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Labor Law -- Civil Rights Act of 1964 -- Sex Discrimination and the Bona Fide Occupational Qualification -- Diaz v. Pan American World Airways, Inc.

Joseph M. Piepul

CASE NOTE

Labor Law—Civil Rights Act of 1964—Sex Discrimination and the Bona Fide Occupational Qualification—*Diaz v. Pan American World Airways, Inc.*[1]—Celio Diaz applied for the position of flight cabin attendant with Pan American World Airways (Pan Am) on April 17, 1967. His application was rejected pursuant to the company policy of hiring only females for the job of cabin attendant. Subsequently, Diaz filed a complaint with the Equal Employment Opportunity Commission[2] (EEOC) alleging that the airline's refusal to hire him for the attendant's position was discriminatory under Title VII of the Civil Rights Act of 1964.[3] The Commission's investigation determined that there was reasonable cause to believe that Pan Am's hiring policy was unlawfully discriminatory and in violation the Act.[4] Diaz thereafter commenced an individual and class action in the United States District Court for the Southern District of Florida under Section 706(e)[5] of the Act seeking an injunction and damages. The district court denied the requested relief and HELD: Pan Am did not violate the Civil Rights Act of 1964 by utilizing a female-only hiring policy for the position of cabin attendant.

In rejecting the plaintiff's allegations charging unlawful discrimination on the basis of sex, the court held that such discrimination was permissible as a bona fide occupational qualification (BFOQ) under Section 703(e) of the Act which provides:

> [I]t 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

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1 Diaz v. Pan American World Airways, Inc., 311 F. Supp. 559 (S.D. Fla. 1970), appeal docketed, No. 30098 (5th Cir., May 25, 1970).

2 The EEOC is empowered under Title VII to investigate charges of unlawful discrimination and to "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(a) (1964).

3 42 U.S.C. § 2000e et seq. (1964). The basic anti-discrimination purposes of Title VII are found in § 703(a) which 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; (2) to limit, segregate, or classify his employees 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) (1964).

4 Brief for EEOC as Amicus Curiae at 2.

5 42 U.S.C. § 2000e-5(e) (1964).

> qualification reasonably necessary to the normal operation of that particular business or enterprise. . . .[6]

Central to the holding in the *Diaz* decision was the court's determination that the BFOQ exemption created by section 703(e) could be based upon job qualifications which demanded the ability to perform non-mechanical tasks. The court accepted Pan Am's contention that the position of flight attendant required the performance of special non-mechanical functions such as "providing reassurance to anxious passengers, giving courteous personalized service, and, in general, making flights as pleasurable as possible within the limitations imposed by aircraft operations."[7] The court rejected the plaintiff's position that qualification for the job of cabin attendant should be based solely upon one's ability to perform mechanical functions "such as the storage of coats and the preparation and service of meals and beverages."[8] In support of the contention that the job of cabin attendant requires non-mechanical qualifications, Pan Am introduced evidence of the history of air transportation to correlate the vast technological changes in air travel with the changes in the cabin attendant's duties. Once primarily responsible for physical tasks, the cabin attendant was relieved of these duties when the sophistication of air travel as a means of transportation led to a specialization in duties and the establishment of better ground facilities.[9] This shift in functions led to reassessment of hiring practices and, in 1959, Pan Am decided that it would subsequently hire only females for the position.[10] This decision was based upon the airline's study which demonstrated the superiority of women in performing the non-mechanical administrative duties vital to the job of cabin attendant.

In accepting Pan Am's evidence of non-mechanical qualifications as a basis for granting a BFOQ, the decision in *Diaz* is contrary to a ruling of the EEOC on the same question which specifically excludes the position of cabin attendant from possible inclusion within the BFOQ exception.[11] The Commission ruled that the job of cabin attendant should be examined to determine "whether the *basic duties* of a flight cabin attendant—whether he or she be called a purser, hostess, steward, or stewardess—can be satisfactorily performed by members of both sexes."[12] (Emphasis added.) Upon application of this mechanical test, the EEOC held that since both sexes could perform the "basic duties"

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[6] 42 U.S.C. § 2000e-2(e) (1964).

[7] 311 F. Supp. at 563.

[8] Id.

[9] Id. at 561-64.

[10] Id. at 563. However, Pan Am continued to hire male cabin attendants for certain routes until 1965. These routes were serviced by Pan Am's Latin American Division which lagged in the introduction of jet aircraft and was slower in eliminating the performance of ground duties from the job of cabin attendant. Id. at 564.

[11] 33 Fed. Reg. 3361 (1968).

[12] Id.

of a flight attendant, discrimination between the sexes was unlawful and not protected by section 703(e).[13]

The *Diaz* court supported its rejection of the EEOC ruling and the adoption of a non-mechanical test by reference to the legislative history of section 703(e). The proponents of the Civil Rights Act of 1964 made it clear that Title VII was not intended to abridge "the right which all employers would have to hire and fire on the basis of general qualifications for the job, such as skill or intelligence."[14] In addition to this basic employer right, section 703(e) was enacted to insure employers the right to discriminate in certain cases where sex, religion or national origin was a valid job qualification. The following examples were offered as permissible types of discrimination within the meaning of section 703(e):

> . . . the preference of a French restaurant for a French cook, the preference of a professional baseball team for male players, and the preference of a business which seeks the patronage of members of particular religious groups for a salesman of that religion.[15]

Clearly, the basic mechanical abilities necessary to prepare French food, play baseball, or sell items to a particular religious group do not require an individual to be of French origin, a male, or a member of that religious affiliation. The *Diaz* court was therefore correct in relying on this legislative history to support its holding that an employer may establish qualifications based upon the ability of one sex to satisfy non-mechanical criteria necessary for job performance.

The court's approval of a non-mechanical standard in *Diaz* represents a fundamentally different approach to section 703(e). While prior decisions do not explicitly reject the use of a non-mechanical qualifications as criteria of a BFOQ, they do reflect a certain distrust of such an approach. In *Cheatwood v. South Central Bell Telephone & Telegraph Co.*,[16] the plaintiff's application for the position of commercial repre-

[13] Id. The only indication of EEOC approval of non-mechanical qualifications is found in an opinion of the General Counsel which stated:

> It is the opinion of the Commission that Congress did not intend to disturb reasonable employer policies designed for the health and protection of minors, both male and female. Therefore, a newspaper publisher may refuse to employ female minors as newspaper carriers in situations where there is reasonable basis to believe that such female minors would be exposed to physical or moral hazards to which male minors would not similarly be exposed.

401 FEP 3019.

[14] 110 Cong. Rec. 7213 (1964) (Interpretative Memorandum submitted by Senators Clark and Case).

[15] Id. For a more complete discussion of the legislative history of Title VII, see Vaas, Title VII: Legislative History, 7 B.C. Ind. & Com. L. Rev. 431 (1966); Miller, Sex Discrimination and Title VII of The Civil Rights Act of 1964, 51 Minn. L. Rev. 877 (1967); Kanowitz, Sex-Based Discrimination In American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963, 20 Hastings L. J. 305 (1968).

[16] 303 F. Supp. 754 (M.D. Ala. 1969).

sentative, which required rural canvassing and the occasional lifting of heavy weights, had been rejected according to the company policy of hiring only men for that job. The employer claimed that discrimination for this job was permissible under section 703(e) since the work demanded physical capabilities not possessed by the average woman.[17] In addition, the employer contended that the work might place women in danger of harrassment by subjecting them to the environs of bars and pool halls when making collections. The court, in rejecting the employer's primary arguments of physical inability, noted that the secondary contentions based on potential non-physical dangers were merely "makeweights" without foundation in the evidence.[18] It was held that the employer had failed to prove that all or nearly all women would be unable to cope with these intangible difficulties.[19] Thus, the rejection of the defendant's arguments based upon non-mechanical job criteria is not a wholesale condemnation of such criteria, but rather represents a finding that non-mechanical abilities were not functionally related to the work of a commercial representative in this case.

A similar conclusion was reached in *Weeks v. Southern Bell Telephone & Telegraph Co.*,[20] where a female plaintiff's application for the position of switchman was rejected pursuant to the company's policy of male-only hiring for that position. The defendant employer claimed that this discrimination was within the BFOQ exception, contending that women were incapable of performing the physical tasks required,[21] and that the work was improper for women because it demanded late hour call-outs.[22] The court found no basis for the argument of physical incapacity and rejected the assertion of impropriety as a product of "romantic paternalism" not functionally related to sex.[23] The *Weeks* court held that the BFOQ exception was never meant to limit certain dangerous, strenuous, boring or unromantic tasks to men in perpetuation of a discriminatory standard of employment.[24] The court thus rejected the employer's contention that a BFOQ could be based upon intangible sex characteristics in this case since the job in question was basically mechanical in nature and there was no need shown for non-mechanical aptitudes.

However, unlike the employers in *Cheatwood* and *Weeks*, Pan Am established a functional relationship between job performance and non-mechanical sex-related qualifications. As well as utilizing its own study of employee performance to prove this relationship, Pan Am also introduced a passenger preference survey substantiating its own findings.

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[17] Id. at 757-58.

[18] Id. at 758.

[19] Id.

[20] 408 F.2d 228 (5th Cir. 1969).

[21] Id. at 234. The job of switchman required the maintenance, repair and testing of various equipment.

[22] Id. at 236.

[23] Id.

[24] Id.

The results of the survey indicated that the majority of the airline's passengers prefer to be served by female flight attendants.[25] In addition, Pan Am introduced psychiatric evidence which indicated that the preference for female cabin attendants was caused by characteristics inherent in members of the female sex which produced a uniquely feminine response to the difficulties encountered by passengers while in flight and a corresponding passenger acceptance of feminine assistance. The court found, on the basis of all the evidence offered, that Pan Am had established the fact that its passengers "overwhelmingly prefer to be served by female stewardesses."[26] This preference was regarded as significant by the court in reaching its decision that sex was a BFOQ for the position of cabin attendant.

However, the EEOC has rejected the use of evidence of customer preference as a basis for the application of section 703(e).[27] The Commission's position has been supported by arguments denouncing the potential prejudicial effects of such evidence.[28] Furthermore, reliance on customer preference criteria for application of section 703(e) has been criticized as being contrary to the purpose of an anti-discrimination statute such as Title VII.[29] However, critics of the use of customer preference have overlooked the value of such evidence in determining qualifications for a job that requires customer contact in its performance. In work involving personal contact, a primary, if not the primary, duty is to please customers. Therefore, of necessity, qualifications for the position must be at least partially defined in terms of customer preference. Furthermore, the legislative history of section 703(e) supports the limited use of customer preference as a basis for granting a BFOQ exception. As an example of the application of the BFOQ, it was noted that it would be permissible for the owner of an Italian restaurant to advertise for an Italian cook since "he would hardly be doing his business justice by advertising for a Turk to cook spaghetti."[30]

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[25] 311 F. Supp. at 564-66. The survey indicated that 79% of the passengers surveyed preferred female cabin attendants, while 18% had no preference and 3% preferred males. These overall figures represented a preference of 85% of the male passengers surveyed for female cabin attendants while 69% of the women passengers preferred female cabin attendants.

[26] 311 F. Supp. at 565.

[27] The EEOC specifically rejected reliance upon customer preference in the following manner:

> (1) the Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception . . .
>
> (iii) the refusal to hire an individual because of the preferences of co-workers, the employer, clients, or customers except . . .
>
> (2) where it is necessary for the purpose of authenticity or genuineness . . . e.g., an actor or actress.

29 C.F.R. 1604.1(a) (1970).

[28] See Murray and Eastwood, Jane Crow and the Law: Sex Discrimination and Title VII, 34 Geo. Wash. L. Rev. 232, 245-46 (1965).

[29] See Note, Classification on the Basis of Sex and the 1964 Civil Rights Act, 50 Iowa L. Rev. 778, 797 (1965).

[30] 110 Cong. Rec. 2549 (1964) (remarks of Representative Dent).

However, it was further noted that such discrimination would be unlawful if applied to the job of dishwasher since there is no reason for a dishwasher to be of a particular national origin.[31] This example demonstrates that evidence of passenger preference, *when related to job performance*, may support an application of section 703(e) consistent with the purpose of the BFOQ exemption.

In addition to proof that the qualifications sought by an employer are legitimately related to job performance, section 703(e) also requires that an employer demonstrate that the qualifications be so predominant in members of one sex as to allow the exclusion of *all* members of the other sex from the hiring process. In *Diaz*, Pan Am demonstrated that the qualifications sought in cabin attendants were predominant in females but admitted, however, that a few members of the male sex would qualify for that position.[32] This admission would preclude application of section 703(e) under a strict reading of the requirement established in *Weeks* that an employer prove that "all or substantially all" members of the excluded sex are unqualified for the work in question.[33] However, the *Diaz* court did not limit application of the BFOQ to a finding that "all or substantially all" males were unable to perform the duties of a cabin attendant. Rather, the court adopted the standard of whether "it is highly impracticable to select employees on an individual basis."[34]

Pam Am contended that while it was theoretically possible to select those few males who would qualify as cabin attendants, it was not practically possible to make such a determination in the hiring process.[35] Since the airline conducted interviews of prospective employees on a world-wide basis, interviewing great numbers of applicants in proportion to the positions available, Pan Am claimed that it was impossible to make a meaningful analysis of individual applicants during interviews.[36] Employment testing was not used because it was unreliable in evaluating the non-mechanical abilities necessary for the position. Furthermore, the airline noted that the brief training system and the lack of supervision during actual job performance made it impractical to rely on post-employment assessment of employees.[37] Because of these inherent difficulties in the hiring process, the airline contended that "to eliminate the female sex qualification would simply eliminate the best available tool for screening out applicants likely to be unsatisfactory and thus reduce the average level of performance."[38] Based upon this evidence, the court found that it would be highly impracticable for Pan Am to select qualified male applicants on an individual basis with-

[31] Id.
[32] 311 F. Supp. at 567.
[33] 408 F.2d at 235.
[34] 311 F. Supp. at 566.
[35] Id. at 567.
[36] Id. at 566.
[37] Id. at 566-67.
[38] Id. at 567.

out reducing the overall level of service offered by the airline, and that sex was, therefore, a "bona fide occupational qualification reasonably necessary to the normal operation of Pan Am's business."[39]

The *Diaz* test of impracticability, while broader than the requirement of "all or substantially all" enunciated by the Fifth Circuit in *Weeks*, is compatible with the basic reasoning of the *Weeks* decision. The court in *Diaz* relied upon dicta in *Weeks* which stated that "[it] may be that where an employer sustains its burden in demonstrating that it is impossible or highly impractical to deal with women on an individualized basis, it may apply a reasonable general rule."[40] Although the argument of impracticability was not raised by the employer in *Weeks*, the court felt that no such showing could be made on the facts of that case because there was nothing unique in the employment system or the nature of the job to support such a finding.[41] In *Diaz*, however, the airline's evidence of the uniqueness of the hiring system and of the qualifications desired in cabin attendants supported use of a standard of impracticability in applying section 703(e).

While impracticability in hiring may be considered in the application of section 703(e), the use of this standard should be recognized as limited. An excessively liberal use of this standard may result in the sanctioning of employer practices that are contrary to the anti-discriminatory purposes of Title VII. An example of such a result is the holding of the district court in *Bowe v. Colgate-Palmolive Co.*[42] In *Bowe*, the plaintiffs charged their employer with discrimination in violation of Title VII by maintaining a seniority system which was composed of separate eligibility sections for men and women. The employer claimed that such discrimination was lawful as a BFOQ because the job assignment system in effect at the plant required the maintenance of sex-based discrimination. The court accepted this contention and found that the "highly refined, bizarre, and extraordinarily complex" system supported the application of section 703(e).[43] However, in *Bowe*, the complexity of the system itself was the result of stereotyped weight restrictions utilized by the employer.[44] Certain jobs were limited to men because males were generally considered to be stronger and therefore better qualified. The court upheld these restrictions on the ground that "[g]enerally recognized physical capabilities and physical limitations of the sexes may be made the basis for occupational qualifications in generic terms."[45]

[39] Id. at 568.

[40] 408 F.2d at 235 n.5.

[41] Id.

[42] 272 F. Supp. 332 (S.D. Ind. 1967).

[43] Id. at 356-57.

[44] It is questionable whether the court properly considered the matter of measuring individual ability. Rather, the court held that since the jobs required lifting heavy weights, it was not practical to operate without the weight restriction. See Note, Civil Rights: Judicial Interpretation of Bona Fide Occupational Qualification Exception of 1964 Civil Rights Act, 52 Minn. L. Rev. 1091 (1968).

[45] 272 F. Supp. at 365. The court in *Weeks*, while approving the result reached in

The Court of Appeals for the Seventh Circuit reversed the finding of the district court in *Bowe*[46] and held that, for a weight-lifting restriction to be valid under Title VII, individual employees must be afforded the opportunity to prove their ability to perform more strenuous tasks.[47] The generalized weight restriction as used to assign jobs by the employer in *Bowe* was held invalid since it was based upon broad sex stereotypes without considering individual abilities.[48] Thus, while the district court was correct in its finding that it would be impracticable for the employer to discontinue his complex seniority system, the court erred in using impracticability as a ground for applying section 703(e) since the seniority system itself reflected discriminatory job assignments. However, unlike the seniority system in *Bowe*, the complexity of Pan Am's hiring system in *Diaz* was not based upon underlying discriminatory job classifications, but resulted from the practical difficulties of selecting qualified cabin attendants from a vast number of applicants. Therefore, the use of impracticability in *Diaz* is not an improper application of that standard as exemplified by the lower court's opinion in *Bowe*.

The *Diaz* court, by extending the application of section 703(e) to the position of airline cabin attendant, has interpreted this section beyond the limits established by the EEOC.[49] It is clear that the court was free to contradict this ruling since the Commission's opinions, while entitled to deference,[50] are not binding upon the courts.[51] Moreover, the liberalized application of the BFOQ exception offered in *Diaz* is a needed alternative to the unworkable, overly narrow interpretation of the EEOC. It has been demonstrated that such a narrow limitation of the scope of section 703(e) may lead to results which frustrate the goals of equal opportunity employment expressed in Title VII. In *Phillips v. Martin Marietta Corp.*,[52] the plaintiff, a woman with pre-school-age children, had been denied employment by the defendant employer pursuant to a company policy which denied women the opportunity to work without applying a like standard to men with pre-school-age children. The court found that this practice was "arguably an apparent discrimination founded upon sex."[53] However, the EEOC position, as expressed in its *amicus* brief, indicated that this discriminatory policy

Bowe, rejected the broad rationale of the decision to the extent that it would permit application of § 703(e) upon a finding of *any* rational employment objective. The court stated that such an interpretation would permit the exception to "swallow the rule." 408 F.2d at 234.

[46] 416 F.2d 711, 715 (7th Cir. 1969).

[47] Id. at 718.

[48] Id. at 717.

[49] See note 11 supra.

[50] See 408 F.2d at 235, citing Udall v. Tallman, 380 U.S. 1 (1965).

[51] See Griggs v. Duke Power Co., 420 F.2d 1225, 1234 (4th Cir. 1970); American Newspaper Publishers Ass'n. v. Alexander, 294 F. Supp. 1100 (D.D.C. 1968).

[52] 411 F.2d 1 (5th Cir. 1969), petition for rehearing denied, 416 F.2d 1257 (1969), vacated and remanded, 91 S. Ct. 496 (1971).

[53] 411 F.2d at 4.

could not qualify for a BFOQ exemption.[54] The *Phillips* court therefore reasoned that since the Commission had so narrowed the scope of application of the section 703(e) exception, the only other alternative allowing a finding of unlawful discrimination would be to construe Title VII so as "to exclude absolutely any consideration of the differences between the normal relationships of working fathers and working mothers to their pre-school age children."[55] Rather than adopt this extreme interpretation, the court held that the exclusion of women from the hiring process was not a violation of Title VII and refused relief to the plaintiff.[56] Thus, the EEOC's extremely limited construction of the BFOQ exception led the court in *Phillips* to reach a result that is "palpably wrong"[57] in terms of the objectives of Title VII.

The *Diaz* court, in refusing to follow the overly narrow reading of section 703(e) advocated by the EEOC, has adopted a more reasonable approach that will better accomplish the basic objectives expressed in Title VII. The exception created in section 703(e) should not be limited to the obvious cases where sex is vital to job qualification, such as actors, models, washroom attendants, or fitters in girdle and brassiere establishments.[58] By accepting the validity of non-mechanical job qualifications and a limited test of impracticability in hiring, the *Diaz* holding allows application of the BFOQ exception in the less obvious cases where members of each sex may possess the basic mechanical qualifications necessary to job performance, but one sex must be excluded from consideration for valid reasons other than purely mechanical ability.*

JOSEPH M. PIEPUL

[54] Id.

[55] Id.

[56] Id.

[57] 416 F.2d 1257, 1259 (dissenting opinion). For further discussion and criticism of the majority decision in *Phillips* see Note, The Mandate of Title VII of the Civil Rights Act of 1964: To Treat Women As Individuals, 59 Geo. L.J. 221, 232-39 (1970).

[58] These occupations are recognized as obvious examples of lawful sex discrimination under New York State anti-discrimination provisions that are similar to § 703(e). See 451 FEP 906.

* Subsequent to the completion of this article for publication, *Diaz* was reversed by the Court of Appeals for the Fifth Circuit (April 6, 1971 No. 30098). The court held that "discrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively." The court found that the essence of the airline's function was to supply safe transportation and held that the non-mechanical duties of a flight attendant were merely tangential to the airline's operation. Therefore, the court held that neither customer preference nor the actualities of the hiring process could justify sex discrimination in this case. It is submitted that the court's interpretation of section 703(e) is unduly narrow and, if adopted, would render section 703(e) virtually ineffective.