

Chapter Five

Early Sex Discrimination Cases

Congress enacted the 1964 Civil Rights Act at a time when the status of women in the workplace had rested on the bottom rung of the employment ladder for many decades. Only 10 percent of managerial positions and fewer than 15 percent of professional jobs were filled by women. Although women represented one of three workers in the labor force, nearly 45 percent of low-paying service jobs were held by women.¹ Thousands of women were relegated to dead-end jobs without hope of promotion. Discrimination against women was profound and pervasive.

Initially, the EEOC was hesitant to address these issues. In the deliberations leading to the adoption of the Civil Rights Act, Congress placed great emphasis on race discrimination as the issue requiring immediate attention, while sex discrimination was considered almost as an afterthought. Although Congress did not specifically direct the EEOC to place less emphasis on sex discrimination than on race discrimination, this is precisely what occurred as a consequence of the nature of the deliberations leading to the enactment of Title VII.

Nor at first did the EEOC take seriously female worker claims that sex discrimination constituted a substantial issue for women in the workplace. As earlier noted, this attitude motivated the EEOC staff to devote far less effort to the elimination of sex discrimination than to the elimination of race discrimination from the workplace.

The EEOC's irresolution in addressing issues regarding discrimination against women was reflected in the original EEOC guidelines on sex discrimination. The guidelines did not favor women. The EEOC assumed that when Congress enacted Title VII, it had not intended to disturb existing state protective laws, such as those limiting women's working hours and restricting their places of employment. Employers had responded to these laws by

assigning female workers to “women’s jobs,” and jobs thus classified generally paid less than those designated as “men’s jobs.” Early on, the EEOC announced it would not consider a state law prohibiting women from working in jobs requiring them to lift more than a specified weight as a violation of Title VII.² Thus, in the early stages of the EEOC administration of Title VII, state protective laws remained significant barriers to the equal treatment of women in the workplace.

Eventually, the EEOC corrected its earlier stance and redirected its attention to Title VII’s prohibitions against sex discrimination. It remained for the courts, however, to determine whether to interpret the statute broadly or restrictively, whether to limit the application of the statute to the most blatant, and therefore the most obvious, forms of discriminatory conduct or to extend the reach of the statute to employer conduct less obviously discriminatory. In 1971, the Supreme Court was presented with this issue.

After reading a local Florida newspaper help-wanted advertisement placed by the Martin Marietta Corporation, Ida Phillips submitted an employment application for the position of assembly trainee. Shortly thereafter, she was notified that female applicants with preschool-age children were not being considered for the job. When she later learned that men with preschool-age children had been interviewed and hired for employment in that position, Phillips sued the company for sex discrimination.

In response to Phillips’s lawsuit, Martin Marietta alluded to its high hiring rate of women for the assembly trainee position, arguing that it had refused to hire Phillips not because she was a woman but solely because she had preschool-age children at home. An employer may not be found guilty of sex discrimination, the company urged, unless it utilized sex, and only sex, as the basis for its action. Martin Marietta concluded that because Phillips’s gender had not been the basis for its refusal to hire her, it had not committed an act in violation of the statute.

The Supreme Court rejected Martin Marietta’s argument and ruled that an employer that promulgates one hiring policy for women and another for men violates Title VII, even though the difference in the hiring policies relates to a factor other than sex—in this case, the presence of young children in the home.

If the court had acceded to Martin Marietta’s argument, the scope of the statute would have been materially limited. As stated by Justice Thurgood Marshall in his concurring opinion:

By adding the prohibition against job discrimination based on sex to the 1964 Civil Rights Act, Congress intended to prevent employers from refusing “to hire an individual based on stereotyped characterizations of the sexes.” . . . Even characterizations of the proper roles of the sexes were not to serve as predicates for restricting employment opportunity. . . . When performance

characteristics of an individual are involved, even when parental roles are concerned, employment opportunity may be limited only by employment criteria that are neutral as to the sex of the applicant.

Thus, the Supreme Court firmly placed its stamp of approval on the side of an expansive, rather than a restrictive, interpretation of the statute, establishing the rule that the differential treatment of women on the basis of her child-caring responsibilities constitutes a violation of Title VII.³

Another issue soon surfaced that threatened to undermine the scope of Title VII. Congress had added an exception to the statute's proscriptions of sex discriminatory practices by permitting employers to deny employment to women when the nature of the job required the physical attributes of a man to perform the job's functions: "Notwithstanding any other provision of this [statute], it shall not be an unlawful employment practice for an employer to hire or employ employees on the basis . . . of sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."⁴ If broadly interpreted, the bona fide occupational qualification exception would justify the exclusion of large numbers of women from some jobs, particularly those requiring the performance of manual tasks.

Dianne Rawlinson, a rather small woman, applied for the position of prison guard in the Alabama prison system. Her application was rejected as she failed to meet the state's minimum 120-pound weight requirement as well as its minimum five-foot, two-inch height requirement. Rawlinson sued, claiming that the weight and height requirements disproportionately excluded women from eligibility for employment as prison guards.

Data submitted to the trial court showed that the five-foot, two-inch minimum height requirement excluded over 33 percent of working women from prison guard positions, while excluding only slightly more than 1 percent of male workers. Similarly, the 120-pound minimum weight requirement eliminated 22.29 percent of female workers but only 2.35 percent of male workers. When the height and weight requirements were combined, over 41 percent of female workers would fail to qualify for the position, while less than 1 percent of working males would be barred.

In defense of the weight and height requirements, the Alabama Board of Corrections argued that these physical requisites were bona fide occupational qualifications directly related to the prison guard position, thus justifying Rawlinson's rejection for the job. However, the board made the mistake of not offering the court any data correlating the height and weight requirements with the requisite amount of strength essential to perform the functions of the prison guard job. When the case reached the Supreme Court, the justices pointed out that if the strength of a prison guard was truly job-related and constituted a bona fide occupational qualification (BFOQ), the board could

have adopted specific tests to measure directly each applicant's strength: "Such a test, fairly administered, would fully satisfy the standards of Title VII because it would be one that measures the person for the job, and not the person in the abstract."⁵

The Supreme Court ruled that if the board wished to rely on the BFOQ defense to deny a position to a woman, it would be required to conduct individual evaluations of each female applicant to determine that applicant's qualifications for the position.

This was the first of many court rulings holding that an employer must evaluate a female worker as an individual rather than rely upon stereotypical characterizations of female worker capabilities. An employer may not validly assert the BFOQ defense on the assumption that all women, as a class, possess identical or even similar attributes. As the Supreme Court emphasized, the BFOQ defense is based on an extremely narrow exception to the general prohibition of discrimination on the basis of sex, and for an employer to rely upon that exception, it must prove a female job applicant is specifically unqualified for the position in question. It is impermissible under Title VII to refuse to hire a woman on the basis of a stereotypical characterization of the female sex.

When may the BFOQ exception be validly asserted? Under Alabama law, Dianne Rawlinson had a second hurdle to surpass before she could qualify for the prison guard position. The Supreme Court noted that Alabama's prison system was "a peculiarly inhospitable one for human beings of whatever sex." Because of insufficient staffing and inadequate penal facilities, the Board of Corrections had not undertaken to segregate inmates according to their offenses and, as a result, male prisoners incarcerated as sex offenders, constituting 20 percent of the prison population, were scattered throughout the prison's dormitory facilities. Were these circumstances such as to render the prison guard job too dangerous for women? Ordinarily, as the court observed, whether a particular job is too dangerous for women is a decision that an individual woman should make for herself. But in this case, more was at stake. The court felt that sex offenders who had criminally assaulted women in the past would be moved to do so again if they had access to women within the prison. There also was the risk that other inmates, deprived of a normal heterosexual environment, would assault women guards.

In a prison system where violence is the order of the day, where inmate access to guards is facilitated by dormitory living conditions, . . . and where a substantial portion of the inmate population is composed of sex offenders mixed at random with other prisoners, there are few visible deterrents to inmate assault on women custodians.

Therefore, the court concluded, Rawlinson's "very womanhood" undermined her capacity to provide the security that is a primary responsibility of a prison guard. Since the use of female guards under the conditions existing in the Alabama prison system would pose a substantial security problem—a problem directly linked to the sex of the prison guards—being male was a bona fide occupational qualification for the prison guard position.⁶

There are not many positions in the business world where "womanhood" constitutes a disqualifying factor. The court's decision in the Rawlinson case, along with other early court decisions emphasizing the narrow application of the BFOQ defense, have opened up many positions for women that formerly were reserved for men. On each occasion that we observe a police woman at her post, a female school bus driver, train engineer, conductor, construction or utility worker, or other female workers performing tasks that prior to the enactment of Title VII had been reserved for men, we have the courts to thank for the limitations that have been placed upon the application of the BFOQ defense.

Beginning with the Rawlinson case, the Supreme Court has repeatedly held that a woman must be evaluated as an individual and not as a member of a class or as a woman in the abstract. Stereotypical characterizations of female attributes may in certain instances be true of some women, but they are not true of all women.

The issue of sex stereotypes next came before the court in connection with a challenge to the pension plan provided the employees of the Los Angeles Department of Water and Power. The department's pension plan was based upon mortality tables and its own experience that women live longer than men. Because the department's female workers lived longer in retirement, the cost of a pension for the average female retiree was greater than that for the average male retiree. To compensate for the difference, the department required its women employees to make larger contributions to the plan. Because greater amounts were withheld from their paychecks to finance their pension benefits, female workers received less take-home pay than their male coworkers. The women objected to this policy and sued the Los Angeles Department of Water and Power.

The Supreme Court struck down the pension plan as an instance of sex stereotyping. The water department's rationale for requiring larger pension contributions from women was based upon the assumption that all women live longer than men. But *all* women do not live longer than *all* men. As a group, women live longer than men as a group, but this may not be true of many members of each group and it is certainly not true of all members of either group. It is simply impossible for an employer to forecast the life span of any particular woman. The Department of Water and Power was not justified, therefore, in using a group's average longevity in the computation of the cost of that woman's pension benefits. To do so was to consider her

not as an individual but as a group member. Employment decisions based upon stereotypical assumptions pertaining to a group or class rather than upon an individual's particular circumstances are antithetical to gender equality.⁷

Other courts, following the Supreme Court's lead, rejected employer initiatives based on sex stereotypes. United Air Lines made the mistake of adopting a no-marriage rule for its female flight attendants but declined to make the rule applicable to male flight personnel, including male flight attendants. United justified its no-marriage rule on the ground that it had received complaints from husbands of its flight attendants concerning their wives' working schedules and irregular working hours. The federal court of appeals sitting in Chicago rejected United's position, noting that Title VII required employers to treat their employees as individuals: "United's blanket prophylactic rule prohibiting marriage unjustifiably punishes a large class of prospective, otherwise qualified and competent employees where an individualized response could adequately dispose of any real employment conflicts."⁸

Subsequent to these early cases, most courts have consistently rejected stereotype-based employment rules and regulations based on group rather than individual characteristics. But despite these rulings, stereotypes still frequently underlie current employment decisions adversely affecting women.

Even though an employer may refrain from discriminating against women in general, it may nonetheless be guilty of acts of discrimination committed in violation of a particular woman's rights. Thus, if an employer generally treats its female employees fairly and advantageously, it can never be justified in discriminating against a particular female worker. Each claim of discrimination must be examined in the circumstances confronted by the particular woman involved. It must be emphasized that Title VII and the principles of nondiscrimination require that an employer consider a female worker on the basis of individual capabilities and not on the basis of any characteristics attributable to women in general. Stereotypical assumptions may play no role in this process.

In addition to adjudicating cases involving sex stereotyping, soon after the enactment of Title VII the courts again were required to consider the validity of the state protective laws. These laws originally were intended for the general benefit of women, but restrictions on working conditions of female workers seriously undermined the career prospects of many women. The initial EEOC guidelines were based on the assumption that Congress, in enacting Title VII, had not intended to invalidate these laws. The courts, however, believed otherwise, and most of the state protective laws soon met their demise.

Another issue arose soon after enactment of Title VII. Pregnant workers who were adversely treated once their employers learned of their pregnancies

began to file claims for sex discrimination. The statute provided that it was unlawful for an employer to discriminate against a woman *because of sex*, but it was silent with regard to pregnancy.⁹ Thus the courts were confronted with the question whether “because of sex” included “because of pregnancy.” The early pregnancy cases concluded with victories for the complainants,¹⁰ but the Supreme Court, sometimes reluctant to assume a leading role in matters relating to civil rights in employment, declared in a case involving the General Electric Company that discrimination against pregnant women was not barred by Title VII.

After GE adopted a disability plan that afforded its employees with sickness and injury benefits, but excluded any benefits for disabilities arising from pregnancy, a group of female workers brought a class action against the company, claiming that the exclusion of pregnancy from the terms of the disability plan amounted to an act of sex discrimination in violation of Title VII. The trial court agreed, declaring that discrimination against pregnant women is a form of sex discrimination and thus the disabilities plan’s pregnancy exclusion was discriminatory. But the Supreme Court thought otherwise. The court, speaking through Justice Rehnquist, first noted that pregnancy is merely a physical condition, and an employer is free to include or exclude disability coverage for this physical condition just as it may with respect to any other physical condition. In Justice Rehnquist’s view, the GE plan did not afford coverage for any disability or illness from which women were excluded. Nor did it include any disability or illness from which men were excluded. “There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.” Since the plan did not exclude anyone from coverage because of gender, it complied with Title VII. For that reason, the Supreme Court rejected the position generally adopted in the lower courts that discrimination based on pregnancy was a form of sex discrimination.¹¹

Sexual harassment was another matter that the courts and the EEOC were required to confront. The sexual harassment of a woman by a man located higher up on the corporate ladder conveys to that woman that the message that she is primarily perceived not as a workplace colleague and a valuable asset but rather as a sexual object. The sexual harassment of women expresses the age-old belief that women should be sexually available to men, and it simultaneously reminds them that they are neither respected nor viewed as workplace equals.¹²

Because sexual harassment reflects an unequal status existing between a man and a woman, it generally involves a power relationship affecting the terms and conditions of the woman’s employment. Sexual harassment may culminate in a hostile and offensive work environment, an environment the harassed woman must confront each day of her work life. Women, therefore,

perceive sexual harassment as a reflection of a status that emphasizes their sex roles over their work roles, thus threatening their economic livelihood.¹³

Catharine A. MacKinnon, who first argued that workplace sexual harassment constitutes a major problem for women, stated in her seminal book *Sexual Harassment of Working Women* that “[s]exual harassment is seen to be one dynamic which reinforces and expresses women’s traditional and inferior role in the labor workplace.” MacKinnon was the first to contend that sexual harassment in the workplace is a form of sex discrimination.¹⁴

In 1976, in one of the earliest sexual harassment cases decided after the advent of Title VII, the complainant alleged that her supervisor had retaliated against her when she refused his request for an “after hours affair.” The District of Columbia federal court held that the substance of the complainant’s allegations centered on her claim that she was discriminated against not because she was a woman but because she had declined to engage in a sexual affair with her supervisor. According to the court, this was not sex discrimination: “This is a controversy underpinned by the subtleties of an inharmonious personal relationship. Regardless of how inexcusable the conduct of plaintiff’s supervisor might have been, it does not evidence an arbitrary barrier to continued employment based on plaintiff’s sex.”¹⁵

Less than a year later, an Arizona federal court arrived at a similar conclusion. The court ordered the dismissal of the complaints of two women who alleged they had been verbally and physically harassed by their supervisor and that his sexually harassing behavior continued unabated until they were compelled to resign their employment. The court stated that, although Title VII bars discrimination against a woman by an employer, nothing appears in the statute to apply to sexual advances of a supervisor in its employ:

In the present case, [the supervisor’s] conduct appears to be nothing more than a personal proclivity, peculiarity, or mannerism. By his alleged sexual advances, [he] was satisfying a personal urge. Certainly no employer policy is here involved. . . . Nothing in the complaint alleges nor can it be construed that the conduct complained of was company directed policy which deprived women of employment opportunities.¹⁶

The court also expressed its concern that the outgrowth of a ruling that such activity was actionable under Title VII would be a federal lawsuit “every time a worker made amorous or sexually oriented advances toward another.” In such circumstances, the court opined, the only certain way an employer could avoid such charges would be to hire only employees who were asexual.

One year later, a District of Columbia federal appellate court ruled that women subjected to acts of sexual harassment are discriminated against not because of their refusal to engage in sexual acts demanded by a supervisor as the first court had held but simply because they are women: “But for her

womanhood . . . her participation in sexual activity would never have been solicited. To say, then, that she was victimized in her employment simply because she declined the invitation is to ignore the asserted fact that she was invited only because she was a woman.”¹⁷

Soon after, another federal appellate court ruled that if a supervisor, with the knowledge of his employer, makes sexual demands of a subordinate female employee and conditions her employment status on a favorable response to those demands, he and his employer acts in violation of Title VII.¹⁸

Thus, in the years immediately following the adoption of Title VII, the courts and the EEOC often formulated broad legal principles applicable to issues relating to discrimination against women. But in some areas—pregnancy and sexual harassment—the courts often adopted much more restrictive views of women’s workplace rights.

