supp. 949 (W.D.N.C.1982) an almost identical situation occurred. In that case a twenty-two year old single black female was employed by the YWCA as a program director. Approximately one and a half years after she became employed at the YWCA, the woman became pregnant. When asked by the executive director how she could continue to work with teenagers, being pregnant and unmarried, the woman responded by saying that she "could offer herself to the teenagers in her condition of unwed pregnancy, as a role model of an alternative lifestyle." *Id.* at 952. The woman was fired. Judge Potter upheld the dismissal as a legitimate business necessity. *Id.* at 956.

The plaintiff in this case seeks to distinguish the *Harvey* case by pointing out that the plaintiff in *Harvey* was espousing an alternative lifestyle, while the plaintiff in this case is not espousing anything. This representation does not comport with the evidence. On several occasions during the trial the plaintiff's attorneys asked witnesses about the possibility of the plaintiff, or other single pregnant women, becoming positive role models for the girls at the

50. *Cf. Dotter v. Wahlert High School*, 483 F.Supp. 266, 271 (N.D.Ia.1980) where court held that Catholic high school could not rely on a bfoq defense when it fired a single pregnant teacher for immoral conduct.

49. There must be more than a mere rational relationship. *Washington v. Davis*, 426 U.S. 229, 247, 96 S.Ct. 2040, 2051, 48 L.Ed.2d 597 (1976); *Dothard v. Rawlinson*, 433 U.S. 321, 329, 97 S.Ct. 2720, 2726-27, 53 L.Ed.2d 786 (1977), quoting *Griggs v. Duke Power Co.*, 401 U.S. at 432, 91 S.Ct. at 854 (manifest relationship); *Donnell v. General Motors Corp.*, 576 F.2d 1292, 1299 (8th Cir.1978) (burden is heavy).

Girls Club by showing them that single women who are educated can become pregnant and can also support themselves and their children. While a single pregnant working woman may, indeed, provide a good example of hard work and independence, the same person may be a negative role model with respect to the Girls Club objective of diminishing the number of teenage pregnancies. In the Girls Club setting, the pregnancy may well be viewed by teenage women as a "tacit" approval by the Girls Club of teenage pregnancies. Accordingly, the Court finds that the rule is necessary and adequately related to the core purpose of the Girls Club.⁵¹

[19] The plaintiff attempted to meet her final burden by showing that the rule is not a business necessity, i.e., that it is merely pretextual. The thrust of the plaintiff's argument is two-fold: (1) that there are less restrictive methods of accomplishing the Girls Club's mission, and (2) there is no empirical data to support the use of the rule i.e., there is no evidence that it works. The Court has previously discussed the first point—the implementation of a less restrictive policy—and found that alternatives had been investigated and determined to be administratively impossible. See *Roller v. City of San Mateo*, 399 F.Supp. at 363. With respect to the second point, the plaintiff argues that empirical data is required to validate job relatedness. The law indicates otherwise. In *Davis v. City of Dallas*, 777 F.2d 205 (5th Cir.1985), where the relationship between a college

education and a police officer's performance was at issue, the Court stated that empirical data was not required because it is virtually impossible to measure maturity, judgment and ability. The Court did require validation of the educational requirement through an expert's opinion.

Here we have a rule made in an attempt to limit teenage pregnancies, and no data to support a finding that the rule either does, or does not, accomplish this purpose. The plaintiff's expert witness, Dr. McAdoo, testified that in her view, poor economic conditions are the greatest contributor to teenage pregnancy and the only way to resolve the problem was to deal with the economic issues, i.e., through education and training. The defendants' expert, Dr. Nancy Perry, testified that she agreed with Dr. McAdoo's assessment, but also believed that because teenagers have a need for "significant others" outside the home and are likely to develop close relationships such as those which are fostered at the Girls Club, that the role modeling rule could be (and in her opinion is) another viable way to attack the problem of teenage pregnancy.⁵²

This Court believes that the policy is a legitimate attempt by a private service organization to attack a significant problem within our society. The evidence has shown that the Girls Club did not intentionally discriminate against the plaintiff and that the policy is related to the Girls Club's central purpose of fostering growth and maturity of young girls. The Court finds

51. Because the Court decides that the defendants have met their burden on the basis of business necessity, it is not necessary to determine whether the evidence would satisfy a bfoq, although presumably it would.

52. The plaintiff suggests that Ms. Simmons and Ms. Chambers who became pregnant after finishing high school and some college (Ms. Chambers at twenty-two and Ms. Simmons at twenty-five) could act as role models to teach the girls to delay pregnancy until after the completion of their education. The defendants' expert, Dr. Nancy Perry conceded that while this was possible, it was more likely that the girls who had come to identify themselves with various staff members would receive a different message.

Dr. Perry stated that girls between the ages of eleven and thirteen years are at a point in life when their self esteem is at its lowest, their decision-making is most impaired and their susceptibility to pressure from peers and role models is the greatest. Dr. Perry also testified that based upon her research she concluded that role modeling with a non-family member is particularly important where the role model shares certain characteristics with the observer, such as race and sex. Dr. Perry testified that identification with the role model is likely to be much stronger at this time. She concluded that the young women are likely to do what they observe without making complex distinctions.

that the rule is not a violation of Title VII, either on the basis of disparate treatment, or disparate impact. The Court emphasizes, however, that this decision is based upon the unique mission of the Girls Club of Omaha, the age group of the young women served, the geographic locations of the Girls Club facilities, and the comprehensive and historical methods the organization has employed in addressing the problem of teenage pregnancy. Therefore, this decision will not be applicable in many other situations which this Court could envision. The case should be dismissed.

A separate order in accordance with this Memorandum shall be entered this date.



Milton HOWARD, et al., Plaintiffs,

v.

Ken MALCOLM, et al., Defendants.

No. 85-123-CIV-3.

United States District Court,
E.D. North Carolina,
Fayetteville Division.

Feb. 12, 1986.

Migrant farm workers initiated action alleging numerous violations of Migrant and Seasonal Agricultural Worker Protection Act, Fair Labor Standards Act, Federal Insurance Contributions Act, and Federal Unemployment Tax Act. Defendant moved to dismiss or, alternatively, for summary judgment. The District Court, James C. Fox, J., held that defendant was "owner" of facility used to house migrant farm workers within purview of housing provisions of Migrant and Seasonal Agricultural Worker Protection Act.

Motion for summary judgment denied.

1. Licenses ¶11(5)

Housing provisions of Migrant and Seasonal Agricultural Worker Protection Act [Migrant and Seasonal Agricultural Worker Protection Act, § 203(a), (b)(1), 29 U.S.C.A. § 1823(a), (b)(1)] applies to any person who owns or controls housing which is used by migrant workers; an employment relationship between migrant workers and person is not required.

2. Licenses ¶11(5)

Individual, who admitted that he rented housing to farm labor contractor, was "owner" of a facility used to house migrant farm workers within purview of housing provisions of Migrant and Seasonal Agricultural Worker Protection Act [Migrant and Seasonal Agricultural Worker Protection Act, § 203(a), (b)(1), 29 U.S.C.A. § 1823(a), (b)(1)].

See publication Words and Phrases for other judicial constructions and definitions.

Robert J. Willis, Farmworkers Legal Services of North Carolina, Raleigh, N.C., for plaintiffs.

Charles F. Blackburn, Henderson, N.C., for Ken Malcolm and Debra Malcolm.

Robert S. Griffith, II, Newton Grove, N.C., for David Godwin.

Frank Blanding, pro se.

ORDER

JAMES C. FOX, District Judge.

Plaintiffs, six migrant farmworkers, initiated this action by complaint, filed September 23, 1985, alleging numerous violations of the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), 29 U.S.C. § 1801 *et seq.*, the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, the Federal Insurance Contributions Act (FICA), 26 U.S.C. § 3101 *et seq.*, and the Federal Unemployment Tax Act, 26 U.S.C. § 3301 *et seq.* Plaintiffs also seek class certification on three claims relating to nonpayment of FICA and FUTA payroll taxes by defendant Blanding and the Mal-

colms pursuant to Fed.R.Civ.P. 23(b). This matter is before the court on defendant Godwin's motion to dismiss or, alternatively, for summary judgment, to which plaintiffs have responded. Thus, the matter is now ripe for disposition.

Plaintiffs have alleged only one claim for relief against Godwin, substantively claiming that:

40. Defendant David Godwin has intentionally violated the AWPA and its implementing regulations in that he:

a. failed to ensure that the housing used by the defendant Blanding to house the named plaintiffs in 1985 met the applicable state and federal substantive safety and health standards during the entire time it was used to house those named plaintiffs in violation of 29 U.S.C. § 1823(a); and

b. permitted the named plaintiffs to occupy the housing used by defendant Frank Blanding to house them in 1985 before defendant Blanding had obtained and posted a certificate indicating that the housing met applicable federal safety and health standards set forth at 29 C.F.R. § 1910.142 in violation of 29 U.S.C. § 1823(b)(1).

In support of this claim, plaintiffs further allege that:

(1) They "were migrant farmworkers within definition of that term found in 29 U.S.C. § 1802(8) at all times relevant to this action."

(2) Defendant David Godwin is a North Carolina resident who operates and has operated a farming business in Sampson County, North Carolina, 1984 and 1985. Defendant Godwin owned the migrant labor camp in Sampson County that was used to house the plaintiffs during their employment with the other defendants. Defendant Godwin rented that housing to Frank Blanding during that period of time.

(3) In or about the late spring or summer of 1985, the named plaintiffs were jointly employed by the defendants to perform farm labor in the fields of the defendants listed in paragraph 8 [defendants Ken

and Debra Malcolm] above for varying periods of time. The wages which the plaintiffs received free and clear from those defendants for that work were less than those required by the FLSA for the work that they performed.

(4) At all times that the named plaintiffs were employed by defendants Blanding and Ken and Debra Malcolm, they were housed in migrant farmworker housing owned by David Godwin and rented by Frank Blanding that was in violation of the substantive requirements of applicable federal and state migrant housing standards; and

(5) Defendants Frank Blanding and David Godwin permitted the named plaintiffs to occupy the housing used by Blanding to house the plaintiffs without obtaining and posting a certificate from an appropriate state or federal agency indicating that the housing met applicable federal safety and health standards. Those defendants never obtained such a certificate.

Complaint at paragraphs 7, 9, 21, 22, and 29.

Defendant contends that no agricultural employment relationship existed between plaintiffs and defendant, thus, plaintiffs' AWPA housing claim against him must be dismissed. Plaintiffs argue that the housing provisions of the AWPA apply to any person who owns or controls the housing which is used by migrant workers and that an employment relationship between plaintiffs and defendant is not required. The court has covered this terrain before, having recently considered the same issue in *Haywood v. Barnes*, 109 F.R.D. 568 (E.D. N.C.1986). For the reasons which follow, the court finds plaintiffs' argument persuasive.

Initially, the court notes that defendant's motion is couched in the alternative—to dismiss or for summary judgment. Normally where, as here, defendant has moved for summary judgment immediately after the filing of the case prior to any relevant discovery, a motion for summary judgment should not be considered. See *Tarleton v.*

362. We note exercise of section 552(b) is subject to section 362 as well as section 544. *In re Casbeer*, 793 F.2d 1436, 1442-43 (5th Cir.1986); *In re Engstrom*, 33 B.R. 369, 373 (Bankr.S.D.1983). However, since a trustee has not been appointed under section 544(b), and FNB has never moved for such appointment, we address whether Saline may sequester the rents and profits without moving the bankruptcy court to set aside the stay.

[4] After the Mahlochs filed and the automatic stay went into effect, Saline did not make any efforts to perfect until September 28, 1983, when it filed petitions to sequester rents and profits. We must assume the amount that has accrued since Saline filed its petitions to sequester is a readily identifiable amount which the bankruptcy court can easily determine. Furthermore, since the Mahlochs have not been involved with the proceedings, and, in fact, the land has been sold, the money requested by Saline is not necessary to a successful reorganization under chapter 11. Here Saline does not seek to go into the state court, rather it simply requests the bankruptcy court to sequester the rents in the proceeding before it. Accordingly, we hold that the stay need not be formally lifted in order to award the rents and profits to Saline from the date after it filed petitions to sequester rents and profits. See *In re Village Properties, Ltd.*, 723 F.2d at 445-447 (while interest was not a lien until perfected, the court recognized that a petition to sequester rents and profits would perfect mortgagee's interest even if filed after the automatic stay was effective); *Consolidated Capital Income Trust v. Colter, Inc.*, 47 B.R. 1008 (D.Col.1985) (a judgment lien creditor can perfect its interest post-petition); *In re Oak Glen R-Vee*, 8 B.R. 213, 216 (Bankr.C.D.Cal.1981) (Benefi-

ciary of trust filed action to require debtor to cease spending and to account for "all rents, income, issues, and profits," 8 B.R. at 215, but in view of equity cushion, debtor was permitted to retain rents and profits for a reasonable time. Filing of complaint, however, was sufficient to enable court to grant request to sequester rents and profits); *contra In re Gotta*, 47 B.R. 198 (Bankr.W.D.Wis.1985) (since Wisconsin requires actual possession in order to perfect interest in rents and profits, and creditor could not obtain actual possession during pendency of stay, an interest in rents and profits cannot be perfected post-petition. 47 B.R. at 203. The *Gotta* court observed, however, that the result might be different in other jurisdictions where actual possession of property was not required to perfect an interest in rents and profits.)¹¹

We therefore affirm the judgment of the district court that the Saline's lien was not valid prior to its motion to sequester rents and profits made September 28, 1983, in the bankruptcy court; the district court erred in avoiding the perfection of the lien under section 544 and the court may allow sequestration of the rents and profits subsequent to September 28 as a secured interest in the name of the Saline State Bank.

Each party to pay its own costs.



11. We note that the instant case and *In re Oak Glen R-Vee*, 8 B.R. at 216, and *Consolidated Capital Income Trust v. Colter, Inc.*, 47 B.R. at 1011, are distinctly different from *United States of America v. Landmark Park & Assoc.*, and *In re Engstrom*. In the latter cases, the basis for permitting a secured creditor to perfect despite the automatic stay was federal law. In *Land-*

mark Park and Engstrom, there were federal contracts and the party seeking to perfect was the United States government. Since it was a federal contract, the effect of a default was determined by federal law and not the law of the underlying state. The instant case, however, is determined under state law as is required by *Butner*.

Crystal CHAMBERS, in her own Behalf
and in behalf of her minor daughter,
Ruth Chambers, Appellants,

v.

The OMAHA GIRLS CLUB, INC., a Nebraska Corporation; Mary Heng-Braun, Director; Mrs. Harold W. Andersen, and 80 other members of the Board of Directors, both individually and in their official capacities; the Omaha World Herald, a Nebraska Corporation; Harold W. Andersen, President; John Gottschalk, Vice President; Woodson Howe, Vice President, both individually and in their official capacities; the Nebraska Equal Opportunity Commission; Lawrence Myers, Executive Director; Daniel Wherry, Chairman; Carmen Gottschalk, Commissioner; Rose Marie Brandt, Commissioner; Peggy Schmidt, Commissioner; Frances Dunson, Commissioner; Patricia Dorwart, Commissioner; Susan Gorrea, Commissioner; Paul Douglas, former Attorney General of Nebraska; Charles Thone, former Governor of Nebraska, all both individually and in their official capacities; Allan Lozier; Clarence Barbee; N.P. Dodge, Jr.; Dennis R. Woods; Dana Bradford, III; Richard Kizer; Kermit Brashear, II; Eileen Wirth, members of the Board; Bobbie Kerrigan, Deputy Director, and the active members of the Girls Club Board, Appellees.

No. 86-1447.

United States Court of Appeals,
Eighth Circuit.

Submitted March 9, 1987.

Decided Dec. 3, 1987.

Rehearing Denied Feb. 25, 1988.

Rehearing En Banc Denied Feb. 25, 1988.*

Unmarried staff member of private social club for girls brought discrimination action following her discharge under club's "negative role model" policy prohibiting continued employment of unmarried staff members who either became pregnant or caused pregnancy. The United States District Court for the District of Nebraska,

* Editor's note: An opinion dissenting from the

629 F.Supp. 925, Clarence Arlen Beam, Chief Judge, dismissed action, and staff member appealed. The Court of Appeals, Wollman, Circuit Judge, held that: (1) role model rule was justified by business necessity because there was manifest relationship between club's fundamental purpose and rule, and (2) role model rule qualified as bona fide occupational qualification.

Affirmed.

McMillian, Circuit Judge, dissented and filed opinion.

1. Civil Rights ⇐9.10

Plaintiff seeking to prove discrimination under disparate impact theory must show that facially neutral employment practice has significant adverse impact on members of protected minority group. Civil Rights Act of 1964, §§ 701(k), 703(a), as amended, 42 U.S.C.A. §§ 2000e(k), 2000e-2(a).

2. Civil Rights ⇐43

Once plaintiff has shown that facially neutral employment practice has significant adverse impact on members of protected minority group, employer has burden of showing that practice has manifest relationship to employment in question and is justifiable on ground of business necessity. Civil Rights Act of 1964, §§ 701(k), 703(a), as amended, 42 U.S.C.A. §§ 2000e(k), 2000e-2(a).

3. Civil Rights ⇐9.10

Even if employer accused of employment discrimination under disparate impact theory shows that discriminatory employment practice is justified by business necessity, plaintiff may prevail by showing that other practices would accomplish employer's objectives without attendant discriminatory effects. Civil Rights Act of 1964, §§ 701(k), 703(a), as amended, 42 U.S.C.A. §§ 2000e(k), 2000e-2(a).

4. Civil Rights ⇐9.14

"Role model rule" of private social club for girls, which was used as basis for discharge of unmarried staff member when she became pregnant, was justified by business necessity because there was manifest denial of rehearing en banc will be published.

relationship between club's fundamental purpose and rule. Civil Rights Act of 1964, §§ 701(k), 703(a), as amended, 42 U.S.C.A. §§ 2000e(k), 2000e-2(a).

5. Civil Rights — 9.14

Private social club for girls which used "role model rule" as basis for discharge of unmarried staff member who became pregnant was not required to grant staff member leave of absence or transfer her to position that did not involve contact with club's members as alternative to discharge; employing temporary replacement would have required six months of on-the-job training, use of temporary replacements would have disrupted atmosphere of stability that club attempted to provide, and transfer to "no contact" position was impossible because there were no positions at club that did not involve contact with club members. Civil Rights Act of 1964, §§ 701(k), 703(a), as amended, 42 U.S.C.A. §§ 2000e(k), 2000e-2(a).

6. Civil Rights — 9.14

"Role model rule" of private social club for girls, which was used as basis for discharge of unmarried staff member who became pregnant, was bona fide occupational qualification; role model rule had manifest relationship to club's fundamental purpose, and there were no workable alternatives to rule. Civil Rights Act of 1964, § 703(e), as amended, 42 U.S.C.A. § 2000e-2(e).

Mary Kay Green, Omaha, Neb., for appellant.

1. The Club's objectives are to:

1. Create a safe and stable environment that fosters trusting relationships and individual value development through interaction with peers and adults.
2. Develop and implement programs to enable girls to build positive self esteem through skill development and application.
3. Make available quality health programs so girls may understand and deal with their own health problems and health maintenance.
4. Establish a climate where girls participate in and experience the decision making process and have broad opportunity to take leadership roles.

Robert D. Mullin, Omaha, Neb., for Omaha Girl's Club.

Sharon Lindgren, Asst. Atty. Gen., Lincoln, Neb. for other appellees.

Before McMILLIAN, BOWMAN, and WOLLMAN, Circuit Judges.

WOLLMAN, Circuit Judge.

Crystal Chambers appeals the district court's orders and judgment disposing of her civil rights, Title VII employment discrimination, and pendent state law claims. Chambers' claims arise from her dismissal as an employee at the Omaha Girls Club on account of her being single and pregnant in violation of the Club's "role model rule." The primary issue in this appeal is whether the Club's role model rule is an employment practice that is consistent with Title VII because it is justifiable as a business necessity or a bona fide occupational qualification.

1

The Omaha Girls Club is a private, non-profit corporation that offers programs designed to assist young girls between the ages of eight and eighteen to maximize their life opportunities.¹ Among the Club's many activities are programs directed at pregnancy prevention. The Club serves 1,500 members, ninety percent of them black, at its North Omaha facility and 500 members, fifty to sixty percent of them black, at its South Omaha facility. A substantial number of youngsters who are not Club members also participate in its programs. The Club employs thirty to thirty-five persons at its two facilities; all of the

5. Provide opportunities for girls to explore the full range of their personal opinions in family roles and career choices in order to take control of their lives.
 6. Encourage a knowledge and understanding of the various cultures in our society. Promote a broad view of responsibility as a citizen of a larger community through education and civic activity.
 7. Encourage both individual and group responsibility.
- Record at 30.

non-administrative personnel at the North Omaha facility are black, and fifty to sixty percent of the personnel at the South Omaha facility are black.

The Club's approach to fulfilling its mission emphasizes the development of close contacts and the building of relationships between the girls and the Club's staff members. Toward this end, staff members are trained and expected to act as role models for the girls, with the intent that the girls will seek to emulate their behavior. The Club formulated its "role model rule" banning single parent pregnancies among its staff members in pursuit of this role model approach.²

Chambers, a black single woman, was employed by the Club as an arts and crafts instructor at the Club's North Omaha facility. She became pregnant and informed her supervisor of that fact. Subsequently, she received a letter notifying her that because of her pregnancy her employment was to be terminated. Shortly after her termination, Chambers filed charges with the Nebraska Equal Opportunity Commission (NEOC) alleging discrimination on the basis of sex and marital status. The

2. The Club's personnel policies state the rule as follows:

MAJOR CLUB RULES

All persons employed by the Girls Club of Omaha are subject to the rules and regulations as established by the Board of Directors. The following are not permitted and such acts may result in immediate discharge:

11. Negative role modeling for Girls Club Members to include such things as single parent pregnancies.

Record at 28.

3. As the case caption indicates, Chambers also brought this action on behalf of her daughter Ruth, the child born of the pregnancy that brought about this litigation. The district court dismissed Ruth Chambers for lack of standing. Chambers challenges the district court's conclusion on the standing issue in this appeal. See *infra* at 704-705.

4. Chambers brought this action during the pendency of her appeal to the Equal Employment Opportunity Commission's (EEOC's) District Office. The EEOC later found reasonable cause to believe that Chambers' charge of employment discrimination was true, but did not enter into a conciliation agreement with or bring a civil action against the Club. Chambers

NEOC found no reasonable cause to believe that unlawful employment discrimination had occurred. Chambers³ then brought this action in the district court seeking injunctions and damages.⁴

Chambers ultimately alleged, after a series of amendments to her complaint, that her rights under the first, fifth, ninth, and fourteenth amendments had been violated. She asserted civil rights claims under 42 U.S.C. §§ 1981, 1983, 1985, 1986, and 1988, and state law claims for bad faith discharge, defamation, invasion of privacy, intentional infliction of emotional distress, intimidation, and conspiracy to deprive her of her livelihood. She also alleged violations of Title VII. Chambers named as defendants numerous organizations and individuals associated with those organizations: the Club, its director, deputy director, and board of directors; the *Omaha World Herald* newspaper and three of its officers; the NEOC, its executive director, and its commissioners; Charles Thone, the Governor of Nebraska; and Paul Douglas, the Attorney General of Nebraska.⁵

On October 19, 1983, the district court⁶ issued an order dismissing Chambers' sec-

amended her complaint to add the employment discrimination claims under Title VII after receiving a right-to-sue letter from the EEOC pursuant to 42 U.S.C. § 2000e-5(f)(1) (1982).

5. Several of the defendants were named as parties to this case primarily on the basis of Chambers' allegations that they were involved in a conspiracy to deprive her of her rights in violation of section 1985(3), section 1986, and state law. Although Chambers appeals the various determinations of the district court rejecting her conspiracy claims, see *infra* at 15-16, we find it unnecessary for the purposes of this opinion to recour in detail the alleged facts in support of these claims. Stated generally, Chambers alleged that the spouses of different *Omaha World Herald* officers were members of the NEOC and the Club's board of directors, that they caused the proceedings before the NEOC to be prejudiced and caused an editorial supporting the role model rule to be published in the *Omaha World Herald*, and that public officials knew of or aided the alleged conspiratorial activities.

6. The Honorable Warren K. Urbom, United States District Judge for the District of Nebraska. On December 31, 1984, Judge Urbom granted Chambers' motion for his recusal. All orders entered after that date and referred to in this

tion 1983 claim against the Club,⁷ finding the NEOC absolutely immune from liability under section 1983, dismissing Governor Thone and Attorney General Douglas for failure to state a claim against them, and dismissing all of the state law claims except the conspiracy and intimidation claims. On November 7, 1985, the district court entered an order granting the motion of the *Omaha World Herald* for summary judgment on the section 1985(3) and state conspiracy claims against it. On January 6, 1986, the matter went to trial. The claims remaining against the Club at the time of trial included: (1) conspiracy to deprive Chambers of her rights in violation of 42 U.S.C. § 1985(3), (2) conspiracy in violation of state law, (3) intentional race discrimination in violation of 42 U.S.C. § 1981, and (4) a combination of race and sex discrimination in the course of employment in violation of 42 U.S.C. § 2000e-2(a).⁸ At the close of the plaintiff's case the court directed a verdict in favor of the Club on the section 1985(3), section 1981, and state conspiracy claims. The court explained its grounds for directing the verdict and announced its judgment

opinion were issued by The Honorable C. Arlen Beam, Chief Judge, United States District Court for the District of Nebraska.

7. Hereinafter we refer to the Club defendants collectively as the "Club." Similarly, we will refer to the other groups of defendants as the "*Omaha World Herald*" and the "NEOC."

8. Chambers voluntarily dismissed her claim under the free exercise clause of the first amendment. The district court did not consider Chambers' other constitutional claims. Chambers challenges the district court's failure to do so in this appeal. See *infra* at 704-705. The district court also dismissed Chambers' state claim for intimidation.

9. Neither party challenges the district court's description of Chambers' Title VII claim as based on a "combination of race and sex discrimination." *Chambers*, 629 F.Supp. at 944. The court also noted that it was concerned with race discrimination "only insofar as [the role model rule] may have an impact upon the class of black women." *Id.*

10. 42 U.S.C. § 2000e-2(a) (1982) provides:

It shall be an unlawful employment practice for an employer—

in favor of the Club on the Title VII claims in its order of February 11, 1986. *Chambers v. Omaha Girls Club*, 629 F.Supp. 925 (D.Neb.1986).

II

We turn first to the district court's determination of the Title VII questions. The district court examined Chambers' allegations of employment discrimination⁹ in violation of 42 U.S.C. § 2000e-2(a) under both the disparate impact and disparate treatment theories.¹⁰ We review in turn the court's conclusions and Chambers' arguments under each of these theories.

A

[1-3] A plaintiff seeking to prove discrimination under the disparate impact theory must show that a facially neutral employment practice has a significant adverse impact on members of a protected minority group. The burden then shifts to the employer to show that the practice has a manifest relationship to the employment in question and is justifiable on the ground of

(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.

A separate provision makes it clear that Title VII prohibits discrimination on the basis of pregnancy. 42 U.S.C. § 2000e(k) (1982) provides in part:

For purposes of this subchapter—

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work

business necessity. Even if the employer shows that the discriminatory employment practice is justified by business necessity, the plaintiff may prevail by showing that other practices would accomplish the employer's objectives without the attendant discriminatory effects.¹¹ The district court found that "because of the significantly higher fertility rate among black females, the rule banning single pregnancies would impact black women more harshly." *Chambers*, 629 F.Supp. at 949.¹² Thus, Chambers established the disparate impact of the role model rule.¹³ The Club then sought to justify the rule as a business necessity.

Establishing a business necessity defense presents an employer with a "heavy burden." *Hawkins v. Anheuser-Busch, Inc.*, 697 F.2d 810, 815 (8th Cir.1983). Business necessity exists only if the challenged employment practice has "a manifest relationship to the employment in question."¹⁴ *Id.* (quoting *Dothard v. Rawlinson*, 433 U.S. 321, 329, 97 S.Ct. 2720, 2725, 53 L.Ed.2d 786 (1977) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158 (1971))). The employer must demonstrate that there is a "compelling need" to maintain that practice,¹⁵ and the practice cannot be justified by "routine business considerations." *Id.* (quoting *Kirby v. Colony Furniture Co.*, 613 F.2d 696, 706 n. 6 (8th Cir.1980); see also *EEOC v. Rath Packing Co.*, 787 F.2d 318, 331 (8th Cir.),

11. See, e.g., *Connecticut v. Teal*, 457 U.S. 440, 446-47, 102 S.Ct. 2525, 2530, 71 L.Ed.2d 130 (1982); *Dothard v. Rawlinson*, 433 U.S. 321, 328-29, 97 S.Ct. 2720, 2726, 53 L.Ed.2d 786 (1977); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 1854 n. 15, 52 L.Ed.2d 396 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-32, 91 S.Ct. 849, 853-54, 28 L.Ed.2d 158 (1971); *Mohr v. Bryn Mawr*, 810 F.2d 1411, 1426-27 (8th Cir. 1987); *Eastley v. Anheuser-Busch, Inc.*, 758 F.2d 251, 255 n. 7 (8th Cir.1985); *Hawkins v. Anheuser-Busch, Inc.*, 697 F.2d 810, 815 (8th Cir.1983); *Kirby v. Colony Furn. Co.*, 613 F.2d 696, 703 (8th Cir.1980).

12. The court relied on statistics showing that black women generally, and black women within certain age groups in Douglas County, Ne-

braska, specifically, are more likely to become pregnant than white women. *Chambers*, 629 F.Supp. at 949 n. 45.

13. The district court found that Chambers had established disparate impact under the first method articulated by this court in *Green v. Missouri Pac. R.R.*, 523 F.2d 1290, 1293-94 (8th Cir.1975). *Chambers*, 629 F.Supp. at 948-49. The Club argues in its brief that the court erred in finding disparate impact. We are unpersuaded by the Club's argument and, furthermore, we are disinclined to devote further attention to the issue because of the Club's failure to assert a cross-appeal seeking reversal of the district court's finding of disparate impact. See *Wycoff v. Menke*, 773 F.2d 983, 985 (8th Cir.1985) (cross-appeal necessary to modify or alter lower court decision), *cert. denied*, 475 U.S. 1028, 106 S.Ct. 1230, 89 L.Ed.2d 339 (1986).

The district court found that the role model rule is justified by business necessity because there is a manifest relationship between the Club's fundamental purpose and the rule. Specifically, the court found:

The Girls Club has established by the evidence that its only purpose is to serve young girls between the ages of eight and eighteen and to provide these women with exposure to the greatest number of available positive options in life. The Girls Club has established that teenage pregnancy is contrary to this purpose and philosophy. The Girls Club established that it honestly believed that to permit single pregnant staff members to work with the girls would convey the

cert. denied. — U.S. —, 107 S.Ct. 307, 93 L.Ed.2d 282 (1986). Moreover, the employer may be required to show that the challenged employment practice is "necessary to safe and efficient job performance," *McCosh v. City of Grand Forks*, 628 F.2d 1058, 1062 (8th Cir.1980) (quoting *Dothard*, 433 U.S. at 332 n. 14, 97 S.Ct. at 2728 n. 14); see also *Rath Packing Co.*, 787 F.2d at 328; *Donnell v. General Motors Corp.*, 576 F.2d 1292, 1299 (8th Cir. 1978), or that the employer's goals are "significantly served by" the practice. *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 n. 31, 99 S.Ct. 1355, 1366 n. 31, 59 L.Ed.2d 587 (1979). See generally *Nutting v. Yellow Freight Sys., Inc.*, 799 F.2d 1192, 1199 (8th Cir.1986).

impression that the Girls Club condoned pregnancy for the girls in the age group it serves. The testimony of board members * * * made clear that the policy was not based upon a morality standard, but rather, on a belief that teenage pregnancies severely limit the available opportunities for teenage girls. The Girls Club also established that the policy was just one prong of a comprehensive attack on the problem of teenage pregnancy. The Court is satisfied that a manifest relationship exists between the Girls Club's fundamental purpose and its single pregnancy policy.

Chambers, 629 F.Supp. at 950. The court also relied in part on expert testimony to the effect that the role model rule could be helpful in preventing teenage pregnancy.¹⁴ *Chambers* argues, however, that the district court erred in finding business necessity because the role model rule is based only on speculation by the Club and has not been validated by any studies showing that it prevents pregnancy among the Club's members.

Business necessity determinations in disparate impact cases are reviewed under the clearly erroneous standard of review applied to factual findings. Fed.R.Civ.P. 52(a); see *Hawkins*, 697 F.2d at 815; see also *Reddemann v. Minnesota Higher Educ. Coordinating Bd.*, 811 F.2d 1208, 1209 (8th Cir.1987) (per curiam). Thus, we may reverse the district court's finding of business necessity only if we are "left with the definite and firm conviction that a mistake has been committed." *Anderson*

14. *Chambers'* expert witness testified that the only way to resolve the teenage pregnancy problem was through economic opportunities such as education and jobs. The Club's expert agreed that these factors were important, but also testified concerning the value of role modeling and concluded that the role model rule "could be (and in her opinion is) another viable way to attack the problem of teenage pregnancy." *Chambers*, 629 F.Supp. at 951.

In addition to relying on the evidence concerning the Club's purpose and approach and the expert testimony, the district court found that the rule was adopted in response to two incidents involving Club members' reactions to the pregnancies of single Club staff members. *Id.* at 945.

v. City of Bessemer City, 470 U.S. 564, 578, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 58 S.Ct. 525, 541, 92 L.Ed. 746 (1948)).

[4] We believe that "the district court's account of the evidence is plausible in light of the record viewed in its entirety." *Id.* 470 U.S. at 578-74, 105 S.Ct. at 1511-12. Therefore, we cannot say that the district court's finding of business necessity is clearly erroneous. The district court's conclusion on the evidence is not an impermissible one. Although validation studies can be helpful in evaluating such questions, they are not required to maintain a successful business necessity defense. *Hawkins*, 697 F.2d at 815-16; see *Davis v. City of Dallas*, 777 F.2d 205, 217-18 (5th Cir.1985), cert. denied, 476 U.S. 1115, 106 S.Ct. 1972, 90 L.Ed.2d 656 (1986). Indeed, we are uncertain whether the role model rule by its nature is suited to validation by an empirical study.¹⁵ Consequently, the court's conclusion in *Hawkins* is apt in this case: "We cannot say * * * that validation studies are always required and we are not willing to hold under the facts of this case that such evidence was required here." *Id.* at 816.

[5] *Chambers* argues further, however, that the district court erred in discounting alternative practices that the Club could have used to ameliorate the discriminatory effects of the role model rule. *Chambers* contends that the Club either could have granted her a leave of absence or transferred her to a position that did not involve contact with the Club's members. The

15. Ironically, at oral argument *Chambers'* counsel responded in the negative to the court's question concerning whether the rule could ever be empirically proven to prevent pregnancy among the Club's members. Counsel's response must be construed to mean either that it is impossible to perform a meaningful empirical study of such matters, or that counsel believes that no such study would ever show the rule to have the effect desired by the Club. If we were to adopt the first construction it would be ludicrous for us to reverse for lack of validation studies. Moreover, the second construction presents nothing more than counsel's own belief concerning the role model rule, a belief rejected by the district court in favor of that held by the Club.

Cite as 834 F.2d 697 (8th Cir. 1987)

Club responds that neither of these alternatives was available in this case. The Club has a history of granting leaves of up to six weeks, but the purposes of the role model rule would have required a five to six month leave for *Chambers*, given that the pregnancy would have become visually apparent probably within three or four months. Moreover, employing a temporary replacement to take *Chambers'* position would itself have required six months of on-the-job training before the replacement would have been able to interact with the girls on the level that the Club's approach requires. The use of temporary replacements would also disrupt the atmosphere of stability that the Club attempts to provide and would be inconsistent with the relationship-building and interpersonal interaction entailed in the Club's role model approach. Furthermore, transfer to a "noncontact position" apparently was impossible because there are no positions at the Club that do not involve contact with Club members. The district court found that the Club considered these alternatives and determined them to be unworkable. *Chambers*, 629 F.Supp. at 945-46. We are unable to conclude that the district court's finding that there were no satisfactory alternatives to the dismissal of *Chambers* pursuant to the role model rule is clearly erroneous. Accordingly, we hold that the district court's finding that the role model rule is justified by business necessity and thus does not violate Title VII under the disparate impact theory is not clearly erroneous.

B

Unlike the disparate impact theory, the disparate treatment theory requires a

plaintiff seeking to prove employment discrimination to show discriminatory animus. The plaintiff must first establish a prima facie case of discrimination. The burden of production then shifts to the employer to show a legitimate, nondiscriminatory reason for the challenged employment practice. If the employer makes such a showing, then the plaintiff may show that the reasons given by the employer were pretextual.¹⁶ No violation of Title VII exists, however, if the employer can show that the challenged employment practice is a bona fide occupational qualification (bfoq).¹⁷

The district court found that *Chambers* had succeeded in establishing a prima facie case of discrimination but concluded that the Club's role model approach is a legitimate, nondiscriminatory reason for the role model rule. *Chambers*, 629 F.Supp. at 947. The court then found that *Chambers* was unable to show that the Club's reason for the rule was a pretext for intentional discrimination. *Id.* at 947-48. The court also stated in passing that the role model rule "presumably" is a bfoq. *Id.* at 941 n. 51.

Chambers argues alternatively that the district court erred in failing to find a violation of Title VII under the disparate treatment theory, and that this case should not be analyzed under the disparate treatment theory because *Chambers'* discharge on account of her pregnancy constitutes intentional discrimination without further analysis. *Chambers* also argues that the role model rule cannot be justified as a bfoq. Because we are persuaded that the role model rule qualifies as a bfoq, we find it

16. *Texas Dep't of Community Affairs v. Burdick*, 450 U.S. 248, 252-53, 101 S.Ct. 1087, 1093, 67 L.Ed.2d 207 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 1824-25, 36 L.Ed.2d 668 (1973); see, e.g., *Johnson v. Legal Servs. of Ark., Inc.*, 813 F.2d 893, 896 (8th Cir.1987); *Netterville v. Missouri*, 800 F.2d 798, 802-03 (8th Cir.1986); *Easley v. Anheuser-Busch, Inc.*, 758 F.2d 251, 256 n. 10 (8th Cir.1985).

17. The bfoq exception, unlike the business necessity defense, is statutory based. 42 U.S.C. § 2000e-2(e) (1982) provides in part:

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, * * * on the basis of 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 * * *.

unnecessary to address Chambers' other arguments.¹⁸

The bfoq exception is "an extremely narrow exception to the general prohibition of discrimination on the basis of sex." *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079, 1085 (8th Cir.), cert. denied, 446 U.S. 966, 100 S.Ct. 2942, 64 L.Ed.2d 825 (1980), (quoting *Dothard v. Rawlinson*, 433 U.S. 321, 334, 97 S.Ct. 2720, 2729, 53 L.Ed.2d 786 (1977)). In *Dothard v. Rawlinson*, 433 U.S. at 321, 97 S.Ct. at 2720, the Supreme Court found that a rule that prohibited employment of women in contact positions in all-male Alabama prisons was a bfoq under the particular circumstances of that case, which involved a prison system rife with violence. The statutory language, see *supra* note 17, is, of course, the best guide to the content of the bfoq exception; however, the courts, including the Supreme Court in *Dothard*, have noted the existence of several formulations for evaluating whether an employment practice is a bfoq. The formulations include: whether "the essence of the business operation would be undermined" without the challenged employment practice, *Dothard*, 433 U.S. at 333, 97 S.Ct. at 2728 (quoting *Dias v. Pan American World Airways, Inc.*, 442 F.2d 585, 388 (5th Cir.), cert. denied, 404 U.S. 950, 92 S.Ct. 275, 30 L.Ed.2d 267 (1971)) (emphasis in original); whether safe and efficient performance of the job would be possible without the challenged employment practice, *id.* (citing *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir.1969)); and whether the challenged employment practice has "a manifest relationship to the employment in question." *Gunther*, 612 F.2d at 1086 (quoting *Griggs v. Duke Pow-*

er Co., 401 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158 (1971)).

[6] Although the district court did not clearly conclude that the role model rule qualified as a bfoq, several of the court's other findings are persuasive on this issue. The court's findings of fact, many of which are relevant to the analysis of a potential bfoq exception, are binding on this court unless clearly erroneous. The facts relevant to establishing a bfoq are the same as those found by the district court in the course of its business necessity analysis. As already noted, see *supra* at 701-02, the district court found that the role model rule has a manifest relationship to the Club's fundamental purpose and that there were no workable alternatives to the rule. Moreover, the district court's finding of business necessity itself is persuasive as to the existence of a bfoq. This court has noted that the analysis of a bfoq "is similar to and overlaps with the judicially created 'business necessity' test." *Gunther*, 612 F.2d at 1086 n. 8. The various standards for establishing business necessity are quite similar to those for determining a bfoq. Indeed, this court has on different occasions applied the same standard—"manifest relationship"—to both business necessity and bfoq. Compare *Hawkins v. Anheuser-Busch, Inc.*, 697 F.2d 810, 815 (8th Cir.1983) (business necessity) with *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079, 1086 (8th Cir.), cert. denied, 446 U.S. 966, 100 S.Ct. 2942, 64 L.Ed.2d 825 (1980) (bfoq).¹⁹ Inasmuch as we already have affirmed the district court's finding of business necessity as not clearly erroneous, see *supra* at 703, we feel compelled to conclude that "[i]n the particular factual circumstances of this

18. Even if the district court erred in finding no discrimination under the disparate treatment theory, our conclusion that the role model rule is a bfoq means that there can be no violation of Title VII. Moreover, the *per se* intentional discrimination approach advocated by Chambers simply eliminates the burden-shifting procedure described *supra* at 703, leaving the bfoq exception as the employer's only defense. Thus, our conclusion on the bfoq issue also would prevent Chambers from prevailing under her proposed *per se* intentional discrimination approach.

19. Further indication of the similarity of business necessity and bfoq is provided in *Dothard*, 433 U.S. at 321, 97 S.Ct. at 2720, where the Court referred to the "necessary to safe and efficient job performance" standard in relation to both of the defenses. Compare *Dothard*, 433 U.S. at 322 n. 14, 97 S.Ct. at 2726 n. 14 (business necessity) with *Dothard*, 433 U.S. at 323, 97 S.Ct. at 2728 (bfoq).

case." *Dothard*, 433 U.S. at 324, 97 S.Ct. at 2729, the role model rule is reasonably necessary to the Club's operations. Thus, we hold that the role model rule qualifies as a bona fide occupational qualification.

III

Chambers also appeals the district court's dismissal of various other claims and parties. Specifically, she challenges the court's dismissal of the section 1983 claim against the Club for lack of state action, *Chambers v. Omaha Girls Club, Inc.*, No. CV 83-L-38, slip op. at 3-4 (D.Neb. October 19, 1983); dismissal of the NEOC on the ground of absolute immunity based on *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2594, 57 L.Ed.2d 895 (1978), *id.* at 4; dismissal of Governor Thone and Attorney General Douglas for failure to state a claim against them, *id.* at 4-6; grant of summary judgment in favor of the *Omaha World Herald* on the section 1985(3) and state conspiracy claims because of Chambers' failure to show conspiratorial agreement or other elements of the cause of action, *Chambers v. Omaha Girls Club, Inc.*, No. CV 83-L-38, slip op. at 3-5 (D.Neb. Nov. 7, 1985); dismissal of Ruth Chambers for failure to meet constitutional standing requirements, *Chambers v. Omaha Girls Club*, No. CV 83-L-38, slip op. at 3 (D.Neb. Jan. 13, 1986); dismissal of the constitutional claims for lack of state action, *Chambers v. Omaha Girls Club*, 629 F.Supp. 925, 931 n. 9 (D.Neb. 1986); grant of a directed verdict in favor of the Club on the section 1981 claim because Chambers failed to produce any evidence of intentional race discrimination, *id.* at 932-34; and grant of a directed verdict in favor of the Club on the section 1985(3) and state conspiracy claims because no evidence was presented to show that the Club was part of a conspiratorial agreement. *Id.* at 934-42. Our review of the record, the briefs, and the memorandum opinions of the district court satisfies us that Chambers' ar-

20. Chambers' claim that the defendants' exercise of their peremptory challenges was unconstitutionally discriminatory is unavailing inasmuch as it was not raised below and no jury

arguments on these issues are without merit.²⁰

IV

In conclusion, we hold that the district court's finding that the Club's role model rule is justified by business necessity is not clearly erroneous, and we find further that the rule qualifies as a bona fide occupational qualification. Chambers' other allegations of error are without merit. Accordingly, the orders and judgment of the district court are affirmed.

McMILLIAN, Circuit Judge, dissenting.

I concur in Part III of the court's decision in this case, but I respectfully dissent from Part II of the opinion. I believe that Crystal Chambers alleged and proved discrimination based on race under a disparate impact theory and discrimination based on pregnancy under a disparate treatment theory in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. I would thus reverse the district court's judgment on the Title VII claims and remand for a determination of an appropriate remedy.

Today, the court, contrary to Title VII, upholds the Omaha Girls Club's (OGC) discharge of Chambers, a black, unmarried pregnant woman because of her pregnancy. Chambers, an arts and crafts instructor at OGC, was held to be a "negative role model" for the OGC members, who are girls and young women between the ages of eight and eighteen.

Title VII provides in part: "It shall be an unlawful employment practice for an employer . . . to discharge . . . or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex. . . ." 42 U.S.C. § 2000e-2(a).

The Equal Employment Opportunity Commission and many courts interpreted

verdict even exists to be challenged in this case. Chambers' argument that Judge Beam erred in refusing to recuse himself is also without merit.

this provision barring gender-based discrimination to prohibit discrimination based on pregnancy. C.F.R. § 1604.10(b) (1973); *Holtzhaus v. Compton & Sons, Inc.* 514 F.2d 651, 553-54 (8th Cir.1975); *In re National Airlines, Inc.*, 434 F.Supp. 249 (D.C. Fla.1977) (the airline's policy of requiring flight attendants to cease working when they became pregnant violated Title VII). *Contra Harris v. Pan American World Airlines, Inc.*, 437 F.Supp. 413 (D.C.Cal. 1977), *aff'd in part, reversed in part*, 649 F.2d 670 (9th Cir.1980). However, the Supreme Court in *General Electric v. Gilbert*, 429 U.S. 125, 145-47, 97 S.Ct. 401, 412-13, 50 L.Ed.2d 343 (1976), determined that an employer could exclude pregnant employees from receiving benefits under a disability plan. The Court reasoned that the exclusion was not gender-based but was condition-based. *Id.* at 135-37, 97 S.Ct. at 402.

In 1978, Congress responded to the Supreme Court's decision in *General Electric v. Gilbert* by amending Title VII to "prohibit sex discrimination on the basis of pregnancy." *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 670, 103 S.Ct. 2622, 2624, 77 L.Ed.2d 89 (1983) (*Newport News*). The new amendment, entitled the Pregnancy Discrimination Act, added a new subsection "k" to the definition section of Title VII; the new subsection reads in part as follows:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes ... as other persons not so affected but similar in their ability or inability to work....

42 U.S.C. § 2000e(k). This provision "made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex." *Newport News*, 462 U.S. at 684. 103 S.Ct. at 2631; see *Carney v. Martin Luther Home, Inc.*, 824 F.2d 643, 647-48 (8th Cir.1987) (*Carney*).

An employer may justify discrimination otherwise prohibited by Title VII by showing either a business necessity or a bona fide occupational qualification (BFOQ) for the discriminatory policy or practice. *Carney*, 824 F.2d at 648. The business necessity exception applies to disparate impact cases involving facially neutral employment practices with a disproportionate impact on a protected group. The BFOQ exception applies to disparate treatment cases involving affirmative deliberate discrimination. *EEOC v. Rath Packing Co.*, 787 F.2d 318, 327 n. 10 (8th Cir.), *cert. denied*, — U.S. —, 107 S.Ct. 307, 93 L.Ed.2d 282 (1986). In *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079, 1085 (8th Cir.), *cert. denied*, 448 U.S. 965, 100 S.Ct. 2942, 64 L.Ed.2d 825 (1980), this court noted that a BFOQ analysis is similar to and overlaps the business necessity test. Essentially, both exceptions require proof that a discriminatory job qualification or practice is both necessary to and effective in promoting the employer's business and that no less discriminatory alternatives exist.

The BFOQ and the business necessity exception are narrow exceptions which impose a heavy burden on the employer. *E.g.*, *Dothard v. Rawlinson*, 453 U.S. 321, 334, 97 S.Ct. 2720, 2729, 53 L.Ed.2d 786 (1977). The employer must show that the problem to be addressed by the discriminatory act or practice is concrete and demonstrable, not just "perceived"; and the challenged act must be essential to eliminating the problem, not simply reasonable or designed to improve the problem. *EEOC v. Rath*, 787 F.2d at 332-33; *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245, 249 (10th Cir.1970), *cert. denied*, 401 U.S. 954, 91 S.Ct. 972, 28 L.Ed.2d 237 (1971).

I agree with the majority that the district court's determination of business necessity or BFOQ in the present case is to be reviewed under the clearly erroneous standard. However, even under this very deferential standard, I would reject the BFOQ or business necessity exceptions offered by OGC because there is no evidence to support a relationship between teenage pregnancies and the employment of an unwed

Cite as 834 F.2d 697 (8th Cir. 1987)

pregnant instructor, and therefore I am left with the definite and firm conclusion that the district court made a mistake. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985).

The district court, and now this court, accepts without any proof OGC's assumption that the presence of an unwed pregnant instructor is related to teenage pregnancies. *Chambers v. Omaha Girls Club*, 629 F.Supp. at 951 (D.Neb.1986) (*Chambers*). OGC failed to present surveys, school statistics or any other empirical data connecting the incidence of teenage pregnancy with the pregnancy of an adult instructor. OGC also failed to present evidence that other girls clubs or similar types of organizations employed such a rule. OGC instead relied on two or three highly questionable anecdotal incidents to support the rule.

The majority, while admitting to some uncertainty about whether the negative role model rule is subject to validation, places great weight on counsel's remarks during oral argument. Counsel's comments concerning the feasibility of such validation, however, are not a substitute for evidence demonstrating the validity or effectiveness of the role model rule. OGC had the burden of establishing a reasonable basis, that is a factual basis, for its belief. *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 235 (5th Cir. 1969), and in the absence of such proof, OGC may not implement the discriminatory rule.

Although there are no cases that have considered precisely the issue raised in this case, a few courts have considered the role model defense in school settings and all have rejected the schools' role model defenses. In *Andrews v. Drew Municipal Separate School District*, 507 F.2d 611 (5th Cir. 1975), two unwed mothers challenged the school district's policy that prohibited the employment of teachers and teachers' aides who were unwed parents. Not unlike OGC, the school district defended the policy on the basis that such teachers would be poor role models for the chil-

dren and that employing such teachers could lead to schoolgirl pregnancies. *Id.* at 613. The Fifth Circuit struck down the rule. *Id.* at 617.

In the absence of overt, positive statements to which the children can relate, we are convinced that the likelihood of inferred learning that unwed parenthood is necessarily good or praiseworthy, is highly improbable, if not speculative. We are not at all persuaded by defendants' suggestions, quite implausible in our view, that students are apt to seek out knowledge of the personal and private life-styles of teachers or other adults within the school system (i.e. whether they are divorced, separated, happily married or single, etc.), and, when known, will approve and seek to emulate them.

Id., citing *Andrews v. Drew Municipal Separate School District*, 371 F.Supp. 27, 35 (N.D.Miss.1973).

Six years later, the Fifth Circuit had a chance to again consider the role model defense in *Avery v. Homewood Board of Education*, 674 F.2d 337 (5th Cir.1982). The school district justified its firing of an unwed pregnant teacher on the basis that she was a negative role model and her pregnancy would provoke teenage pregnancies. *Id.* at 339. Citing *Andrews v. Drew Municipal Separate School District*, 507 F.2d at 614, the Fifth Circuit, once again, rejected the role model defense.

[W]e rejected all three rationales offered in support of ... the rule ... (1) that unwed parenthood is prima facie proof of immorality; (2) that unwed parents are unfit role models, and (3) that employment of an unwed parent in a scholastic environment materially contributes to the problem of school-girl pregnancies. 574 F.2d at 341.

In *Ponton v. Newport News School Board*, 632 F.Supp. 1056 (E.D.Va.1986) (*Ponton*), the district court also carefully considered the same issue. In *Ponton*, a pregnant unmarried teacher of vocational home economics at a magnet school in Newport, Virginia, was forced to take a leave of absence because the school district

alleged that it had an interest in "protecting schoolchildren from exposure to a single, pregnant teacher." *Id.* at 1082. The district court, noting that it had "serious doubt as to whether this is in fact a legitimate interest," concluded that the effect on students of the "mere sight of a single, pregnant teacher would be negligible, at best." *Id.* The court further commented that

[e]ven if plaintiff's students would have known that she was single, the mere knowledge that their teacher had gotten pregnant out of wedlock would seem to have a fairly minimal impact on them. There was no evidence that plaintiff intended to proselytize her students regarding the issue of unwed pregnancy. *Id.* at 1083. The district court in *Porton* also determined that plaintiff's pregnancy had not affected her ability to implement the prescribed curriculum in her classes nor could her pregnancy be perceived as representing a "School Board-sponsored statement regarding the desirability of pregnancy out of wedlock; rather, such status could only be viewed as representing a personal decision made by plaintiff in her private capacity." *Id.* Although the plaintiff in *Porton* alleged a constitutional right of privacy claim and the district court decided the case on this basis, the rationale is applicable to the present case because the employers in both cases contended that the policy prohibiting single pregnancies is necessary to the effectiveness of its program.

The district court in the present case, although correctly articulating the BFOQ and business necessity tests, failed to actually apply the tests. *Clumbers*, slip op. at 951. Instead of requiring OGC to demonstrate a reasonable relationship between teenage pregnancy and the employment of single pregnant women, the district court accepted the beliefs and assumptions of OGC board members. *Id.* at 951. The district court stated that "the Girls Club established that it honestly believed that to permit single pregnant staff members to work with the girls would convey the impression that the Girls Club condoned pregnancy for the girls in the age group it serves." *Id.* at 950. Based on this belief

alone, the district court stated that "the court is satisfied that [OGC has] met the burden of showing that a manifest relationship exists between the Girls Club's fundamental purpose and its single pregnancy policy." *Id.* at 950. The district court, in discussing the BFOQ defense, further stated: "Here we have a rule made in an attempt to limit teenage pregnancy, and no data to support a finding that the rule either does, or does not, accomplish this purpose." *Id.* at 951. Despite this explicit recognition by the district court that there was no data to support a relationship between teenage pregnancy and the negative role model role, the district court, nonetheless, stated: "This court believes that the policy is a legitimate attempt by a private service organization to attack a significant problem within our society." *Id.* at 951.

Neither an employer's sincere belief, without more, nor a district court's belief, that a discriminatory employment practice is related and necessary to the accomplishment of the employer's goals is sufficient to establish a BFOQ or business necessity defense. The fact that the goals are laudable and the beliefs sincerely held does not substitute for data which demonstrate a relationship between the discriminatory practice and the goals. The district court, recognizing that there was no data to support such a relationship, should have held that OGC failed to carry its burden of showing a BFOQ or business necessity.

Even if I were to accept for purposes of argument that OGC established a relationship between the single pregnancy policy and the work of the club, the BFOQ and the business necessity exception must still fail because OGC did not establish that there were no less discriminatory alternatives available. Unlike the district court and the panel majority, I am unimpressed by OGC's rejection of alternatives which less discriminatory impact. OGC's personal policy provided leave of absence for up to six weeks for pregnancies and other classes and longer leaves upon approval of the board. It is clear that OGC could have accommodated its stated mission and the

pregnancy of Crystal Chambers by granting her a leave of absence or by placing her in a noncontact position. Administrative inconvenience is not a sufficient justification for not utilizing these less discriminatory alternatives.

In summary, OGC failed to carry the heavy burden of showing a nexus between its negative role model rule and teenage pregnancies and that implementation of the rule is essential to eliminating the problem, and thus failed to demonstrate that the single pregnancy policy was justified by either business necessity or was a BFOQ. Thus, I would reverse the judgment of the district court on the Title VII claims and remand this case with instructions to the district court to enter judgment in favor of Chambers on the Title VII claims and to grant appropriate relief.



Denots P. GLICK, Appellant.

WOODSON D. WALKER, Chairman; A.L. Lockhart, Director; Larry Norris, Warden; Tucker Max. Sec. Unit; K. Howell, Records Supervisor; Tucker Max. Sec. Unit, Appellees.

United States Court of Appeals,
Eighth Circuit.

Submitted Oct. 27, 1987.
Decided Dec. 4, 1987.

State prison inmate brought pro se § 1983 action, seeking damages for time spent in punitive isolation and relief concerning his institutional classification and good-time credits. After inmate's disciplinary committee member under Department of Corrections policy. The United States District Court for the Eastern

District of Arkansas, H. David Young, United States Magistrate, granted summary judgment against inmate and he appealed. The Court of Appeals held that: (1) prison officials' lack of intent to deprive inmate of any interest defeated inmate's § 1983 action; (2) alleged failure to restore inmate's institutional classification and good-time credit after reversal of disciplinary did not constitute deprivation of due process; (3) inmate was not entitled to damages for time spent in punitive isolation on subsequently reversed disciplinary matter; and (4) deprivation of mattress, personal property and general correspondence while in punitive isolation did not constitute cruel and unusual punishment.

Affirmed.

1. Civil Rights (4-13,415)

Even if inmate at state correctional institution had a liberty interest in state Department of Correction's policy requiring disciplinary committee members to have been employed for at least six months in department dealing firsthand with inmates, Department's lack of intent to deprive inmate of any interest defeated inmate's § 1983 claim for damages sustained in serving 82 days in punitive isolation based on disciplinary action which were subsequently reversed as result of ineffectiveness of disciplinary committee member under the "six-month" requirement. U.S.C.A. Const. Amend. 14; 42 U.S.C.A. § 1983.

2. Constitutional Law (4-27,213)

Prisons (4-13,410)
Failure to restore state prison inmate's institutional classification and good-time credit after reversal of disciplinary action after Compliance Attorney ruling due to ineffectiveness of a disciplinary committee member did not deprive inmate of due process, since failure to restore was based on a major disciplinary separate from and subsequent to reversal of the prior disciplinary. 42 U.S.C.A. § 1983; U.S.C.A. Const. Amend. 14.

**DO UNWED PREGNANT MOTHERS CONSTITUTE
NEGATIVE ROLE MODELS? CHAMBERS V.
OMAHA GIRLS CLUB**

*We are human beings first, with minor differences from men that apply largely to the act of reproduction. We share the dreams, capabilities, and weaknesses of all human beings, but our occasional pregnancies and other visible differences have been used—even more pervasively, if less brutally, than radical differences have been used—to mark us for an elaborate division of labor that may once have been practical but has since become cruel and false.**

INTRODUCTION

The overwhelming number of women who participate in the work force today emphasizes the importance of Title VII's protection from sex discrimination in their employment.¹ Title VII of the Civil Rights Act of 1964² provides that employers cannot discriminate against any person based upon that individual's "race, color, religion, sex or national origin."³ The legislative intent behind Title VII was to eliminate the prejudices and stereotypes encountered by minorities and women in the work place.⁴ Congress then broadened protection for women in the workplace by enacting the Pregnancy Discrimination Act in 1978.⁵

Violations of Title VII are evidenced by disparate treatment of statutorily protected individuals,⁶ and facially neutral practices which

* Steinem, *Sisterhood* in *THE FIRST MS. READER* (F. Kingsbrun ed. 1972).

1. Comment, *Fourth Circuit Review*, 37 *WASH. & LEE L. REV.* 373, 620-21 (1980).

2. 42 U.S.C. §§ 1981 through 2000h-8 (1982). Specifically, 42 U.S.C., 2000e-2(a)

provides:

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.

Id. § 2000e-2(a).

3. L. MODJESKA, *HANDLING EMPLOYMENT DISCRIMINATION CASES* 2 (1980).

4. C. SULLIVAN, M. ZIMMER & R. RICHARDS, *FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION* 2 (1980) [hereinafter C. SULLIVAN].

5. Comment, *The Pregnant Employee's Appearance As a BFOQ Under the Pregnancy Discrimination Act*, 14 *LEV. D. CH. L.J.* 195, 212 (1982).

6. See *infra* notes 103-06 and accompanying text.

have a disparate impact upon a protected group.⁷ Both theories of Title VII discrimination were addressed by the Eighth Circuit Court of Appeals in *Chambers v. Omaha Girls Club*.⁸

In *Chambers*, the Eighth Circuit denied the plaintiff's request for relief under Title VII, finding that the discharge of an unwed pregnant employee was justified under the employer's Role Model Policy.⁹ The Eighth Circuit's decision affirmed the finding by the district court that the employer's Role Model Policy was a legitimate means of addressing the problem of teenage pregnancy in our society.¹⁰

This Note will address the various issues created when a court examines both disparate treatment and disparate impact claims of discrimination under Title VII of the Civil Rights Act.¹¹ This Note will critically analyze the *Chambers* decision with a special focus placed on the applicable burdens of proof and the compelling justifications required by an employer which would allow discriminatory treatment under Title VII.¹² This Note will then conclude with a determination of the chilling effect that the *Chambers* decision may have on women in the workplace.¹³

FACTS AND HOLDING

Crystal Chambers, an unmarried black female, learned that she was pregnant while employed as an arts and crafts instructor at the Omaha Girls Club.¹⁴ The Omaha Girls Club ("Club") is a private organization which provides educational and social programs for girls in the Omaha area who are between the ages of eight and eighteen.¹⁵

After Chambers informed her supervisor of her pregnancy, she was notified that her employment was to be terminated as a result of her failure to comply with the Club's Negative Role Model Policy ("Policy").¹⁶ Essentially, this Policy prohibited the continuing employment of unmarried pregnant employees.¹⁷ The Club adopted this

7. See *infra* notes 71-72 and accompanying text.
8. 834 F.2d 697 (8th Cir. 1987).
9. *Id.* at 698. Specifically, Rule 11 of the Club's personnel policies, stated: "Negative role modeling for Girls Club Members . . . include such things as single parent pregnancies." *Id.* at 699 n.2. The Club's policy made it clear that negative role models could result in immediate discharge. *Id.*
10. *Id.* at 702.
11. See *infra* notes 82-120 and accompanying text.
12. See *infra* notes 217-83 and accompanying text.
13. See *infra* notes 234-58 and accompanying text.
14. *Chambers*, 834 F.2d at 699.
15. *Id.* at 698.
16. *Id.* at 699.
17. *Id.*

Policy because it believed that unmarried pregnancies presented the wrong impression to the Club's members.¹⁸ Teenage pregnancy is a serious societal problem and the Club believed that its Policy prevented its members from perceiving that it approved of teenage pregnancy.¹⁹

Following her discharge, Chambers brought suit in the United States District Court for the District of Nebraska.²⁰ The original complaint in the district court alleged violations of the first, fifth, ninth, and fourteenth amendments of the United States Constitution.²¹ The complaint also included alleged violations of 42 U.S.C. §§ 1981, 1985, 1986 and 1988 of the Civil Rights Act of 1964.²² Chambers subsequently amended the complaint to include a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e).²³ Additionally, Chambers asserted pendant state claims for bad faith discharge, defamation, invasion of privacy, intentional infliction of emotional distress, and conspiracy to deprive her of a right to livelihood.²⁴

The district court either dismissed or directed a verdict in favor of the Club on all of Chambers' claims, except the alleged Title VII violation and the sections 1981, 1985(3) and state conspiracy claims.²⁵ Based upon the facts of Chambers' case, the district court permitted her to present evidence of both disparate impact and disparate treatment in violation of Title VII.²⁶ At the conclusion of Chambers' case, however, the district court directed a verdict in favor of the Club on the sections 1981, 1985(3) and state conspiracy claims.²⁷ The court later announced its judgment in favor of the Club on Chambers' Title VII claims.²⁸

The district court indicated that its decision in favor of the Club was based on a unique set of facts.²⁹ The court placed great emphasis upon the societal problem of teenage pregnancy, and was convinced

18. *Id.* at 701-02.
19. *Id.*
20. *Chambers v. Omaha Girls Club*, 629 F. Supp. 925 (D. Neb. 1986), *aff'd*, 834 F.2d 697 (8th Cir. 1987).
21. *Id.* at 929.
22. *Id.*
23. *Id.* at 930.
24. *Id.* at 929.
25. *Id.* at 930-31, 943.
26. *Id.* at 945.
27. *Id.* at 932-52.
28. *Id.* at 952.
29. *Id.* These facts included "the unique mission of the Girl's Club of Omaha, the age group of the women served, the geographic locations of the Girl's Club facilities, and the comprehensive and historical methods . . . employed in addressing the problem of teenage pregnancy." *Id.*

that the Club's Policy was a means of addressing that problem.³⁰ Consequently, the court could not envision another situation in which the decision would be applicable.³¹

On appeal, the Eighth Circuit examined the district court's treatment of Chambers' allegations of discrimination under Title VII.³² The Eighth Circuit agreed with the district court's conclusion that the Club's Policy had a disparate impact upon a statutorily protected class and that Chambers was a member of that class.³³

After Chambers established this prima facie case of disparate impact, the burden shifted to the Club to show that the Policy was justifiable as a business necessity.³⁴ The Eighth Circuit accepted the district court's finding that the Policy was justified.³⁵ Although the Eighth Circuit acknowledged that an employer carries a "heavy burden" in order to establish a business necessity defense, it found that the Club had shown that the Policy had a manifest relationship to the Club's fundamental purpose.³⁶

The Eighth Circuit then addressed Chambers' claim that the district court erred by failing to find that the Club could have resorted to a less restrictive alternative in its employment practices.³⁷ Chambers contended that the Club could have granted her a leave of absence during the time when the pregnancy was apparent, or transferred her to a position that did not involve contact with the Club's members.³⁸ The Club maintained that the use of temporary replacements during the time when Chambers would be absent

30. *Id.* The court stated that "the policy is a legitimate attempt by a private service organization to attack a significant problem within our society." *Id.* at 951.

31. *Id.* at 952.

32. *Chambers*, 834 F.2d at 701.

33. *Id.* The disparate impact theory of discrimination requires a plaintiff to prove that a "facially neutral employment practice has a significant adverse impact on members of a protected minority group." *Id.* at 702. Chambers successfully demonstrated that the rule banning unmarried pregnant workers would impact black women more harshly, as their fertility rates were significantly higher. *Id.*

34. *Id.* at 701.

35. *Id.* at 702. The Eighth Circuit held that because validation studies are not required in order to maintain a successful business necessity defense, it could only reverse the district court's factual determinations if they were found to be clearly erroneous. *Id.* On this matter, the court concluded that it was not "left with the definite and firm conviction that a mistake had been committed" by the district court on the finding of business necessity. *Id.*

36. *Id.* at 701-02. Without any validation studies as a basis for decision, the Eighth Circuit relied on expert testimony to the effect that the Policy could be helpful in preventing teenage pregnancy. *Id.* The Club established "that it honestly believed that to permit single pregnant staff members to work with the girls would convey the impression that the . . . Club condoned pregnancy for the girls in the age group it serves." *Id.*

37. *Id.* at 702.

38. *Id.*

would disrupt the Club's attempt to provide stable relationships between the staff members and the girls.³⁹ Moreover, the Club asserted that there were no positions available which would not require contact with the Club's members.⁴⁰ Based upon the trial record and the evidence presented, the Eighth Circuit affirmed the district court's determination, finding that there were no feasible alternatives available to the Club.⁴¹

In addition, the Eighth Circuit examined Chambers' claim that the district court erred in releasing the Club from liability based on the disparate treatment theory of discrimination under Title VII.⁴² Unlike the disparate impact theory, disparate treatment requires a showing of intentional discrimination.⁴³

As a first step, Chambers successfully established a prima facie case of discrimination based upon her discharge for pregnancy.⁴⁴ The burden then shifted to the Club to prove either a legitimate, nondiscriminatory reason for the Policy, or that the Policy was justified as a Bona Fide Occupational Qualification ("BFOQ").⁴⁵ The Club argued that its teachers engaged in positive role modeling for underprivileged girls. Accordingly, the Eighth Circuit agreed with the lower court's finding that it had a legitimate nondiscriminatory reason for discharging an unwed pregnant staff member.⁴⁶ Furthermore, the Eighth Circuit reasoned that the district court's finding of a business necessity defense to Chambers' disparate impact claim persuasively evidenced the existence of a BFOQ.⁴⁷

Dissenting, Judge McMillian stated that the majority's findings of both business necessity and a BFOQ in favor of the Club's Policy were incorrect.⁴⁸ Judge McMillian reasoned that the mere assumption that the Policy was related to the prevention of teenage preg-

39. *Id.* at 703.

40. *Id.*

41. *Id.* The Eighth Circuit again used a "clearly erroneous" standard in reviewing the lower court's finding. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* Chambers had to show that she was a member of a protected class under Title VII and that she was a victim of intentional discrimination. Her status as a single black female, being qualified for the job, discharged for her pregnancy and replaced by another single black female made out the required prima facie case. See *Zungis v. Kleberg County Hospital*, 692 F.2d 886, 891 (5th Cir. 1982).

45. *Chambers*, 834 F.2d at 703. The BFOQ exception is a statutorily provided defense to Title VII actions. *Id.* at n.17.

46. *Id.* at 703.

47. *Id.* at 704. In *Chambers*, the Eighth Circuit determined that the judicially created business necessity element of a disparate impact case and the BFOQ analysis of a disparate treatment case were both demonstrated by proving a "manifest relationship" between the Policy and the Club's purposes. *Id.*

48. *Id.* at 706-07 (McMillian, J., dissenting).

nancy was not enough to override the overt discrimination in violation of Title VII.⁴⁹ The Club "failed to present surveys, school statistics, or any other empirical data connecting the incidence of teenage pregnancy with the pregnancy of an adult instructor."⁵⁰

In addition, the dissent found it significant that the Club could not establish that any similar type of organization used such a similar Policy.⁵¹ In the absence of any evidence which would establish a reasonable or factual basis for the Club's belief that the Policy prevents teenage pregnancy, Judge McMillian reasoned that the Club should not be permitted to maintain a discriminatory employment practice.⁵²

Even though there were no cases precisely on point, the dissent discussed several cases which had rejected similar role model policies in a public school setting.⁵³ These cases, presenting similar issues to those in *Chambers*, rejected the notion that a single pregnant teacher would contribute to the occurrence of teenage pregnancy.⁵⁴

Moreover, the dissent found that the Club failed to prove that the Policy was the least restrictive alternative available.⁵⁵ Because the Club provided leaves of absence for pregnancies while married and other disabilities, the Club could have accommodated a leave of absence for *Chambers*.⁵⁶ Thus, Judge McMillian reasoned that the Club's defenses were based on administrative inconvenience which was not a legitimate reason for failing to utilize an alternative that was less discriminatory.⁵⁷

BACKGROUND

In the more than twenty years since the enactment of the Civil Rights Act of 1964, courts have faced complex issues dealing with employment discrimination.⁵⁸ Traditionally, claims of employment discrimination under Title VII have been based on two theories, disparate impact and disparate treatment.⁵⁹ A plaintiff seeking to prove disparate impact must show that a facially neutral employment

49. *Id.* at 707 (McMillian, J., dissenting). Justice McMillian felt that the Club failed to present substantial evidence linking the Policy to the prevention of teenage pregnancy. *Id.*

50. *Id.* at 707 (McMillian, J., dissenting).

51. *Id.*

52. *Id.*

53. *Id.* See *Penton v. Newport News School Board*, 632 F. Supp. 1056 (E.D. Va. 1986).

54. *Chambers*, 834 F.2d at 707 (McMillian, J., dissenting).

55. *Id.* at 708 (McMillian, J., dissenting).

56. *Id.* at 708-09 (McMillian, J., dissenting).

57. *Id.* at 709 (McMillian, J., dissenting).

58. Shoben, *Compound Discrimination: The Interaction of Race and Sex in Employment Discrimination*, 55 N.Y.U. L. REV. 793, 793 (1980).

59. L. MODJESKA, *supra* note 3, at 10.

practice has a significant adverse impact on members of a protected minority group.⁶⁰ In contrast, the disparate treatment theory requires proof of intentional discrimination by the employer, which requires an inquiry into the employer's motivation.⁶¹

Disparate Impact Cases

The first United States Supreme Court case to recognize the disparate impact model of discrimination was *Griggs v. Duke Power Co.*⁶² The Supreme Court held that Title VII required the "removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications."⁶³

The Duke Power Company operated five separate departments in its power plants consisting of labor, coal handling, operations, maintenance, and laboratory and testing.⁶⁴ The company had a plant policy which required a high school diploma or the satisfactory completion of various aptitude tests as a condition of employment in or transfer to any department except labor.⁶⁵ This policy was eventually challenged by black employees who claimed it violated Title VII.⁶⁶ Essentially, the plaintiffs alleged that the requirements of a high school diploma or the satisfactory completion of various aptitude tests had operated to keep blacks concentrated in the labor department at a comparatively lower pay rate than most whites who worked at the plant.⁶⁷

When the Court applied the disparate impact theory of discrimination to these facts, it found that both the high school diploma and the testing requirements unlawfully impacted blacks more heavily than whites.⁶⁸ The company had a long-standing practice of giving preferences to whites in its employment decisions; this, along with

60. C. SULLIVAN, *supra* note 4, at 33.

61. C. SULLIVAN, *supra* note 4, at 16-17.

62. 401 U.S. 424 (1971).

63. *Id.* at 431.

64. *Id.* at 427.

65. *Id.* at 427-28. The company used the Wonderlic Personnel Test, which purported to measure general intelligence, and the Bennett Mechanical Comprehension Test. These tests supposedly approximated the intelligence level of a high school graduate. *Id.* at 428.

66. *Id.* at 428.

67. *Id.* at 427. The highest paying jobs in the labor department paid less than the lowest paying jobs in the other departments. *Id.*

68. *Id.* at 430. The Supreme Court agreed with the Fourth Circuit's finding that "whites register[ed] far better on the company's alternative requirements than negroes." *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1239 n.5 (4th Cir. 1971). This consequence was directly traceable to the inferior educational backgrounds of the black applicants. *Griggs*, 401 U.S. at 430.

the diploma and testing requirements tended to disqualify blacks for transfer or employment at a substantially higher rate than whites.⁶⁹

The Supreme Court, in striking down the challenged employment policy, established the fundamental structure of the disparate impact model.⁷⁰ The Court did this by discussing disparate impact in terms of the purposes of Title VII.⁷¹ The Court stated:

The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. 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.⁷²

In addition, the *Griggs* court rejected the notion that an employer's improper motive must be proved by the plaintiff in order to sustain a claim of discrimination.⁷³ Once adverse impact upon a protected group was established, the Court then addressed what must be shown by an employer in order to maintain the employment practice in question.⁷⁴

The Court interpreted Congress' prohibition of discrimination in Title VII as a requirement that discriminatory policies must be justified by business necessity.⁷⁵ Business necessity may be demonstrated by proving a "manifest relationship" to the employment in question.⁷⁶ Therefore, business necessity was not evaluated in general or conclusory terms, but by reference to an employee's ability to perform a particular job.⁷⁷ The employer in *Griggs* failed to prove that the diploma and testing requirements had a manifest relationship to

69. *Griggs*, 401 U.S. at 427.

70. *Id.* at 431.

71. *Id.* at 429-30.

72. *Id.*

73. *Id.* at 431. The court stated that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built in headwinds' for minority groups and are unrelated to measuring job capability." *Id.* at 432.

74. *Id.*

75. *Id.* at 431.

76. *Id.* at 432.

77. *Id.* at 443. The concept of business necessity discussed in *Griggs* is nonstatutory, and has never been uniformly defined by courts. However, in *Robinson v. Lovillard Corp.*, the Fourth Circuit provided a three prong test for determining a business necessity:

[The] business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose . . . and there must be available no alternative policies which would better accomplish the business purpose advanced.

Robinson, 444 F.2d 791, 798 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971). In *Green v.*

the quality of job performance within the different decisions in the plant.⁷⁸

*Albemarle Paper Co. v. Moody*⁷⁹ further established the structure of the disparate impact concept. This case addressed the same issues as *Griggs*, in that the company required applicants and employees seeking promotion to have a high school diploma and a passing score on two intelligence tests.⁸⁰ A group of black employees sued the company, claiming disparate impact discrimination as a result of these employment practices.⁸¹

The *Albemarle* Court held that a prima facie case of disparate impact was established by a showing that "the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants."⁸² The Court, however, changed the "manifest relationship" test created by the *Griggs* decision.⁸³ The *Albemarle* decision in effect creates an additional defense for the employer when an employee establishes a prima facie case of disparate impact.⁸⁴ The employer's discriminatory practice can be justified by a showing that the practice arose from a business necessity or was the result of a job-related criteria.⁸⁵

The Court in *Albemarle* was concerned only with the question of whether the company had shown its employment policy to be job-related.⁸⁶ The company's policy was found by the Court not to be job-

Missouri Pacific R.R. Co., the Eighth Circuit stated that the doctrine of business necessity,

which has arisen as an exception to the amenability of discriminatory practices, 'connotes an irresistible demand.' The system in question must not only foster safety and efficiency, but must be essential to that goal. . . . In other words, there must be no acceptable alternative that will accomplish that goal 'equally well with a lesser differential racial impact.'

Green, 523 F.2d 1290, 1298 (8th Cir. 1975) (quoting *United States v. St. Louis-San Francisco Ry. Co.*, 464 F.2d 301, 308 (8th Cir. 1972)).

78. *Griggs*, 401 U.S. at 433.

79. 422 U.S. 405 (1975).

80. *Id.* at 410. The tests administered by the company were the Revised Beta Examination, allegedly a measure of nonverbal intelligence, and the Wonderlic Personnel Test, allegedly a measure of verbal facility. *Id.* at 410-11.

81. *Id.* at 408.

82. *Id.* at 425. Although the language in *Albemarle* refers specifically to testing, the basic order and allocation of proof set forth in this case is applicable to all disparate impact cases. See *id.*

83. *Id.* at 425.

84. *Id.*

85. *Id.* at 425. The court stated that "[i]f the concept of job relatedness takes on meaning from the facts of the *Griggs* case." *Id.* In effect, "job relatedness" inquires into the relevancy of the employment policy while "business necessity" focuses on the "manifest relationship" between the policy and the employment in question. *Id.* See *Griggs v. Duke Power Co.*, 401 U.S. 424, 432-33 (1975).

86. *Albemarle*, 422 U.S. at 425. In order to define job relatedness, the Court in *Albemarle* gave great deference to Equal Employment Opportunity Commission

related as it was materially defective in comparison with EEOC guidelines.⁸⁷ The company's attempt to validate the testing policy through a local validation study was also found materially faulty by the Court.⁸⁸ This finding refuted the company's claims that the testing procedure did not impact black applicants in a discriminatory manner.⁸⁹ As such, the Court held that the company could not continue to make employment and promotion decisions which were based on the testing policy.⁹⁰

One result of the *Albemarle* decision is that many courts do not effectively distinguish between the terms business necessity and job-relatedness, and frequently use the terms interchangeably.⁹¹ Commonly, it is the particular employment practice in question which will determine the application of either the job-related criterion or the business necessity requirement.⁹² One plausible interpretation is that job-relatedness is merely one means of proving business

("EEOC") Guidelines. *Id.* at 431. These guidelines proscribed tests unless they were shown to be significantly correlated with important elements of work behavior relevant to employment qualification. 29 C.F.R. § 1607.4(c) (1975).

87. *Albemarle*, 422 U.S. at 432. The EEOC guidelines provided that:

The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described; and, additionally, in the case of rating techniques, the appraisal form(s) and instructions to the rater(s) must be included as a part of the validation evidence. Such criteria may include measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance and tenure. Whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analyses.

In view of the possibility of bias inherent in subjective evaluations, supervisory rating techniques should be carefully developed, and the ratings should be closely examined for evidence of bias. In addition, minorities might obtain unfairly low performance criterion scores for reasons other than supervisor's prejudice, as when, as new employees, they have had less opportunity to learn job skills. The general point is that all criteria need to be examined to insure freedom from factors which would unfairly depress the scores of minority groups.

29 C.F.R. §§ 1607.5(b)(3), 1607.5(b)(4) (1975).

88. *Albemarle*, 422 U.S. at 431-35. The Court found that there was "no way to determine whether the criteria actually considered [in the validation process] were sufficiently related to the company's legitimate interest in job-specific ability to justify a testing system with a racially discriminatory impact." *Id.* at 433.

89. *Id.*

90. *Id.*

91. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1329 (1983).

92. *Id.* at 1329-30. See, e.g., *Smith v. Olin Chemical Corp.*, 555 F.2d 1253, 1255-55 (5th Cir. 1977) (holding that the job-related criterion must be met even in cases where the business necessity requirement is obvious). But see *Johnson v. Pike Corp. of America*, 332 F. Supp. 490, 495 (C.D. Cal. 1971). In this case, the court found that the "sole permissible reason for discriminating against actual or prospective employees involves the individual's capability to perform the job effectively." *Id.* at 495. As such, the defendant would have to prove both the job-related criterion and the business necessity requirement to justify a discriminatory job policy. *Id.*

necessity.⁹³

If job-relatedness or some other form of business necessity is established by an employer then the burden of proof may shift back to the plaintiff in order to show that there was a less discriminatory alternative available to the employer.⁹⁴ Although *Albemarle* appeared to place this burden upon the plaintiff, several lower courts have required defendants to bear the burden of proving the absence of a less restrictive alternative as a portion of their business necessity claim.⁹⁵

The burden of proof allocation with respect to business necessity in the Eighth Circuit differs from the standard created by the *Albemarle* decision.⁹⁶ In *Kirby v. Colony Furniture Co.*,⁹⁷ the Eighth Circuit held that the defendants in a Title VII disparate impact case must bear the burden of showing an absence of a less discriminatory employment device and business necessity to rebut a prima facie case of disparate impact.⁹⁸ This, in effect, places a more formidable barrier in front of an employer who is attempting to justify a discriminatory employment practice.⁹⁹

Disparate Treatment Cases

The concept of disparate treatment was first articulated by the Supreme Court in *McDonnell Douglas Corp. v. Green*.¹⁰⁰ The Court found that the plaintiff ultimately bears the burden of establishing that the employer's practices or policies were motivated by a discriminatory intent.¹⁰¹ A plaintiff may prove a prima facie case of dispa-

93. B. SCHLEI & P. GROSSMAN, *supra* note 91, at 1329.

94. *Albemarle*, 422 U.S. at 436. If job relatedness is shown, "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.* at 425 (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

95. *Id.* at 425. See also *Chrisner v. Complete Auto Transit Inc.*, 545 F.2d at 1261 (holding that "the burden of establishing the presence of available alternatives . . . belongs only to the plaintiff and must be sustained in the third stage of the analysis"); *Guardians Ass'n of the New York City Police Dep't v. Civil Serv. Comm'n*, 630 F.2d 79 (2d Cir. 1980) (rejecting the suggestion that an employer must devise a selection procedure with the "least adverse impact upon minority applicants"). But see *Blake v. City of Los Angeles*, 585 F.2d 1367, 1376 (9th Cir. 1979) (holding that the defendant had to demonstrate an absence of acceptable alternative policies or practices which would better or equally accomplish the defendant's purpose with a lesser discriminatory impact).

96. See *supra* notes 94-95 and accompanying text.

97. 613 F.2d 696 (8th Cir. 1980).

98. *Id.* at 705 n.5.

99. See *supra* notes 94-95, 98 and accompanying text. Since the burden of proof in these cases is often outcome determinative, the allocation of the burden of proof by the Eighth Circuit in effect makes it more difficult for an employer to demonstrate a business necessity. See *supra* notes 94-95.

100. 411 U.S. 792 (1973).

101. *Id.* at 802. See *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273,

rate treatment by demonstrating membership in a protected class, and that despite being qualified for a particular job, the plaintiff was discharged and replaced by a person of similar qualifications who was not from the protected class.¹⁰²

The disparate treatment theory of discrimination was further clarified by the Supreme Court in *International Brotherhood of Teamsters v. United States*.¹⁰³ In *IBT* the plaintiffs alleged that a trucking company had engaged in hiring and initial assignment practices which excluded blacks and hispanics from the more favored trucking jobs such as line or over the road drivers.¹⁰⁴ Disparity of treatment was shown by statistics indicating that blacks and hispanics were purposely treated less favorably because of a refusal to recruit, hire, transfer or promote them on an equal basis with whites.¹⁰⁵ The Supreme Court stated in *IBT*:

Disparate treatment . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . . Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII.¹⁰⁶

The establishment of a prima facie case of disparate treatment creates a rebuttable presumption of discrimination, which shifts the burden of production to the employer.¹⁰⁷ The *McDonnell* approach requires the employer to articulate a "legitimate, nondiscriminatory

282 (1978). The Supreme Court interpreted *McDonnell* as requiring a showing "that race was a 'but for cause,' but not a showing that race was the sole cause of the adverse action." *Id.* See also *Teamsters v. United States*, 431 U.S. 324, 335 (1977) (holding that the ultimate factual issue in disparate treatment cases is employer intent); *Johnson v. Legal Services of Arkansas*, 613 F.2d 839 (8th Cir. 1987) (plaintiff may demonstrate disparate treatment by a showing that he was treated less favorably than similarly situated employees who were not within the protected class); *Kirby v. Colony Furniture Co.*, 613 F.2d 696, 703 (8th Cir. 1980) (plaintiff bears burden to show that it is more likely than not that the employer's actions were based on a "discriminatory criterion (illegal under the Act)").

102. *McDonnell*, 411 U.S. at 802. Although the elements of a prima facie case in *McDonnell* referred to a hiring case, the Court made clear that the elements set forth were not inflexible especially because the facts will vary in Title VII cases. *Id.* at 802 n.13.

103. 431 U.S. 324 (1977) [hereinafter *IBT*].

104. *Id.* at 325.

105. *Id.* at 337.

106. *Id.* at 336 n.15.

107. *Id.* See *Easley v. Anheuser-Busch Inc.*, 758 F.2d 291, 295-96 (8th Cir. 1985). The Eighth Circuit held that the burden of proof shifted to the defendant company after the applicant passed the company's bottler test; was subsequently interviewed; passed at least one physical examination; and the company determined that she was fully qualified for job as a bottler, but was not hired. *Id.*

reason" for the adverse action in order to rebut the inference of discrimination.¹⁰⁸

The nature of the burden which shifts to the employer was addressed by the Supreme Court in *Furnco Construction Corp. v. Waters*.¹⁰⁹ *Furnco* held that an employer must only prove that the employment practice in question was based on a legitimate consideration, and not on an illegitimate one such as race or sex.¹¹⁰ Examples of legitimate nondiscriminatory reasons accepted by the federal courts include instances of misconduct and disloyalty, budgetary constraints, attitude problems, lack of diligence, and lesser comparative qualifications.¹¹¹

If the employer successfully presents a legitimate nondiscriminatory reason for the practice in question, the plaintiff may still prevail in a disparate treatment case by proving that the employer's justifications were a disguise or pretext for discrimination.¹¹² The Supreme Court in *Texas Department of Community Affairs v. Burdine*¹¹³ stated that pretext could be shown "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."¹¹⁴

The Supreme Court in *McDonnell* apparently gave the term "pretext" the connotation of evil motive or intent to discriminate.¹¹⁵ The Court found that a plaintiff could demonstrate pretext by showing prior discrimination.¹¹⁶ For example, the plaintiff could point to situations where white employees who engaged in conduct of compa-

108. *McDonnell*, 411 U.S. at 802.

109. 433 U.S. 567 (1978). Three bricklayers brought suit under Title VII after being denied employment by *Furnco Construction Corporation*. *Id.* at 569.

110. *Id.* at 577-78. See *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978). The court held that a defendant need not go so far as proving absence of discriminatory intent at the rebuttal stage because the articulation of a legitimate nondiscriminatory action is sufficient to require the plaintiff to show a pretext. *Id.* at 27-29.

111. See, e.g., *Kenyatta v. Bookey Packing Co.*, 649 F.2d 552, 555 (8th Cir. 1981) (involving unsatisfactory job performance); *Burdine v. Texas Dep't of Community Affairs*, 647 F.2d 513, 514 (5th Cir. 1981) (concerning a plaintiff's personality which conflicted with fellow employees); *Orabhood v. Board of Trustees of Univ. of Arkansas*, 645 F.2d 651, 656 (8th Cir. 1981) (involving a failure to reclassify as supervisor based on small size of department); *Green v. Armstrong Rubber Co.*, 612 F.2d 967, 968 (5th Cir. 1980) (involving a black employee discharged for fighting); *Leiman v. Fashion Inst. of Tech.*, 591 F.2d 1330 (2d Cir. 1978) (concerning a female plaintiff rejected in favor of a better qualified male).

112. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254-56 (1981).

113. 450 U.S. 248 (1981).

114. *Id.* at 256.

115. *McDonnell*, 411 U.S. at 804.

116. *Id.*

rable seriousness were nevertheless retained or rehired.¹¹⁷ Moreover, the plaintiff could prove through the use of statistical analysis that the treatment by the employer "conformed to a general pattern of discrimination against blacks."¹¹⁸

Both the plaintiff and the defendant in disparate treatment cases have relatively easy burdens of proof regarding the prima facie case and the articulation of a legitimate nondiscriminatory reason for the practice in question.¹¹⁹ Therefore, the outcome in a disparate treatment case can turn on the plaintiff's ability to demonstrate that the nondiscriminatory justifications offered by the employer are but a pretext for discrimination.¹²⁰

The Bona Fide Occupational Qualification

In order to refute a claim of discrimination, employers can demonstrate either a business necessity and legitimate nondiscriminatory reason for an employment practice or an exception which is statutory.¹²¹ Title VII contains an important exception to its general prohibition against discrimination.¹²² This exception states:

Notwithstanding any other provision of this Title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of that particular business or enterprise.¹²³

Courts have often inadequately distinguished the statutory BFOQ defense and the judicially-created business necessity defense.¹²⁴ Several commentators have indicated that the conceptual difference between the doctrines is that the BFOQ defense seems to be available in both disparate treatment and disparate impact cases.¹²⁵ However, the business necessity defense only operates in cases involving disparate impact.¹²⁶

117. *Id.*

118. *Id.* at 805.

119. *Burdine*, 450 U.S. at 253-56. See generally Comment, *Defendants' Burden of Proof in Title VII Class Action Disparate Treatment Suits*, 31 AM. U. L. REV. 753, 769 (1982).

120. B. SCHLEI & P. GROSSMAN, *supra* note 91 at 1317.

121. See *infra* note 123.

122. *Dothard v. Rawlinson*, 433 U.S. 321, 332-33 (1977) (citing 42 U.S.C. § 2000e-2(a) (1977)).

123. 42 U.S.C. § 2000e-2(a). Note that race discrimination is not made subject to the BFOQ exception. *Id.*

124. B. SCHLEI & P. GROSSMAN, *supra* note 91 at 358.

125. B. SCHLEI & P. GROSSMAN, *supra* note 91 at 358-59.

126. B. SCHLEI & P. GROSSMAN, *supra* note 91 at 358-59.

In *Dothard v. Rawlinson*,¹²⁷ the Supreme Court pointed out that the relevant legislative history of the BFOQ exception and the interpretation of the applicable EEOC guidelines indicated that "the bfoq exception was . . . meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex."¹²⁸ Despite this narrow interpretation given the BFOQ, the Court in *Dothard* upheld the exclusion of females from contact positions as guards in a maximum security, all-male penitentiary.¹²⁹ The State of Alabama's BFOQ defense was based upon its need to control and maintain effective security in their penal system by employing persons of adequate strength.¹³⁰ The Court held that the state's defense successfully rebutted *Dothard's* allegation of sex discrimination.¹³¹

Many courts have disagreed as to what constitutes a sufficient BFOQ defense.¹³² The narrowest view is found in the Ninth Circuit's decision in *Rosenfeld v. Southern Pacific Co.*,¹³³ which involved a railroad's refusal to hire a woman for the job of agent-telegrapher.¹³⁴ Southern Pacific restricted this position to male employees on the grounds that women could not handle the physical aspects of the job as well as the long hours required.¹³⁵ The *Rosenfeld* court held that when there was a high degree of correlation between particular sex characteristics and the ability to perform a particular job, there had to be an individual evaluation of the employee's ability to perform the tasks required by that particular job.¹³⁶ Therefore, the court held that Southern Pacific's exclusion of all women from the job as agent-telegrapher was not justified as a BFOQ.¹³⁷

127. 433 U.S. 321 (1977).

128. *Id.* at 334. See, e.g., *Interpretive Memorandum of Senators Clark and Case*, 119 CONG. REC. 7213 (1964) (explaining the legislative intent to create an exception); 29 C.F.R. § 1604.2(a) (1980) (which provides that the EEOC "believes that the [BFOQ] exception as to sex should be interpreted narrowly and that the construction of the statute should be given weight"); Sitota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 TEX. L. REV. 1025 (1977) (generally supporting the interpretation of Title VII which creates the BFOQ exception).

129. *Dothard*, 433 U.S. at 328.

130. *Id.* at 335. The court accepted the state's contention that sex offenders incarcerated in the prison could sexually assault female guards, which would not only pose a threat to the guards personally, but to the security of the facility as a whole. *Id.* at 336.

131. *Id.* at 336-37. However, the Eighth Circuit has rejected a similar defense. *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1075, 1082 (8th Cir. 1980). In *Gunther*, the court declined to permit a BFOQ exception which would have excluded women from the position of correctional officers. *Id.* at 1082-85.

132. Comment, 84 HARV. L. REV. 1109, 1177 (1971).

133. 444 F.2d 1219 (9th Cir. 1971).

134. *Id.* at 1223.

135. *Id.* at 1224.

136. *Id.* at 1225.

137. *Id.* at 1227.

The Fifth Circuit in *Weeks v. Southern Bell Telephone & Telegraph Co.*¹³⁸ articulated a broader definition which permitted a finding of a BFOQ where "all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."¹³⁹ In *Weeks* the telephone company had excluded women from the position of switchman based on the company's perception that the job was too strenuous for women.¹⁴⁰ Despite the broad interpretation given the BFOQ defense, the Fifth Circuit concluded that the telephone company failed to satisfy its burden that substantially all women would be unable to perform the job of switchman.¹⁴¹

This broad interpretation was soon limited in a subsequent decision by the Fifth Circuit. In *Diaz v. Pan American Airways Inc.*¹⁴² a plaintiff challenged the airline's policy of excluding men from flight attendant positions.¹⁴³ Pan American excluded males from the positions based upon its belief that customers preferred to be served by female flight attendants.¹⁴⁴ The Fifth Circuit held that the BFOQ section of Title VII requires an employer to prove that the "essence" of the business would be undermined without the discriminatory job classification.¹⁴⁵ The Fifth Circuit found that Pan American failed to prove that male flight attendants would undermine the "essence" of the airline industry which the court found to be passenger safety.¹⁴⁶

In *Gunther v. Iowa State Men's Reformatory*,¹⁴⁷ the Eighth Circuit refused to accept a BFOQ justification presented by the State of Iowa with regard to its hiring practices in its minimum security prisons.¹⁴⁸ The Eighth Circuit distinguished the *Dohard* precedent by focusing on the "manifest relationship" between the BFOQ and the employment in question.¹⁴⁹ The Eighth Circuit found that the "rampan violence" and the "peculiarly inhospitable" environment found

138. 408 F.2d 228 (5th Cir. 1969).

139. *Id.* at 235.

140. *Id.* at 235-36. The company asserted that the heavy lifting involved in the job was beyond most women's capabilities. *Id.*

141. *Id.* at 236. The company failed to substantiate that "all or substantially all" of the women applicants would be unable to perform the lifting involved in the job classification. *Id.*

142. 442 F.2d 385 (5th Cir.), cert. denied, 404 U.S. 950 (1971).

143. *Id.* at 385-86.

144. *Id.* at 387. Pan American argued that an airplane cabin represents a unique environment which creates fear. Passenger's fears could be psychologically reduced by employing females in order to produce a calming effect among its passengers. *Id.*

145. *Id.* at 388.

146. *Id.* at 389. The court recognized that the public's expectations of female flight attendants would initially be difficult to change. However, the court held that it was these very stereotyped prejudices which Title VII was meant to overcome. *Id.*

147. 612 F.2d 1078 (1980).

148. *Id.* at 1083.

149. *Id.* at 1085-86.

in the Alabama maximum security prison system was the justification that the Supreme Court used to find a BFOQ in the *Dohard* case.¹⁵⁰ As the *Gunther* case involved a minimum security prison, the Eighth Circuit could find no justifiable reason advanced by the state, other than the reason of the plaintiff's gender, which would indicate that the plaintiff was unable to perform the duties required by the job classification.¹⁵¹ Accordingly, the Eighth Circuit held that the State of Iowa failed to demonstrate that its job classification met Title VII's "extremely narrow" BFOQ exception in employment discrimination.¹⁵²

The Pregnancy Discrimination Act

One of the most perplexing issues in the *Chambers* case is the adequacy of protection afforded to women who "work and bear children."¹⁵³ The Supreme Court first addressed pregnancy discrimination in *General Electric Co. v. Gilbert*.¹⁵⁴ General Electric provided compensation to all employees who became totally disabled as a result of a nonoccupational sickness or accident.¹⁵⁵ However, it excluded compensation for pregnancy under the plan.¹⁵⁶ The Court held that an employer was not prohibited under Title VII from excluding pregnancy disabilities from a comprehensive disability plan.¹⁵⁷ Consequently, there was no gender-based discrimination, since pregnant women were the only group of employees who did not receive disability benefits offered under the plan.¹⁵⁸

The Supreme Court's decision in *General Electric* prompted Congress to reverse it through the enactment of the Pregnancy Discrimination Act ("PDA") of 1978.¹⁵⁹ The PDA provides in pertinent part:

[T]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of preg-

150. *Id.*

151. *Id.*

152. *Id.* at 1087.

153. Greene, *Twenty Years of Civil Rights: How Firm a Foundation?*, 27 RUTGERS L. REV. 707, 728 (1985).

154. 429 U.S. 125 (1976).

155. *Id.* at 127.

156. *Id.* at 127-28.

157. *Id.* at 145-46. But see *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977) (determining that *General Electric* limits but does not eliminate Title VII's application to pregnancy discrimination).

158. *General Electric*, 429 U.S. at 138. See *Geduldig v. Aiello*, 417 U.S. 484 (1974). There are essentially two groups, one being an all-female group which is seeking pregnancy disability benefits, and a second one which includes both males and females, seeking general disability compensation. Therefore, females as a protected class were not discriminated against. *Id.* at 496-97.

159. 42 U.S.C. § 2000e(k) (1980). See Note, *Dependant's Pregnancy-Related Medical Benefits and the Pregnancy Discrimination Act*, 1983 DUKE L.J. 134, 134 (1983).

nancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.¹⁶⁰

Following the enactment of the PDA the Supreme Court in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*¹⁶¹ embraced the concept that "[t]he Pregnancy Discrimination Act has now made it clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex."¹⁶² The decision in *Newport* is supported by the legislative history of the PDA, which demonstrates Congress' intention to subject pregnancy-based discrimination to the same judicial scrutiny as other acts of sex discrimination.¹⁶³

A recent Eighth Circuit case, *Carney v. Martin Luther Home, Inc.*,¹⁶⁴ held that an employer violated the PDA when it placed a pregnant employee on unpaid pregnancy leave.¹⁶⁵ Carney was employed as a services trainer for the mentally impaired at the Martin Luther Home, where she taught a range of skills to the residents.¹⁶⁶ In addition to these training activities, Carney was a house parent which required her to assist residents and give baths.¹⁶⁷

As a result of her pregnancy, Carney was discharged without pay until the birth of her child, based on the employer's belief that she would be unable to lift or care for residents without assistance.¹⁶⁸ However, the employer failed to carry its burden of establishing that lifting and caring for residents without assistance was a BFOQ.¹⁶⁹

The Eighth Circuit emphasized that the PDA was enacted "to ensure that pregnant women are judged on their actual ability and willingness to work" rather than on an employer's personal beliefs

160. 42 U.S.C. § 2000e(k).

161. 452 U.S. 669 (1983).

162. *Id.* at 684. See H.R. REP. NO. 95-948, 95th Cong., 2d Sess. 18, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 4749, 4754.

163. H.R. REP. NO. 948, 95th Cong., 2d Sess. 4, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 4749, 4754. The House Report recognized the serious obstacles faced by pregnant women in the work force. The Report clearly noted that the "[c]onsequences of . . . discriminatory employment policies on pregnant women in general has historically had a persistent and harmful effect upon their careers." *Id.* H.R. REP. NO. 948 at 6, 1978 U.S. CODE CONG. & ADMIN. NEWS at 4754.

164. 824 F.2d 643 (8th Cir. 1987).

165. *Id.* at 644.

166. *Id.* at 643-44.

167. *Id.* at 644.

168. *Id.* at 648.

169. *Id.* at 649. In fact, the employer conceded on appeal that Carney could perform her job adequately in a pregnant condition. *Id.*

concerning the employee's pregnancy.¹⁷⁰

Constitutional Issues and Their Application to Title VII

Regardless of whether a case is based on constitutional grounds applicable to public employers, or Title VII grounds applicable to private employers, courts have made it clear that employers may not discharge female employees for reasons of pregnancy absent a showing of necessity.¹⁷¹ Specifically, the cases decided on equal protection or right to privacy grounds clearly indicate that in the absence of sufficient justification, discriminatory policies will likely be found to be irrational and arbitrary.¹⁷²

Judicial protection against employment discrimination under the guise of equal protection was evidenced by the Fifth Circuit in *Andrews v. Drens Separate School District*.¹⁷³ The Fifth Circuit struck down a school district's policy which violated the equal protection clause of the fourteenth amendment.¹⁷⁴ The school district's policy prohibited the employment of parents of illegitimate children.¹⁷⁵ Two parents of illegitimate children employed in the school district as teachers aides brought an action challenging the constitutionality of the illegitimate parent policy.¹⁷⁶

The school district defended its policy on the basis that illegitimate parenthood is prima facie proof of immorality.¹⁷⁷ The district further contended that the presence of unwed parents in an educational environment would significantly contribute to teenage pregnancies.¹⁷⁸ However, the Fifth Circuit rejected this argument because it was based only on speculation and lacked factual sup-

170. *Id.* See also *Levin v. Delta Airlines, Inc.*, 703 F.2d 994, 998-99 (5th Cir. 1984) (holding that there must be an objective analysis of the employee's capabilities and the necessary requirements of the job); *EEOC v. Old Dominion Security Corp.*, 41 F.E.P. Cases 612, 617-18 (E.D. Va. 1986) (finding that an employer's discriminatory practices will not be upheld based solely on an employer's good faith or subjective beliefs).

171. *Legal Decisions of Interest*, 7 CURRENT MUN. PROBS. 117, 123 (1980-81).

172. *Harris v. Pan American World Airways Inc.*, 649 F.2d 670, 676 (9th Cir. 1980).

173. 507 F.2d 811 (5th Cir. 1975).

174. *Id.* at 617.

175. *Id.* at 612. The school district's policy provided that parenthood of an illegitimate child would automatically exclude an applicant or employee from employment within the school system. *Id.*

176. *Id.*

177. *Id.* at 614.

178. *Id.* at 617. The school district stated that its policy furthered the creation of a moral scholastic environment. Their justification for the policy was: "(1) unwed parenthood is prima facie proof of immorality; (2) unwed parents are improper communal role models, after whom students may pattern their lives; (3) employment of an unwed parent in a scholastic environment materially contributes to the problem of school-girl pregnancies." *Id.* at 614.

port.¹⁷⁹ The final justification offered by the school district was that parents of illegitimate children are poor role models for the students.¹⁸⁰ The court rejected this rationale as well and stated that:

In the absence of overt, positive stimuli to which children can relate, we are convinced that the likelihood of inferred learning that unwed parenthood is necessarily good or praiseworthy, is highly improbable, if not speculative. We are not at all persuaded by defendants' suggestions, quite implausible in our view, that students are apt to seek out knowledge of the personal and private family lifestyles of teachers or other adults within a school system (i.e. whether they are divorced, separated, happily married or single, etc.), and, when known, will approve of and seek to emulate them.¹⁸¹

Moreover, the school district failed to take into consideration the multitude of circumstances "under which illegitimate childbirth may occur and which may have little, if any, bearing on the parent's present moral worth."¹⁸² As a result, the Fifth Circuit held that the policy failed to withstand the most lenient equal protection analysis, which required that a classification be rationally related to a legitimate governmental interest.¹⁸³ It was not disputed that the school had a legitimate governmental interest in assisting their student's moral as well as scholastic development.¹⁸⁴ Yet, the means used to obtain that goal, by firing unwed parents, was not rationally related to that interest.¹⁸⁵

Many courts have held that public employment is not a privilege that can be made subject to unreasonable demands.¹⁸⁶ In *Ponton v. Newport News School Board*,¹⁸⁷ an unmarried pregnant teacher challenged the school board's policy which required her to take a forced leave of absence because she was single and pregnant.¹⁸⁸ The plaintiff claimed that this policy constituted both a violation of Title VII and of her constitutional right to privacy.¹⁸⁹

The school board attempted to justify its policy by contending that it had a legitimate interest in "protecting school children from

179. *Id.* at 617.

180. *Id.* at 614.

181. *Id.* at 616-17.

182. *Id.* at 613-14.

183. *Id.* at 614.

184. *Id.*

185. *Id.*

186. *Ponton v. Newport News School Board*, 632 F. Supp. 1056, 1062 (E.D. Va. 1986).

187. 632 F. Supp. 1056 (E.D. Va. 1986).

188. *Id.* at 1060.

189. *Id.* at 1058.

exposure to a single, pregnant teacher."¹⁹⁰ Unwed pregnancy was considered by the school board to be a moral defect which rendered the plaintiff "unfit to teach."¹⁹¹ The district court found this contention to be meritless.¹⁹² The mere sight of an unmarried, pregnant teacher, without proof that the teacher intended to openly advocate the virtues of unwed pregnancy, would not create a need for the students to be protected.¹⁹³ The court further determined that the:

[p]laintiff's pregnancy would not have affected the School Board's authority to prescribe the curriculum for plaintiff's students, nor would it have affected plaintiff's ability to implement this curriculum in her classes. Finally there was no danger that plaintiff's single, pregnant status could in any way be perceived as representing a School Board-sponsored statement regarding the desirability of pregnancy out of wedlock; rather, such status could only be viewed as representing a personal decision made by plaintiff in her private capacity.¹⁹⁴

Moreover, the court found that the plaintiff had a right to bear children out of wedlock which is protected by the Constitution.¹⁹⁵ The school board's prohibition of this right constituted a violation of the teacher's constitutional right to privacy.¹⁹⁶

In order to determine whether the teacher's constitutional right of privacy had been violated, the court used a balancing test.¹⁹⁷ This balancing test weighed the school board's interest in protecting school children against the teacher's right to bear a child out of wedlock.¹⁹⁸ The court found that the school board failed to prove that it had a legitimate state interest capable of overriding the teacher's constitutional right to privacy.¹⁹⁹

In addition, the court found that the constitutional violations also

190. *Id.* at 1062.

191. *Id.*

192. *Id.*

193. *Id.* at 1062-63. There was no evidence presented by the school board that the plaintiff intended to shape her students' views toward the acceptance of unwed pregnancy. Therefore, the mere knowledge that the teacher was single and pregnant would "be negligible at best." *Id.*

194. *Id.* at 1063.

195. *Id.* at 1061.

196. *Id.* at 1062. The Court stated that "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

197. *Ponton*, 632 F. Supp. at 1062.

198. *Id.* The court had "serious doubt" as to whether protecting school children from exposure to an unwed parent was a legitimate state interest. *Id.*

199. *Id.* at 1063. The court found that the school board's interest asserted in support of the mandatory pregnancy leave was, at best, very weak. *Id.*

stated a cause of action under Title VII.²⁰⁰ The fact that the teacher had been forced to take a leave of absence because she was single and pregnant established a prima facie case of sex discrimination.²⁰¹ This shifted the burden of proof to the school board in order to articulate a legitimate, nondiscriminatory reason for the policy.²⁰²

The only justification offered by the school board was that unwed pregnant teachers set a bad moral example for school children.²⁰³ This justification was found by the district court to be unacceptable.²⁰⁴

SUMMARY

In summary, a Plaintiff bringing a Title VII action under the disparate impact theory must show that the employment practice in question impacts statutorily protected employees in a discriminatory manner.²⁰⁵ The burden then shifts to the employer to establish either a business necessity or a job-related criteria.²⁰⁶ In addition, the employer must show that the employment policy in question is the least restrictive alternative.²⁰⁷

On the other hand, the disparate treatment analysis focuses on the establishment of discriminatory intent as a motivation behind an employer's policies.²⁰⁸ This showing shifts the burden to the employer to articulate a legitimate, nondiscriminatory reason for the employment policy in question.²⁰⁹ Furthermore, an employee may be required to demonstrate that the employment practice in question is a BFOQ, which is a statutorily created exception to a discriminatory practice under Title VII.²¹⁰

Another statutory provision which seeks to protect the rights of pregnant employees is the PDA.²¹¹ This act has made it clear that for Title VII purposes, discrimination based on pregnancy, is on its face, sex discrimination.²¹²

Finally, the application of the equal protection doctrine, and

200. *Id.* at 1065. The court identified pregnancy as an immutable sex characteristic and accorded constitutional protection to the right to bear a child out of wedlock. *Id.*

201. *Id.* The court emphasized the PDA which makes it clear that discrimination on the basis of pregnancy is sex discrimination in violation of Title VII. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. See *supra* notes 70-74 and accompanying text.

206. See *supra* notes 75-93 and accompanying text.

207. See *supra* notes 94-99 and accompanying text.

208. See *supra* notes 100-02 and accompanying text.

209. See *supra* notes 107-11 and accompanying text.

210. See *supra* notes 121-23 and accompanying text.

211. See *supra* notes 159-60 and accompanying text.

212. See *supra* notes 161-63 and accompanying text.

other constitutional issues, to a Title VII case is unclear,²¹³ while the cases which have utilized a constitutional approach to find a violation of Title VII have dealt only with the public sector and state action, the question remains open whether these same standards apply to discriminatory employment policies by a private employer.²¹⁴

ANALYSIS

In *Chambers v. Omaha Girls Club*,²¹⁵ the Eighth Circuit addressed a contemporary pregnancy discrimination claim.²¹⁶ Chambers successfully established a prima facie case of both disparate impact and disparate treatment, because she was fired for being single and pregnant.²¹⁷ She was fired because the Girls Club ("Club") had a Negative Role Model Policy ("Policy") which prohibited the employment of unmarried, pregnant staff members.²¹⁸ The Club justified this Policy as a business necessity and a BFOQ by emphasizing the Club's goal of preventing teenage pregnancy.²¹⁹

In *Chambers*, the Eighth Circuit did not accurately distinguish between the BFOQ and the business necessity exceptions to a claim of Title VII discrimination.²²⁰ The business necessity defense is a judicially created exception to a case of disparate impact, and the BFOQ is a statutorily created exception to a case of sex-based disparate treatment.²²¹ Yet, the Eighth Circuit erroneously concluded that the Club met its burden of establishing a BFOQ based on its evidentiary proof of a business necessity.²²²

Moreover, the Eighth Circuit's determination that the Policy constituted a business necessity is questionable.²²³ The Club failed to prove that there was a manifest relationship between the Policy and the prevention of teenage pregnancy.²²⁴ Therefore, the application of an insufficient justification to meet the much narrower BFOQ de-

213. See *supra* notes 171-72 and accompanying text.

214. See *supra* notes 171-204 and accompanying text.

215. 834 F.2d 697 (8th Cir. 1987).

216. This is the first time that the Eighth Circuit has heard a pregnancy-based sex discrimination case since *Brown v. Bathke*. See *Brown v. Bathke*, 566 F.2d 558 (8th Cir. 1977).

217. *Chambers*, 834 F.2d at 701, 703.

218. *Id.* at 699.

219. *Id.* at 701, 704.

220. C. SULLIVAN, *supra* note 4, at 137-38. See *supra* note 124-26 and accompanying text (detailing the distinction between the two concepts).

221. C. SULLIVAN, *supra* note 4, at 139. See also *Griggs v. Duke Power Co.*, 401 U.S. 424, 438 (1971) (creating the exception).

222. *Chambers*, 834 F.2d at 804. The Eighth Circuit applied the manifest relationship analysis to both defenses. *Id.*

223. See *infra* notes 248-53 and accompanying text.

224. See *infra* notes 266-74 and accompanying text.

fense was improper and led to an erroneous conclusion by the Eighth Circuit.²²⁵

THE BUSINESS NECESSITY DEFENSE: AN EMPLOYER'S HEAVY BURDEN

The Eighth Circuit's Failure to Apply its Heavy Burden

According to the Supreme Court in *Griggs*, a business necessity exists only if the challenged employment practice has a "manifest relationship to the employment in question."²²⁶ The Eighth Circuit in *Chambers* expressly stated that this presents an employer with a heavy burden.²²⁷ However, this heavy burden was never placed on the Club.²²⁸

The Eighth Circuit upheld the district court's finding of business necessity by determining that the Policy had a manifest relationship to the Club's fundamental purpose.²²⁹ This manifest relationship test was applied without clarifying any nexus between the Policy and the Club's purposes.²³⁰ The Club's express purpose was to serve young girls and to provide them with positive options in life.²³¹ Specifically it was established by the Club that teenage pregnancy would be contrary to that purpose.²³² The only evidence presented to establish a business necessity was that the Club "honestly believed that to permit single pregnant staff members to work with the girls would convey the impression that the Girls Club condoned pregnancy for the girls in the age group it serves."²³³

Notwithstanding that validation studies are not always required to prove a business necessity defense, mere speculation should not be permitted.²³⁴ In the absence of a factual basis for a discriminatory practice, an employer should not be permitted to implement the policy.²³⁵ The Club's honest belief that the Policy acted to prevent teenage pregnancy is insufficient to support either a business necessity or

225. See *infra* notes 275-77 and accompanying text.

226. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

227. *Chambers*, 834 F.2d at 701.

228. See *infra* notes 266-74 and accompanying text.

229. *Chambers*, 834 F.2d at 701-02.

230. See *infra* notes 243-50 and accompanying text.

231. *Chambers*, 834 F.2d at 701.

232. *Id.*

233. *Id.* at 701-02.

234. *Id.* at 702. See also *Davis v. City of Dallas*, 777 F.2d 205, 217-18 (5th Cir. 1985) (holding that the professional nature of the job of city policy officers, coupled with the risks and the public responsibility inherent in that position, justified not requiring empirical evidence of job relatedness to a job requirement which required applicants to have completed 45 semester hours of college credit with a C average).

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

BFOQ defense.²³⁶ Beliefs and speculation, without more, are not plausible substitutes for demonstrable data.²³⁷ The prevention of teenage pregnancy by the Policy must be definite and irrefutable, not merely believed by the Girls Club.²³⁸

Despite the theoretical awkwardness of applying the constitutional doctrine cases to the facts at hand, it is essential to do so in order to demonstrate the lack of business necessity.²³⁹ If courts have seen fit to reject a role model defense because it was not rationally related to a legitimate interest, it stands to reason that the Club's Policy cannot meet the stricter manifest relationship analysis.²⁴⁰ It must be noted that the constitutional doctrines only apply when the plaintiff can make a showing of state action. However, there is nothing in the applicable case law or statutory provisions to suggest that Congress intended to impose an easier burden on the private employer with regard to sexual discrimination.²⁴¹ There are several cases which have dealt with factual situations very similar to *Chambers*, yet have correctly rejected an employer's role model defense.²⁴²

The Fifth Circuit in *Andrews* rejected a school district's policy which excluded parents of illegitimate children from employment.²⁴³ The school district claimed that unwed parents were improper role models for school children, and would contribute to the problem of teenage pregnancy.²⁴⁴ The Fifth Circuit stated that these claims were "patently absurd" and that illegitimate childbirth should not be likened to a moral disease.²⁴⁵

More importantly, the Fifth Circuit discussed examples of illegitimate childbirth which would have no relation at all to a parent's present capability of being a positive role model.²⁴⁶ For example, the school district's policy would have excluded an unmarried teacher who became pregnant as a result of being raped and chose not to

236. *Chambers*, 834 F.2d at 707-08 (McMillian, J., dissenting). See *supra* note 186 and accompanying text.

237. *Chambers*, 834 F.2d at 707-08 (McMillian, J., dissenting).

238. See generally, *EEOC v. Rath Packing Co.*, 787 F.2d 318, 332 (8th Cir. 1986) (holding that there must be a compelling need for the policy that is concrete and definite).

239. See *supra* notes 171-214 and accompanying text.

240. See *Saity v. Nashville Gas Co.*, 522 F.2d 850, 855 (6th Cir. 1975).

241. See *supra* notes 75-78 and accompanying text. Generally *rational* is defined as "having reason or understanding," and *Manifest* as "easily understood or recognized; obvious; to make evident or certain by showing or displaying." Webster's Collegiate Dictionary 724, 977 (9th ed. 1983).

242. See *supra* notes 173-99 and accompanying text.

243. *Andrews v. Drew Municipal Separate School District*, 507 F.2d 611, 617 (1975).

244. *Id.* at 614.

245. *Id.* at 615.

246. *Id.*

abort the child.²⁴⁷

Admittedly, a school district has a legitimate state interest in contributing to the moral and scholastic development of children.²⁴⁸ However, the exclusion of parents with illegitimate children is not rationally related to that interest.²⁴⁹ The Fifth Circuit has stated that there is no factual correlation between the exclusion of an unwed parent and the prevention of teenage pregnancy.²⁵⁰

If a role model defense identical to that made in *Chambers* could not withstand the most lenient standard of an equal protection analysis, arguably it should not have withstood the more rigorous manifest relationship test of Title VII.²⁵¹ The Policy in *Chambers*, like that in *Andrews*, constitutes both an inherent and as applied impermissible discriminatory classification based on sex.²⁵² Hence, the Club should not be permitted to discriminate under the guise of Title VII when it would not be permitted to do so if it were a state agency.²⁵³

Furthermore, courts have found that the right of childbearing is a matter of privacy which falls within the penumbra of personal rights protected by the ninth and fourteenth amendments.²⁵⁴ In *Ponton*, a pregnant unmarried teacher was forced to take a leave of absence because the school district alleged that such teachers would have a negative impact on school children.²⁵⁵ The district court recognized that school districts must be accorded great deference in regard to decisions affecting the management of schools.²⁵⁶ However, the school district's interest in avoiding the student's exposure to the sight of an unwed pregnant teacher did not outweigh the teacher's constitutional right to bear a child out of wedlock.²⁵⁷

The resolution of the constitutional issues in *Ponton* indicates

247. *Id.* The Fifth Circuit stated that "[a] person could live an impeccable life, yet be barred as unfit for employment for an event, whether the result of indiscretion or not, occurring at any time in the past." *Id.*

248. *Id.* at 614.

249. *Id.*

250. *Id.* at 617.

251. *Chambers*, 634 F.2d at 708 (McMillian, J. dissenting).

252. *Andrews*, 507 F.2d at 613.

253. Compare *Chambers*, 634 F.2d at 703 with *Andrews*, 507 F.2d at 617. Where a state has adopted a suspect classification involving sex, the Court stated that it "bears a heavy burden of justification." *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964). The Supreme Court stated that "In order to justify the use of a suspect classification a state must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary to the accomplishment' of its purpose or the safeguarding of its interest." *Sugarman v. Dougall*, 413 U.S. 634, 646 (1973).

254. See *supra* note 195.

255. *Ponton*, 632 F. Supp. at 1062. See *supra* note 206.

256. *Ponton*, 632 F. Supp. at 1062.

257. See *supra* notes 197-99 and accompanying text.

that the school district's policy also violated Title VII.²⁵⁸ *Ponton* successfully claimed that the school district's mandatory pregnancy leave discriminated on the basis of sex in violation of Title VII.²⁵⁹ The establishment of *Ponton*'s prima facie case of sex discrimination shifted the burden of proof to the school district in order to articulate a legitimate, nondiscriminatory reason for the forced pregnancy leave.²⁶⁰

The court emphatically reiterated the invalidity of the school district's justification that unwed pregnant teachers provide a bad moral example for children.²⁶¹ The court stated that "discrimination based on either immutable sex characteristics or constitutionally protected activities such as marriage or child rearing violate [Title VII] because they present obstacles to employment of one sex that cannot be overcome."²⁶²

The analogy between the decision in *Ponton* and the Eighth Circuit's holding in *Chambers* is particularly appropriate in the Title VII context.²⁶³ The discrimination in both cases is based on both an immutable sex characteristic (pregnancy) and a constitutionally protected activity (the right to bear children out of wedlock).²⁶⁴ *Ponton* unequivocally holds that a policy which discriminates against the enjoyment of these rights are, without exception, in violation of Title VII.²⁶⁵

Additionally, the decision in *Ponton* demonstrates that a role model defense without sufficient justification cannot meet even the least burdensome test of Title VII.²⁶⁶ The articulation of a legitimate, nondiscriminatory reason for a discriminatory employment practice is much easier to establish than the business necessity and BFOQ defenses.²⁶⁷ Although the articulation of a legitimate, nondiscriminatory reason for an employment policy is a defense to a claim of disparate treatment, it is important to note that a claim of disparate impact places a much heavier burden on the employer to prove a business necessity.²⁶⁸

258. *Ponton*, 632 F. Supp. at 1064.

259. *Id.*

260. *Id.* at 1063.

261. *Id.*

262. *Id.*

263. See *infra* notes 266-74 and accompanying text.

264. See *Chambers*, 634 F.2d at 697.

265. *Ponton*, 632 F. Supp. at 1065.

266. *Id.*

267. See *supra* note 119 and accompanying text.

268. See *supra* notes 107-08 and accompanying text. See also *Hawkins v. Anheuser-Busch, Inc.*, 697 F.2d 810-15 (8th Cir. 1983) (holding that disparate impact claims place a heavier burden on the employer).

Therefore, it is inconceivable that the Eighth Circuit in *Chambers* could have found the Club's role model defense justifiable as a business necessity.²⁶⁹ Apparently, the Eighth Circuit failed to place the proper burden of proof on the Club.²⁷⁰ This is evidenced by the court's unsubstantiated acceptance of the Club's proposition relating an unwed pregnant instructor to increased teenage pregnancies.²⁷¹ The assumption by the Club that *Chambers* was a negative role model should not have been able to withstand a business necessity analysis.²⁷² There was no evidence *Chambers* intended to proselytize the Club's members about the virtues of single pregnancy.²⁷³ Furthermore, the Club should have been forced to support its allegation of the absence of a least restrictive alternative by more substantial evidence.²⁷⁴

THE BFOQ: CONGRESS' NARROW EXCEPTION

The Eighth Circuit's Failure to Apply a Proper BFOQ Analysis

Courts must evaluate the legitimacy of a BFOQ defense in a different manner than a business necessity defense.²⁷⁵ Any policy that discriminates on the basis of sex must satisfy the statutory requirement of a BFOQ which provides that it must be "reasonably necessary to the normal operation of that particular business."²⁷⁶ The BFOQ defense is an "extremely narrow exception to the general prohibition of discrimination on the basis of sex."²⁷⁷

The BFOQ exception requires a court to undertake a closer examination of the employer's job classification and of the justification offered for the challenged policy than the examination made by the Eighth Circuit in *Chambers*.²⁷⁸ Congress intended the BFOQ exception to be used in only "rare situations" and gave it a "very limited" application.²⁷⁹ In contrast to Congressional intent, the Eighth Circuit endorsed the Club's subjective belief that single pregnant instructors contribute to teenage pregnancy without any showing of a factual

269. *Chambers*, 834 F.2d at 704.

270. *Id.* at 708 (McMillian, J., dissenting).

271. *Id.*

272. *Id.*

273. See *supra* notes 195 and accompanying text.

274. *Brown*, 566 F.2d at 593-94.

275. See *supra* notes 124-31 and accompanying text.

276. *Carney v. Martin Luther Home, Inc.*, 824 F.2d 643, 649 (8th Cir. 1987).

277. *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977).

278. *Chambers*, 834 F.2d at 706 (McMillian, J., dissenting).

279. See, H.R. REP. NO. 914, 88th Sess., 13, reprinted in 1969 U.S. CODE CONG. & AD. NEWS 2355, 2403. *Chambers* would negate congressional intent if pregnancy distinctions were permitted after application of the BFOQ exception.

basis.²⁸⁰

Incredibly, it was the Eighth Circuit itself which admitted that a BFOQ analysis was not applied.²⁸¹ In *Chambers*, the Eighth Circuit stated that "inasmuch as we already have affirmed the district court's finding of business necessity . . . we feel compelled to conclude that . . . the role model rule qualifies as a bona fide occupational qualification."²⁸² While acknowledging that the district court had not clearly concluded that the Policy qualified as a BFOQ, the Eighth Circuit mistakenly substituted the insufficient evidence used to establish the business necessity defense and applied it to find a BFOQ justification.²⁸³

CONCLUSION

Chambers demonstrates the Eighth Circuit's dereliction in applying the requisite degrees of proof in order to justify discrimination under Title VII.²⁸⁴ By its failure to place the proper burden of proof upon an employer, the Eighth Circuit in *Chambers* perpetuates a woman's constant struggle for equality in the work place.²⁸⁵ *Chambers*, in effect, provides a loophole for employers to escape allegations of pregnancy discrimination by a reliance upon subjective criteria of employment.²⁸⁶

Crystal *Chambers* established a prima facie case of both race and sex discrimination.²⁸⁷ Having established this burden, the Eighth Circuit saw fit to disregard the Club's heavy burden of rebuttal.²⁸⁸ This decision represents a chilling step backwards for the congressionally mandated goal of equal opportunity in the workplace.²⁸⁹ The decision also creates a loophole for the Eighth Circuit to further erode women's rights not only in the workplace but possibly in the home. What becomes strikingly clear in the *Chambers* decision is that the Eighth Circuit only partially respects the rights granted women through the constitution and various legislative enactments.

280. *Chambers*, 834 F.2d at 707-08.

281. *Id.* at 703-04.

282. *Id.* at 704-05.

283. *Id.* at 705. The Eighth Circuit noted in its order denying a rehearing en banc that the district court had stated that since the Club "had met [its] burden on the basis of business necessity, it [was] not necessary to determine whether the evidence would satisfy a BFOQ, although presumably it would." *Chambers v. Girls Club of Omaha*, 629 F. Supp. 925, 951 n.31 (1986).

284. See *supra* notes 219-83 and accompanying text.

285. See *supra* notes 225-83 and accompanying text.

286. See *supra* notes 234-38 and accompanying text.

287. See *supra* notes 34-44 and accompanying text.

288. See *supra* notes 243-77 and accompanying text.

289. See *supra* notes 228-74 and accompanying text.

Apparently, the Eighth Circuit may permit an individual to bear arms under the law, but deny the same individual the right to bear children.

Kimberly L. Hilliard — 89**

ESTOPPEL AND THE AFFIRMATIVE MISCONDUCT REQUIREMENT—*CHIEN-SHIH WANG V.* ATTORNEY GENERAL

INTRODUCTION

Traditionally, the United States government has been immune from the doctrine of equitable estoppel.¹ However, in recent years this view has given way to the sounder view that estoppel may lie against the government in the proper case.² Determining the proper case, however, has not been an easy task.³

As a general rule, the doctrine of equitable estoppel precludes a party from maintaining a defense or a right that may have otherwise been available against one who reasonably relied to his detriment on the former's actions or misinformation.⁴ In order to invoke the defense of estoppel, four elements must be established:

- (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.⁵

In the United States, the traditional rule has been that estoppel cannot lie against the United States government.⁶ The underlying reason for the rule appears to stem from the early notion that "the King can do no wrong," which led to the doctrine of sovereign immunity in the United States.⁷ The principle seemed so firmly embedded that courts would apply it rather mechanically, without discerning any need for explanation or justification of its rationale.⁸ Early on, the Supreme Court has discarded the estoppel argument by simply

1. K. DAVIS, ADMINISTRATIVE LAW TREATISE § 17.01, at 343 (1959); See, e.g., Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 383-86 (1947) (finding that the estoppel argument is not applicable against a government agency); Utah Power & Light Co. v. United States, 243 U.S. 389, 408-09 (1917) (discarding the estoppel argument by stating that "it is enough to say that the United States is neither bound by nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit").

2. K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 17.01, at 399 (1975).

3. *Id.*

4. 3 J. POMEROY, EQUITY JURISPRUDENCE § 804, at 189 (5th ed. 1941).

5. United States v. Georgia-Pacific Co., 421 F.2d 92, 96 (5th Cir. 1970) (quoting Hampton v. Paramount Pictures Corp., 279 F.2d 100, 104 (9th Cir. 1960)).

6. See *supra* note 1 and accompanying text.

7. K. DAVIS, ADMINISTRATIVE LAW TREATISE § 17.01, at 383 (1959).

8. Note, *Equitable Estoppel of the Government*, 79 COLUM. L. REV. 551, 552 (1970).

** Dedicated to my parents for their support and faith.

negligent treatment does no violence to the statute since the wrongful acts did in fact occur at different times throughout the treatment. However, where only a single negligent act has occurred, application of the continuous treatment rule would be contrary to the express statutory language. Regardless of future decisions, *Lane* is a significant liberalization of Arkansas medical malpractice law.

John D. Nichols

EMPLOYMENT DISCRIMINATION—BUSINESS NECESSITY AND BFOQ EXCEPTIONS TO TITLE VII EXTENDED TO UNMARRIED, PREGNANT YOUTH SERVICES WORKERS SERVING AS ROLE MODELS. *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697 (8th Cir. 1987).

The Omaha Girls Club (OGC) is a private club organized to help girls ages 8 to 18 "maximize their life opportunities."¹ One of OGC's goals is pregnancy prevention, because it sees pregnancy as limiting the opportunities for its young members. OGC emphasizes the development of close relationships between staff and members and trains its staff to act as role models for its members as a means of fulfilling its mission. Pursuant to this approach, OGC adopted a "role model rule" forbidding single parent pregnancies among its staff members.²

Crystal Chambers, a single black woman, worked as an arts and crafts instructor at the North Girls Club, a facility of OGC.³ She was discharged for violation of OGC's "role model rule" when she became pregnant. Chambers challenged the firing for her unmarried pregnancy by filing suit in federal district court in Nebraska.⁴ She brought suit under several theories, including violation of title VII of the Civil Rights Act of 1964, as amended.⁵ Except for the title VII claim based

1. *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697, 698 (8th Cir. 1987).

2. The OGC's personnel policies state:

MAJOR CLUB RULES

All persons employed by the Girls Club of Omaha are subject to the rules and regulations as established by the Board of Directors. The following are not permitted and such acts may result in immediate discharge:

* * * * *

11. Negative role modeling for Girls Club Members to include such things as single parent pregnancies.

Id. at 699 n.2.

3. An *amicus curiae* brief for the plaintiff/appellant points out that Chambers' employment with OGC was only part time. Brief of The Sisterhood of Black Single Mothers, The American Civil Liberties Union, The Nebraska Civil Liberties Union, and The Center for Constitutional Rights as *Amici Curiae* in Support of Appellant at 1, *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697 (8th Cir. 1987) (No. 86-1447).

4. *Chambers v. Omaha Girls Club, Inc.*, 629 F. Supp. 925 (D. Neb. 1986), *aff'd*, 834 F.2d 697 (8th Cir. 1987).

5. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-716, 78 Stat. 241, 251-56 (codified as amended at 42 U.S.C. §§ 2000e, 2000e-1 to -17 (1982); 5 U.S.C. §§ 2204-05 (repealed 1964)) [hereinafter title VII].

Chambers also filed claims for violations of her rights under the first, fifth, ninth, and fourteenth amendments to the Constitution and under civil rights statutes 42 U.S.C. §§ 1981, 1983, 1985, 1986, and 1988. She filed state law claims for bad faith discharge, defamation,

on sex and race discrimination, the district court dismissed all her claims before trial or at the end of her case in chief. The court ruled against Chambers on the title VII claim after a full trial.⁶

The court found that the title VII claim presented a prima facie case of combined race and sex discrimination under both the disparate treatment⁷ and disparate impact⁸ theories of recovery.⁹ However, it further found that OGC successfully rebutted Chambers' case under both theories, articulating a legitimate, nondiscriminatory reason for discharging her under the former theory¹⁰ and proving a business necessity for the role model rule with respect to the latter.¹¹

On appeal, Chambers contended that OGC based the role model rule upon its own speculation and presented no validation studies to show that the rule prevented pregnancies among OGC's members.¹² She also argued that the court should not have applied disparate treatment analysis to her case because discharge on account of pregnancy, without further analysis, constitutes intentional sex discrimination.¹³ Finally, she argued the role model rule could not be justified as a bona fide occupational qualification (bfoq) which would bring it within the statutory exception for intentional discrimination.¹⁴

The United States Court of Appeals for the Eighth Circuit affirmed the district court's factual findings as not clearly erroneous.¹⁵

invasion of privacy, intentional infliction of emotional distress, intimidation, and conspiracy to deprive her of her livelihood. *Chambers v. Omaha Girls Club, Inc.*, 629 F. Supp. 925, 929 (D. Neb. 1986).

6. 629 F. Supp. at 931-32.

7. The disparate treatment theory of recovery applies when an employer treats some people differently from others based on race, color, religion, sex, or national origin. See *infra* text accompanying notes 22-43.

8. Disparate impact analysis applies when an employer's apparently neutral practice has a disproportionate effect upon one of the groups protected by title VII. See *infra* text accompanying notes 44-54.

9. 629 F. Supp. at 947, 949.

10. *Id.* at 947.

11. *Id.* at 950.

12. 834 F.2d at 702.

13. *Id.* at 703. The shifting burdens of proof used in disparate treatment analysis to determine whether a defendant intentionally discriminated against a plaintiff for reasons prohibited by title VII do not apply when the employment discrimination is openly based upon one of the prohibited reasons. See *infra* text accompanying notes 24-34.

14. 42 U.S.C. § 2000e-2(e)(1) (1982) provides, in relevant part:

[I]t shall not be an unlawful employment practice for an employer to hire and employ employees, . . . on the basis of . . . religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

15. The court noted that the standard of review for business necessity determinations is

It further found that OGC's role model rule was justified as a bfoq, as well as a business necessity.¹⁶ Chambers petitioned the court of appeals for a rehearing *en banc*. The majority of the court denied her petition with three judges dissenting.¹⁷ *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697 (8th Cir. 1987).

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, religion, sex, or national origin.¹⁸ Courts have developed two major theories of discrimination under title VII—disparate treatment and disparate impact.¹⁹ Although the theories are quite distinct in principle,²⁰ courts have treated them as overlapping one another in application.²¹

disparate impact cases is the clearly erroneous standard applied to factual findings. 834 F.2d at 702 (citing *Reddemann v. Minnesota Higher Educ. Coordinating Bd.*, 811 F.2d 1208, 1209 (8th Cir. 1987) (per curiam); *Hawkins v. Anheuser-Busch, Inc.*, 697 F.2d 810, 815 (8th Cir. 1983); *FED. R. CIV. P.* 52(a)).

Under the clearly erroneous standard of review an appellate court may reverse a lower court's factual findings only if the appellate court is "left with the definite and firm conviction that a mistake has been committed." *Chambers*, 834 F.2d at 702 (citing *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948))).

16. 834 F.2d at 703. Although the district court had not found the role model rule was justified as a bfoq, the appellate court found that the factual findings relevant to establishing a bfoq were the same as those supporting the finding that the rule was justified as a business necessity.

17. *Chambers v. Omaha Girls Club, Inc.*, 840 F.2d 583 (8th Cir. 1988). Circuit Judge C. Arlen Beam, who was chief judge of the Nebraska District Court and decided the case at that level, did not participate in the vote for rehearing *en banc*.

18. 42 U.S.C. § 2000e-2a provides:

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.

19. B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 128b-139a (2d ed. 1983) [hereinafter B. SCHLEI & P. GROSSMAN (2d ed. 1983)].

20. J. A. LARSON & L. LARSON, *EMPLOYMENT DISCRIMINATION: RACE, RELIGION, AND NATIONAL ORIGIN* § 72.10 (1987) [hereinafter J. A. LARSON & L. LARSON]; see also *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977).

21. Courts often apply disparate treatment and disparate impact analysis to the same set of facts. See, e.g., *Jones v. International Paper Co.*, 720 F.2d 496, 499-500 (8th Cir. 1983). See also *Page v. U.S. Indus., Inc.*, 726 F.2d 1038 (5th Cir. 1984); B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 310-11 (Supp. 1985) [hereinafter B. SCHLEI & P. GROSSMAN (Supp. 1985)].

Courts apply the same standards to bfoq and business necessity defenses under the respective theories. Compare *Hawkins v. Anheuser-Busch, Inc.*, 697 F.2d 810, 815 (8th Cir. 1983)

Disparate treatment occurs where

(1) the employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.²²

There are two types of disparate treatment cases—facial discrimination and pretext.²³ Facial discrimination involves an overtly discriminatory rule or policy by which an employer explicitly treats some employees differently from others on the basis of one of the classifications prohibited by title VII.²⁴ The employer's act of classifying employees on a prohibited basis establishes intent.²⁵ The only defense to facial discrimination is the affirmative defense of the bona fide occupational qualification (bfoq)²⁶ provided in section 2000e-2(e)(1) of title VII.²⁷

Courts interpret the bfoq exception narrowly.²⁸ The Supreme Court has applied the bfoq exception to sex discrimination in only one case, *Dothard v. Rawlinson*.²⁹ At issue in this case was an Alabama Board of Corrections administrative regulation that prohibited women from working in positions which brought them in contact with maximum security male inmates. In holding that the exception is to be interpreted narrowly, the Court noted the requirement from a lower court decision that an employer relying on the bfoq defense must prove "that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."³⁰ The

(business necessity) with *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079, 1086 (8th Cir.), cert. denied, 446 U.S. 966 (1980) (bfoq) (both applying "manifest relationship" standard). See also *Gunther*, 612 F.2d at 1086 n.8 (bfoq analysis "similar to and overlaps with the judicially created 'business necessity' test").

22. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

23. *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543, 1547 (11th Cir. 1984) (citing Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection With Employment Opportunity Goals Under Title VII*, 69 GEO. L.J. 641, 673-82 (1981) [hereinafter Williams]). See also Note, *Title VII and Exclusionary Employment Practices: Fertile and Pregnant Women Need Not Apply*, 17 RUTGERS L.J. 95, 106 (1985).

24. *Hayes*, 726 F.2d at 1547; Williams, *supra* note 23, at 668; Note, *supra* note 23, at 106 n.61.

25. Williams, *supra* note 23, at 669 n.176; Note, *supra* note 23, at 106 n.61.

26. *Hayes*, 726 F.2d at 1547; Williams, *supra* note 23, at 668; Note, *supra* note 23, at 106.

27. 42 U.S.C. § 2000e-2(e)(1) (1982).

28. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977); *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079, 1085 (8th Cir. 1977) (quoting *Dothard*, 433 U.S. at 334).

29. 433 U.S. 321 (1977).

30. *Id.* at 333 (quoting *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th

Court then held that, based upon "the particular factual circumstances of this case,"³¹ the regulation which excluded females from contact positions in maximum security prisons was justified as a bfoq.³² The Court relied upon opinion testimony from both the plaintiff's and the defendant's expert witnesses to establish that, under the conditions existing in the Alabama maximum-security male penitentiaries,³³ the very sex of a female guard would diminish her ability to perform the essence of her job, which is keeping order in the prisons.³⁴

The second type of disparate treatment theory applies when an employer takes some apparently neutral action, or adopts an ostensibly neutral policy, which the plaintiff alleges is a pretext for prohib-

Cir. 1969)). Two tests with respect to ability to perform had emerged in prior case law. *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219, 1224-25 (9th Cir. 1971) and *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 718 (7th Cir. 1969) restricted the use of the bfoq exception to sexual characteristics rather than characteristics which, to some degree, correlate with a particular sex. Both defendants restricted certain jobs to men only, based upon assumptions about the lesser strength of women. In such cases an employer must administer individualized tests to determine ability to perform. *Weeks*, 408 F.2d at 235, set out the less restrictive test quoted by the *Dothard* Court. See B. SCHLES & P. GROSSMAN (2d ed. 1983), *supra* note 19, at 348.

Although it quoted a requirement for a "factual basis," the *Dothard* Court spoke in terms of probabilities. For example, the Court wrote that "[a] woman's relative ability to maintain order . . . could be directly reduced by her womanhood;" that while there is a "basis in fact" it is an "[expectation] that sex offenders . . . would be moved to [assault women] again;" and that there is a "likelihood that inmates would assault a woman because she was a woman . . ." 433 U.S. at 335-36 (emphasis added). See Note, *Sex as a Bona Fide Occupational Qualification: Defining Title VII's Evolving Enigma. Related Litigation Problems, and the Judicial Vision of Womanhood after Dothard v. Rawlinson*, 3 WOMEN'S RTS. L. REP. 107, 134 n.229 (1979).

The Court noted that the district court held, in effect, that the challenged regulation was based on stereotyped assumptions about women's ability to perform as guards in male prisons. *Dothard*, 433 U.S. at 334. The Court was careful to point out that it did not question women's abilities as prison guards under normal conditions. *Id.* at 336 nn.23-24.

The Court found a basis for support of the regulation other than a stereotyped belief that women are unable to adequately perform prison guard duties. Rather, it found that the inevitable incidents of assault that would be triggered by a woman's sexuality would pose a threat to prison security, given the unstable conditions in the male maximum security facilities. Note, *supra* at 138 n.261.

31. *Dothard*, 433 U.S. at 334. The Court found there were "few visible deterrents to inmate assaults on women custodians." *Id.* at 336. Inmate access to guards was made easier by dormitory living arrangements. The institutions were understaffed. *Id.* An estimated 20% of the male prison population was sex offenders mixed in with the rest of the population in the dormitory facilities. *Id.* at 335.

A federal district court had held that the conditions of confinement in Alabama's prisons were characterized by "rampant violence" and a "jungle atmosphere" and were constitutionally intolerable. *Id.* at 334 (citing *Fugh v. Locke*, 406 F. Supp. 318, 325 (M.D. Ala. 1977)).

32. *Dothard*, 433 U.S. at 336-37.

33. *Id.* at 336.

34. *Id.* In *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 388 (5th Cir. 1971), the court set out the requirement that the bfoq applied "only when the essence of the business operation would be undermined by not hiring members of one sex exclusively." That court applied a "business necessity test, not a business convenience test." *Id.*

ited discrimination.³⁵ The Supreme Court has articulated the order and allocation of proof for analysis of pretext cases.³⁶ The plaintiff must establish a prima facie case of discrimination prohibited by title VII.³⁷ The burden of production then shifts to the defendant "to articulate some legitimate, nondiscriminatory reason" for its action against the plaintiff.³⁸ The plaintiff may then show that the defendant's reasons were a pretext for statutorily prohibited discrimination.³⁹ The ultimate burden of persuasion remains with the plaintiff throughout the disparate treatment pretext analysis.⁴⁰

Shifting the burdens of production insures that a plaintiff has the opportunity to show the defendant's discriminatory intent even though he has no direct evidence of it.⁴¹ Hence, the shifting burdens do not apply when a plaintiff presents direct evidence of the defendant's illegal discrimination.⁴² In the face of direct evidence of its discriminatory intent, the defendant has the burden of proving an affirmative bfoq defense for its challenged policy or action.⁴³

The second major theory of recovery under title VII, disparate impact, also involves apparently neutral employment practices and

35. *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543, 1547 (11th Cir. 1984); *Williams*, *supra* note 23, at 668; Note, *supra* note 23, at 107.

36. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *McDonnell Douglas* was a failure to rehire case. In *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), the Court applied the *McDonnell Douglas* analysis to a discharge case and further refined the allocations of proof.

37. *Burdine*, 450 U.S. at 252-54.

38. *McDonnell Douglas*, 411 U.S. at 802; *Burdine*, 450 U.S. at 253. When the plaintiff has met her initial burden, a presumption is created. The burden which shifts to the defendant is that of rebutting the presumption by coming forward with enough evidence to create a genuine issue of fact regarding whether it discriminated against the plaintiff. The defendant does not have to persuade the court that the articulated reason(s) actually motivated it. *Burdine*, 450 U.S. at 254-55.

39. *McDonnell Douglas*, 411 U.S. at 804; *Burdine*, 450 U.S. at 253.

40. *Burdine*, 450 U.S. at 253, 256.

41. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (citing *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014 (1st Cir. 1979)). See also *Burdine*, 450 U.S. 255-56 (shifting burdens clarifies the factual issue so that "plaintiff will have a full and fair opportunity to demonstrate pretext").

42. *Thurston*, 469 U.S. at 121 (citing *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977)); see also *Carney v. Martin Luther Home, Inc.*, 824 F.2d 643, 648 (1987) and B. SCHLEI & P. GROSSMAN (Supp. 1985), *supra* note 21, at 301.

Thurston involved an action brought under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-34 (1982). In *Lorillard v. Pons*, 434 U.S. 575, 584 (1978) the Court found that the substantive provisions of the ADEA "were derived *in haec verba* from Title VII." *Id.*

43. *Thurston*, 469 U.S. at 121; *Carney*, 824 F.2d at 648 and I. A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION: SEX § 12.11 at 3-24 (1987) [hereinafter I. A. LARSON & L. LARSON].

shifting burdens of producing evidence.⁴⁴ Again, the analysis has three parts.⁴⁵ However, analysis here focuses on the impact or consequences of the challenged practice rather than the defendant's motives for it.⁴⁶ The plaintiff has the initial burden of establishing a prima facie case of adverse impact.⁴⁷ Once adverse impact is established, the burden shifts to the defendant to show that the practice is justified as job-related or as a business necessity.⁴⁸ If business necessity is established, the plaintiff has the burden to show the existence of alternative practices which would serve the defendant's needs with a less discriminatory impact.⁴⁹

At the stage of the disparate impact theory in which the burden of proof shifts to the defendant, the Court created the business necessity defense.⁵⁰ Because business necessity is a defense, the defendant bears a heavy burden of production at this stage of the analysis.⁵¹

44. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

45. *Connecticut v. Teal*, 437 U.S. 440, 446-47 (1982); *Moody*, 422 U.S. at 425.

Schlei & Grossman emphasize that "the *Griggs/Albemarle* formula is an analytical tool for evaluating evidence and not a three-step procedure by which evidence is presented. Thus, in considering whether or not one side or the other has satisfied its burden at particular steps, the court will consider evidence relevant to that step offered by both plaintiff and defendant." B. SCHLEI & P. GROSSMAN (2d ed. 1983), *supra* note 19, at 1325.

The same is also true of the three-part formula for disparate treatment analysis. See *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978); B. SCHLEI & P. GROSSMAN (2d ed. 1983), *supra* note 19, at 1321.

46. *Teamsters*, 431 U.S. at 335-36 n.15; see also *Griggs*, 401 U.S. at 432 ("Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.")

47. *Dothard*, 433 U.S. at 329; *Moody*, 422 U.S. at 425; *Griggs*, 401 U.S. at 432.

48. *Dothard*, 433 U.S. at 329; *Moody*, 422 U.S. at 425; *Griggs*, 401 U.S. at 431 ("[T]he touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."). See also *Hawkins v. Anheuser-Busch, Inc.*, 697 F.2d 810, 815 (8th Cir. 1983) (citing *Griggs*, 401 U.S. at 431).

49. *Dothard*, 433 U.S. at 329; *Moody*, 422 U.S. at 425.

50. The *Griggs* Court, and other courts since, have used the terms business necessity and job-related interchangeably. B. SCHLEI & P. GROSSMAN (2d ed. 1983), *supra* note 19, at 1329.

Furthermore, courts have defined business necessity in several ways. The Court in *Dothard*, 433 U.S. at 331 n.14 found that "a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge," must be "essential to effective job performance," and "essential to good job performance." *Id.* In *Griggs*, 401 U.S. at 432, the Court held that the employer must show the challenged job requirement had a "manifest relationship to the employment in question" and found that the employer had not shown that the challenged job requirement bore "a demonstrable relationship to successful performance of the jobs for which it was used." *Id.* In *Kirby v. Colony Furniture Co.*, 613 F.2d 696, 705 n.6 (8th Cir. 1980), the Eighth Circuit found "the proper standard is . . . whether there is a compelling need for the employer to maintain that practice and whether the employer can prove there is no alternative to the challenged practice." *Id.*

51. *Hawkins v. Anheuser-Busch, Inc.*, 697 F.2d at 815 (quoting *Dothard*, 433 U.S. at 329).

With respect to proof at this stage, the Court has required the employer to show job-relatedness by use of validation studies when the challenged practice is a scored test or requirement of a high school diploma.⁵² However, when the challenged practice involves other objective job criteria for professional or highly skilled jobs, lower courts have not insisted upon validation studies to show the job-relatedness of the criteria.⁵³ Even so, the proof must consist of more than the conclusory testimony of the defendant's employees.⁵⁴

Courts have analyzed cases involving discrimination on the basis of pregnancy under both of the major title VII theories of recovery.⁵⁵ Consistent with Equal Employment Opportunity Commission (EEOC) guidelines,⁵⁶ lower federal courts in the early 1970s found

(The defendant must demonstrate that the job requirement had "a manifest relationship to the employment in question."); *Hawkins*, 697 F.2d at 815 (quoting *Kirby v. Colony Furniture*, 613 F.2d 696, 706 n.6 (8th Cir. 1980)) ("A discriminatory employment practice cannot be 'justified by routine business considerations' (the employer must demonstrate that there is a 'compelling need . . . to maintain that practice.'). See also B. SCHLEI & P. GROSSMAN (2d ed. 1981), *supra* note 19, at 1328.

The evidentiary burden in the second part of the disparate impact analysis is greater than it is in the second part of disparate treatment pretext analysis. See, e.g., *Williams v. Colorado Springs School Dist.*, 641 F.2d 835, 842 (10th Cir. 1981) ("[I]n a disparate impact case, unlike a disparate treatment case, a rational or legitimate, nondiscriminatory reason is insufficient. The practice must be essential, the purpose compelling.").

The question of whether the defendant's burden is a burden of persuasion or simply one of producing evidence is open. Until recently, the Court had cast the burden of persuasion upon the defendant. See, e.g., *Moody*, 422 U.S. at 425 (defendant must "meet the burden of proving that its tests are 'job-related'"); *Dothard*, 433 U.S. at 329 (defendant must "prov[e] that the challenged requirements are job related"). However, the Court's recent plurality decision creates doubt as to what burden future defendants will carry—persuasion or production. *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2777, 2790 (1988) ("[T]he ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times.").

52. *Griggs*, 401 U.S. at 431 (job requirements adopted "without meaningful study of their relationship to job-performance ability"); *Moody*, 422 U.S. at 425, 431-32 (employer's validation studies inadequate when measured against guidelines for validation studies issued by the Equal Employment Opportunity Commission (EEOC)). See also, J.A. LARSON & L. LARSON, *supra* note 20, at § 72.10, 14-3 to 14-6 (issue of business necessity in testing cases almost exclusively an inquiry whether tests have been adequately validated for job-relatedness).

53. See, e.g., *Hawkins*, 697 F.2d at 815-16 (validation study not required to show job-relatedness of college degree to trade returns supervisor job); *Spurlock v. United Airlines, Inc.*, 475 F.2d 216, 218-19 (10th Cir. 1972) (job-relatedness of requirement of 500 flight hours established by statistics showing applicants with higher flight hours more likely to succeed in pilot training program).

54. *Hawkins*, 697 F.2d at 815 (lengthy testimony by company personnel concerning why college degree requirement was job-related showed business necessity).

55. *Wald, Judicial Construction of the 1978 Pregnancy Discrimination Amendment to Title VII: Ignoring Congressional Intent*, 31 AM. U.L. REV. 591, 595-97 (1982).

56. 29 C.F.R. § 1604.10 (1973). EEOC guidelines issued in 1972 declared that pregnancy constitutes a temporary disability for all employment purposes. After Congress passed the

that employment discrimination on the basis of pregnancy constituted disparate treatment and was prohibited by title VII.⁵⁷ However, in 1976 the Supreme Court applied the disparate impact theory in *General Electric Company v. Gilbert*⁵⁸ to uphold an employer's disability benefits plan which excluded pregnancy but paid benefits for other nonoccupational disabilities. The Court held that pregnancy-based differentiation was not sex discrimination because it produced categories of pregnant and nonpregnant persons. The nonpregnant category included both men and women.⁵⁹ Analyzing the challenged policy as a facially neutral one, the Court found that the female plaintiffs had not shown the gender-based effects necessary to make out a prima facie case under the disparate treatment theory.⁶⁰

In response to the Court's decision in *Gilbert*, Congress passed the Pregnancy Discrimination Act of 1978 (PDA).⁶¹ The PDA amended title VII to specifically include pregnancy discrimination in the definition of discrimination on the basis of sex.⁶² The House Labor and Education Committee specifically approved the EEOC guidelines, which the majority of the Court had rejected.⁶³ The Committee stated that the Act clarified Congress' original intent "to ensure that working women are protected against all forms of employment dis-

Pregnancy Discrimination Act, the EEOC issued new guidelines which are almost identical to the earlier ones. 29 C.F.R. § 1604.10 (1986) provides, in part, that a written or unwritten employment policy or practice which excludes applicants because of pregnancy is a prima facie violation of title VII. Furthermore, disability insurance, sick leave, leave duration, seniority, and reinstatement must apply to pregnancy on the same terms as they are applied to other disabilities.

57. Eighteen federal district courts and seven federal courts of appeals had rendered decisions prohibiting discrimination in employment based on pregnancy before 1976. H.R. REP. NO. 948, 95th Cong., 2d Sess. 2, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 4749, 4750 [hereinafter HOUSE REPORT].

58. 429 U.S. 125 (1976).

59. *Id.* at 133-34.

60. *Id.* at 137.

61. HOUSE REPORT, *supra* note 57, at 2-5, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS at 4750-53.

62. The Pregnancy Discrimination Act, Pub. L. No. 95-55, § 1, 92 Stat. 2076 (1977) (codified at 42 U.S.C. § 2000e(x) (1982)) [hereinafter PDA].

The PDA provides:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work

63. HOUSE REPORT, *supra* note 57, at 2, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS at 4750.

crimination based on sex.⁶⁴ Congress' original intent was also to prevent discrimination against women in employment "based on stereotyped characterizations of the sexes."⁶⁵

After Congress passed the PDA, the Supreme Court held the Act "made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex."⁶⁶ Because discrimination on the basis of pregnancy is now facial discrimination, the burden of proof shifts to the employer to show that such discrimination is justified as a bfoq in the circumstances of the particular employment at issue.⁶⁷ Since passage of the PDA, courts have considered nonpregnancy as a bfoq in the circumstances of the employment of airline flight attendants and of workers in environments which may be hazardous to fetuses. In both circumstances, employers seek to justify exclusion of pregnant workers on the basis of safety concerns.

In *Levin v. Delta Air Lines, Inc.*⁶⁸ the United States Court of Appeals for the Fifth Circuit found that concerns for passenger safety in emergency situations justified the exclusion of pregnant workers from the job of flight attendant. The court held that a discriminatory policy must address the essence of an employer's business to be justified as a bfoq.⁶⁹ It found that passenger safety was the essence of the defendant airline's business because of its commitment to safety.⁷⁰ Testimony of medical experts established that pregnant women are subject to pregnancy-related ailments which can render them unable to perform routine safety duties in emergencies.⁷¹ The court acknowledged that many pregnant women do not suffer such disabilities. Nevertheless, it found that the impossibility of predicting which women will suffer pregnancy-related disabilities and the magnitude of

64. *Id.* at 3, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS at 4751.

65. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 545, 546 n.3 (1971) (Marshall, J., concurring) (quoting EEOC Guideline now codified at 29 C.F.R. § 1604.2(a)(1)(ii) (1985)).

66. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983).

67. I. A. LARSON & L. LARSON, *supra* note 43, at 3-22.

68. *Levin v. Delta Air Lines, Inc.*, 730 F.2d 994 (1984). See also *Harriss v. Pan Am World Airways, Inc.*, 649 F.2d 670, 677 (1980) (finding that, after Congress passed PDA, airline policy excluding pregnant women from flight attendant work was justified as a bfoq because of the significant safety risk to passengers).

69. *Levin*, 730 F.2d at 997.

70. *Id.* at 999.

71. *Id.* at 997. Defendant's medical experts testified that pregnant women are subject to spontaneous abortion, nausea, and fatigue. Plaintiff's experts did not dispute that these ailments could impair the ability of a pregnant attendant to perform safety duties but argued that the likelihood of a pregnant flight attendant being incapacitated at the same time that an emergency occurred was infinitesimally small. *Id.*

the risk to passengers justified excluding all pregnant attendants from flight duties.⁷²

Employers have also advanced concerns for the safety of the unborn child of pregnant workers as justification for excluding pregnant employees from certain jobs.⁷³ The United States Court of Appeals for the Eleventh Circuit set out a framework for analysis of fetal protection cases in *Hayes v. Shelby Memorial Hospital*.⁷⁴ The court began its analysis by establishing a rebuttable presumption that fetal protection policies which apply only to women are facially discriminatory.⁷⁵ To rebut the presumption, the court required that a defendant must produce objective scientific evidence supported by opinion evidence of experts in the relevant scientific fields to prove there is a substantial risk of harm to the fetus.⁷⁶ If the defendant does not rebut the presumption of facial discrimination, its only defense is a bfoq. The court held that there is no defense to a facially discriminatory fetal protection policy "unless the employer shows a direct relationship between the policy and the actual ability of a pregnant or fertile female to perform her job."⁷⁷

When an employer discriminates against a female employee because she is unmarried as well as pregnant, the analysis remains the same. Although title VII does not prohibit discrimination on the basis of marital status, when marital status is combined with pregnancy

72. *Id.* at 998.

73. See, e.g., *Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982); *Zuniga v. Kleberg County Hosp.*, 692 F.2d 986 (5th Cir. 1982).

74. 726 F.2d 1543 (5th Cir. 1984). See also EEOC Compliance Manual (CCH) § 4318 (Oct. 7, 1988) (setting forth an analytical framework based on *Hayes* and *Wright* for determining when exclusionary fetal protection policies violate title VII).

75. *Id.* at 1548.

76. *Id.* If the defendant carries the threshold burden of proving significant risk of harm to the fetus, it must then prove, also with scientific evidence, that the risk does not also apply to the offspring of male employees. When scientific evidence concerning the risk to men does not exist, an employer may adopt a suitable policy aimed only at women. *Id.* at 1548-49.

A defendant which successfully rebuts the initial presumption of facial discrimination has, in effect, proven its fetal protection policy is neutral because it protects equally the offspring of both men and women employees. However, the policy has a disparate impact on women because it affects only them. Therefore, the plaintiff has an automatic prima facie case of disparate impact for which the defendant is entitled to assert a business necessity defense. Under traditional title VII analysis, the employer must prove business necessity by showing its policy is related to job performance. Because a fetal protection policy has nothing to do with job performance, the employer in such a case would not be able to make the required showing. For public policy reasons, the *Hayes* court held that employers in fetal protection cases will be allowed the business necessity defense. Its defense is automatic in such a situation because the employer has already proved, to rebut the presumption of facial discrimination, that its policy is justified on a scientific basis and addresses a harm that affects only women. *Id.* at 1552-53.

77. *Id.* at 1549.

as the basis for the discrimination, courts have held that the combination violates title VII.⁷⁸ Unwed pregnancy has been the basis for discrimination in several cases involving teachers or counselors.⁷⁹ Two of these cases involved public school defendants and were, therefore, decided under the Constitution.⁸⁰ In these cases, the schools offered role modeling as justification for their discriminatory actions against the unmarried pregnant teachers.⁸¹ The courts rejected the role model defense under equal protection analysis.⁸²

In a third public school case, *Panton v. Newport News School Board*,⁸³ the plaintiff teacher brought her case under title VII, as well as the Constitution. The defendant had forced the plaintiff to take leave after it learned she was pregnant but unmarried. It did not hold her position for her, but allowed her to return two years later when another position for which she was qualified became available.⁸⁴ The court first decided the plaintiff's constitutional claim, weighing her right to privacy against the public employer's asserted interest in "protecting schoolchildren from exposure to a single, pregnant teacher."⁸⁵ Without referring to any evidence presented, the court found that students' knowledge that plaintiff was unmarried would have "a fairly minimal impact on them."⁸⁶ The court further found

78. See, e.g., *Jacobs v. Martin Sweets Co.*, 550 F.2d 364 (6th Cir.), cert. denied, 431 U.S. 917 (1977) (executive secretary demoted to a clerical position because of her out-of-wedlock pregnancy, and was effectively discharged on the basis of a classification which had no rational relationship to business necessity); *Doe v. Osteopathic Hosp.*, 333 F. Supp. 1357 (D. Kan. 1971) (because unwed pregnancy did not adversely affect her job performance, hospital business office worker's discharge for her failure to notify the employer of her condition violated title VII).

79. *Avery v. Homewood City Bd. of Educ.*, 674 F.2d 337 (5th Cir. 1982); *Andrews v. Drew Mun. Separate School Dist.*, 507 F.2d 611 (5th Cir. 1975); *Panton v. Newport News School Bd.*, 632 F. Supp. 1056 (E.D. Va. 1986).

80. *Avery*, 674 F.2d 337; *Andrews*, 507 F.2d 611.

81. *Avery*, 674 F.2d at 341; *Andrews*, 507 F.2d at 614.

82. *Avery*, 674 F.2d at 341 (asserted role model defense violated rights under equal protection clause of fourteenth amendment for the same reasons as the court rejected the defense in *Andrews*); *Andrews*, 507 F.2d at 616 (quoting *Andrews v. Drew Mun. Separate School Dist.*, 371 F. Supp. 27, 35 (1973)) (role model defense violated equal protection clause of the fourteenth amendment because "the likelihood of inferred learning that unwed parenthood is necessarily good or praiseworthy, is highly improbable, if not speculative").

83. 632 F. Supp. 1056 (E.D. Va. 1986).

84. *Id.* at 1059-60. Married pregnant teachers were given the option of taking a disability leave which allowed them to work until they were physically unable to do so and guaranteed them their former jobs when they returned. *Id.* at 1059. The school district contended the plaintiff elected to take parental leave rather than disability leave. *Id.* at 1060. However, the court found the preponderance of the evidence showed she was forced to take immediate indefinite leave because she was single and pregnant. *Id.* at 1060-61.

85. *Id.* at 1062.

86. *Id.* at 1063.

there was no danger that the plaintiff's single, pregnant status could be perceived as representing the school board's advocacy of unwed pregnancy.⁸⁷ Hence, the court held that the school district violated plaintiff's right to privacy when it forced her to take leave because the state interest asserted did not outweigh her constitutional right of privacy.⁸⁸

As for her title VII claim, the court found the plaintiff had proved a prima facie case of sex discrimination by showing she was forced to take leave because she was pregnant.⁸⁹ The court found the defendant had forced the plaintiff to take leave early in her pregnancy because it was concerned that her teaching while she was pregnant and unmarried "would have been a bad moral example for her students."⁹⁰ The court pointed out that, in deciding the constitutional claim, it had already discussed why this was not a legitimate concern.⁹¹ The court then held that, because the discrimination was based upon pregnancy and a constitutionally protected right, it violated title VII.⁹²

The courts have decided, under title VII, only two cases involving discrimination by private educational institutions on the basis of unwed pregnancy. The first such case was *Dolter v. Wahlert High School*,⁹³ in which a Catholic school refused to renew the contract of an unmarried English teacher after she became pregnant. The defendant moved for summary judgment or dismissal on two grounds, one of which was its right under section 2000e-2(e)(2) of title VII to impose upon its teachers a code of moral conduct consistent with recognized moral precepts of the Catholic church.⁹⁴ The court acknowledged that a religious employer has such a right as a bfoq defense for religious discrimination.⁹⁵ However, if it imposes the moral code upon one sex only, it violates title VII on the basis of sex discrimination.⁹⁶ The court found that the defendant's contentions concerning a bfoq defense did not relate to plaintiff's failure to state or support a sex discrimination claim, but to the parties' respective burdens of

87. *Id.*

88. *Id.*

89. *Id.* at 1065.

90. *Id.*

91. *Id.*

92. *Id.*

93. 483 F. Supp. 266 (N.D. Iowa 1980).

94. 42 U.S.C. § 2000e-2(e)(2) (1982) provides that it is not unlawful discrimination for a religious educational institution to employ only persons of a particular religion.

95. *Dolter*, 483 F. Supp. at 270-71.

96. *Id.* at 271.

proof under disparate treatment analysis.⁹⁷ The plaintiff submitted an affidavit asserting that other employees, known to have violated the defendant's moral code by engaging in premarital sex, were not discharged.⁹⁸ Her affidavit created a question of fact concerning the crucial issue of whether the defendant's religious bfoq was a pretext for sex discrimination. Therefore, the court denied the defendant's motion for dismissal or summary judgment.⁹⁹

The second case involving a private institution defendant and discrimination on the basis of unwed pregnancy is *Harvey v. Young Women's Christian Association*.¹⁰⁰ In *Harvey*, the single female plaintiff was a program director who developed and implemented various programs among teenage girls in a community-based project away from the defendant's facility.¹⁰¹ When hired, she signed an agreement that she would uphold the defendant's Christian principles and philosophy.¹⁰² After learning that she was pregnant out of wedlock, the plaintiff met with her supervisor to discuss the matter. She told her supervisor that she could offer herself in her unmarried, pregnant condition as a role model of an alternative lifestyle.¹⁰³ After this discussion, the defendant asked her to resign.¹⁰⁴

The court found the plaintiff had proved a prima facie case of sex discrimination by her testimony that she was discharged because of pregnancy.¹⁰⁵ However, the testimony of three of defendant's officials established that she was discharged because of her expressed intent to represent to the teenagers, with whom she worked, a lifestyle that was contrary to the defendant's principles and, therefore, violated her hiring agreement.¹⁰⁶ Thus, the defendant rebutted plaintiff's prima facie case by showing it had a legitimate, nondiscriminatory reason for discharging her.¹⁰⁷ Finally, the court found that the plaintiff had not met her burden of proving that the defendant's reasons for discharging her were a pretext.¹⁰⁸

At the trial level of the present case, *Chambers v. Omaha Girls*

97. *Id.*

98. *Id.*

99. *Id.* at 271-72.

100. 333 F. Supp. 949 (W.D.N.C. 1982).

101. *Id.* at 951.

102. *Id.* at 950-51.

103. *Id.* at 952.

104. *Id.*

105. *Id.* at 954.

106. *Id.* at 954-55.

107. *Id.* at 954.

108. *Id.* at 956.

Club, Inc.,¹⁰⁹ the district court relied upon *Harvey* in finding that the OGC had shown its role model rule was a business necessity under the disparate impact theory.¹¹⁰ The court found that teenage pregnancy was contrary to the OGC's purpose of providing young girls with "exposure to the greatest number of available positive options in life."¹¹¹ It found that OGC had established its honest belief that allowing single pregnant staff members to work with its members would convey the impression that it approved of teenage pregnancy.¹¹²

The district court also analyzed the case under the disparate treatment theory.¹¹³ It found the defendant had articulated a legitimate, nondiscriminatory reason for its role model rule, attempting to discourage teenage pregnancy.¹¹⁴ The court's conclusions were based upon numerous preliminary findings of fact.¹¹⁵ These findings included: 1) the OGC was engaged in a program of pregnancy prevention for at least five years; 2) the rule was adopted after two single staff members became pregnant; 3) two club members reacted to the pregnancies; and 4) the plaintiff was fired only because she was pregnant.¹¹⁶ The court also noted the conflicting evidence of the parties' expert witnesses. The plaintiff's expert testified that economic factors are the primary reason for teenage pregnancy and only education can resolve the problem. The defendant's expert agreed, but, testified that in her opinion, role modeling could be another way to attack the problem.¹¹⁷

The United States Court of Appeals for the Eighth Circuit reviewed the lower court's business necessity determination under the clearly erroneous standard of review.¹¹⁸ In so doing, it quoted the lower court's findings of fact regarding business necessity. It also noted that the lower court had relied upon the defendant's expert testimony "to the effect that the role model rule could be helpful in preventing teenage pregnancy."¹¹⁹

Chambers argued that the district court's business necessity finding was clearly erroneous because the role model rule was based solely

109. 629 F. Supp. 925 (D. Neb. 1986), *aff'd*, 834 F.2d 697 (8th Cir. 1987).

110. 629 F. Supp. at 950.

111. *Id.*

112. *Id.*

113. *Id.* at 946-48.

114. *Id.* at 947.

115. *Id.* at 945-46.

116. *Id.*

117. *Id.* at 951.

118. *Chambers*, 834 F.2d at 702. See *supra* note 15.

119. *Chambers*, 834 F.2d at 702.

on OGC's speculation and had not been validated by any studies showing its relationship to the purpose of preventing teenage pregnancies. In response, the court stated that validation studies are not required to maintain a successful business necessity defense.¹²⁰

Chambers also argued that the lower court's conclusion that there were no less discriminatory alternatives was clearly erroneous. The appeals court disagreed, noting that a leave for the purpose of keeping Chambers out of contact with members while she was visibly pregnant would be much longer than the OGC's customary leaves of up to six weeks.¹²¹

The United States Court of Appeals for the Eighth Circuit next reviewed the lower court's findings under the disparate treatment/bfoq theory. The court reasoned that, if the same standard, "manifest relationship,"¹²² applied to both the business necessity and bfoq defenses, then the lower court's findings with respect to one would apply to the other. Having already concluded that the finding of business necessity was not clearly erroneous, the court felt compelled to hold that the role model rule was also a bfoq.¹²³

Judge McMillian dissented,¹²⁴ pointing out that the district court and the majority accepted, without any supporting empirical evidence, the defendant's assumption that the presence of unwed pregnant instructors was related to teenage pregnancies.¹²⁵ The dissent supported its position by citing three public school cases rejecting the role model defense as speculative.¹²⁶ Finally, the dissent argued that,

120. *Id.* (citing *Hawkins v. Anheuser-Busch, Inc.*, 697 F.2d 810, 815-16 (8th Cir. 1983)).

121. *Id.* at 703.

122. *Id.* at 704.

123. *Id.* at 704-05.

124. *Id.* at 705-09 (McMillian, J., dissenting).

125. The dissent pointed out that the district court relied upon "questionable anecdotal incidents" to support the rule. *Id.* at 707.

The district court had found that:

The rule was also adopted in response to the reaction of a fourteen year old Girls Club member (Sheila Brown) stating that she wanted to have a baby as cute as Marchese (Melanie Well's baby) and that shortly thereafter Ms. Brown did become pregnant. And, the rule was adopted in response to the reaction of another member, Sue Miller, who became upset when she learned of Ms. Price's pregnancy . . .

Chambers, 629 F. Supp. at 945.

Chambers rebutted these incidents with the testimony of Sheila Brown and her mother that Sheila's pregnancy accidentally resulted from relations with her steady boyfriend and was altogether unintended. Brief for Appellants at 7, *Chambers v. Omaha Girls Club*, 834 F.2d 697 (8th Cir. 1987) (No. 86-1447).

126. *Chambers*, 834 F.2d at 707-08 (citing *Avery v. Homewood City Bd. of Educ.*, 674 F.2d 337 (5th Cir. 1982); *Andrews v. Drew Mun. Separate School Dist.*, 507 F.2d 611 (5th Cir. 1975); *Ponton v. Newport News School Bd.*, 632 F. Supp. 1056 (E.D. Va. 1986)).

even if OGC had proved a defense, it still could not prevail because Chambers had shown there was a less discriminatory alternative. The OGC's personnel policy provided pregnancy and illness leaves up to six weeks and longer leaves upon approval of the board.¹²⁷

The same judge dissented, along with two others, from the denial of Chambers' request for a rehearing *en banc*.¹²⁸ They emphasized that the bfoq defense should be limited to the pregnant worker's ability to perform the duties of her job.¹²⁹ Otherwise, there is no way to insure that pregnant workers will be treated the same as other employees "not so affected but similar in their ability or inability to work."¹³⁰

The *Chambers* decision illustrates the need for clear guidelines for the application of the supposedly narrow bfoq defense to claims of sex discrimination. Despite the fact that Congress has clearly stated that title VII prohibits discrimination on the basis of pregnancy,¹³¹ the court found that role modeling justifies firing an unwed pregnant worker. This finding was based on nothing more than the defendant's beliefs, the unsupported opinion of the defendant's expert, and two anecdotes.¹³² The Supreme Court set the precedent for such a result when it sought to narrow the application of the bfoq defense by the circumstances of the employment rather than adhering to the lower courts' requirement of a factual basis showing that substantially all women are unable to perform the work at issue.¹³³ The "circumstance" standard allows the exclusion of women from employment on the basis of stereotypes about them. The experts' opinions in *Dothard*¹³⁴ were based upon the unsupported assumption that women are more vulnerable to sexual assault than men.¹³⁵ Whether or not the court acknowledges it, implicit in the role modeling bfoq is the assumption that unwed pregnant women are immoral.¹³⁶ As long as the courts are willing to base decisions on unsupported opinions, Congress' intent that women not be excluded from employment on the basis of stereotypes about them will be thwarted.¹³⁷ To avoid this

127. *Chambers*, 834 F.2d at 708-09.

128. *Chambers v. Omaha Girls Club*, 840 F.2d 583 (8th Cir. 1988) (Lay, C.J., dissenting).

129. *Id.* at 585-86.

130. *Id.* at 586.

131. See *supra* notes 61-65 and accompanying text.

132. See *supra* notes 112, 119, 125 and accompanying text.

133. See *supra* note 30 and accompanying text.

134. *Dothard*, 433 U.S. 321, 336 (1977).

135. See Note, *supra* note 30, at 134 n.229.

136. See *supra* text accompanying notes 80-93.

137. See *supra* text accompanying note 65.

result, courts should require demonstrable proof of the justification for sex discrimination.¹³⁸ Otherwise, it is time for Congress to further clarify that discrimination on the basis of sex includes unmarried as well as married women.

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BARGAINING WITH BAD GUYS: IS THE
GOVERNMENT BOUND TO FULFILL PROMISES
MADE TO SECURE THE RELEASE OF HOSTAGES?

*David McCord**

I. INTRODUCTION

CUBAN INMATES IN LOUISIANA
FREE ALL 26 HOSTAGES

Oakdale, La., Nov. 29—Cuban inmates today released 26 hostages they had held for eight days in the Federal detention center here. . . .

A few minutes after the hostages walked out of the facility into the arms of their colleagues, a negotiator for the Government, four detainees and three witnesses signed a formal settlement, ending what was believed to be the second-longest prison siege in the country's history.

Under the accord, the Government agreed not to rescind parole decisions it had already made for Cuban detainees with families or sponsors in this country. The Government also agreed, as it had done before, to grant the detainees individual hearings. . . .

J.D. Williams, the chief Government negotiator, said there would be no reprisals against the 1,000 detainees. He said they

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138. See *supra* note 76 and accompanying text.

DISCRIMINATION LAW—IMPERMISSIBLE USE OF THE BUSINESS
NECESSITY DEFENSE AND THE BONA FIDE OCCUPATIONAL
QUALIFICATION

INTRODUCTION

Title VII of the Civil Rights Act of 1964¹ prohibits employment discrimination based upon race, color, religion, sex, pregnancy, or national origin.² Although the statute does not define discrimination,³

1. Congress enacted the Civil Rights Act, Pub. L. No. 88-352, §§ 701-716, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1982 & Supp. 1987)), in response to over two hundred years of oppression and discrimination directed toward minorities in general and blacks in particular. See Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COMM. L. REV. 431 (1966). Early advocates had been trying unsuccessfully to pass fair employment practice (FEP) legislation since the 1940's. *Id.* at 431. Finally, in two messages to Congress, President Kennedy urged legislative relief and supported FEP legislation. 109 CONG. REC. 11,174, 11,178 (1963). The Civil Rights bill, "H.R. 7152, was introduced in the House . . . the day after the President submitted his . . . message." Vaas, *supra*, at 434. The bill went through a series of amendments, aggressive efforts to postpone its consideration in the House, and a fourteen day discussion in the Senate on whether it should be considered. *Id.* at 443-44. After a protracted debate on the merits and a vote with every legislator present, Title VII was passed on July 2, 1964. 110 CONG. REC. 15,897 (1964). For a list of hearings and reports in which FEP legislation was sought and defeated prior to 1964, see Vaas, *supra*, at 431 n.2. See also H.R. REP. NO. 914, 88th Cong., 1st Sess. 16-18, reprinted in 1964 U.S. CODE CONG. & ADMIN. NEWS 2355, 2392 (listing dates of civil rights hearings before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives).

2. Title VII provides that:

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.

42 U.S.C. § 2000e-2(a) (1982). Notwithstanding their explicit inclusion among the classes of protected individuals, women continued to be exposed to discrimination that was based upon pregnancy. Consequently, Congress enacted the Pregnancy Discrimination Act (PDA) amendment to Title VII which extended the list of protected classes to include pregnant women. Pregnancy Discrimination Act, Pub. L. No. 95-555 § 1, 92 Stat. 1076 (1978) (codified at 42 U.S.C. § 2000e(k) (1982)). The PDA provides in pertinent part that:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions

the courts have developed two distinct theories of liability. A Title VII plaintiff may allege either one of these two theories. The easier to prove is disparate treatment, or intentional discrimination, which has three forms. The first is straight forward, facial discrimination, which will be called overt disparate treatment.⁴ A plaintiff must simply show that an employment policy openly discriminates against a protected class and that he or she is a member of that class.

The second and third forms of disparate treatment are closely related. They are more subtle and slightly more complicated to prove because they are covert. To prove the second form, the plaintiff establishes prima facie discrimination by showing (1) that he or she belongs to a protected group, (2) that he or she applied for and was qualified for a job, but was rejected, and (3) that the employer continued to search for applicants. This creates a presumption of unlawful discrimination. The burden of proof shifts to the employer to articulate a nondiscriminatory reason for the rejection. Finally, the plaintiff may attempt to prove that the proffered reasons are not the true reasons for his or her rejection. If the plaintiff succeeds, he or she has proved intentional discrimination or covert disparate treatment.

The third form of disparate treatment is also covert and is quite rare. The plaintiff must show that a facially neutral employment policy (1) has a disparate impact on a protected class, (2) that he or she is a member of that group, and (3) that the employer's business reasons for the policy are a pretext or a cover-up for a hidden intent to discriminate. This form of disparate treatment also will be called covert disparate treatment.⁵

The second theory of liability available to a Title VII plaintiff is disparate impact, which is unintentional discrimination. To prove disparate impact, the plaintiff must show that a facially neutral employment policy (1) has a disparate impact on a protected class, and (2) that he or she is a member of that class.⁶

shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefits programs, as other persons not so affected but similar in their ability or inability to work . . .

42 U.S.C. § 2000e(k) (1982).

3. Stonefield, *Non-Determinative Discrimination, Mixed Motives and the Inner Boundary of Discrimination Law*, 35 *Burr. L. Rev.* 85, 86 n.1 (1986).

4. For a more complete discussion of overt disparate treatment, see *infra* note 20 and accompanying text.

5. For a more complete discussion of covert disparate treatment, see *infra* notes 21-29 and accompanying text.

6. For a more complete discussion of the disparate impact theory, see *infra* notes 45-50 and accompanying text.

Each of the two theories has its own defense. An employer who is accused of disparate treatment (either overt or covert) can avoid liability by using the bona fide occupational qualification defense (BFOQ).⁷ The use of this defense is restricted, however, and can be asserted only when the employer discriminates against religion, sex, pregnancy, or national origin. It does not apply to race claims.⁸ Similarly, an employer who is accused of disparate impact can avoid liability by using the business necessity defense (BND). This defense is not restricted. It applies to disparate impact against all protected groups. Consequently, the analysis of a Title VII discrimination claim requires that a court determine which theory of liability the plaintiff is asserting and to which protected class the plaintiff belongs.

Normally the plaintiff in a Title VII claim is a member of only one of the protected classes. For example, a black male employee might allege race discrimination, or a pregnant female employee might allege sex discrimination. A court's analysis of such claims is likely to be reasonably well guided by statute. On the other hand, a black pregnant female employee is a member of one protected group because of her race and is a member of another protected group because of her pregnancy. This plaintiff might allege both race and sex (pregnancy) discrimination in a single claim. Furthermore, this plaintiff also might base her action upon both disparate treatment and disparate impact.

A recent decision by the United States Court of Appeals for the Eighth Circuit provides an example of a Title VII claim which included the two legal theories, the two defenses and, most significantly, a plaintiff who was a member of two protected classes.⁹ In *Chambers v. Omaha Girls Club, Inc.*,¹⁰ the plaintiff, Ms. Chambers, was a black female employee who became pregnant shortly after the Omaha Girls Club (Girls Club) adopted a written policy, the Role Model Rule, stating that single pregnant staff members would be fired.¹¹ Ms. Chambers was fired. She sued the Girls Club, alleging disparate impact and disparate treatment in her race and sex claim.¹² The trial court found,¹³ and the court of appeals agreed,¹⁴ that Ms. Chambers proved

7. For a discussion of the BFOQ, see *infra* notes 30-43 and accompanying text.

8. For the text of the Title VII section which describes the bona fide occupational qualification, see *infra* note 30. For evidence that the BFOQ is not an affirmative defense to discrimination against race or color, see *infra* note 32.

9. See *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697 (8th Cir. 1987).

10. 834 F.2d 697 (8th Cir. 1987).

11. *Id.* at 699 n.2.

12. For a more complete description of the *Chambers* facts and the court's analysis, see *infra* notes 63-123.

13. *Chambers v. Omaha Girls Club*, 629 F. Supp. 925, 949 (D. Neb. 1986) ("The

disparate impact. Even though the trial court's finding of disparate impact was based upon race, neither the trial court nor the court of appeals discussed the discrimination in terms of "race" or "sex." Moreover, neither court mentioned or seemed to notice that the Role Model Rule was overtly discriminatory against sex (pregnancy). The Court of Appeals for the Eighth Circuit affirmed the trial court's dismissal of Ms. Chambers' claim, concluding that the Girls Club successfully answered the claim because the Role Model Rule was justified by business necessity and also was a bona fide occupational qualification.¹³

This note examines the *Chambers* decision. Section I explains the two theories of liability and their respective defenses. Section II sets out the facts of *Chambers*. It describes the court's reasoning and identifies the tests that the court used to evaluate the Girls Club's assertion of the BFOQ and the BND. Finally, in Section III, this note discusses how the court failed to notice which of the two theories of liability supported the sex claim and which supported the race claim. The note argues that the failure to separate the sex claim from the race claim led to impermissible use of the defenses. It suggests a brief analytical framework designed to simplify the handling of race and sex claims in a single action. It argues further that the tests for finding the BND and the BFOQ that the *Chambers* court used did not conform to the Supreme Court standards for finding these defenses. As a result, the *Chambers* decision sets a precedent that exposes a vulnerable, although protected, group—black women—to increased possibility of wrongful discrimination.

I. THE LEGAL THEORIES AND DEFENSES PERTINENT TO RACE AND SEX CLAIM ANALYSIS

A. *The Disparate Treatment Theory and the Bona Fide Occupational Qualification*

As stated above, a plaintiff may bring a Title VII discrimination claim under one of two distinct theories of liability.¹⁴ The first of these

Court finds that because of the significantly higher fertility rate among black females the rule banning single pregnancies would impact black women more harshly.")

14. *Chambers*, 834 F.2d at 701 ("Chambers established the disparate impact of the [R]ole [M]odel [R]ule.")

15. *Id.* at 703, 705.

16. See *Connecticut v. Teal*, 457 U.S. 440 (1982). The *Teal* Court said that: It is well established under Title VII that claims of employment discrimination because of race may arise in two different ways. An individual may allege that he has been subjected to "disparate treatment" because of his race, or that he has

theories, disparate treatment, was the immediate focus of Title VII.¹⁷ "[I]t . . . is the most easily understood form of discrimination. The employer simply treats some employees less favorably than others because of their race, color, religion, sex [pregnancy], or national origin. Proof of discriminatory motive is critical . . ." ¹⁸ Disparate treatment may be proved in three ways (one overt and two covert), each requiring that the plaintiff prove intent to discriminate.¹⁹ Under the easiest method, overt disparate treatment, the plaintiff must prove that an employment policy or practice is facially discriminatory.²⁰ In other words, the plaintiff must establish plain, overt, intentional discrimination (overt disparate treatment).

Under the second method of proving disparate treatment, the first covert disparate method, the plaintiff must prove that an employment policy contains a hidden intent to discriminate. The Supreme Court discussed the more common form of covert disparate treatment in *Texas Department of Community Affairs v. Burdine*.²¹ There the Court said that the plaintiff "has the burden of proving . . . a prima facie case of discrimination."²² He does this by showing that he belongs to a racial minority, applied for and was qualified for a job, was rejected, and the employer continued to seek applicants.²³ The *Burdine* Court stated further that if the plaintiff succeeded in proving this prima facie discrimination by a preponderance of the evidence, the burden shifts to the employer to articulate a legitimate nondiscrimina-

been a victim of a facially neutral practice having a "disparate impact" on his racial group.

Id. at 457 (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 562, 581-82 (1978) (Marshall, J., concurring in part)).

17. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). "Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII." *Id.* at 335 n.15. See also 110 CONG. REC. 13,088 (1964) (remarks of Sen. Humphrey). "What the bill does . . . is simply to make it an illegal practice to use race as a factor in denying employment. It provides that men and women shall be employed on the basis of their qualification . . ." *Id.*

18. *International Bhd. of Teamsters*, 431 U.S. at 335 n.15.

19. *United States Postal Serv. Bd. of Govs. v. Aikens*, 460 U.S. 711 (1983). "The 'factual inquiry' in a Title VII case is [whether] the defendant intentionally discriminated against the plaintiff." *Id.* at 715 (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

20. "[F]acial discrimination, in which the policy explicitly discriminates," is prima facie discrimination. Note, *Employment Discrimination—Title VII's Limited Preemptive Effect Allows State Laws Mandating Pregnancy Leave and Reinstatement: California Federal Savings and Loan Association v. Guerra*, 107 S. Ct. 683 (1987), 9 U. ARK. LITTLE ROCK L.J. 669, 672 n.25 (1987).

21. 450 U.S. 248 (1981).

22. *Id.* at 252-53.

23. *Id.* at 253 n.6.

tory reason for the rejection. If the defendant employer succeeds, the plaintiff then has the opportunity to prove that the reasons offered were not true reasons.²⁴

Finally, the Supreme Court discussed the third and most rare form of disparate treatment in *Connecticut v. Teal*.²⁵ According to the *Teal* Court, a plaintiff must first prove that a facially neutral employment policy or practice has a significantly adverse impact on a protected group.²⁶ If the plaintiff succeeds in showing this adverse impact (disparate impact), the burden of proof shifts to the defendant, who may assert a legitimate business necessity for the policy or practice.²⁷ Finally, if the plaintiff can prove that the employer's business reasons are pretextual, he or she has proved intentional discrimination, or covert disparate treatment.²⁸ The important element is discriminatory intent.²⁹

When Congress enacted Title VII, it included a statutory defense to Title VII's proscriptions. That defense is the bona fide occupational qualification which is available for disparate treatment against reli-

24. *Id.* at 252-53.

25. 437 U.S. 440 (1982).

26. *Id.* at 446.

27. *Id.* at 446-47.

28. *Id.* at 447. This formula for finding disparate treatment through the multi-step process is widely accepted by the courts of appeals. See, e.g., *Johnson v. Legal Serv. of Ark., Inc.*, 813 F.2d 893, 896 (8th Cir. 1987); *Netterville v. Missouri*, 800 F.2d 798, 802-03 (8th Cir. 1986); *Bluebeard's Castle Hotel v. Government of the Virgin Islands, Dep't of Labor*, 786 F.2d 168, 171 (3d Cir. 1986); *White v. Colgan Elec. Co.*, 781 F.2d 1214, 1217 (6th Cir. 1986); *Meiri v. Dacon*, 759 F.2d 989, 997 (2d Cir. 1985); *Easley v. Anheuser-Busch, Inc.*, 758 F.2d 251, 256 n.10 (8th Cir. 1985); *Robinson v. Polaroid Corp.*, 732 F.2d 1010, 1014 (1st Cir. 1984); *McKenzie v. Sawyer*, 684 F.2d 62, 71 (D.C. Cir. 1982). One commentator also has summarized this formula. See Note, *supra* note 20, at 672 n.25 (stating that if a business policy is facially neutral but has disparate impact and the plaintiff can show that reasons given are pretextual, there is discrimination). "Both facial discrimination and pretext cases are called 'disparate treatment.'" *Id.*

29. *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697, 703 (8th Cir. 1987) ("While the disparate impact theory does not require discriminatory intent, the disparate treatment theory does."). Section 604.1(a) of the EEOC Compliance Manual defines disparate treatment by stating that:

Discrimination within the meaning of Title VII of the Civil Rights Act of 1964 can take many forms. It can occur when an employer or other person subject to the Act intentionally excludes individuals from an employment opportunity on the basis of race, color, religion, sex, or national origin. . . . The presence of a discriminatory motive can be inferred from the fact that there were differences in treatment.

EEOC Compl. Man. (BNA) § 604.1(a) (1981). "To prove disparate treatment, the charging party must establish that [the employer's] actions were based on a discriminatory motive." *Id.* § 604.2.

gion, sex, or national origin.³⁰ During debate on the House floor, Representative McClellan suggested that the BFOQ apply to all five protected groups,³¹ but it was specifically disallowed as a defense to discrimination that is based upon "race" and "color."³²

If the plaintiff proves intent to discriminate (disparate treatment), either by showing that an employment practice is facially discriminatory or by showing that the reasons given for a facially neutral policy or practice are pretextual, an employer may avoid liability by proving that the offensive employment policy or practice is a bona fide occupational qualification. Consequently, the BFOQ allows for lawful discrimination on the basis of "sex"³³ when "sex" (or nonpregnancy) "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."³⁴

30. 42 U.S.C. § 2000e-2(e) (1982) provides that:

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of [their] 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

Id.

31. See 110 CONG. REC. 13,825 (1964) (remarks of Rep. McClellan). In an attempt to dilute the effect of Title VII, Representative McClellan suggested that the BFOQ should apply to race, color, religion, sex, and national origin. *Id.*

32. Vaas, *supra* note 1, at 438 n.28. "Representative Williams of Mississippi proposed amending the [BFOQ] amendment by the inclusion . . . of the words 'race' and 'color.' This proposal was defeated, the debate thereon making it abundantly clear that under no circumstances may 'race' or 'color' be considered a 'bona fide occupational qualification' under new law." *Id.* (emphasis added). See generally 110 CONG. REC. 2550-63 (1964) (House discussion on inclusion of race and color in the BFOQ exception).

West's Federal Practice Manual states:

The . . . [BFOQ] makes no reference to race or color even though these classifications are repeatedly covered within the protected groups covered by that section and other sections of the statute. This divergent treatment is particularly significant, because a companion subsection provides that no preferential treatment will be given to the protected groups but specifically includes race and color within these groups. 42 U.S.C.A. § 2002-2(j). Inferentially, therefore, a bona fide occupational qualification exception cannot be based upon race or color.

11 WEST'S FEDERAL PRACTICE MANUAL § 16.333, at 155 (C.D. Philo. ed. 1980). See also EEOC Compl. Man. (BNA) § 625.1 (1982) ("The protected class of race is not included in the [BFOQ] statutory exception and clearly cannot, under any circumstances, be considered a BFOQ for any job.")

33. The BFOQ also is available for discrimination based on religion or national origin. Those classifications, however, are beyond the scope of this note. See 42 U.S.C. § 2000e-2(e) (1982).

34. 42 U.S.C. § 2000e-2(e) (1982). According to the Equal Employment Opportunity Commission (EEOC), the BFOQ is appropriate "where only individual[s] of one sex, religion, or national origin can perform the duties and functions of the job in question." EEOC Compl. Man. (BNA) § 604.10(c) (1982).

Even though the BFOQ provides for lawful sex discrimination under some circumstances, its legislative history suggests that the defense should be used with caution.³⁵ Moreover, the Equal Employment Opportunity Commission (EEOC)³⁶ published guidelines which stated that the BFOQ is permissible only in extremely rare instances.³⁷ The Supreme Court of the United States supported this narrow interpretation in *Dothard v. Rawlinson*³⁸ by expressing deference to the EEOC standards and by describing it as the "narrowest of exceptions."³⁹ Additionally, the *Dothard* Court formulated certain tests for finding the BFOQ. It stated that for sex to be a bona fide occupational qualification the employer must show that the "essence of the busi-

35. Section 2000e-2(e) provides for a very limited exception to the provisions of the title. Notwithstanding any other provisions, it shall not be an unlawful employment practice for an employer to employ persons of a particular religion or national origin in those rare situations where religion or national origin is a bona fide occupational qualification.

H.R. REP. NO. 914, 88th Cong., 1st Sess. 27, reprinted in 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2403 (emphasis added). See generally 110 CONG. REC. 7213 (1964) (Interpretative Memorandum of Senators Clark and Case advocating a narrow interpretation of the BFOQ).

36. For the purpose of the EEOC and the source of its authority, see *infra* note 56.

37. 29 C.F.R. § 1604.2(a) (1989). "The commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly." *Id.* The EEOC Compliance Manual expanded on the requirement that the BFOQ be used narrowly. It says that:

Title VII provides an exception to its prohibition of discrimination based on sex, religion, or national origin. That exception, called the bona fide occupational qualification (BFOQ), recognizes that in some extremely rare instances a person's sex, religion, or national origin may be reasonably necessary to carrying out a particular job function in the normal operation of an employer's business or enterprise.

EEOC Compl. Man. (BNA) § 625.1 (1982) (emphasis added).

38. 433 U.S. 321 (1977). In *Dothard*, a woman applied for a position as a correctional counselor in a men's prison. *Id.* at 323. The job entailed maintenance of security and control over inmates by "continually supervising and observing their activities" in all locations, such as "communal showers and toilets" and by strip searching the prisoners who re-enter the prison buildings. *Id.* at 326-27. The environment was a "jungle atmosphere" with "rampant violence." *Id.* at 334. Many of the prisoners were sex offenders who had assaulted women in the past and were perceived to be a danger to a female correctional counselor. *Id.* at 335. The *Dothard* Court concluded that because of the extreme conditions in the prison, sex was a BFOQ for the job. In other words, correctional counselors must be male. *Id.* at 336-37.

39. *Id.* at 334. The *Dothard* Court was persuaded by "the restrictive language of [the BFOQ] . . . 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.* (emphasis added). It recognized that the lower federal courts maintain the "virtually uniform view . . . that [the BFOQ] provides only the narrowest of exceptions to the general rule requiring equality of employment opportunities." *Id.* at 333 (footnote omitted).

ness operation would be undermined by not hiring members of one sex exclusively."⁴⁰ The *Dothard* Court stated further that "an employer could rely on the [BFOQ] exception only by proving 'that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.'"⁴¹

Even though the *Dothard* Court allowed sex to be used as a BFOQ, it confined that holding to the harsh facts of *Dothard* in which a woman applied to be a correctional counselor in a maximum security Alabama prison.⁴² Moreover, there is a strong dissenting opinion in which Justice Marshall objected to justifying sex discrimination, even in extreme circumstances. Justice Marshall sent a message to the lower courts cautioning them to restrict the use of the BFOQ to the narrow facts of *Dothard*.⁴³ As illustrated in *Chambers v. Omaha Girls Club, Inc.*,⁴⁴ at least one court of appeals ignored this message.

The plaintiff in *Chambers* brought her claim under the disparate impact theory in addition to the disparate treatment theory. Therefore, it is necessary to have an understanding of disparate impact and its business necessity defense before examining the *Chambers* case.

B. The Disparate Impact Theory and the Business Necessity Defense

To succeed with the disparate impact theory, the plaintiff must

40. *Id.* at 333 (quoting *Diaz v. Pan American World Airways*, 442 F.2d 385, 388 (5th Cir.), cert. denied, 404 U.S. 950 (1971)).

41. *Id.* (quoting *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969)) (emphasis added).

42. *Id.* at 334-37. For a brief summary of the *Dothard* facts, see *infra* note 38.

43. Writing the dissenting opinion in *Dothard*, Justice Marshall cautioned against the use of the BFOQ. He accused the majority of:

perpetuat[ing] one of the most insidious of the old myths about women—that women, wittingly or not, are seductive sexual objects. . . . It is women who are made to pay the price in lost job opportunities for the threat of depraved conduct by prison inmates. Once again, "[t]he pedestal upon which women have been placed has . . . upon closer inspection, been revealed as a cage."

Id. at 345 (quoting *Sailer Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 20, 485 P.2d 529, 541 (1971) (Marshall, J., concurring in part and dissenting in part)).

In addition, Justice Marshall concluded with a pointed message to the lower courts by stating that they must:

recognize that the [*Dothard*] decision was impelled by the shockingly inhuman conditions in Alabama prisons, and thus that the "extremely narrow [BFOQ] exception" recognized here, will not be allowed "to swallow the rule" against sex discrimination. Expansion of today's decision beyond its narrow factual basis would erect a serious roadblock to economic equality for women.

Id. at 347 (Marshall, J., concurring in part and dissenting in part) (citation omitted).

44. 834 F.2d 697 (8th Cir. 1987).

prove that a facially neutral employment policy has a significant adverse impact on a protected group⁴⁵ and that he or she is a member of that group.⁴⁶ Such a showing establishes prima facie discrimination.⁴⁷ The Supreme Court introduced Title VII disparate impact analysis in *Griggs v. Duke Power Co.*,⁴⁸ where black employees objected to promotional test requirements.⁴⁹ The *Griggs* Court said that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."⁵⁰

The *Griggs* Court also introduced the business necessity defense which is the proper defense to a disparate impact Title VII claim.⁵¹ It said that if an "employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."⁵² In addition, an employer must prove that any given employment policy has a "manifest relationship to the employment in question."⁵³ In *Washington v. Davis*,⁵⁴ the Court added that demonstrating some "rational basis" for disparate impact is insufficient.⁵⁵ According to the *Davis* Court, it is necessary that hiring and promotion practices that have a disparate impact on blacks be "validated" in

45. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). "[Title VII] proscribes . . . practices that are fair in form, but discriminatory in operation." *Id.* at 431. To prove disparate impact, the plaintiff "must show that a facially neutral employment practice has a significant adverse impact on a protected minority group." *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697, 700 (8th Cir. 1987).

46. The ultimate issue in [*Chambers*] is whether the [Role Model Rule] permitting the termination of single employees who become pregnant, or cause a pregnancy, unlawfully discriminates against the plaintiff, individually, or has an unlawfully discriminatory impact upon a class of women or black women, of which the plaintiff is a member.

Chambers v. Omaha Girls Club, 629 F. Supp. 925, 943 (D. Neb. 1986) (emphasis added).

47. *Griggs*, 401 U.S. at 430. "Under the [Civil Rights] Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained . . . [if they have a discriminatory impact]." *Id.* See also *Connecticut v. Teal*, 457 U.S. 440 (1982). In *Teal*, four black employees of the Department of Income Maintenance complained that a test given to them disproportionately excluded blacks. Each of them had been provisionally promoted to Welfare Eligibility Supervisor but had to be tested to attain permanency. *Id.* at 445-46. The *Teal* Court held that "[w]hile there was no showing that the employer had a racial purpose . . . these requirements . . . were invalid because they had a disparate impact." *Id.* at 446.

48. 401 U.S. 424 (1971).

49. *Id.* at 430-32.

50. *Id.* at 431.

51. *Id.*

52. *Id.* (emphasis added).

53. *Id.* at 432 (emphasis added).

54. 426 U.S. 229 (1976).

55. *Id.* at 247 (emphasis added).

terms of job performance."⁵⁶

A recent Supreme Court decision discusses the allocation of the burden of proof between plaintiff and defendant in a business necessity defense and sets a standard which makes it easier for the defendant to avoid liability. In *Wards Cove Packing Company, Inc. v. Atanilo*,⁵⁷ plaintiffs alleged that an employer discriminated against non-white cannery workers.⁵⁸ Although the Court ultimately held that the cannery workers did not make out a prima facie case of disparate impact,⁵⁹ it remanded the case with instructions to the lower court on how it should analyze the employer's assertion of the BND if the cannery workers prove disparate impact at retrial.⁶⁰

The *Wards Cove* Court said that "the employer carries the burden of producing evidence of a business justification for his employment practice. The burden of persuasion, however, remains with the disparate-impact plaintiff."⁶¹ The effect of this dicta is to lighten the burden on the defendant/employer once the plaintiff/employee has proved disparate impact. All the employer must do is articulate some legitimate business reasons for the offensive employment practice. According to the *Wards Cove* Court, the burden then shifts back to the plaintiff to prove that those business reasons are false or that there is an alternative means to accomplish the business goals.⁶²

56. *Id.* (emphasis added). See also EEOC Guidelines, 29 C.F.R. § 1604.10(c) (1989) (stating that business necessity is met when the employer shows that the discriminatory requirement has a manifest relationship to the employment in question). The EEOC is a federal agency created by the Civil Rights Act of 1964. It is charged with the enforcement of Title VII. 42 U.S.C. § 2000e-4(a) (1982).

57. 109 S. Ct. 2115 (1989).

58. *Id.* at 2119.

59. *Id.* at 2121-22.

60. *Id.* at 2124.

61. *Id.* In his dissenting opinion, Justice Stevens points out that the *Griggs* Court placed the burden of persuasion on the employer. *Wards Cove*, 109 S. Ct. at 2127 (Stevens, J., dissenting). In *Wards Cove*, the Court was speaking hypothetically about what the employer's burden would be if the plaintiff proved disparate impact. Shifting the burden of persuasion back to the plaintiff differs from the *Griggs* formulation, making it easier for the defendant to succeed with the BND. In response to the *Wards Cove* decision, a bill has been introduced in the Senate that will overturn the ruling and clarify the burden of proof in disparate impact cases. See Fair Employment Act, S. 1261, 101st Cong., 1st Sess., 135 CONG. REC. 57512 (June, 1989).

62. *Wards Cove*, 109 S. Ct. at 2127.

II. CHAMBERS V. OMAHA GIRLS CLUB, INC.⁶³

A. Facts

According to the findings of the trial court, the Girls Club of Omaha is a "private, non-profit, tax exempt corporation" that serves girls between the ages of eight and eighteen. Its staff conducts educational, vocational, and social programs that are designed to help the "young girls reach their full potential."⁶⁴ While the Girls Club's stated purpose is to "provide behavioral guidance and to promote the health, education and vocational and character development of girls, regardless of race, creed or national origin," it also boasts that its "extensive contact and the close relationships which often develop between the staff and the members . . . differentiate it from schools and other youth programs."⁶⁵ Staff members "act as role model[s]" to the counselees with the expectation that the girls will emulate their behavior.⁶⁶ In addition to the role modeling, staff members are required to adopt the Girls Club's philosophies, among which is the belief "that teenage pregnancy limits life's options for a young woman."⁶⁷

In 1981, after two of the Girls Club's single staff members became pregnant, the Girls Club instituted Rule Eleven, or the Role Model Rule,⁶⁸ which said that pregnancies of single women were grounds for

63. 834 F.2d 697 (8th Cir. 1987).

64. *Chambers v. Omaha Girls Club*, 629 F. Supp. 925, 928 (D. Neb. 1986).

65. *Id.*

66. 834 F.2d at 699.

67. *Id.* The Girls Club's objectives are to:

1. Create a safe and stable environment that fosters trusting relationships and individual value development through interaction with peers and adults.
2. Develop and implement programs to enable girls to build positive self esteem through skill development and application.
3. Make available quality health programs so girls may understand and deal with their own health problems and health maintenance.
4. Establish a climate where girls participate in and experience the decision making process and have broad opportunity to take leadership roles.
5. Provide opportunities for girls to explore the full range of their personal options in family roles and career choices in order to take control of their lives.
6. Encourage a knowledge and understanding of the various cultures in our society. Promote a broad view of responsibility as a citizen of a larger community through education and civic activity.
7. Encourage both individual and group responsibility.

Chambers, 834 F.2d at 698 n.1.

68. The Girls Club's personnel policies contain the following provisions:

MAJOR CLUB RULES

All persons employed by the Girls Club of Omaha are subject to the rules and regulations as established by the Board of Directors. The following are not permitted and such acts may result in immediate discharge:

dismissal.⁶⁹ Shortly thereafter, Ms. Chambers, a twenty-two-year old, single staff member, became pregnant, reported the pregnancy to her supervisor, and received a letter of termination.⁷⁰

Ms. Chambers sued the Girls Club in the United States District Court for the District of Nebraska⁷¹ alleging, in addition to constitutional and state law claims, that black single women comprise a class affected adversely by the Role Model Rule.⁷² Essentially, she alleged a combination of race and sex-based discrimination.⁷³

To show adverse impact on race, Ms. Chambers presented statistical evidence at trial⁷⁴ which supported the court's finding of disparate impact. Responding to Chambers' arguments, the Girls Club asserted legitimate business reasons for the Role Model Rule to avoid liability for disparate impact against race.⁷⁵

Ms. Chambers then attempted to prove that those reasons were pretextual by arguing that there were less restrictive means to accom-

11. Negative role modeling for Girls Club Members to include such things as single parent pregnancies.

Chambers, 834 F.2d at 699 n.2.

69. *Chambers v. Omaha Girls Club*, 629 F. Supp. at 929.

70. *Chambers*, 834 F.2d at 699.

71. *Chambers v. Omaha Girls Club*, 629 F. Supp. at 929. Chambers alleged violations of the:

first, fifth, ninth and fourteenth amendments of the Constitution of the United States, violations of the Civil Rights Act, 42 U.S.C. 1981, 1983, 1985, 1986 and 1988, and pendant state violations including: bad faith discharge, defamation, invasion of privacy, intentional infliction of emotional distress, and conspiracy to deprive her of a right to a livelihood . . .

Id.

72. *Id.* at 944.

73. *Id.*

74. Chambers' statistical evidence showed:

(1) that in 1981 the fertility rate for teenage whites in the Douglas County area was 36.2 per thousand (or 3.6 per hundred) as compared to 107.1 per thousand for non-white teenagers (or 10.7 per hundred), . . . the fertility rate of black teenagers is approximately 2 1/2 times greater than that of whites. With respect to the overall fertility rates, whites as a class are likely to become pregnant approximately seventy percent as often as blacks [that is, for every ten blacks who become pregnant only seven whites become pregnant].

From these facts, it is possible, even in the absence of more specific data, to conclude that the impact of the [Role Model Rule] would fall more harshly on black women of child-bearing age.

Chambers v. Omaha Girls Club, 629 F. Supp. at 949 n.45.

75. "The Court believes that the [Girls Club's] articulated reason for the [Role Model Rule], i.e., to provide positive role models in an attempt to discourage teenagers from becoming pregnant, is a legitimate, nondiscriminatory reason that was clearly explained." *Id.* at 947.

plish the Girls Club's goals.⁷⁶ Responding to Ms. Chambers' arguments, the Girls Club convinced the district court that there were no other, less restrictive means to accomplish its goals.⁷⁷

Ms. Chambers further argued that the Role Model Rule was a cover for animus towards black women,⁷⁸ and thus, that the Girls Club should be held liable for covert disparate treatment. The Girls Club maintained that it was not intentionally discriminating against black women.⁷⁹

Additionally, Ms. Chambers argued that there was no evidence to show that the Role Model Rule was effective.⁸⁰ The Girls Club failed to offer any data to show a relationship between the Role Model Rule and the incidence of pregnancy in counselees.⁸¹ Instead of proving the Rule's efficacy, the Girls Club proposed that empirical data are not required to prove that the Role Model Rule discourages illegitimate pregnancy. It argued that expert testimony is sufficient to justify the Rule, even in the absence of verifying data.⁸² Accordingly, the Girls Club called an expert to testify that the Role Model Rule might relieve the problem of teenage pregnancy.⁸³

The district court analyzed the case under both the disparate

treatment theory and the disparate impact theory.⁸⁴ It discussed disparate treatment analysis first, but without distinguishing the race claim from the sex claim.⁸⁵ Ms. Chambers and the Girls Club formed arguments based upon race. Ms. Chambers' argument which she used to show covert disparate treatment contained both race and sex components.⁸⁶ Ultimately, the district court found no disparate treatment.⁸⁷

The district court then analyzed the case under the disparate impact theory. It concluded that Ms. Chambers proved disparate impact against black females because a rule banning single, pregnant workers would impact black women more harshly because of their higher fertility rates.⁸⁸ The court dismissed the case, however, holding that the Girls Club's reasons for the discrimination were legitimate business reasons,⁸⁹ and, therefore, there was no discrimination under Title VII.⁹⁰

modeling rule could be . . . another viable way to attack the problem of teenage pregnancy." *Id.* (emphasis added).

The EEOC has strict requirements for establishing the need for same-sex role models. Because the Pregnancy Discrimination Act made discrimination against pregnancy a violation of Title VII, the same strict requirements, by analogy, apply to "same pregnancy-state" role models. That is, if the Girls Club insisted on having nonpregnant role models, it, by analogy, must follow the same strict guidelines for same-sex role modeling. For a discussion of the EEOC compliance manual requirements with respect to same-sex role models, see *infra* note 154.

84. *Id.* at 946-48, 949-52.

85. *Id.* at 947.

86. *Id.*

87. *Id.* at 947-48.

88. *Id.* at 949. See *supra* note 74.

89. The district court said that to find business necessity, the Girls Club was required to show a "close nexus between the policy in question and a 'substantial goal of the employer.'" *Chambers v. Omaha Girls Club*, 629 F. Supp. at 949 (citing *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971)). "[T]here must be a 'positive relationship' between the rule or policy and the employer's program." *Id.* at 950 (quoting *Washington v. Davis*, 426 U.S. 229, 250 (1976)). Applying these tests, the court concluded that the Omaha Girls Club:

established by the evidence that its only purpose is to serve young girls between the ages of eight and eighteen and to provide these women with exposure to the greatest number of available positive options in life. The Girls Club has established that teenage pregnancy is contrary to this purpose and philosophy. The Girls Club established that it *honestly believed* that to permit single pregnant staff members to work with the girls would convey the impression that the Girls Club condoned nonmarried pregnancy for the girls in the age group it serves.

Id. at 950 (emphasis added).

90. *Id.* at 952. The district court did not expressly state that the Role Model Rule is justified by the BND. The court of appeals, however, makes it clear that the district court found that it was. *Chambers*, 834 F.2d 697, 703 (8th Cir. 1987). The court of appeals also clarified that the trial court did not find that the Role Model Rule is a BFOQ. *Id.* at 704.

76. Chambers argued that she could be given a leave of absence or could be put in a non-contact position, thereby removing herself from contact with the club members and avoiding any negative role model influence. *Chambers*, 834 F.2d at 702.

77. The Girls Club convinced the district court that there were no such non-contact positions, see *supra* note 76, and that a leave of absence would have to be three or four months long to accomplish the desired effect. Training a replacement for Chambers would require six months of on-the-job training. *Id.* at 702-03.

78. To show that the Girls Club's reasons for the Role Model Rule were pretextual, Chambers tried to prove: (1) that the rule required intrusion into the staff members' private lives; (2) that less restrictive alternatives were available such as a leave of absence or transfer of duties; (3) that the rule is applied in an irrational manner, i.e., it applies to single pregnant women but not to single mothers; (4) that the rule promotes abortion and abortion is not a viable option for black women; (5) that the rule impacts black women more harshly; and (6) that ratification of the rule by the board of directors was an attempt to cover up animus toward the plaintiff. *Chambers v. Omaha Girls Club*, 629 F. Supp. at 947 (emphasis added).

79. The Girls Club rebutted the allegations of intentional racial discrimination with the evidence that there was a high percentage of minorities employed by the Club and alleged that percentage was probative on intent. *Id.* at 947-48 n.43.

80. *Chambers*, 834 F.2d at 702.

81. *Id.* at 706-07 (McMillian, J., dissenting) (stating that there is no evidence to support a relationship between teenage pregnancies and the employment of an unwed pregnant instructor).

82. To support this argument, the Girls Club relied upon *Davis v. City of Dallas*, 777 F.2d 205 (5th Cir. 1985), cert. denied, 476 U.S. 116 (1986).

83. *Chambers v. Omaha Girls Club*, 629 F. Supp. at 951. The expert testified that "because teenagers have a need for 'significant others' outside the home and are likely to develop close relationships such as those which are fostered at the Girls Club . . . the role

Ms. Chambers appealed to the Court of Appeals for the Eighth Circuit. Even though it affirmed the dismissal of her claim, the court of appeals recognized that Ms. Chambers asserted a "combination of race and sex discrimination . . . in violation of 42 U.S.C. [section] 2000e-2(a)."⁹¹ Furthermore, it is clear from the Chambers' arguments that she alleged intentional race discrimination⁹² and intentional sex discrimination.⁹³

B. The Court of Appeals' Analysis

1. Disparate Impact: Finding the Business Necessity Defense

The court of appeals accepted the district court's finding that Ms. Chambers' statistical evidence proved disparate impact without explicitly stating whether that impact was based upon race or sex.⁹⁴ Since the BND is the proper defense for unintentional disparate impact against either race or sex, the court analyzed the case to determine whether the Girls Club had proved business necessity.⁹⁵

The court said that a defendant must satisfy two tests to prove the BND. The first test, formulated by the Supreme Court in *Griggs*, requires the defendant to prove that there is a "manifest relationship [between the challenged employment practice and] . . . the employment in question."⁹⁶ The second test forces the defendant to prove

91. *Chambers*, 834 F.2d at 700.

92. *Chambers v. Omaha Girls Club*, 629 F. Supp. at 930. At trial, Chambers tried to prove that the Role Model Rule had a disparate impact on race and that the Girls Club's reasons for the Rule were pretextual. During its discussion of the parties' arguments, the district court stated that "[t]he plaintiff's evidence of pretext generally tries to establish that the [Role Model Rule] is a cover-up for the Girls Club's 'morality standard' which disapproves of black single mothers." *Id.* at 947 (emphasis added). The Girls Club attempted to rebut this evidence by showing that its "work force was racially balanced or contained a disproportionately high percentage of minority employees . . ." *Id.* (emphasis added) (citation omitted).

Thus, it is plain from Chambers' argument and from the Girls Club's response that both parties knew that the argument was about race.

93. *Chambers*, 834 F.2d at 703. According to the court of appeals:

Chambers argue[d] alternatively that the district court erred in failing to find a violation of Title VII under the [covert] disparate treatment theory, and that this case [with respect to sex] should not be analyzed under the [covert] disparate treatment theory because Chambers' discharge on account of her pregnancy constitutes [overt, facially discriminatory disparate treatment or] intentional discrimination

Id. For a discussion of the three methods of showing disparate treatment, see *supra* notes 17-29 and accompanying text.

94. *Id.* at 701.

95. *Id.*

96. *Id.* (quoting *Hawkins v. Anheuser-Busch, Inc.*, 697 F.2d 810, 815 (8th Cir. 1983)

that there is a "compelling need . . . to maintain [the] practice."⁹⁷ In addition to these two tests, the court said that the defendant might have to prove that the employment practice is "necessary to safe and efficient job performance"⁹⁸ or "that the employer's goals are 'significantly served by' the practice."⁹⁹

The court of appeals accepted the district court's finding that the Girls Club's purpose was to serve young girls and to expose them to life's opportunities.¹⁰⁰ It agreed that the "Girls Club established that it *honestly believed* that to permit single pregnant staff members to work with the [counselees] would convey the impression that the Girls Club condoned pregnancy"¹⁰¹ and that pregnancy would limit opportunities in life for young girls.¹⁰² Ruling that this "purpose" and this "belief" satisfied the tests for finding the BND, it held that the district court's finding "that the [R]ole [M]odel [R]ule is justified by [the BND] and thus does not violate Title VII under the disparate impact theory is not clearly erroneous."¹⁰³

In addition to accepting the district court's reasoning regarding "purpose" and "belief," the court of appeals concluded that the testimony of an expert witness was sufficient to show a manifest relationship between the Role Model Rule and teenage pregnancy in the absence of any data or validation studies.¹⁰⁴ Thus, it concluded that the Girls Club proved the BND.¹⁰⁵

(quoting *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971))).

97. *Id.* (quoting *Hawkins*, 697 F.2d at 815 (quoting *Kirby v. Colony Furniture Co.*, 613 F.2d 696, 706 n.6 (8th Cir. 1980))).

98. *Id.* (quoting *McCosh v. City of Grand Forks*, 628 F.2d 1058, 1062 (8th Cir. 1980) (quoting *Dothard*, 433 U.S. at 332 n.14)).

99. *Id.* (quoting *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 n.31 (1979)) (holding that a rule which prohibited methadone users who were participants in a drug rehabilitation program from occupying positions which were "safety-sensitive" was manifestly related to the employment in question). The *Chambers* court cited *Beazer* to support the notion that one way to establish the BND defense is to show that the employer's goals are significantly served by the practice. However, it was the trial court in *Beazer* that discussed goals. *Beazer*, 440 U.S. at 587 n.31. The *Beazer* Court ultimately reaffirmed the *Griggs* test that the practice must be manifestly related to the employment in question. *Id.*

100. *Chambers*, 834 F.2d at 701.

101. *Id.* at 701-02 (emphasis added).

102. *Id.* at 702.

103. *Id.* at 703.

104. *Id.* at 702.

105. *Id.* at 703.

2. Disparate Treatment: Finding the Bona Fide Occupational Qualification

In its analysis of the disparate treatment claim, the court of appeals concluded that Ms. Chambers had not shown that the Girls Club's reasons for the Role Model Rule were pretextual. Thus, there was no intent to discriminate, and therefore, no disparate treatment.¹⁰⁶ Ms. Chambers argued that there was covert disparate treatment on the basis of race and that the contrary finding was erroneous.¹⁰⁷ Additionally, Ms. Chambers argued that her "[sex claim] should not be analyzed under the [covert] disparate treatment theory because [her] discharge on account of her pregnancy constitute[d] intentional discrimination [or overt disparate treatment]."¹⁰⁸ More simply, she argued that there was covert disparate treatment against race and overt disparate treatment against sex.

The court of appeals said that the BFOQ is a defense to either of these two arguments,¹⁰⁹ without discussing the disparate treatment in terms of race or sex. It reasoned, therefore, that even if the lower court erred in finding no disparate treatment,¹¹⁰ Ms. Chambers could not prevail if the Role Model Rule constituted a BFOQ.¹¹¹ Without expressly saying so, the court effectively concluded that the Role Model Rule could justify both covert disparate treatment based upon race and overt disparate treatment based upon sex.

In assessing the validity of the Role Model Rule as a BFOQ, the court said that the Girls Club had to prove that the "essence of the business operation would be undermined" "¹¹² if single pregnant counselors were not fired. Additionally, the court said that sex or non-

106. *Id.*

107. *Id.* Even though the *Chambers* court did not specify the basis of the discrimination at this point, it is clear that Chambers was arguing that the court should have found covert racial disparate treatment, see *supra* note 92, and that the error was the court's failure to find racial disparate treatment.

108. *Id.*

109. *Id.* at 703-04 and n.18. The court reasoned that because the BFOQ is the proper defense against intentional discrimination, it is available for covert disparate treatment as well as for the overt disparate treatment. Because the *Chambers* court ultimately found that the Role Model Rule was a BFOQ, it concluded that both Chambers' arguments were answered. *Id.*

110. *Id.* at 704 n.18 ("Even if the district court erred in finding no discrimination under the disparate treatment theory, our conclusion that the role model rule is a bfoq means that there can be no violation of Title VII."). This quoted language refers to the covert disparate treatment argument.

111. *Id.* at 703-04.

112. *Id.* at 704 (quoting *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977) (quoting *Diaz v. Pan Amer. World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971))).

pregnancy would be a BFOQ when "safe and efficient performance of the job would [not] be possible without the challenged employment practice."¹¹³ Finally, according to the court, the Girls Club must prove that the Role Model Rule has a "manifest relationship to the employment in question."¹¹⁴

Instead of applying the BFOQ tests, however, the *Chambers* court proposed that the analysis of the BFOQ was "similar to and overlaps" the analysis of the BND.¹¹⁵ It apparently reasoned that because the tests were similar, the BFOQ and the BND are the same. To support this conclusion, the *Chambers* court stated that in one case¹¹⁶ "manifest relationship" was used to find the BND,¹¹⁷ while in another case,¹¹⁸ "manifest relationship" was the test used to find a BFOQ.¹¹⁹ The court continued its comparison by reasoning that in *Dothard v. Rawlinson*,¹²⁰ the Supreme Court applied the "necessary to safe and efficient job performance" test to find both the BND and the BFOQ.¹²¹

Thus, relying on the similarity in the wording of the tests, the court reasoned that the same facts that support the BND will also support the BFOQ.¹²² Consequently, because it was satisfied that the Role Model Rule was justified by the BND, the *Chambers* court concluded that the Role Model Rule also was a BFOQ.¹²³ According to the court, this conclusion justified its dismissal of Ms. Chambers' case.

III. ANALYSIS

The *Chambers* decision contains two fundamental errors, each of

113. *Id.* (citing *Dothard*, 433 U.S. at 333 (citing *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969))).

114. *Id.* (quoting *Gunther v. Iowa Men's Reformatory*, 612 F.2d 1079, 1086 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971))).

115. *Id.* at 704 (quoting *Gunther*, 612 F.2d at 1086 n.8).

116. *Hawkins v. Anheuser-Busch, Inc.*, 697 F.2d 810 (8th Cir. 1983).

117. *Chambers*, 634 F.2d at 704 (citing *Hawkins*, 697 F.2d at 815).

118. *Gunther v. Iowa Men's Reformatory*, 612 F.2d 1079 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980).

119. *Chambers*, 634 F.2d at 704 (citing *Gunther*, 612 F.2d at 1086). The *Chambers* court cited *Gunther* to show that the test for a BFOQ is the same as for the BND. The *Gunther* court, however, got its test for the BFOQ by citing *Griggs* which was about the BND and not the BFOQ. The Supreme Court applied the "manifest relationship to the employment in question" test to the BND and not to the BFOQ. See *Griggs*, 401 U.S. at 431-32.

120. 433 U.S. 321, 321 (1977).

121. "Compare *Dothard*, 433 U.S. at 332 n.14 (business necessity) with *Dothard*, 433 U.S. at 333 (bfoq)." *Chambers*, 634 F.2d at 704 n.19.

122. *Id.* at 704.

123. *Id.* at 705.

which may lead to increased exposure¹²⁴ to discrimination for employees who allege race and sex claims in the same action. The first problem was the court's failure to separate its discussion of the race claim from its discussion of the sex claim. The second error was the court's failure to hold the Girls Club to the Supreme Court's standards for proving the BND. An additional twist to this second error was the court's determination that the BFOQ and the BND are so similar that proving the BND also proves the BFOQ.

A. Confusing the Claims

Ms. Chambers was fired for becoming pregnant.¹²⁵ As stated in

124. Women may be particularly exposed to wrongful discrimination, due in part to their last place consideration as members of a protected group. The term "sex" was added to the Civil Rights bill in what was an apparent attempt to keep the bill from passing. 110 CONG. REC. 2377 (1964). See Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 TEX. L. REV. 1025 (1977). "On the last day of House debate on the Civil Rights Bill, Representative Smith, a staunch opponent of the Bill, proposed, 'in jest,' the inclusion of 'sex' as a prohibited classification in an attempt to make the Bill unacceptable to as many legislators as possible." *Id.* at 1027 (citations omitted); Veas, *supra* note 1, at 441-42. "Mr. Smith, long-time Chairman of the House Committee on Rules—and not a civil rights enthusiast—offered his amendment in a spirit of satire and ironic cajolery. In support of the amendment he quoted at length from a letter he had just received from a lady, presumably one of his constituents . . ." The letter was a complaint about how God did not supply enough men to avoid the plight of spinsterhood, asking Congress if it could help. *Id.* See also 110 CONG. REC. 2584 (1964). Arguing that the purpose of Title VII was to protect blacks, Representative Greene stated that "sex" should not be added to the bill without extensive hearings on the biological differences between men and women. *Id.* See generally 110 CONG. REC. 2577-84 (1964) (the complete discussion on the House floor pertaining to the passage of Title VII).

125. Before passage of the Pregnancy Discrimination Act, pregnant women were relegated to a "subclass" which was not covered by Title VII. For a discussion of the concept of subclasses within one sex, see Sirota, *supra* note 124, at 1039-42. The author provides an example of how subclasses are created:

A conservative men's club has an opening for a locker room attendant. It announces that it will hire only nonbearded males. If the fifty women who apply for the position bring a Title VII action, a court should find sex discrimination since the employer's no-female rule burdens the class of all women because of their unique physical characteristics. In this case, however, sex discrimination is permissible and a BFOQ exists, because of the privacy-related requirement that the locker room attendants possess the same unique sexual characteristics as the locker room patrons. The exclusion of all women applicants (may leave, for example) twenty-five bearded and twenty-five nonbearded men competing for the job in the BFOQ-created subclass. If the twenty-five bearded men brought a Title VII action claim for sex discrimination, a court should reject their claim. Since a BFOQ has eliminated all women from competition, discrimination against the bearded males does not reduce their competitive employment opportunities against female applicants. Because the discrimination within a single subclass is on the basis of beards and not sex, Title VII does not prohibit it.

Id. at 1040 (footnotes omitted). Following this reasoning, if an employer favored non-

the Pregnancy Discrimination Act amendment to Title VII,¹²⁶ pregnancy discrimination is sex discrimination.¹²⁷ Because the Role Model Rule expressly stated that single pregnant counselors would be

pregnant women over pregnant women, the pregnant women would not have a Title VII claim because they would be discriminated against on the basis of pregnancy rather than on the basis of sex.

126. Congress enacted the Pregnancy Discrimination Act, Pub. L. No. 95-555 § 1, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1982)), in response to a Supreme Court decision which categorized pregnant women as a subclass and excluded them from Title VII protection. *General Electric Co. v. Gilbert*, 429 U.S. 125, 145-46 (1976) (exclusion of employment benefits of pregnancy-related disabilities did not violate Title VII). See *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (stating that the PDA was enacted in response to the *Gilbert* decision); *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 678-80 (1983) (legislative history of PDA reflecting Congress' disapproval of *Gilbert* in which pregnancy discrimination was allowed); H.R. REP. NO. 948, 95th Cong., 2d Sess. 2, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 4749, 4750 (stating that the *Gilbert* Court decided in favor of a disability plan which excluded disabilities based on pregnancy). Congress reacted to the *Gilbert* decision by introducing two bills specifically designed to overrule *Gilbert*. See S. 995, 95th Cong., 1st Sess. (1977); H.R. 6075, 95th Cong., 1st Sess. (1977). "[S. 995 which resulted in the PDA] was passed in lieu of [H.R. 6075] after amending its language to contain much of the text of the House bill." H.R. REP. NO. 948, 95th Cong., 2d Sess. 1, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 4749. Additional minor differences were resolved by the managers of the House and Senate. See H.R. CONF. REP. NO. 1786, 95th Cong., 2d Sess. 3, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 4749, 4765. One commentator stated that the *Gilbert* Court "ignored the congressional intent in enacting Title VII of the Civil Rights Act—that intent was to protect individuals from unjust employment discrimination including pregnant workers." Note, *supra* note 20, at 674-75 (citing the statements of Senator Williams, 123 CONG. REC. 2539 (1977) in Staff Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., Legislative History of the Pregnancy Discrimination Act of 1978 2 (1979)).

127. 42 U.S.C. § 2000e(k) (1982). For text of the PDA, see *supra* note 2. See also 29 C.F.R. § 1604.10(a) (1988) ("A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy, childbirth or related medical conditions is in prima facie violation of Title VII.")

One explanation for the blindness to intentional discrimination based on pregnancy is that the Act was originally and exclusively intended to protect the black race. See H.R. REP. NO. 914, 88th Cong., 1st Sess. 13, reprinted in 1964 U.S. CODE CONG. & ADMIN. NEWS 2355, 2391. While offering some additional views on the meaning of Title VII, Senators Poff and Cramor stated in a House report that Title VII:

enumerates a series of acts or omissions on the part of an employer which it declares to be "unlawful employment practices."

These include:

1. failure to hire a job applicant on account of his race;
2. refusal to hire a job applicant on account of his race;
3. discharge of an employee on account of his race;
4. discrimination in compensation against an employee on account of his race;
5. . . .
13. discrimination on account of race against any individual in an apprenticeship program.

Id. at 107, reprinted in 1964 U.S. CODE CONG. & ADMIN. NEWS at 2474. Further evi-

fired, it was overt disparate treatment against sex (pregnancy).¹²⁸

The court of appeals referred to Ms. Chambers' Title VII claim as a "combination of race and sex discrimination in the course of employment,"¹²⁹ recognizing that the claim was a race claim and a sex claim. It did not recognize, however, that the sex claim was overt disparate treatment while the race claim was based upon both disparate impact and covert disparate treatment. The court simply accepted that Ms. Chambers' statistical evidence proved disparate impact without specifying whether the disparity was based upon race or sex.¹³⁰ Consequently, when it held that the lower court's finding, that the Role Model Rule was justified by the BND, was not clearly erroneous,¹³¹ it impliedly held that the overt disparate treatment based upon sex was justified by the BND.¹³² This reasoning is incorrect because disparate treatment on the basis of sex (pregnancy) requires the BFOQ defense to be lawful. The *Chambers* court acknowledged that the district court "did not clearly conclude that the [R]ole [M]odel [R]ule qualified as a [BFOQ] . . .,"¹³³ and in the same paragraph of its

dependence of the exclusive focus on the black race is indicated by the following discussion which accompanied Title VII debate:

In various regions of the country there is discrimination against some minority groups. Most glaring, however, is the discrimination against Negroes which exists throughout our Nation. Today, more than 100 years after their formal emancipation, Negroes, who make up over 10 percent of our population, are by virtue of one or another type of discrimination not accorded the rights, privileges, and opportunities which are considered to be, and must be, the birthright of all citizens.

Id. at 18, reprinted in 1964 U.S. CODE CONG. & ADMIN. NEWS at 2393.

128. For the circumstances that led to the enactment of the Role Model Rule, see *supra* text and accompanying notes 68-69. For the text of the Role Model Rule, see *supra* note 68.

129. *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697, 700 (8th Cir. 1987).

130. *Id.* at 701. A recent note also has failed to make this distinction. See Note, *Do Unwed Pregnant Mothers Constitute Negative Role Models? Chambers v. Omaha Girls Club*, 21 CREIGHTON L. REV. 1119 (1988). Even though this author challenges the court of appeals' failure to recognize the difference between the BND and the BFOQ, she does not mention or notice that disparate impact is based upon race and disparate treatment is based upon sex. *Id.* at 1141.

131. *Chambers*, 834 F.2d at 703.

132. "The district court found that the [R]ole [M]odel [R]ule [was] justified by business necessity because there [was] a manifest relationship between the Club's fundamental purpose and the [R]ule." *Chambers*, 834 F.2d at 701. The court held that the district court's account of the evidence was plausible, making the Role Model Rule lawful as a BND. *Id.* at 702. Therefore, since the Role Model Rule was facially discriminatory, the court, in effect, held that intentional sexual discrimination was justified by the BND.

One student note also found fault with justifying disparate treatment claims with the BND. See Note, *Chambers v. Omaha Girls Club, Inc.: The Eighth Circuit Opens the Door to Pregnancy Based Discrimination*, 3 ST. JOHN'S J. OF LEGAL COMMENT 197, 211 (1988).

133. *Chambers*, 834 F.2d at 704.

opinion, the *Chambers* court stated that an intentional violation of Title VII requires a BFOQ.¹³⁴

Notwithstanding this inaccurate analysis, however, the court ultimately concluded that the Role Model Rule was justified by the BND and also was a BFOQ.¹³⁵ If the Role Model Rule were a BFOQ, then the dismissal of the sex claim was proper, even though the race and sex claims were confused. This is not true, however, with respect to the race claim.

Ms. Chambers argued that the district court erred in not finding disparate treatment.¹³⁶ Ms. Chambers' attempt to prove disparate treatment was made through the process of showing disparate impact and then proving that the employer's business reasons were pretextual.¹³⁷ The court of appeals said that even if disparate treatment had been shown through this analysis, the dismissal was still proper because the Role Model Rule was also a BFOQ.¹³⁸ However, the disparate impact-to-disparate treatment analysis that Ms. Chambers proposed was directed at proving racial discrimination. When Ms. Chambers introduced the statistical evidence of higher rates of pregnancy among black women¹³⁹ to show disparate impact on a protected group, she showed racial discrimination. It was not women who were adversely affected, it was black women.¹⁴⁰ If, as the court seems will-

134. *Id.* This statement is true only with respect to sex. See *supra* note 32 for evidence that the BFOQ cannot be applied to race discrimination.

135. The *Chambers* court said that:

Even if the district court erred in finding no discrimination under the disparate treatment theory, our conclusion that the [R]ole [M]odel [R]ule is a [BFOQ] means that there can be no violation of Title VII. Moreover, the *per se* intentional discrimination approach advocated by Chambers simply eliminates the burden-shifting procedure . . . leaving the [BFOQ] exception as the employer's only defense. Thus, our conclusion on the [BFOQ] issue also would prevent Chambers from prevailing under her proposed *per se* intentional discrimination approach.

Id. at 704 n.18.

136. *Id.* at 703.

137. *Chambers v. Omaha Girls Club*, 629 F. Supp. 925, 946-48 (1986). See *supra* notes 25-29 for a discussion of the Supreme Court case where this method of proving disparate treatment is described.

138. *Chambers*, 834 F.2d at 703, 704 n.18.

139. *Chambers v. Omaha Girls Club*, 629 F. Supp. at 949 n.44.

140. *Id.* at 932-34. Chambers alleged intentional race discrimination under 42 U.S.C. § 1981. The trial court found no evidence of intentional race discrimination and dismissed the claim. *Id.* at 934. Consequently, when the trial court discussed the Title VII claims, it began by limiting its discussion of race discrimination to the disparate impact that the Role Model Rule may have on black women. *Id.* at 943. It felt that section 1981 barred a finding of covert disparate treatment with respect to race. Chambers, however, argued that the finding on intentional racial discrimination was an error. *Chambers*, 834 F.2d at 704 n.18.

ing to assume.¹⁴¹ Ms. Chambers had succeeded in proving covert racial disparate treatment, she should have prevailed. The law is clear that the BFOQ is not an affirmative defense for racial disparate treatment.¹⁴²

To avoid confusing the theories, courts can use the following simple analytical framework. First, courts should separate the evidence that supports the race claim from the evidence that supports the sex claim. Second, if the evidence pertaining to sex discrimination proves disparate impact, then the employer can avoid liability by successfully asserting the BND. If the evidence proves disparate treatment, then the defendant/employer must prove a BFOQ to avoid liability. Third, courts should follow the same steps for the race claim. In the race claim, however, if the plaintiff/employee proves disparate treatment, the employer cannot use a BFOQ to justify the discrimination.¹⁴³

B. The Court's Failure to Apply the Judicially Indicated Standards for Finding Business Necessity or Bona Fide Occupational Qualification

1. Finding the Business Necessity Defense

In making the determination that the Role Model Rule was a BND, the court of appeals purported to subject the Role Model Rule to tests formulated by the Supreme Court in *Griggs* and *Washington v. Davis*.¹⁴⁴ While the *Chambers* court accurately identified the tests, the Girls Club did not meet its burden of proof for passing those tests based upon the facts of *Chambers*.

The Supreme Court stated that employment practices which have a disparate impact on a protected class must be manifestly related to the employment in question¹⁴⁵ and must be validated in terms of job performance.¹⁴⁶ The Girls Club offered as its proof of "manifest relationship" that it "honestly believed" that the presence of single, pregnant staff members would convey the impression of condoning

141. *Id.*

142. 42 U.S.C. § 2000e-2(e) (1982). For the text of the statute that lists religion, sex, and national origin as the only classifications that are subject to the BFOQ justification, see *supra* note 30. For legislative history of the BFOQ indicating that it was not meant to apply to race, see *supra* note 32.

143. EEOC Compl. Man. (BNA) § 625.1 (1982) ("The protected class of race is not included in the [BFOQ] statutory exception and clearly cannot, under any circumstances, be considered a BFOQ for any job."). For further evidence that the BFOQ cannot be applied to race, see *supra* note 32.

144. See *supra* notes 96-105 and accompanying text.

145. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

146. *Washington v. Davis*, 426 U.S. 229, 247 (1976).

illegitimate teenage pregnancy.¹⁴⁷ By its own admission, the Girls Club had no data to support the relationship.¹⁴⁸ The *Chambers* court relied upon *Davis v. City of Dallas*¹⁴⁹ to underscore the notion that validation studies were not required. The *Davis* court, however, limited its holding to the specific facts of *Davis* in which human safety concerns justified using other means of judging qualifications.¹⁵⁰ The *Davis* court emphasized that when there are high economic and human safety risks involved in a job, there are verifiable ways to judge qualifications other than validating educational requirements.¹⁵¹ Thus, the *Chambers* court's reliance on the lack of data was misguided because the *Davis* court's willingness to "relax the stringent validation requirements" was strictly limited to the evaluation of academic credentials.¹⁵²

Assuming that expert testimony could substitute for verifying data, the Girls Club called an expert who testified that the Role Model Rule "could be . . . another viable way to attack . . . pregnancy."¹⁵³ This testimony, however, did not comply with standards set by the EEOC for establishing the need for single nonpregnant role models.¹⁵⁴

147. *Chambers v. Omaha Girls Club*, 629 F. Supp. at 950. *But see* EEOC v. Old Dominion Sec. Corp., 41 F.E.P. Cases 612, 617-18 (E.D. Va. 1986) (good faith subjective belief will not save an otherwise discriminatory decision).

148. *Chambers v. Omaha Girls Club*, 629 F. Supp. at 951 (stating that the Girls Club made the Role Model Rule in an attempt to limit teenage pregnancies but offers no data to support a finding that the Rule either does, or does not, accomplish this purpose).

149. 777 F.2d 205 (5th Cir. 1985), *cert. denied*, 476 U.S. 1116 (1986).

150. *Id.* at 218. In *Davis*, the challenged practice was the criteria used for selecting city police officers. *Id.* at 206. While expressing its willingness to allow the police force wide latitude in determining the qualifications of police officers because of the dangers of the job, the *Davis* court stated that "[b]ecause of the professional nature of the job, coupled with the risks and public responsibilities inherent in the position, we conclude that empirical evidence is not required to validate the job relatedness of the educational requirement. This is not to say, of course, that validation is not required." *Id.* at 217.

151. *Id.*

152. *Id.* at 217 n.12. The court of appeals also relied upon *Hawkins v. Anheuser-Busch, Inc.*, 697 F.2d 810 (8th Cir. 1983), to support its conclusion that statistical proof of a relationship between the Role Model Rule and teenage pregnancy was not required. *Chambers*, 834 F.2d at 702. In *Hawkins*, a female employee with only a high school degree was denied promotion to the position of materials control analyst which required a college degree. The *Hawkins* court stated that "validation studies[were] would have strengthened the company's case," but could not "say . . . that validation studies [were] always required." *Hawkins*, 697 F.2d at 815-16. It restricted its holding, however, to "the facts of . . . [*Hawkins*]." *Id.*

153. *Chambers*, 834 F.2d at 702 n.14 (emphasis added).

154. The EEOC Compliance Manual discusses the BFOQ in specific types of claims. Section 625.8 sets out a detailed list of requirements that an employer must meet in order to prove that a "[s]ame-sex Role Model is a BFOQ." EEOC Compl. Man. (BNA) § 625.8 (1982). In the *Chambers* case, the "same-state-of-nonpregnancy" is analogous to "same-sex" because the PDA established that discrimination based on pregnancy is sex discrimi-

The EEOC directs that a court must find by a preponderance of evidence that the counselees have a psychological need for nonpregnant role models. This need must be medically verified in writing.¹⁵⁵

In addition to its search for a justification for dismissing Chambers' claim after ignoring the need for validation studies and relying on inadequate expert witness testimony, the court of appeals tried to modify the manifest relationship standard to include a relationship to the employer's company goals. The court cited *New York City Transit Authority v. Beazer*¹⁵⁶ to support its argument that the Role Model Rule may be related to company goals rather than to the employment in question.¹⁵⁷ The use of *Beazer* arguably allowed the Chambers court to justify finding the BND because *Beazer* introduced the idea of manifest relationship to the goals rather than to the actual performance of the job as required by *Griggs*. The *Beazer* Court, however, was simply reaffirming the *Griggs* standard when it conceded to the *Beazer* trial court's findings that goals and safety can have a bearing on whether an employment policy is manifestly related to the employment in question.¹⁵⁸

nation. The Manual states that to determine whether a same-sex role model is a BFOQ, a court must:

- (1) Ascertain whether providing a same-sex role model to fill the psychological needs of clients is necessary to the normal operation of the employer's business.
- (2) Obtain medical evidence from the employer that the employer's clients have psychological need for a same-sex role model. This evidence is the main element in the same-sex role model investigation and must be in the form of a written statement or affidavit provided by a doctor, psychiatrist, or psychologist.

Id. § 625.8(a). While the expert witness in *Chambers* was a doctor, she testified that the counselees were likely to "do what they observe," but made no inference that the girls had a psychological need for nonpregnant role models. *Chambers v. Omaha Girls Club*, 629 F. Supp. at 951 n.52.

The standard of proof required by the EEOC Compliance Manual is stated in § 625.4(b)(5):

A . . . finding [of discrimination] will result if the . . . employer fails to prove by a preponderance of the evidence that: (i) the essence of the business would be undermined by employing members of the excluded sex [single, pregnant staff members in our case], and (ii) all or substantially all members of the excluded sex are unable to perform the essential duties of the job in question.

EEOC Compl. Man. (BNA) § 625.4(b)(5) (1982).

155. EEOC Compl. Man. (BNA) § 625.8(a) (1982).

156. 440 U.S. 568 (1979).

157. *Chambers*, 834 F.2d at 701.

158. *Beazer*, 440 U.S. at 587 n.31.

2. Finding the Bona Fide Occupational Qualification

Even if the evidence offered by the Girls Club had been sufficient to establish the BND, the Role Model Rule still had to meet the tests for the BFOQ because it discriminated overtly against pregnant women.¹⁵⁹ The *Chambers* court, however, equated the standards for finding a BFOQ with the standards for finding the BND and erroneously concluded that the tests for the two defenses were the same.

Comparing *Dothard* to *Chambers* underscores a vast discrepancy between the Supreme Court standards for finding a BFOQ and the standards used by the court of appeals. Recall that the *Dothard* Court allowed the BFOQ defense only after a showing that the essence of the prison operation would be undermined if women employees were not fired. It demanded a *factual basis* for believing that no woman could perform the job safely and efficiently. In *Chambers*, the Girls Club's only evidence was the unsubstantiated "honest belief" in the efficacy of the Role Model Rule.¹⁶⁰ The Girls Club offered expert testimony, with validation, that the Role Model Rule may reduce the number of single pregnancies in counselees.¹⁶¹ Moreover, the *Dothard* Court emphasized personal safety concerns as extreme as fear of rape and murder,¹⁶² while in *Chambers*, the plaintiff worked in an innocuous setting, with no threat of danger beyond the undocumented possibility that her pregnancy would give an undesirable impression.

The court of appeals, however, did not compare *Dothard* to *Chambers*. It did not examine the Girls Club's evidence in light of the BFOQ language, its history, or its treatment by the EEOC. It avoided the entire issue, simply by proposing that the analysis of a BFOQ was "similar to and overlaps" the analysis of the BND.¹⁶³ It compared the tests for finding the BND and the BFOQ,¹⁶⁴ concluding that the tests for each defense were essentially the same.¹⁶⁵ For the court of appeals, it logically followed that if the Role Model Rule were a BND, and if the tests for finding the BND and for finding the BFOQ were the

159. The Role Model Rule was facially discriminatory and therefore required the BFOQ to be lawful. EEOC Compl. Man. § 604.10(c) (1981).

160. *Chambers*, 834 F.2d at 701.

161. *Id.* at 702 n.14.

162. *Dothard v. Rawlinson*, 433 U.S. 321, 334-37 (1977). The *Dothard* Court did not specifically state that safety concerns were always to be taken into consideration. It did underscore, in its statement of facts, that the conditions were extreme and the BFOQ should be used with extreme reservation.

163. *Chambers*, 834 F.2d at 704 (quoting *Gunther v. Iowa Men's Reformatory*, 612 F.2d 1079, 1086 n.8 (8th Cir.), cert. denied, 446 U.S. 966 (1980)).

164. *Id.* at 704 n.19.

165. *Id.* at 704-05.

same, then the Role Model Rule was also a BFOQ.¹⁶⁶

To compare the tests, the court said that in *Hawkins v. Anheuser-Busch, Inc.*,¹⁶⁷ the "manifest relationship to the employment in question" test is used to prove the BND.¹⁶⁸ Then, in its attempt to demonstrate the similarity between the BFOQ and the BND, the court pointed out that the test which was used to prove the BND in *Hawkins* also was used to prove the BFOQ in *Gunther v. Iowa State Men's Reformatory*.¹⁶⁹ Even though *Gunther* involved a BFOQ, it quoted *Griggs*, the seminal disparate impact case that first established the BND.¹⁷⁰ Thus, both the *Hawkins* and the *Gunther* courts associated the "manifest relationship to the employment in question" test with the BND. The *Chambers* court apparently thought that the "manifest relationship" test was used to prove a BFOQ in *Gunther*. The *Chambers* court's reasoning that the Girls Club proved a BFOQ because it proved the BND contained two errors. First, the Girls Club did not prove the BND. Second, the court mistakenly believed that the *Gunther* court used the "manifest relationship" test to find a BFOQ. The *Chambers* court's belief that the same manifest relationship proved both the BND and the BFOQ led that court to conclude, erroneously, that the same set of facts proves both defenses.

An examination of the respective uses of the BND and the BFOQ provides evidence that the two defenses are not the same. "In analyzing a BFOQ defense to a charge, it is important to distinguish between the BFOQ and business necessity. . . . The primary difference is that the BFOQ statutory exception allows an employer to *deliberately* discriminate on the basis of religion, sex, or national origin. . . ." ¹⁷¹ The BND is the proper defense for unintentional discrimination.¹⁷² The BFOQ is the proper defense for intentional discrimination.¹⁷³ Because intentional discrimination implies greater culpability than unintentional discrimination,¹⁷⁴ for policy reasons, the BFOQ standard

166. *Id.*

167. 697 F.2d 810 (8th Cir. 1983).

168. *Chambers*, 834 F.2d at 704.

169. *Id.* In *Gunther*, a female employee alleged that a men's state prison official discriminated against her on the basis of sex. *Id.* at 1081.

170. *Gunther v. Iowa Men's Reformatory*, 612 F.2d 1079, 1086 (8th Cir.), cert. denied, 446 U.S. 966 (1980) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)).

171. EEOC Compl. Man. (BNA) § 604.10(c) (1981). See also Note, *supra* note 132, at 212 (stating that the BFOQ and the BND have mutually exclusive evidentiary foundations and are not properly consolidated by a court).

172. *Griggs*, 401 U.S. at 431.

173. 42 U.S.C. § 2000e-2(e) (1982). See EEOC Compl. Man. (BNA) § 604.10(c) (1981).

174. This proposition is an accepted moral notion or a societal judgment. For exam-

should be more rigorous than the BND standard. There is some support for this distinction in current case law. For example, statements made by the Supreme Court in *Dothard* imply more rigorous standards for establishing a BFOQ,¹⁷⁵ when compared with the milder statements about the BND made by the Court in *Griggs*.¹⁷⁶

As recently as 1986, the Court of Appeals for the Eighth Circuit, the same circuit that decided *Chambers*, distinguished the two defenses by recognizing that the BFOQ was harder to prove than the BND. In *EEOC v. Rath Packing Co.*,¹⁷⁷ the Court of Appeals for the Eighth Circuit stated that the "business necessity defense . . . is appropriately raised when facially neutral employment practices have a disproportionate impact on protected groups. The BFOQ, on the other hand, is a defense to affirmative deliberate discrimination on the basis of sex."¹⁷⁸ Thus, in 1986, the *Rath Packing* court clearly implied that the BFOQ and the BND are different. Then, in 1987, the same court, deciding *Chambers*, reasoned that the BFOQ and the BND are so similar that they are interchangeable.

The Supreme Court provided additional evidence that the two defenses are different in *Wards Cove Packing Co. v. Atonio*.¹⁷⁹ The *Wards Cove* Court shifted the burden of persuasion back to the plaintiff/employee once the defendant/employer articulates its business reasons for causing disparate impact on that employee.¹⁸⁰ This effectively makes the BND much easier to prove than it was before *Wards Cove*. Admittedly, *Wards Cove* had not yet been decided when the Eighth Circuit dismissed Ms. Chambers' claim; nevertheless, the fact that the Court has made the BND so much easier to prove makes it

ple, under the Model Penal Code, a criminal homicide is murder when "it is committed purposely or knowingly" (intentionally). Model Penal Code, § 210.2 (1985). The Model Penal Code provides that a person convicted of murder may be sentenced to death (the maximum penalty). *Id.* at § 210.5. An unintentional killing of another person, if accidental and without negligence, has no criminal or civil liability. This comparison illustrates the intuitive notion that greater responsibility (or culpability) attaches to intentional acts.

175. The BFOQ was an extremely narrow exception. *Dothard*, 433 U.S. at 334. The BFOQ is permissible only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively. *Id.* at 333. There must be a *factual basis for believing* that all or substantially all women would be unable to perform *safely and efficiently* the duties of the job in question. *Id.*

176. A business policy leading to disparate impact is unlawful if it cannot be shown to be related to job performance or shown to have a manifest relationship to the employment in question. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971).

177. 787 F.2d 318 (8th Cir. 1986).

178. *Id.* at 327 n.10.

179. 109 S. Ct. 2115 (1989).

180. *Id.* at 2124.

even more improbable that the BND and the BFOQ were ever so similar that they were interchangeable.

In addition to this evidence that the defenses are not the same, the EEOC Compliance Manual specifically states the importance of distinguishing "between BFOQ and business necessity."¹⁸¹ The manual says that the "BFOQ statutory exception allows an employer to *deliberately* discriminate on the basis of religion, sex, or national origin The business necessity defense [on the other hand] may be raised where a neutral employment criterion applied to all employees or applicants, has the *effect* of discriminating on the basis of race, color, religion, sex or national [origin]."¹⁸²

By equating the two defenses, the court of appeals implied that it would allow intentional sex discrimination when the facts support the BND. Thus, the *Chambers* decision sets a precedent that is inconsistent with Title VII's purpose, with other court of appeals' decisions, and with the reasoning of the Supreme Court. Such a precedent may increase employee exposure to discrimination by broadening the tests for finding the BND and by equating the BND and the BFOQ.

CONCLUSION

In *Chambers*, the plaintiff alleged discrimination that was based upon two classes—race and sex—that are protected under Title VII. The BFOQ is the proper defense for intentional sex or pregnancy discrimination. It is specifically unavailable, however, for intentional race discrimination. The failure to analyze the race and sex claims separately may result in justifying race discrimination with a BFOQ. This result can be avoided by employing an analytical framework that segregates the evidence according to race or sex, determines which theory each piece of evidence supports, decides whether disparate impact or disparate treatment is proved for the race claim or for the sex claim, and applies the defenses accordingly.

In addition to the difficulty with separating the race claim from the sex claim, the *Chambers* court ruled that the Girls Club proved the BND even though the Girls Club failed to meet its burden of proof according to the standards set out by the Supreme Court. The *Chambers* court compounded the error by equating the tests for the BND and the BFOQ to find a BFOQ. These errors can be avoided by maintaining consistency with the Supreme Court's standards on burden of

181. EEOC Compl. Man. (BNA) § 604.10(c) (1981).

182. *Id.*

proof for each defense and by recognizing that the defenses are not the same: they have different uses and different standards of proof.

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