COMMENTS

SEX-PLUS: THE FAILURE OF THE ATTEMPT TO SUBVERT THE SEX PROVISION OF THE CIVIL RIGHTS ACT OF 1964

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I. An Overview

A. *Introduction*

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 (e)(2)(a) (hereinafter paragraph "a"), makes it 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."[2] 42 U.S.C. § 2000(e)(2)(e) (hereinafter paragraph "e") creates an exception to this prohibition and establishes limited situations where employers may legally discriminate in hiring on the basis of religion, sex, or national origin. It states that employers may discriminate "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."[3]

This comment is concerned with discrimination on account of sex. Within the large area of sex discrimination in employment, it will focus on a short-lived, but nonetheless potent, theory known as "sex-plus." "Sex-plus" is a theory of statutory interpretation used by a handful of Southern courts, which interpreted the above quoted statute as prohibiting discrimination which is based *solely* on sex. They reasoned that if another factor were added to sex—*e.g.*, "sex-plus" marriage, pre-school age children or *any* other factor—then such discrimination by the employer would not violate paragraph

[1] 42 U.S.C. § 2000(e)(2)(b)-(c) (1964) apply similar provisions to employment agencies and labor unions.
[2] 42 U.S.C. § 2000(e)(2)(a)(1) (1964).
[3] 42 U.S.C. § 2000(e)(2)(e) (1964).

"a" even if the policy were applied only to female employees. It is important to note that this interpretation obviated the necessity of proving a bona fide occupational qualification (hereinafter bfoq) and legitimate business necessity under paragraph "e" because that paragraph applies only when the employer is found to have violated paragraph "a."

Before exploring further the definition, application, and status of the "sex-plus" theory, it is necessary to limit the scope of this comment and to make clear what it will not cover. First, it will not discuss cases where sex *alone* is the basis for discrimination. Situations of straight sex discrimination include blanket prohibitions which prevent women from becoming jockies or bartenders, and men from becoming stenographers or airline flight cabin attendants.[4] The Equal Employment Opportunity Commission (hereinafter EEOC) has also ruled that discrimination against women on account of pregnancy is straight sex discrimination, because only women can become pregnant. Another example is a company benefit plan which pays survivor benefits to the wife of a male employee, but denies the same benefits to the husbands of female employees.[5] Second, bfoq's are not discussed except as the Supreme Court speaks to the issue in *Phillips v. Martin Marietta Corporation*, 400 U.S. 542 (1971). This is because, as was mentioned above, if "sex-plus" is a valid statutory interpretation, discrimination on the basis of sex-plus is not in violation of paragraph "a," so that paragraph "e" and the issue of bfoq is not reached.[6] Third, state protective laws, that is, those state laws which limit the number of hours a female employee may work and the amount of weight a female employee is permitted to lift, are not covered here. Although a "sex-plus" situation could arise,[7] this subject matter involves different issues which have been adequately handled elsewhere.[8] Fourth, arbitration decisions are beyond the scope of this paper.[9] Finally, sex discrimination in areas outside of employment are not discussed

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[4] *See* DeFigueiredo v. Trans World Airlines, Inc., 322 F. Supp. 1384 (S.D.N.Y. 1971).

[5] *See* EEOC Dec., Case No. 70-513, 2 BNA FAIR EMPLOYMENT PRACTICE CASES (FEP CASES) 515.

[6] *See* Diaz v. Pan American World Airways, Inc., 311 F. Supp. 559 (S.D. Fla. 1970), *rev'd* 442 F.2d 385 (5th Cir.), *cert. denied* 40 U.S.L.W. 3220 (U.S. Nov. 9, 1971) (Douglas, J., dissenting). This is a recent case which holds that sex is not a bfoq for the position of flight cabin attendant.

[7] An example of "sex-plus" in the state protective law area is an employer's requirement that women applicants be able to life 100 pounds (while the requirement is not applied to men). Thus, "sex-plus" ability to lift 100 pounds—despite state law limiting the amount of weight a female may lift to 25 pounds.

[8] *See* Oldham, *Sex Discrimination and State Protective Laws*, 44 DENVER L.J. 344 (1967). *See also* Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (1969), and 29 C.F.R. 1604 1(b).

[9] With the exception of example No. 3 in Pt. "B" of Ch. I of this comment.

because the Civil Rights Act of 1964 does not prevent sex discrimination against women in any other area (*e.g.*, public accommodations, etc.).

B. *"Sex-Plus": Examples and Definition*

On September 6, 1966, Mrs. Ida Phillips, mother of one preschool age child, sought employment at the Martin Marietta Corporation plant in Orlando, Florida. She was attracted to Martin Marietta by an advertisement for the position of assembly trainee. She was told by the receptionist that the company had a policy of not hiring women with pre-school age children. *The company admitted that it hired men with pre-school age children.* After the EEOC failed in achieving voluntary compliance, Mrs. Phillips went to court, claiming that she was being discriminated against because of her sex. The United States District Court[10] and the United States Court of Appeals for the Fifth Circuit held, despite the fact that no women with pre-school age children were considered for employment and that this policy was not applied to men, that Mrs. Phillips was not being discriminated against because of her sex, but *because of her status as a mother of pre-school age children.*[11] The courts held that Martin Marietta did not violate the Title VII prohibitions on sex discrimination in employment.[12]

On April 1, 1966, Mrs. Eulalie Cooper, a stewardess for Delta Airlines, was fired because she had gotten married. Delta had a policy that no stewardess could be married while in their employ. *Delta admitted that this policy was not applied to male flight crew personnel.* Mrs. Cooper sued Delta, claiming that because male flight personnel could be married, and female stewardesses could not, she was being discriminated against on account of sex. The United States District Court held that she was not fired because she was a woman, but because she was married, "and the law does not prevent discrimination against married people in favor of the single ones."[13] In effect, the court held that Mrs. Cooper was fired because she was a female stewardess who was married, "sex-plus" marriage, and therefore, Delta did not violate the Civil Rights Act.

A male grocery store clerk in Yakima, Washington, was fired from his job because Tradewell Grocery Stores, Inc., his employer, determined that his hair was too long. The collective bargaining

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[10] Phillips v. Martin Marietta Corp., 58 CCH Lab. Cas. ¶ 9152 (M.D. Fla. 1968).

[11] Phillips v. Martin Marietta Corp., 411 F.2d 1, *rehearing denied* 416 F.2d 1257 (5th Cir. 1969), *rev'd* 400 U.S. 542 (1971).

[12] The United States Supreme Court overruled the Court of Appeals (5th Cir.) in the case of Phillips v. Martin Marietta Corporation, 400 U.S. 542 (1971). For a complete discussion of this case, see Ch. IV of this paper.

[13] Cooper v. Delta Airlines, 274 F. Supp. 781, 783 (E.D. La. 1967).

agreement between Tradewell and the Retail Clerks' International incorporated by reference the terms of Title VII which bar discrimination in employment based on sex. *The company admitted that it would not have discharged a female clerk whose hair was as long and as neatly kept as the male clerk's.* An arbitrator between the company and the union held on December 14, 1970, that the clerk was not being discriminated against because of his sex, but because of the length of his hair.[14]

These three examples all have one factor in common: the application by the employer of one policy to one sex, but not to the other, based on a factor not proven to be relevant to job performance. This is the heart of the "sex-plus" theory.

The court of appeals in *Phillips*, in explaining its "sex-plus" theory, held that

> [a] per se violation of the Act can only be discrimination based solely on one of the categories, i.e., in the case of sex; women vis-a-vis men. When *another* criterion of employment is added to one of the classifications listed in the Act, there is no longer apparent discrimination based solely on race, color, religion, sex or national origin.[15]

Therefore, discrimination on account of "sex-plus" *any* other factor took that discrimination outside of the ambit and protection of Title VII.

Chief Judge Brown in his dissent on the denial of a petition for rehearing *en banc* was quite correct when he said:

> If "sex plus" stands, the Act is dead. This follows from the court's repeated declaration that the employer is not forbidden to discriminate as to non-statutory factors. Free to add non-sex factors, the rankest sort of discrimination against women can be worked by employers. This could include, for example, all sorts of physical characteristics, such as minimum weight (175 lbs.), minimum shoulder width, minimum biceps measurement, minimum lifting capacity (100 lbs.), and the like . . . .[16]

On January 25, 1971, however, the United States Supreme Court in a per curiam decision, *Phillips v. Martin Marietta Corporation,*[17] destroyed the concept of "sex-plus" and obliterated the myth that "sex-plus" discrimination did not violate Title VII. The Court realized that this theory, if taken literally, could take all legal signi-

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[14] 71-1 CCH LAB. ARB. AWARDS ¶ 8078 (1970); *see also* CCH EMPL. PRAC. GUIDE, Rept. No. 62 at 3 for a discussion of *Johnson v. Baptist Memorial Hospital,* (pending in U.S.D.C.), Lindquist v. Coral Gables, 323 F. Supp. 1161 (S.D. Fla. 1971), Dodge v. Giant Food, Inc., 3 CCH EMPL. PRAC. GUIDE ¶ 8184 (1971), also involving male employees discharged because of the length of their hair.

[15] 411 F.2d at 3-4 (emphasis added).

[16] 416 F.2d at 1260 (footnotes omitted).

[17] 400 U.S. 542 (1971).

ficance out of the sex provisions, and could well threaten the entire Act.

The significance of the *Phillips* decision perhaps can not be over-emphasized. To this writer, the "sex-plus" movement, born in the states of Florida and Louisiana, and given legitimacy by the United States Court of Appeals for the Fifth Circuit, was a serious attempt by the Southern courts to completely subvert the Civil Rights Act of 1964.[18] The courts knew full-well that if "sex-plus" were given legitimacy, there would be no reason either in logic or law why "race-plus" or "religion-plus" or "national origin-plus" would not be a legal method of bringing race, religion, and national origin discrimination outside of the prohibitions of Title VII.[19]

It is important to an analysis of "sex-plus" to remember that the theory was created by courts which were opposed at least to the sex discrimination prohibitions of Title VII and may have been opposed to *other* provisions of the Act as well.

With this in mind, it is useful to briefly examine the legislative history of sex discrimination legislation and Title VII and to view the changing role of women as a class in the American labor force.

C. *Legislative History*

Although several courts and legal commentators have been correct in pointing out that the legislative history of the sex provisions of Title VII gives little aid in determining the interpretation which Congress intended be given the provision,[20] there is no doubt as to the legislative intent with regard to the specific issue of "sex-plus." The failure of *any* court or legal commentator to recognize this legislative fact should cause those concerned with "sex-plus" much embarrassment.[21] If those involved with the "sex-plus" issue had researched the legislative history, they would have found that the United States Senate considered and rejected the "sex-plus" concept.

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[18] The only decisions to approve of the theory are: Lansdale v. United Airlines, 2 BNA FEP CASES 46 (1969), *rev'd* 430 F.2d 1341 (5th Cir. 1970); Cooper v. Delta Airlines, 274 F. Supp. 781 (E.D. La. 1967); Phillips v. Martin Marietta Corp., 58 CCH Lab. Cas. ¶ 9152 (M.D. Fla. 1968), 411 F.2d 1, *rehearing denied* 416 F.2d 1257 (5th Cir. 1969), *rev'd* 400 U.S. 542 (1971).

[19] This interpretation is given support by the fact that the court of appeals in *Phillips* did not even attempt to differentiate between "sex-plus" and "race-plus" or to explain why adoption of "sex-plus" would not necessarily lead to legitimacy of "race-plus."

[20] *See, e.g.*, Cooper v. Delta Airlines, 274 F. Supp. 781, 782 (1967); Oldham, *Sex Discrimination and State Protective Laws*, 44 DENVER L.J. 344, 346 (1967).

[21] Brief for United States Government as Amicus Curiae at 9, Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) did refer to the legislative background of this pt.

As stated above, the court of appeals in *Phillips* said,

> [a] *per se* violation of the Act can only be discrimination based *solely* on one of the categories . . . . When another criterion of employment is added to one of the classifications listed in the Act, there is no longer apparent discrimination based *solely* on race, color, religion, sex or national origin.[22]

On June 15, 1964, Senator McClellan of Arkansas proposed that the word "solely" be inserted before race, color, religion, sex, and national origin, "so that there will not be a dragnet, a catchall, to leave something uncertain for a court to interpret."[23]

Senator Warren Magnuson from Washington stated that the question of whether "solely" should be included was given lengthy consideration by the Senate committee. He said: "The difficulty is that a legal interpretation or a court interpretation of the word 'solely' would so limit this section as probably to negate the entire purpose of what we are trying to do."[24]

Senator Clifford P. Case from New Jersey observed that "this amendment would place upon persons attempting to prove a violation of this section, no matter how clear the violation was, an obstacle so great as to make the title completely worthless."[25]

Senator Frank Lausche from Ohio favored the amendment and said, "the argument that the inclusion of the word proposed to be included would negate the provision is, in my opinion, absolutely specious and captious, and is an attempt to find, on some pretext, a reason for opposing the amendment."[26] When the "yeas" and "nays" were called, the Senate defeated the amendment 39 to 50.

D. *Historical Background*

Although the legislative history of the sex provisions of Title VII throws little light on their proper interpretation, the task need not be attempted in a total historical vacuum. As early as 1885, states began passing legislation designed to increase the employment opportunities of women, and end discrimination based upon sex.[27] Prior to 1900, a large majority of the states had at least impliedly affirmed the policy established by these statutory enactments, by passing various "Married Women's Acts," allowing a married wo-

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[22] 411 F.2d at 3-4 (emphasis added).

[23] 110 CONG. REC. 13837 (1964).

[24] *Id.*

[25] *Id.*

[26] *Id.* at 13838.

[27] COMMISSIONER OF LABOR, LABOR LAWS OF THE VARIOUS UNITED STATES, TERRITORIES, AND DISTRICT OF COLUMBIA, H.R. REP. No. 1960, 52d Cong., 1st Sess. 65 (1892).

man the right to retain, as separate property, any earnings and property obtained through her separate employment.[28] In 1919, the Constitution of the International Labour Organisation recognized the "special and urgent" principle that "men and women should receive equal remuneration for work of equal value."[29] In 1939, the Massachusetts Supreme Judicial Court advised the state legislature that an act banning married, but not unmarried, women from public employment would be in violation of both the Federal and State Constitutions.[30] In 1949, the federal government passed legislation prohibiting sex discrimination in federal government employment,[31] and in 1963 the Equal Pay Act was passed.[32] Thus, paragraph "a" has a legislative background of 86 years, showing increased tendency to more equal opportunities for women in the labor market. It is in light of this history that this provision of the Civil Rights Act should be interpreted.

During this same period of favorable legislation, the nature of the female portion of the American working force has undergone substantial changes in several respects. In 1890, the women workers comprised approximately 16% of the total working force.[33] By 1969, this proportion had risen to nearly 40%.[34] During the same period, the median age of women workers increased from under 25 years to over 41 years,[35] and the number who were married increased from 30% to 78%.[36] The most impressive change, however, has taken place in the type of work which women do. In 1890, 69% of the women workers were engaged in "women's trades" such as servants, laundresses, and textile mills, while only 3.5% were clerical workers and only 9.6% were "professional workers."[37] By 1950, 37% were clerical and sales workers, and 12% were "professional."[38] Although the ratio of professional workers to the total women's working force may appear small, it was, nevertheless, 42% of *all* professional workers in the American working force.[39] It has also been clearly shown that "economic need" is the largest single reason that women ini-

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28 *Id.* at "*Women: Earnings of Married Women*" in Index.

29 2 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949 at 254 (C. Bevans ed. 1969).

30 *In re* opinion of the Justices, 303 Mass. 631, 22 N.E.2d 49 (1939).

31 Act of October 28, 1949, Pub. L. No. 81-429, 63 Stat. 972.

32 Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56.

33 National Manpower Council, *Womanpower* 110 (1957).

34 *Women Workers in the 1970's*, MONTHLY LABOR REV., June, 1970 at 20.

35 Perrella, *Women and the Labor Force*, MONTHLY LABOR REV., Feb., 1968, at 1, 3.

36 *Id.* at 2.

37 *Womanpower* at 113.

38 *Id.* at 114.

39 *Id.* It should be noted, however, that approximately 40% of the women classified as "professional" are teachers, and 25% are nurses. *Id.* at 123.

tially enter the working force.[40] Obviously, if "sex-plus" were to be accepted as a valid interpretation of paragraph "a," a great many of these women could be deprived of the opportunity to make the necessary financial contribution to their own and their family's support, and might very well become dependent upon the public welfare system. Such a result would be directly contrary to stated national policy.[41]

II. Decisions of the Equal Employment Opportunity Commission

A. *Introduction*

As discussed earlier, "sex-plus" marriage, age, and motherhood are common devices which employers have used to discriminate against women employees and applicants. The EEOC has taken a definitive and unwavering stand against the "sex-plus" theory of statutory interpretation. For example, the EEOC, on November 24, 1965, issued regulations which state that an employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is discrimination based on sex.[42] The Commission recently held that an employer's maternity leave policy that limited benefits to *married* female employees amounted to unlawful sex discrimination against unwed mothers in the absence of a provision for the termination of unmarried fathers.[43] It has consistently held that retirement plans which permit women to retire at age 58 discriminate against men when the plans require that male employees must work until age 65 years. The degree to which the EEOC extends its condemnation of "sex-plus" is reflected in its decision of *Neal v. American Airlines, Inc.*, CCH Empl. Pract. Guide ¶ 6002. American Airlines had a policy of terminating the employment of all stewardesses six months after marriage. Because American Airlines did not hire stewards for the position of flight cabin attendant, it argued that if all incumbents in a job classification

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40 Women's Bureau, United States Dep't of Labor, Leaflet No. 37, Who Are the Working Mothers? (1970).

41 *See* 1969 Public Papers of the Presidents of the United States: Richard Nixon, 640 and 648.

42 29 C.F.R. § 1604.3 (1965) states in part:

> The Commission has determined that an employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is discrimination based on sex prohibited by Title VII of the Civil Rights Act. It does not seem to us relevant that the rule is not directed against all females, but only against married females, for so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex.

43 *See* EEOC Dec., Case No. 71-562, CCH Empl. Prac. Guide ¶ 6184 (Dec. 4, 1970).

are members of one sex, any conditions of employment relating to the job cannot be based upon sex. The EEOC stated:

> The concept of discrimination based on sex does not require an actual disparity of treatment among male and female employees presently in the same job classification. It is sufficient that a company policy or rule is applied to a class of employees *because* of their *sex*, rather than because of the requirements of the job.[44]

B. *Marriage*

The airlines industry, until recently, had a policy of requiring all female stewardesses to resign from service upon their marriage or shortly afterwards. The leading EEOC decision on the subject of termination of employment upon marriage is *Neal v. American Airlines, Inc.*[45] In that case, the airlines argued that employment of married stewardesses would lead to operational[46] and administrative problems. They contended that because of competing demands from home and job, inferior customer service would necessarily result. The airlines argued that the travel demands on married stewardesses would cause marital difficulties for them. This conclusion was reached because "our society places the responsibility for homemaking and childrearing on women, [so that] married women's absences from home would be more likely to put a strain on family harmony than similar absences by married men for business reasons."[47] Finally, the airlines argued that the policy of immediately terminating the employment of all married stewardesses is supported by public policy factors such as the promotion of high standards of customer service and marital stability.

The Transportation Workers Union and other unions argued on behalf of the stewardesses and against the airline policy. They argued that the airline industry employed male stewards and had never terminated them for marriage. They argued that the "no-marriage" rule was irrelevant to the performance of the job of flight cabin attendant as witnessed by the fact that foreign airlines have no such policy. The union said that there is a public policy against contracts in restraint of marriage.

In a strongly worded opinion, the EEOC decided that "the no-marriage rule has been adopted because *female* flight attendants are involved rather than because marriage disqualifies an individual from performing as a flight attendant."[48] The Commission, in addi-

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[44] Neal v. American Airlines, Inc., EEOC Dec., Case No. 6-6-5759, CCH EMPL. PRAC. GUIDE ¶ 6002, at 4014 (1968) (emphasis added).

[45] *Id.*

[46] *Id.* at n.9.

[47] *Id.* at n.11.

[48] *Id.* at 4015.

tion to agreeing with the arguments advanced by the unions, cited the fact that male flight personnel, although also absent from home for long periods, are not terminated upon marriage.[49]

This decision is significant in that the EEOC has decided that no company may automatically terminate its female employees upon marriage, if it does not also terminate male personnel. But the *Neal* decision goes further. The airlines argued that the decision here outlined could be remedied by applying the same "no-marriage" rule to *male* flight cabin attendants. The EEOC said:

> Discrimination based on sex unrelated to job performance is not to be eliminated by applying the same irrelevant conditions to members of the opposite sex, just as discriminatorily depressed wage rates based on race are not to be eliminated by similarly depressing the wage rates paid to employees of other races.[50]

This extension sets it apart from "sex-plus," but in so doing has the potential for tremendous impact within the next few years.

The EEOC concludes this opinion by observing that the airlines may lawfully terminate a stewardess who is unable to satisfactorily perform her job because of domestic responsibilities as it terminates all other employees who do not satisfactorily perform their jobs. The point of the decision is to make clear that the employer may not terminate a stewardess, prior to *individual* dereliction on her part, because of its assumptions about married women as a class.[51]

Less than two years after the *Neal* decision, the Air Line Stewards and Stewardesses Association was able to report to the Supreme Court[52] that the seven major airlines voluntarily had dropped the "no-marriage" rule from their employment contracts.

C. *Age*

"Sex-plus" age discrimination is illustrated by several cases. First, the airline industry, until recently, required all female stewardesses to resign when they reached the age of 32 years. No such policy was applied to male flight cabin attendants.[53] Second, an industry allows women to retire with compensation upon reaching the age of 58 years, but requires men to reach age 65 before permitting them to retire at equal compensation.[54] Third, an industry maintains a pro-

[49] An article speaking favorably of this decision is: 4 U. of San Fran. L. Rev. 323, 336 (1970).

[50] CCH Empl. Prac. Guide ¶ 6002, at 4015 (1968).

[51] *See also* Colvin v. Piedmont Aviation, Inc., EEOC Dec., Case No. 6-8-6975, CCH Empl. Prac. Guide ¶ 6003 (1968).

[52] Brief for the Air Line Stewards and Stewardesses Association as Amicus Curiae, Phillips v. Martin Marietta, 400 U.S. 542 (1971).

[53] Dodd v. American Airlines, Inc., EEOC Dec., Case No. 6-6-5762, CCH Empl. Prac. Guide ¶ 6001 (1968).

[54] *See* 29 C.F.R. § 1604.31 (1968).

fit sharing plan for all employees. Under its rules, however, male employees may not receive their shares until they become 50 years of age, while female employees receive their shares anytime they leave the company, regardless of age.[55] Fourth, a retail sales store refused to hire an 18-year-old female for the position of manager trainee because the manager of the store was a young male in his twenties and "the company felt it would be extremely inadvisable for his assistant to be a young girl of approximately his own age." Further evidence revealed that the median age of male assistant managers was 22.3 years, and for females was 42.4 years of age.[56]

In each of the four illustrations, the EEOC held that the employer violated the Title VII prohibition on sex discrimination. It can therefore be said that according to the Commission any discrimination between the sexes based on age differentials, in either conditions or benefits of employment, are in violation of Title VII.

D. *Unwed Mothers*

The EEOC has recently rendered important decisions in the cases of employers who discriminate against women employees and applicants who are unwed mothers.[57] The Commission held that it is unlawful discrimination on account of sex to terminate the employment of an unmarried female employee who becomes pregnant, when there is no policy of terminating unmarried fathers.[58] It also held that a company policy of not hiring unwed mothers violates Title VII *even if the company attempted to apply the same policy to unwed fathers.*[59]

These results were reached because (1) it is much more difficult for a woman to hide the fact that she is an unwed mother than it is for a man who is an unwed father, and (2) because of this fact, the impact of the policy will be much more harmful to women than men.[60]

Recently, the EEOC intervened as an amicus curiae in the case

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[55] *See* EEOC Dec., Case No. 68-9-183E, CCH EMPL. PRAC. GUIDE ¶ 6022 (1969); *See also* EEOC Dec., No. 70-706 CCH EMPL. PRAC. GUIDE ¶ 6149 (1970).

[56] *See* EEOC Dec., Case No. 70-145 CCH EMPL. PRAC. GUIDE ¶ 6066 (1969).

[57] *See* EEOC Dec., Case No. 71-332, CCH EMPL. PRAC. GUIDE ¶ 6164 (1970).

[58] *See* EEOC Dec., Case No. 71-562, CCH EMPL. PRAC. GUIDE ¶ 6184 (1970).

[59] EEOC Dec., Case No. 71-332, CCH EMPL. PRAC. GUIDE ¶ 6164 (1970). It should be noted that this decision discusses the application of the so-called "neutral rule." Here, the Commission decided that the complainant was also discriminated against because of her race. It reached this conclusion because 80% of the unwed mothers in the community were black, while only 29% of the total population was black.

[60] *Id.*

of *Braddy v. Southern Bell Telephone and Telegraph Company*[61] involving a policy of not hiring unwed mothers. The Commission's position is made clear in its argument to the court:

> Southern Bell's alleged policy of hiring men who are unwed fathers, but not women who are unwed mothers is clearly an unlawful employment practice. This policy allows such men a "term, condition or privilege" of employment which is denied to women. Thus, newly hired males are allowed the privilege of unwed parenthood, while females are denied the same privilege through the operation of Southern Bell's policy. The only basis for the distinction is the sex of the individual being considered. The Act prohibits such distinctions.[62]

III. "Sex-plus" in the Courts

A. *Introduction*

The number of court decisions dealing with "sex-plus" situations is very limited. Despite the limited number of cases, a distinct trend can be discerned: "sex-plus" is rejected as invalid by the lower federal courts.

The exceptions to this general rule are the lower court decisions in *Phillips v. Martin Marietta*, which, as noted earlier, were overruled by the United States Supreme Court, and the case of *Lansdale v. United Airlines*, 2 BNA FEP Cases 462 (S.D. Fla. 1969) which was subsequently overruled by the Fifth Circuit Court of Appeals. The earlier case of *Cooper v. Delta Airlines*, 274 F. Supp. 781 (1967), although it held that an airline may terminate the employment of married stewardesses is distinguished from the usual "sex-plus" case because Delta employed no male flight cabin attendants and therefore, the policy had no adverse effect on women vis-a-vis men.[63] The controversy in *Cooper* has been rendered moot by Delta's change of policy involving married stewardesses.

Cases decided by the federal courts, with the exceptions of *Rosen v. Public Service Electric*, 2 BNA FEP Cases 1090 (1970), *Bowe v. Colgate-Palmolive*, 272 F. Supp. 332 (S.D. Ind. 1967), *rev'd* 416 F.2d 711 (7th cir. 1969), and *Weeks v. Southern Bell Telephone*, 408 F.2d 228 (5th Cir. 1969),[64] involve situations of "sex-plus" marriage.

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[61] Case No. 70-1187-Civ-CA (D. Fla. 1970).

[62] Brief for EEOC as Amicus Curiae at 6, Braddy v. Southern Bell Telephone, Case No. 70-1187-Civ-CA (D. Fla. 1970).

[63] Brief for Petitioner at 8, Phillips v. Martin Marietta, 400 U.S. 542 (1971).

[64] *Bowe* and *Weeks* will not be considered here because they concern weight lifting restrictions on the employment of women. Although not discussed, it should be noted that the employer refused to hire women for jobs requiring the lifting of moderate weights while not fixing similar weights for men. In both cases, the courts held that this double standard violated Title VII.

B. *Cooper v. Delta Airlines*

This was the first case[65] involving discrimination on account of "sex-plus" marriage to be considered by a federal court.[66] (The use of the term "sex-plus" was not formulated until Chief Judge Brown's dissent in the *Phillips* case.)

In this case, Delta fired Mrs. Eulalie Cooper, a stewardess, on April 1, 1966, because she had gotten married on October 17, 1964. Plaintiff Cooper signed an agreement of employment with Delta which provided for automatic termination upon her marriage. (Apparently, Mrs. Cooper was successful for some time in concealing her marriage from the airlines.) When fired, Mrs. Cooper charged Delta with violating Title VII.

The *Cooper* case is particularly interesting because Delta argued that it did not violate the law, *not* because terminating the employment of women who are married does not violate paragraph "a," but because Delta had a legitimate business necessity, which came under Title VII's bfoq.[67] They argued that single women had "better passenger acceptance, change flight schedules easier, [and have] less likelihood of pregnancy."[68]

Despite Delta's argument on the basis of the bfoq, Judge Comiskey of the United States District Court for the Eastern District of Louisiana decided the case on the basis that Title VII does not expressly prohibit discrimination on account of marital status and therefore, such discrimination does not violate the law. In so holding, Judge Comiskey became the first judge to attempt to give legitimacy to the concept of "sex-plus."[69] He said:

> By reading the act it is plain that Congress did not ban discrimination in employment due to one's marital status and that is the issue in this case. Delta has a right to employ single females and to refuse to employ married females, and this discretion is in no way limited by the Civil Rights Law. . . .
>
> The plaintiff argues that no such unmarried status is required of Delta's male employees and therefore this is discrimination against plaintiff because she is female. But that reasoning is faulty. The discrimination lies in the fact that the plaintiff is married—and the law does not prevent discrimination against married people in favor of the single ones.[70]

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[65] 274 F. Supp. 781 (E.D. La. 1967).

[66] The decisions of state courts are difficult if not impossible to uncover because they are not uniformly reported by any looseleaf series.

[67] 274 F. Supp. at 782.

[68] *Id.*

[69] For a somewhat different interpretation of Cooper see 4 U. OF SAN FRAN. L. REV. 323, 340, 341 (1970).

[70] 274 F. Supp. at 783.

C. *Lansdale v. United Airlines and Lansdale v. Air Line Pilots Association*

Mrs. Lansdale, a stewardess for United Airlines sued United and the Air Line Pilots Association on December 20, 1968.[71] She claimed that she was being discriminated against on account of sex because United and the Pilots Association entered into an agreement providing that female stewardesses must leave the employ of United upon their becoming married.

The United States District Court, Southern District of Florida, on September 11, 1969, granted defendant's motion to dismiss Mrs. Lansdale's complaint against the Air Line Pilots Association.[72] In so doing, the court said:

> [T]he Court finds as a matter of law that a Labor Organization within the meaning of Title VII of the 1964 Civil Rights Act . . . does not commit an unlawful employment practice within the meaning of said Act if it causes an Employer within the meaning of said Act, to allow its male flight cabin attendants the privilege of marriage while denying this same privilege to its female flight cabin attendants within the same classification.[73]

The same court, two months later, held that as a matter of law, United's policy did not violate Title VII.[74] Relying on the court of appeals' *Phillips* decision, Judge Atkins said:

> As in *Phillips* there is a coalescence here of a two-pronged qualification, i.e. sex plus marriage. United did not discharge plaintiff because she was a woman *nor* because she was married. Her discharge came about because she was a woman *and* married. It is clear that the Civil Rights Act of 1964 does not prohibit discrimination in employment because of marital status.[75]

The court of appeals overruled *Lansdale v. Air Line Pilots Association* in a per curiam decision.[76] This decision derived special significance because this is the same court that held on October 13, 1969, that the Martin Marietta Corporation could refuse to hire mothers with pre-school children, while hiring men with preschool children, without proving it qualified as a bfoq exception. Ten months later, on August 13, 1970, (and after the Supreme Court granted certiorari in *Phillips*) the court of appeals said that a union may not refuse to permit female flight cabin attendants to marry while granting that privilege to male attendants.

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[71] Lansdale v. United Air Lines, Inc., 62 CCH Lab. Cas. ¶ 9417 (S.D. Fla. 1969); Lansdale v. Air Line Pilots Ass'n Int'l, 62 CCH Lab. Cas. ¶ 9416 (S.D. Fla. 1969).

[72] 62 CCH Lab. Cas. ¶ 9416 (S.D. Fla. 1969).

[73] *Id.* at 6632.

[74] 62 CCH Lab. Cas. ¶ 9417 (S.D. Fla. 1969).

[75] *Id.* at 6634 (emphasis added).

[76] 430 F.2d 1341 (5th Cir. 1970).

The court said, "The bare ruling of the district court would permit discrimination by sex without the requisite finding which must support such a conclusion—that the same is a [bfoq] under 42 U.S.C.A. § 2000e-2(e) (1970)."[77] By this decision, it appears that the court of appeals was telling the Supreme Court that it was limiting its holding in *Phillips* to the facts of that particular case.

Lansdale v. United Airlines,[78] was overruled by the court of appeals on February 17, 1971, after the Supreme Court decision in *Phillips*.[79] In a brief decision, the court said: "The district court ruled for United as a matter of law on the basis of our decision in Phillips . . . . That decision has now been reversed. . . . It follows that the judgment herein must be vacated . . . ."[80]

D. *Sprogis v. United Airlines*

One month after the federal district court decision in *Lansdale*, the federal district court for the Northern District of Illinois reached the opposite results of the Florida court on similar facts.[81]

As findings of fact, the court found that United Airlines maintained a policy of requiring stewardesses to remain unmarried while employed, but that no such policy was applied to male stewards. The court further found that Mrs. Sprogis was fired "for the sole reason that she is a female and became married while in the employ of defendant in the capacity of stewardess."[82]

As a conclusion of law, the court found that United Airlines' policy "was an unfair employment practice in violation of Title VII of the Civil Rights Act of 1964"[83] and that plaintiff was entitled to reinstatement and back pay, with rights of seniority and longevity restored. The court further concluded that the defenses asserted by United were not sufficient to show that sex or single status is a bfoq for the position of airline stewardess. Hence, the court found, as a matter of law, that "sex-plus" marriage discrimination was discrimination on account of sex in violation of Title VII.

E. *Rosen v. Public Service Electric Co.*

The United States District Court of New Jersey held on August 25, 1970, that the retirement plan operated by the company

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[77] *Id.* at 1342.
[78] 62 CCH Lab. Cas. ¶ 9417 (S.D. Fla. 1969).
[79] 437 F.2d 454 (5th Cir. 1971).
[80] *Id.* at 455.
[81] 308 F. Supp. 959 (N.D. Ill. 1970), 444 F.2d 1194 (7th Cir.), *petition for cert. filed*, 40 U.S.L.W. 3167 (U.S. Oct. 1, 1971).
[82] *Id.* at 960.
[83] *Id.* at 961.

violated Title VII because it discriminated against men solely on account of their sex.[84]

The facts essential to consideration here are these. Public Service operated a non-contributory pension plan for its employees. Under the terms of the plan, male employees were eligible to retire at age 65, with 25 years of service, with mandatory retirement at age 70. Males were also eligible to retire at age 60, with 30 years of service, but at reduced pensions. Female employees, however, could retire without a reduction in pension at age 60 with 20 years of service, with mandatory retirement at age 65. Plaintiffs in this case (males) retired at age 60 and claimed because they had a reduced pension (and female employees similarly situated received full pensions) that they were discriminated against because of their sex.

The court agreed with the EEOC that the defendant's pension plan did discriminate against male employees on the basis of sex. The bulk of the decision centered on problems of transition from a discriminatory system to a non-discriminatory system without violating vested rights of both male and female employees. Such considerations are not relevant to this comment, however.

IV. PHILLIPS v. MARTIN MARIETTA CORPORATION

The first sex discrimination case based on Title VII of the Civil Rights Act of 1964 accepted for consideration by the United States Supreme Court was *Phillips v. Martin Marietta Corporation*.[85] This case has derived its legal significance from the fact that this Supreme Court decision destroyed the "sex-plus" theory. The Court called discrimination on the basis of "sex-plus" pre-school children (where the same prohibitions are not applied to the other sex) discrimination in contravention of Title VII.

On September 6, 1966, Mrs. Ida Phillips, a resident of Jacksonville, Florida, applied for employment with the defendant company Martin Marietta Corporation. She submitted her application pursuant to an advertisement in the local newspaper for 100 assembly trainee positions. The only qualification specified was a "high school background." Plaintiff answered the advertisement by going to defendant's office and filling out an application. When she gave her application to the receptionist, "she was told that defendant was not considering applications from women with pre-school children."[86] She failed to obtain the employment she was seeking.

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[84] 2 BNA FEP CASES 1090 (D.N.J. 1970), supplemental opinion reaffirming this decision at 3 CCH EMPL. PRAC. GUIDE ¶ 8242 (1971).

[85] 400 U.S. 542 (1971).

[86] Appendix to Brief for Petitioner at 4A, Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

On October 5, 1966, Mrs. Phillips filed a charge with the EEOC in Washington, D.C. On July 28, 1967, in EEOC Case No. 6-9-7758, the Commission found probable cause to believe that Martin Marietta violated Title VII by its refusal to consider a woman with pre-school children for employment. On November 9, 1967, the Commission notified her of its failure to achieve voluntary compliance by the company, and informed her of her right to institute suit.

On December 12, 1967, plaintiff Ida Phillips filed a complaint in the United States District Court for the Middle District of Florida, on behalf of herself and other persons similarly situated who were denied employment by Martin Marietta because of a company policy not to hire mothers of pre-school age children. Because the company had no such policy for men, she alleged discrimination on account of sex, and sought injunctive relief and back pay.

On May 31, 1968, defendant moved for entry of summary judgment in its favor on the grounds that there was no genuine issue as to any material fact and that it was entitled to a judgment as a matter of law. On July 9, 1968, Judge Young granted defendant's motion. The Judge stated that the issue was whether Mrs. Phillips was discriminated against because of her sex. After stating that for purposes of his ruling on summary judgment, it was assumed that the company hired men with pre-school age children, he said this fact is "irrelevant and immaterial to the issue before the Court." The Judge went on to say, "The responsibilities of men and women with small children are not the same, and employers are entitled to recognize these different responsibilities in establishing hiring policies."[87]

On August 12, 1968, Phillips noted an appeal to the United States Court of Appeals (5th Cir.) on the basis that the district court erred in granting summary judgment to the defendant.

The court of appeals rendered its decision on May 26, 1969. Judge Morgan, speaking for the three-man bench, stated the issue as being whether the refusal to employ women with pre-school age children, while hiring men with pre-school age children, is an apparent violation of the 1964 Civil Rights Act proscription of discrimination based on sex. The court decided the issue in the negative.

The court noted that defendant did not choose to rely on the bfoq section of the Act, but instead defended on the premise that their established policy of not hiring women with pre-school age children is not per se discrimination on the basis of sex. With this,

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[87] *Id.* at 23A.

the issue was clearly drawn: is the "sex-plus" theory to be upheld? The court decided that it was to be upheld. It said:

> A per se violation of the Act can only be discrimination based solely on one of the categories, i.e., in the case of sex; women vis-a-vis men. When another criterion of employment is added to one of the classifications listed in the Act, there is no longer apparent discrimination based solely on race, color, religion, sex or national origin.[88]

In affirming the opinion of the district court, the court clearly gave legitimacy and continued life to the "sex-plus" theory. It said, "Ida Phillips was not refused employment because she was a woman nor because she had pre-school children. It is the coalescence of these two elements that denied her the position she desires."[89]

This decision was immediately criticized and challenged. Three judges on the court of appeals exercised their prerogative under F.R.A.P. 35 and 28 U.S.C. § 46 and moved for rehearing en banc. The Fifth Circuit bench decided ten to three to deny the petition for rehearing. Chief Judge Brown, joined by Judges Ainsworth and Simpson, dissented.

"If 'sex-plus' stands, the Act is dead."[90] With this, Judge Brown became the first to label the theory "sex-plus." He went on to carry the court's decision to its logical and necessary conclusion. He said that sex-plus any physical characteristics, or educational requirements, or any other non-sex factors except those expressly prohibited by the Act could be added in order to successfully contravene the law. He notes that the addition of one factor to sex would be a complete defense to a charge of violating Title VII without putting upon the employer the burden of proving a bfoq exception.

Criticism of the majority's decision by legal writers was swift and strong. "[T]he decision, if allowed to stand, will mean the end of the protections originally provided . . . ."[91] Discussing the court's interpretation of congressional intent, one writer said, "But if the Act itself is controlling and the only allowable sex discrimination in the Act is a bona fide occupational qualification, then the analysis is faulty if it is maintained that Congress intended to allow some other kinds of discrimination . . . ."[92] Another commentator said, "The court by its own admission ignored the patent sex discrim-

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88 411 F.2d 1, 3-4 (5th Cir. 1969).

89 *Id.* at 4.

90 416 F.2d 1257, 1260 (5th Cir. 1969).

91 7 HOUSTON L. REV. 494, 498 (1970).

92 Comment, *Civil Rights Act of 1964: An Exception to Prohibitions on Employment Discrimination*, 55 IOWA L. REV. 509, 519 (1969).

ination. In light of the statutory language, this plainly was an inartistically drawn decision."[93]

Certiorari was granted by the United States Supreme Court on March 2, 1970.[94] The issue, as the Supreme Court defined it, was whether the sex discrimination prohibition of § 703 of the Civil Rights Act is violated by refusal to hire men or women of the same job classification where the distinction does not purport to be based on a bfoq.

In arguing this question in the affirmative, the lawyers for petitioner Phillips made three points. First, the decision below was based upon an erroneous interpretation of Title VII. When all women with pre-school age children are denied a job, but all men with pre-school age children are not so denied, removal of the constant factor—pre-school age children—leaves only women and men. Or, men get hired and women do not. This is discrimination on account of sex in violation of Title VII. Along with this argument, petitioner makes clear that the employer has the right to set hiring standards to protect its bona fide business interests through the bfoq exception. It is argued, however, that the standards should be related to the problem at hand (*i.e.*, the arrangement of daytime care for the child) and not to the sex of the potential employee.

The second argument set out in the petitioner's brief is that the "sex-plus" principle threatens the effectiveness of the entire federal fair employment law, and conflicts with other court of appeals decisions. Petitioner argues that if "sex-plus" is not sex discrimination, then it "is difficult to understand why 'race-plus' is not exempted from the race discrimination prohibition in the Act."[95]

Third, petitioner argued that the "sex-plus" principle has been rejected by the EEOC. Citing *Udall v. Tallman*,[96] and *FTC v. Colgate-Palmolive*,[97] petitioner argued that the EEOC's judgments should be given great weight by the reviewing courts.

Respondent Martin Marietta Corporation argued that the "sole question [was] whether the District Court erred in granting respondent's motion for summary judgment on the record as it then stood." Respondent argued that because its motion for summary judgment was granted, there were not enough facts developed

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[93] Comment: *Sex Discrimination in Employment or Can Nettie Play Professional Football?*, 4 U. SAN FRAN. L. REV. 323, 344 (1970).

[94] 397 U.S. 960 (1970).

[95] Brief for Petitioner at 12, Phillips v. Martin Marietta, 400 U.S. 542 (1971).

[96] 380 U.S. 1 (1965).

[97] 380 U.S. 374 (1965).

for the Supreme Court to make a judgment. The company denied that its policy was to exclude all females with pre-school children and further denied that it hired all male applicants with pre-school children.[98] The company contended that the record was silent as to what Martin Marietta's policy would have been if it were disclosed that Mrs. Phillips had day-care provisions arranged for her pre-school child. In closing, the respondent recognized that the Court might then conclude that to avoid confusion and misconstruction of the important principles involved in the Act that the judgment of the court of appeals should be reversed and the case remanded to determine what the precise policy of the company was and decide whether it violated the Act.

An analysis of both the respondent's brief and oral argument indicates that Martin Marietta wanted the Court, if it were not going to affirm, simply to reverse and remand *without court comment*, in order to have the record developed further in the district court.

There were numerous amicus curiae briefs filed on behalf of petitioner Phillips. Human Rights for Women, Inc., the National Organization for Women (N.O.W.), the American Civil Liberties Union (A.C.L.U.), the Air Lines Stewards and Stewardesses Association, and the United States Government, among others, filed briefs as friends of the Court. These briefs urged the following points: (1) if the "sex-plus" standard or "social custom" standard adopted by the court of appeals is sustained, then the Act is rendered largely nugatory; (2) that the court of appeals decision was based on an incorrect interpretation of congressional intent—that Title VII prohibits pre-judging an individual on the basis of sex by making a generalized assumption about women; and (3) that working mothers make up a substantial portion of the nation's work force and that an affirmance of this decision could have a particularly disastrous effect on them.

On January 25, 1971, the Supreme Court rendered its decision, per curiam. The unanimous Court had no difficulty in finding "sex-plus" an invalid attempt to subvert the Civil Rights Act. It said:

> Section 703(a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex. The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men—each having pre-school age children.[99]

The Court added, however, that "[t]he existence of such con-

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[98] Brief for Respondent at 7, Phillips v. Martin Marietta, 400 U.S. 542 (1971).
[99] 400 U.S. 542, 544 (1971).

flicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction under § 703(e) of the Act." (The bfoq exception.)[100] Thus, it appears that the Court has set a standard for business which, if met, will permit them to discriminate on account of sex. Mr. Justice Marshall, in a concurring opinion, expressed his own fear of such a possibility. He stated:

> I can not agree with the Court's indication that a "bona fide occupational qualification reasonably necessary to the normal operation of" Martin Marietta's business could be established by a showing that some women, even the vast majority, with preschool age children have family responsibilities that interfere with job performance and that men do not usually have such responsibilities. Certainly, an employer can require that all of his employees, both men and women, meet minimum performance standards, and he can try to insure compliance by requiring parents, both mothers and fathers, to provide for the care of their children so that job performance is not interfered with.
>
> But the Court suggests that it would not require such uniform standards. I fear that in this case, where the issue is not squarely before us, the Court has fallen into the trap of assuming that the Act permits ancient canards about the proper role of women to be a basis for discrimination. Congress, however, sought the opposite result.[101]

V. CONCLUSIONS

The immediate impact of *Phillips* is this: no longer may em-employers apply one policy to employees and applicants of one sex only, without proving that sex is a bfoq "reasonably necessary to the normal operation of that particular business or enterprise."[102] As the Court said, "The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men—each having pre-school age children."[103]

What then is the significance of this decision? Further, what issues and problems will the *Phillips* case face on remand? First and foremost, the Southern attempt to completely negate the protections of Title VII has been stopped. "Sex-plus" is dead. The ugly specter of "race-plus" as a way to contravene Title VII has been destroyed.[104]

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[100] *Id.*

[101] *Id.* at 544-45.

[102] *Id. quoting* 42 U.S.C. § 2000(e)(2)(e). This court of appeals rendered its decision in Lansdale v. United Airlines, 437 F.2d 454 (5th Cir. 1971) on February 17, 1971, two weeks after the Supreme Court decision in *Phillips*. The court said, "The district court ruled for United as a matter of law on the basis of our decision in Phillips . . . . The decision has now been reversed. . . . It follows that the judgment must be vacated. . . ." *Id.* at 455.

[103] 400 U.S. 542, 545 (1971).

[104] *See* Comment, *Civil Rights Act of 1964: An Exception to Prohibitions on Employment Discriminations*, 55 IOWA L. REV. 509, 517 (1969).

Referring to the examples in Chapter II, Part B, herein, this means that Martin Marietta may not refuse to hire mothers of pre-school age children and hire fathers of pre-school age children *unless* it can be proven that this discriminatory practice comes under the paragraph "e" exception. It means that Mrs. Cooper and Mrs. Lansdale could not be fired as stewardesses because they were married *unless* the airline could show that married women were so poor as stewardesses as to create a legitimate business necessity for their removal. It means that the male grocery store clerk should not have been fired because his hair "was too long" *unless* Tradewell could prove short hair in men is a bfoq reasonably necessary to the normal operation of that business.

Of course, this poses and clarifies the issue which will face the federal courts in the near future—and for some time to come. That issue is: what constitutes a bfoq exception "reasonably necessary to the normal operation of that particular business?" In the case of *Phillips* on remand, if 50% of the applicants who are mothers of pre-school age children have sole responsibility for their care (and, therefore, are supposedly forced to miss days and "be inattentive at work") is this a sufficient percentage to say that sex is a bfoq for mothers of pre-school age children? What if the percentage is 33 or 99? As Mr. Justice Marshall observed in his concurring opinion in *Phillips*, the issue of bfoq is fraught with dangers. The primary one is this: is it fair that 1% or 50% of the mothers of pre-school age children who apply to Martin Marietta and *have an unemployed husband, or a competent relative living at home either of whom could care for the children* should be denied employment because a court has found that the existence of such conflicting family obligations is demonstrably more relevant to job performance for a woman than for a man? It is clear to this writer that the better rule is one which evaluates each applicant by his *own* family situation. If Martin Marietta finds that parents who have sole custody of pre-school age children and have no access to daycare facilities are bad employees, then as long as this rule does not disproportionately injure a protected minority,[105] *e.g.*, women, men, blacks, etc., then the policy should be applied to both male and female applicants.[106]

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[105] *See* Griggs v. Duke Power Company, 292 F. Supp. 243 (M.D.N.C. 1968), *rev'd in part* 420 F.2d 1225 (4th Cir. 1970), *rev'd* 401 U.S. 424 (1971).

[106] It would be well to remember that if the court on remand finds that parenthood of pre-school age children is not a condition which qualified as a bfoq and is not justified by a legitimate business necessity, then the company *may not* make legitimate its policy by applying it to both male and female applicants. As the EEOC said in the *Neal* case, "Discrimination based on sex unrelated to job performance is not to be eliminated by applying the same irrelevant conditions to members of the opposite sex. . . ." CCH EMPL. PRAC. GUIDE ¶ 6002, at 4015 (1968).

By way of summary, the EEOC has long been active in condemning "sex-plus" discrimination in hiring and in benefits. It condemns discrimination against men, who may retire only at age 65 while women may retire at age 60, as strongly as it condemns discrimination against unwed mothers or married stewardesses. This strong and unwavering stand has pointed the way for courts to follow. The only courts to disregard this position were the Florida district courts in *Phillips* and *Lansdale*, the Louisiana district court in *Cooper* and the court of appeals in *Phillips*. The Supreme Court reversed *Phillips* and the court of appeals has since reversed the lower court decisions in *Lansdale*. The only decision upholding "sex-plus" is *Cooper v. Delta Airlines* in 1967. Practically speaking, the effect of the decision was negated when Delta and the other major airlines reversed their policy of firing married stewardesses.

In conclusion, then, with the Supreme Court's *Phillips* decision, the short-lived, but potentially disastrous theory of statutory interpretation known as "sex-plus" was laid to rest and another chapter in the struggle for equal employment opportunities for women is ended.

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