PROTECTING THE HANDICAPPED FROM EMPLOYMENT DISCRIMINATION: THE JOB-RELATEDNESS AND BONA FIDE OCCUPATIONAL QUALIFICATION DOCTRINES

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The rights of the handicapped to equal employment opportunity guaranteed by federal and state statutes and constitutional provisions still stand in need of proper implementation by the courts and administrative agencies. Such implementation requires the formulation of specific standards which will assist in distinguishing between discriminatory and justifiable employment rejections as a result of a handicap. The author suggests that two such standards, the job-relatedness and bona fide occupational qualification doctrines used in Title VII Civil Rights adjudications, can be, with careful modification, appropriately applied to employment cases involving discrimination against the handicapped.

Rights of the handicapped to equal employment opportunity have only recently been established by statutes and enunciated by the courts.[1] Translation of these new rights into effective remedies is the next logical step, a step which must be taken for the most part by the courts, and in some instances, by administrative agencies. Along the way, some notions implicit in handicap discrimination law, not explicated by the legislators, need to be clarified. In particular, two issues must be resolved. The first is the extent and the manner in which employers must show job-relatedness or validity of employment selection criteria that disproportionately exclude the handicapped. The second, related to the first, is the scope of the bona fide occupational qualification ("BFOQ") exception which may be used to justify practices that expressly exclude the handicapped.

The most analogous statute available for guidance, Title VII of the Civil Rights Act of 1964,[2] prohibits discrimination in employment based upon race, color, religion, sex and national origin but not, un-

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1. For recent developments, *see generally, Employment Rights of the Handicapped,* 11 CLEARINGHOUSE REV. 703 (Dec. 1977). For a discussion of the relevant statutes and other provisions *see* notes 8-28 *infra*.

2. 42 U.S.C. § 2000e (Supp. V 1975).

fortunately, handicap.[3] Under Title VII, selection criteria that operate to exclude a disproportionate number of the protected class are justifiable only by a showing of job-relatedness or validity.[4] Moreover, religion, sex or national origin may be used as criteria in and of themselves only if justified as a BFOQ "reasonably necessary to the normal operation of [the] . . .particular business or enterprise."[5]

The notion of job-relatedness is thus distinguished from that of the BFOQ in that the former comes into play when selection criteria that are neutral on their face nevertheless operate to exclude members of certain groups, while the latter serves as a justification for the overt exclusion of these groups. Each doctrine occupies a separate and integral part of employment discrimination law under Title VII; both act in practice as limitations on the protected applicant's or employee's rights under the statute. It is important, therefore, that these limitations be read carefully, with the interests of the persons that Congress sought to protect in mind. In the area of Title VII this has been done to a great extent; the burden of showing job-relatedness and BFOQ has been placed upon the user of the criteria in question.[6]

In facing the task of shaping the legal rights and remedies of the handicapped, the courts today are in a position not dissimilar from that occupied by the courts construing Title VII in the late 1960's. The unexplained intentions of the legislature must be given meaning, this time in the special context of the handicapped employee or applicant for employment.

The judicial interpretations of Title VII on the issues of job-relatedness and BFOQ lend themselves to application in the handicap field. In this regard, the substantive rights under the statutes and constitutional provisions protecting the handicapped from employment discrimination will be discussed briefly as they bear upon or subsume the job-relatedness and BFOQ doctrines. Then the applica-

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3. Amendments have been proposed which would make Title VII applicable to discrimination based upon handicap. H.R. 10198, 95th Cong., 1st Sess., 123 CONG. REC. H12,613 (daily ed. Dec. 1, 1977) (remarks of Rep. O'Brien). H.R. 9477, 95th Cong., 1st Sess., 123 CONG. REC. H10,739 (daily ed. Oct. 6, 1977) (remarks of Rep. O'Brien). However, to date, these amendments have not been passed into law.

4. Dothard v. Rawlinson, 433 U.S. 321 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

5. Civil Rights Act of 1964, § 703(e), 42 U.S.C. § 2000e-2(e) (Supp. 1975); *see* Dothard v. Rawlinson, 433 U.S. 321 (1977). The BFOQ exception is to be construed narrowly. *See* notes 82-98 and accompanying text *infra*.

6. *See* Dothard v. Rawlinson, 433 U.S. 321, 329-31 (1977) (BFOQ); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (job-relatedness).

tions of these two doctrines in recent handicap cases will be treated and compared with the current state of Title VII law. Finally, an argument for applying the Title VII standards of job-relatedness and BFOQ to the handicap cases will be made.

THE JOB-RELATEDNESS AND BFOQ DOCTRINES AS PART OF THE STATUTORY AND CONSTITUTIONAL PROVISIONS PROTECTING THE HANDICAPPED.

Protection from employment discrimination against the handicapped is guaranteed by federal statutes, United States constitutional provisions, and state statutes.[7] Foremost among the federal statutes is the Rehabilitation Act of 1973,[8] but also of importance are the nondiscrimination provisions of the Fiscal Assistance to State and Local Governments ("Revenue Sharing") Act of 1972[9] and the federal Civil Service Act.[10] To date, all of the federal statutes are applicable only to employment with agencies, grantees or contractors of the federal government. Of the federal constitutional remedies available to the handicapped, due process in the form of the irrebuttable presumption doctrine has proven to be the most effective,[11] although some cases have been based upon equal protection.[12] Coverage under either constitutional provision is limited, of course, to public employment or employment in which requisite governmental action is present.

At the state and local level, at least 36 states, as well as the District of Columbia and New York City, have some type of provision[13] prohibiting to some degree[14] employment discrimination against the handicapped. All of these federal, state and local statutes and provisions subsume, to varying degrees, the doctrines of job-relatedness and BFOQ, and the potential limitation on discriminatees' rights that

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7. *See generally, Employment Rights of the Handicapped,* 11 CLEARINGHOUSE REV. 703 (Dec. 1977).

8. 29 U.S.C. § 701 (Supp. V 1975).

9. 31 U.S.C. § 1242 (a) (1) (Supp. 1978).

10. 5 U.S.C. § 7153 (Supp. V 1975).

11. *See, e.g.,* Beazer v. New York City Transit Auth., 558 F.2d 97 (2d Cir. 1977); Gurmankin v. Costanzo, 556 F.2d 184 (3d Cir. 1977); Duran v. City of Tampa, 430 F. Supp. 75 (1977); *Cf.* Cleveland Bd. of Educ. v. LeFleur, 414 U.S. 632 (1974) (mandatory maternity leave policy violates due process).

12. Beazer v. New York City Transit Auth., 558 F.2d 97 (2d Cir. 1977). Equal protection cases are now made more difficult to prove by the Supreme Court's requirement that discriminatory *animus* be shown. Washington v. Davis, 426 U.S. 229 (1976). *Beazer* was decided in the district court prior to *Washington,* and equal protection was one of the grounds relied upon. *See* 399 F. Supp. 1032, 1057 (S.D.N.Y. 1975).

13. *See Employment Rights of the Handicapped,* 11 CLEARINGHOUSE REV. 703 (Dec. 1977).

14. *Id.*

are concomitant with them. For example, Section 504 of the Federal Rehabilitation Act provides:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[15]

Regulations promulgated by the Department of Health, Education and Welfare ("HEW")[16] have defined the term "qualified handicapped[17] person":

> (1) with respect to employment, a handicapped person who, with reasonable accomodation, *can perform the essential functions of the job in question. . . .*[18]

The HEW regulations go on to incorporate directly the requirement of job-relatedness.[19] However, a handicapped person must at least be able to perform the essential functions of the job in question[20] in order to be protected under Section 504 of the Rehabilitation Act. Thus, criteria that purport to test for or indicate this ability are permissible, even if the criteria exclude handicapped individuals.

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15. 29 U.S.C. § 794 (Supp. V 1975).

16. 45 C.F.R. § 84 (1977).

17. For the purpose of employment discrimination, the Act defines "handicapped individual" as:

> any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) or a record of such an impairment, or (C) is regarded as having such an impairment.

29 U.S.C. § 706(6) (Supp. V 1975).

The HEW regulations further define the terms used in 29 U.S.C. § 706(6), such as "physical and mental impairment," and "major life activities." 45 C.F.R. § 84.3(j)(2)(1977).

18. 45 C.F.R. § 84.3(k) (1) (1977) (emphasis added).

19. 45 C.F.R. § 84.13 (1977) provides:

> (a) A recipient may not make use of any employment test or other selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons unless: (1) the test score or other selection criterion, as used by the recipient, is shown to be job-related for the position in question, and (2) alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Director to be available.
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> (b) A recipient shall select and administer tests concerning employment so as best to ensure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's job skills, aptitude, or whatever other factor the test purports to measure, rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

20. Subject, of course, to the employer's duty under the Act to accommodate the employee's handicap.

Similarly, job-relatedness plays an important role in the context of federal constitutional litigation. When equal protection violations are alleged, the standard defenses are showings of rational basis and legitimate or compelling state interests.[21] In the face of allegations that due process has been violated, defendants may assert that the challenged procedures or criteria are not arbitrary or "utterly lacking in rational justification."[22] In either event, the basis of the defense rests upon a showing that the criteria used are somehow reasonably related to performance on the job in question.[23]

Finally, almost all of the relevant state legislation also subsumes the notion of job-relatedness and/or BFOQ. For example the New York statute[24] provides that:

> in all provisions. . .dealing with employment, the term (disability) shall be limited to physical, mental or medical conditions *which are unrelated to the ability to engage in the activities involved in the job or occupation* which a person claiming protection of this article shall be seeking.[25]

New York's treatment of this issue is typical of most state laws. The various state laws differ, however, in that some speak in terms of job-relatedness,[26] others in terms of BFOQ,[27] and still others in ambiguous terms.[28] All, however, incorporate the concept that physical criteria bearing a relationship to the job in question are not prohibited.

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21. *See, e.g.*, Gilmore v. City of Montgomery, 417 U.S. 556 (1974); Fortin v. Darlington Little League Inc., 514 F.2d 344 (1st Cir. 1975); Neeld v. American Hockey League, 453 F. Supp. 466 (W.D.N.Y. 1977).

22. Flemming v. Nestor, 363 U.S. 603, 611 (1960); *accord*, Weinberger v. Salfi, 422 U.S. 749 (1975). *But cf.*, Gurmankin v. Costanzo, 556 F.2d 184, 187 n.5 (3d Cir. 1977) discussed in text accompanying notes 37-39 *infra*.

23. For example, in Gurmankin v. Costanzo, 556 F.2d 184 (3d Cir. 1977), the district court below had noted that "the school district's apparent goal of insuring that only competent teachers are hired is proper and legitimate," 411 F. Supp. 982, 990 (E.D. Pa. 1976), but held that the total exclusion of blind applicants from consideration was not justified in view of more reasonable ways to determine competence. *Id.* at 991-92.

24. N.Y. EXEC. LAW §§ 290-301 (McKinney 1975).

25. *Id.* § 292.21 (emphasis added).

26. COLO. REV. STAT. § 24-34-801 (1973); FLA. STAT. ANN. § 413.08 (West 1974); N.J. STAT. ANN. § 10:5-4.1 (West 1976); MONT. REV. CODES ANN. § 64-304.

27. CONN. GEN. STAT. ANN. § 31-126; HAW. REV. STAT. § 378-2 (1975); IOWA CODE ANN. § 601A.6 (West 1974); MINN. STAT. ANN. § 363.01-.13 (1973); NEV. REV. STAT. § 613.310-430 (1971); N.H. REV. STAT. ANN. § 354A:8.

28. ILL. ANN. STAT. ch. 48 § 853 (Smith-Hurd 1975); ME. REV. STAT. ANN. tit. 5 § 4572 (West 1977); MASS. GEN. LAWS, Chap. 149 § 24 (k) (West 1975); IND. CODE ANN. § 22-9-1-10 (Burns 1975).

Thus, in any forum in which the handicapped litigant finds himself, be it a federal court, a state court or an administrative agency, he will have to deal with the issue of job-relatedness or BFOQ. The litigant is therefore well advised, in the first instance, to be familiar with the treatment these issues have received in the few handicap cases that have been decided.

JOB-RELATEDNESS AND BFOQ IN THE RECENT HANDICAP CASES.

The courts have only recently proven to be viable vehicles for redressing the problems of the handicapped. Accordingly, unlike the Title VII cases, in the absence of supportive judicial precedent, the courts treating the job-relatedness and BFOQ issues in handicap cases have applied individualized standards, based in large part upon the conception of the particular judge.

A case in point is *Chicago, Milwaukee, St. Paul and Pacific R.R. v. Washington State Human Rights Commission,* [29] in which the trial court was called upon to determine whether an employer was prohibited from discriminating against an applicant who had had the medial *menisci* cartilage removed from his knees.[30] The job in question was that of brakeman. The bulk of the evidence considered by the court appears to have been a film made by the defendant Railroad which "showed in great detail the duties and dangers involved in the job of railroad brakeman."[31] Despite the fact that the Railroad's examining physician had found no weakness or instability in the applicant's knees,[32] the court concluded that "[a] person who has had medial *menisci* removed from his knees cannot properly perform the job of railroad brakeman."[33] Although medical testimony had been offered by both sides, it was not discussed in detail.[34] This case exemplifies the current lack of legal standards in the area of handicap discrimination litigation.

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29. 11 Fair Empl. Prac. Cas. 854 (Wash. Super. Ct. 1975), *aff'd in part, rev'd in part, and remanded on other grounds,* 87 Wash. 2d 802, 557 P.2d 307 (1976).

30. The claim was based upon the applicable Washington statute, WASH. REV. CODE § 49.60 (1973).

31. Chicago, Mil., St. P., & Pac. R.R. v. Washington State Human Rights Comm'n, 11 Fair Empl. Prac. Cas. 854, 855 (Wash. Super. Ct. 1975).

32. *Id.* at 854.

33. *Id.* at 855.

34. The full discussion of the medical testimony was brief indeed:

> The testimony of Dr. James F. Depree establishes that all or substantially all

Other courts have conducted somewhat more studied inquiries into the nature of a particular handicap and a particular job in order to determine job-relatedness as an exclusionary criterion. For example, in *Chicago, Milwaukee, St. Paul and Pacific R.R. v. Wisconsin Department of Industry, Labor, and Human Relations,*[35] an employee was terminated from his job performing cleaning tasks in the defendant's diesel house due to a history of asthma and a back problem. The Wisconsin Supreme Court found that the criteria for termination were not shown by the defendant to be job-related:

> On review of the record as a whole, there is no evidence that Goodwin was unable to efficiently perform the duties of his job as a common laborer. Goodwin performed without ill effects all of the jobs assigned to him in the diesel house. In fact, there was no medical testimony that, to a reasonable degree of medical certainty, that [sic] the working conditions were or would be hazardous to his health.
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> In fact, the record as a whole reveals that the complainant was physically qualified to efficiently perform the duties of his job as a common laborer. . . .[36]

Although obviously favorable from the handicapped worker's point of view, this case, like the one discussed before it, shows only a cursory effort on the part of the court to establish or follow any guidelines in determining job-relatedness. Nor are more detailed analyses found in the cases decided under the United States Constitution or the Rehabilitation Act. For example, in *Gurmankin v. Costanzo,*[37] a blanket exclusion of blind applicants from consideration as teachers of sighted students was held to violate the Due Process Clause by imposing an irrebuttable presumption that blind persons are incompetent to teach sighted students.[38] The *Gurmankin* court did not reach the issue of the job-relatedness of the school district's selection criteria, beyond holding that blindness *per se* should not be disqualifying. In fact, the

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> persons who have had medical meniscectomies on each knee cannot properly perform the job of railroad brakeman. . . .
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> Dr. John Nilan, an orthopedic surgeon, examined Robert G. Clark and testified that Clark could do strenuous labor. Dr. Nilan knew nothing about the particular demands of the job of brakeman other than what he might have seen on television.

Id.

35. 62 Wisc. 2d 392, 215 N.W. 2d 443 (1974).

36. *Id.* at 398-99, 215 N.W. 2d at 446. *Cf.* City of Wis. Rapids v. Wisconsin Dep't of Indus., Labor and Human Relations, 15 Empl. Prac. Dec. 6227 (Cir. Ct. 1977) (discharge of fireman because of heart murmur violates Wisconsin state statute).

37. 556 F.2d 184 (3d Cir. 1977).

38. *Id.* at 186-88. Reliance was placed on Cleveland Bd. of Educ. v. LeFleur, 414 U.S. 632 (1974), in which the Supreme Court had invalidated mandatory fixed maternity leave as violative of due process.

court expressly left open the question of the validity of the other selection criteria used by the school district:

> In this case. . .Gurmankin's complaint is not addressed to the requirement that Philadelphia teachers pass a qualifying examination, which she eventually passed, but rather to the pre-1974 denial of the opportunity to demonstrate her competency.[39]

The irrebuttable presumption doctrine defers the question of job-relatedness to another day, since the doctrine is applied only when an individual has been totally denied the opportunity to present evidence of competence.[40] However, some constitutional decisions have inquired into the job-related merits of the case. In *Duran v. City of Tampa*,[41] the plaintiff alleged that the principles of *LeFleur* had been violated by the defendants' blanket refusal to hire as police officers individuals who had suffered epilepsy. On motion by the plaintiff for a preliminary injunction, the court concluded that there was a substantial likelihood of success on the due process claim.[42] In reaching this conclusion, the court relied upon the unrebutted expert testimony of two doctors that the plaintiff had outgrown his epilepsy

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39. *Id.* at 187. The court also noted: "This is not a case challenging the competency requirements for teachers. It challenges the deprivation of the right to present evidence of competency." *Id.* at 187 n.5.

40. *See* Cleveland Bd. of Educ. v. LeFleur, 414 U.S. 632 (1974); Vlandis v. Kline, 412 U.S. 441 (1973); Stanley v. Illinois, 405 U.S. 646 (1972); Gurmankin v. Costanzo, 556 F.2d 184 (3d Cir. 1977); Duran v. City of Tampa, 430 F. Supp. 75 (M.D. Fla. 1977); *Cf.* Weinberger v. Salfi, 422 U.S. 749 (irrebutable presumption attack rejected on duration-of-relationship requirements of the Social Security Act, 42 U.S.C. §§ 416 (c) (5) and (e) (2)). In *Gurmankin* the Third Circuit distinguished *Weinberger* in which the challenged social security provision disqualified any person married to a decedent within nine months of the decedent's death from receipt of surviving spouse (and stepchildren) benefits. *Id.* at 187 n.5. The court in *Gurmankin* reasoned that in *Weinberger* the plaintiffs were at least able to present evidence that they met the statutory requirements. By contrast, in *Gurmankin* the blind plaintiff, at least until 1974, had not been allowed to present any evidence at all that she was competent to teach. This distinction between *Gurmankin* and *Weinberger* may be more apparent than real. The presumption challenged in *Weinberger* was that persons marrying within the statutory time before death had done so for the purpose of collecting surviving spouse benefits. In *Gurmankin* the presumption was that blind persons were incompetent to teach sighted students. Although it is true that in *Weinberger* persons were free to present evidence that they married outside of the proscripted period, the same might be said of the situation in *Gurmankin*, since applicants probably would have been allowed to present evidence that they were able to see.

41. 430 F. Supp. 75 (M.D. Fla. 1977).

42. *Id.* at 78. Additionally, violation of the Rehabilitation Act had been alleged, and the court found a substantial likelihood of success on that claim also. *Id.* The preliminary injunction was denied, however, because the plaintiff did not show irreparable injury. 430 F. Supp. at 79. *See* Sampson v. Murray, 415 U.S. 61 (1974). The court noted, however, that "an almost immediate trial of these issues is anticipated." Duran v. City of Tampa, 430 F. Supp. at 79.

and was "perfectly able to serve from a medical perspective as a policeman."[43]

The cases discussed above, as well as others,[44] are indicative of the manner in which the courts to date have approached the issues of job-relatedness and BFOQ in the handicap discrimination cases. Essentially, a common sense (or lack of it)[45] approach has been applied. The reasons for exclusion of a particular handicapped person have been considered, and if deemed reasonable, fair or legitimate, have been upheld,[46] and if not, invalidated.[47] Although there are merits to this simplified approach, it is submitted that the well developed set of standards, which has evolved under Title VII, will be instructive in formulating general principles of job-relatedness and BFOQ in the handicap area.

TREATMENT OF THE ISSUES OF JOB-RELATEDNESS AND BFOQ UNDER TITLE VII.

Under Title VII the notion of job-relatedness differs from that of the BFOQ in that the former comes into play to justify criteria that exclude a disproportionate number of a protected class, while the latter is used to justify the outright exclusion of a particular group. To date, the handicap cases and applicable statutes are not in agreement

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43. Duran v. City of Tampa, 430 F. Supp. at 76. The court also concluded from the expert testimony that the chances of the plaintiff having a future seizure were "equal to that of any person in the general population. . . ." *Id.* This observation may take the case out of the ambit of handicap discrimination, since the court thereby found that the plaintiff was not at all handicapped. Ironically, then, the presumption in *Duran* did not operate accurately to include the handicapped applicants that it ostensibly was designed to include (i.e., epileptics).

44. *See, e.g.*, Neeld v. American Hockey League, 439 F. Supp. 459 (W.D.N.Y. 1977); City of Wis. Rapids v. Wisconsin Dep't of Indus., Labor and Human Relations, 15 Empl. Prac. Dec. 6227 (Wis. Cir. Ct. 1977); Coleman v. Darden, 13 Empl. Prac. Dec. 6788 (D. Colo. 1977); Bucyrus-Erie Co. v. Wisconsin Dep't of Indus., Labor and Human Relations, 13 Empl. Prac. Dec. 7078 (Wisc. Cir. Ct. 1977).

45. *See e.g.*, Chicago, Mil., St. P. & Pac. R.R. v. Washington State Human Rights Comm'n, 11 Fair Empl. Prac. Cas. 854 (Wash. Super. Ct. 1975), *aff'd in part, rev'd in part and remanded on other grounds*, 87 Wash. 2d 802, 557 P.2d 307 (1976); *see also* text accompanying notes 29-34 *supra*. In addition to the holding the Washington trial court held that a blind person could not serve on the fact finding tribunal of the Human Rights Comm'n because she was unable to view the film shown by the defendant railroad on the duties of a brakeman. 11 Fair Empl. Prac. Cas. at 855. This exclusion was upheld on appeal, although for a different reason—bias—than that posited by the lower court. 87 Wash. 2d 802, 557 P.2d 307 (1976).

46. *See, e.g.*, Coleman v. Darden, 13 Empl. Prac. Dec. 6788 (D. Colo. 1977).

47. *See, e.g.*, Chrysler Outboard Corp. v. Wisconsin Dep't of Indus., Labor and Human Relations, 13 Empl. Prac. Dec. 6883 (Wis. Cir. Ct. 1976); Bucyrus-Erie Co. v. Wisconsin Dep't of Indus., Labor and Human Relations, 13 Empl. Prac. Dec. 7078 (Wis. Cir. Ct. 1977); Fraser Shipyards Inc. v. Department of Indus., Labor and Human Relations, 13 Fair Empl. Prac. Cas. 1809 (Wis. Cir. Ct. 1976).

as to whether one or both of these standards should be applied, and if so, in what instances.[48] By contrast, under Title VII a substantial body of law has emerged dealing separately with the job-relatedness and BFOQ doctrines and their applicability to particular situations.

Job-Relatedness

The seminal case on job-relatedness under Title VII is *Griggs v. Duke Power Co.*,[49] in which the Supreme Court held that an employer's use of written tests and a high school degree requirement as employment criteria violated Title VII[50] because the criteria disqualified a disproportionate number of blacks and because the criteria were not shown to be related to job performance. The Court's unanimous holding was summarized in the Chief Justice's opinion:

> Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. . . . The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.[51]

The Court in *Griggs* considered intent of the user of the criteria of no legal significance in determining validity.[52] Only the consequences

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48. *Compare*, Coleman v. Darden, 13 Empl. Prac. Dec. 6788 (D. Colo. 1977) *with* Neeld v. American Hockey League, 439 F. Supp. 459 (W.D. N.Y. 1977). In *Coleman* the court stated that denial by a federal agency of employment to a blind person as legal research assistant because he required a reader did not amount to arbitrary or capricious action based on a conclusion or irrebutable presumptions. The court maintained that sufficient visual acuity to enable the employee to read had a direct relationship to the job of assisting lawyers. In *Neeld*, the court said that under New York state law, "blindness is a disability against which an employer may not discriminate unless sight in one or both eyes is shown to be a bona fide occupational qualification." 439 F. Supp. at 462.

49. 401 U.S. 424 (1971).

50. *Griggs* was decided under Section 703(a) of Title VII, which provides, in pertinent part:

> It shall be an unlawful employment practice for an employer—
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> . . .
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2 (Supp. V 1975).

51. 401 U.S. at 431.

52. *Id.* at 432.

of the employer's practices, not the motivation, are relevant.[53] Finally, the Court held that the employer, not the aggrieved party, has the burden of proving job-relatedness once the criteria are shown to have disparate impact.[54]

Since *Griggs*, a number of lower court decisions,[55] and some Supreme Court decisions,[56] have applied its principles. In 1975, the Supreme Court was called upon to explain the nature and extent of the employer's obligation under Title VII to validate selection criteria (i.e., show them to be job-related). In *Albemarle Paper Co. v. Moody*,[57] written tests having disparate impact on blacks were again challenged as violative of Title VII. However, unlike *Griggs*, where the tests and high school requirement had been adopted without any meaningful study,[58] the employer, in *Moody*, at least attempted to defend its test with a professional study made by an industrial psychologist.[59] This study was rejected by the Court, however, which took the opportunity to further delineate the burden that must be carried by an employer in showing job-relatedness. After noting that "[t]he question of job-relatedness must be viewed in the context of the plant's operation and the history of the testing program,"[60] the

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53. *Id.*

54. *Id. Accord* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Even if the employer is able to show job-relatedness, the employee may still prevail if he then carries a burden of showing that criteria without disparate effect would also serve the employer's interest in "efficient and trustworthy workmanship." 411 U.S. at 801; *accord* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

55. *See e.g.*, United States v. Jacksonville Terminal Co., 451 F.2d 418, 455-57 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973); Rogers v. International Paper Co., 510 F.2d 1340 (8th Cir. 1975), *vacated and remanded for reconsideration of relief*, 423 U.S. 809 (1975); Stevenson v. International Paper Co., 516 F.2d 103 (5th Cir. 1975); League of Latin American Citizens v. City of Santa Ana, 410 F. Supp. 873 (C.D. Cal. 1976); United States v. Local 638, Enterprise Ass'n of Steamfitters, 360 F.Supp. 979 (S.D. N.Y. 1973), *aff'd and modified*, 501 F.2d 622 (2d Cir. 1974).

56. Dothard v. Rawlinson, 433 U.S. 321 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Espinoza v. Farah Mfg. Co., 414 U.S. 86, 93-95 (1973); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

57. 422 U.S. 405 (1975).

58. 401 U.S. at 831. The Court in *Griggs* noted:

> On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used. Both were adopted, as the Court of Appeals noted, without meaningful study of their relationship to job-performance ability. Rather, a vice president of the Company testified, the requirements were instituted on the Company's judgment that they generally would improve the overall quality of the work force.

Id.

59. 422 U.S. at 429-30.

60. *Id.* at 427.

Moody Court concluded that the validation study offered as a defense was legally insufficient because it did not conform with the testing guidelines published by the Equal Employment Opportunity Commission ("EEOC Guidelines").[61]

Promulgated primarily in recognition of the inherently racially discriminatory nature of written tests,[62] the EEOC Guidelines require the presentation of empirical data which demonstrate that a given test[63] is predictive of or significantly correlated with important elements of work behavior. By the successful presentation of such data, a test is "validated."[64] Before validation is required, however, the Title VII plaintiff must make out a *prima facie* case of discrimination. This is ordinarily done by showing that minority group applicants

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61. *Id.* at 430-31. The EEOC Guidelines are found at 29 C.F.R. § 1607 (1977). They are not "administrative regulations" in that they were not promulgated in accordance with the Administrative Procedure Act, 5 U.S.C. §§ 501-559, 701-703, 3105, 3344, 5371, 7521 (1976). In *Griggs*, however, the Court had held that they were "[t]he administrative interpretation of the Act by the enforcing agency," and accordingly, were "entitled to great deference." 401 U.S. at 433-34. In *Moody*, the Court reaffirmed this principle, 422 U.S. at 431, although the Chief Justice, in partial dissent, took issue with the Court's apparent view that "absolute compliance with the EEOC Guidelines is a *sine qua non* of pre-employment test validation." *Id.* at 449.

62. 29 C.F.R. § 1607.1(b) (1977).

63. The EEOC Guidelines define "test" broadly:

> The term "test" includes all formal, scored, quantified or standardized techniques of assessing job suitability including, in addition to the above, specific qualifying or disqualifying personal history or background requirements, specific educational or work history requirements, scored interviews, biographical information blanks, interviewers' rating scales, scored application forms, etc.

29 C.F.R. § 1607.2 (1977). Thus, for validation purposes under the EEOC Guidelines, the term "test" translates in effect into "criterion," making the Guidelines particularly instructive in the handicap area. *But see* Griggs v. Duke Power Co., 401 U.S. 424, 433 n.8 (1971).

64. 29 C.F.R. § 1607.4(c) (1977). In addition to the EEOC Guidelines on validation, a second set of employee selection guidelines known as the Federal Executive Agency Employee Selection Guidelines ("FEA Guidelines") has emerged under the auspices of the United States Department of Justice, Department of Labor and Civil Service Commission. 28 C.F.R. § 50.14 (1977) (Department of Justice); 41 C.F.R. § 60-3 (1977) (Department of Labor); 41 Fed. Reg. 51752 (1976) to be published in the Federal Personnel Manual Supplements (Civil Service Commission).

The EEOC has specifically refused to adopt the FEA Guidelines. 41 Fed. Reg. 51984 (1976). Thus, in light of the "great deference" given the EEOC Guidelines by *Griggs* and *Moody*, the FEA Guidelines are of limited applicability in Title VII cases. Nonetheless, the FEA Guidelines do affect the agencies which adopted them. The Department of Justice has enforcement authority under Title VII § 706(b), 42 U.S.C. § 2000e-5(f) (Supp. V 1975), in cases against state and local governmental agencies, and thus may be expected to argue for the FEA Guidelines in such cases. The Civil Service Commission has the power to enforce Title VII in cases involving federal agencies at the administrative level, Title VII § 717 (b), 42 U.S.C. § 2000e-16 (b) (Supp. V 1975). The Department of Labor has no authority under Title VII but will use the FEA Guidelines in enforcement of Executive Order No. 11246 *as amended by* Executive Order No. 11375, 41 Fed. Reg. 51986 (1976), which prohibits discrimination on the basis of race, national origin, religion or sex by federal contractors and mandates affirmative action to insure equal employment opportunity.

have failed to satisfy a particular requirement (or test) at a disproportionately higher rate than non-minority applicants.[65] The courts have generally looked for "statistically significant" differences in impact,[66] without requiring any specific percentage difference or level of statistical significance.[67]

In cases where statistics on actual pass-fail rates have not been available, or have not been sufficiently reliable (*e.g.*, due to the small size of the sample), courts have relied upon the results of a particular test in another context, expert testimony, and census statistics demonstrating a disparity between the employer's work force and the general population of the community as an indication of disparate effect of a selection device.[68] This approach is of particular significance in the handicap context, since the sample of handicapped applicants for a specific job is likely to be small,[69] and the handicapped are a particularly insular minority that has not yet been the subject of extensive statistical analyses.

Under both EEOC Guidelines and case law, once a *prima facie* case has been established by demonstrating the discriminatory impact

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65. *See, e.g.*, United States v. City of Chicago, 549 F.2d 415, 427-28 (7th Cir. 1977); United States v. Georgia Power Co., 474 F.2d 906, 912 n.5 (5th Cir. 1973).

66. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

67. However, the FEA Guidelines, § 4, 41 Fed. Reg. 51737 (1976), generally regard a selection for a racial, ethnic or sex group which is less than 80% of the rate for the group with the highest rate as evidence of adverse impact.

68. *See* Dothard v. Rawlinson, 433 U.S. 321, 330 (1977); Rogers v. International Paper Co., 510 F.2d 1340, 1348-49 (8th Cir. 1975), *vacated and remanded for reconsideration of relief*, 423 U.S. 809 (1975); Stevenson v. International Paper Co., 516 F.2d 103, 115-16 (5th Cir. 1975); League of Latin American Citizens v. City of Santa Ana, 410 F. Supp. 873, 902 (C.D. Cal. 1976).

69. The promulgators of the HEW regulations under the Rehabilitation Act recognized the problems inherent in applying the Title VII *prima facie* case standards in the handicap area:

> *Tests and selection criteria.* Revised § 84.13(a) prohibits employers from using test or other selection criteria that screen out or tend to screen out handicapped persons unless the test or criterion is shown to be job-related and alternative tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Director to be available. This paragraph is an application of the principle established under Title VII of the Civil Rights Act of 1964 in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).
>
> Under the proposed section, a statistical showing of adverse impact on handicapped persons was required to trigger an employer's obligation to show that employment criteria and qualifications relating to handicap were necessary. This requirement was changed because the small number of handicapped persons taking tests would make statistical showings of "disproportionate, adverse effect" difficult and burdensome. Under the altered, more workable provision, once it is shown that an employment test substantially limits the opportunities of handicapped persons, the employer must show the test to be job-related.

Appendix A to Proposed HEW Regulations, 42 Fed. Reg. 22688-89 (1977).

of a selection device, the burden shifts to the user of the device to rebut the inference of discrimination by introducing evidence of validation.[70] The EEOC Guidelines allow the use of three methods of validation, criterion-related, content and construct,[71] and deal with them in order of preference.[72] Whichever validation technique is used, a professional inquiry is made into the selection device in order to determine whether application of that device predicts job performance.[73]

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70. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). The FEA Guidelines, § 3 (b) (i) and (ii), 41 Fed. Reg. 51736 (1976), exempt formal and informal tests from technical validation where such validation is "not feasible or not appropriate." Instead, under such circumstances a test must be modified to "minimize or eliminate adverse impact . . . or otherwise justify the continued use of the procedure or alternatively, its continued use in accord with Federal law." Of course, if the applicable federal law is Title VII, validation would be required.

71. 29 C.F.R § 1607.5(a) (1977).

72. The first and clearly preferred form of validation (by the EEOC Guidelines) is criterion-related validity, which indicates the effectiveness of a test in predicting job performance. Various criteria which measure job performance are identified. Test scores are then matched with job performance ratings for the selected criteria. If the performance ratings and test scores correlate, the test is said to have criterion-related validity, which is especially essential in validating entry-level aptitude tests.

The second method of validation is content validity. A test which has content validity measures actual job knowledge or proficiency, *e.g.*, a typing test for a stenographer's job. Content validation is useful for determining the validity of achievement tests.

The third method of validation is construct validity. A test which has construct validity measures the degree to which a job applicant possesses characteristics or traits, such as intelligence, mechanical comprehension, and verbal fluency, which are believed to be important to successful job performance.

Neither content nor construct validity are preferred forms of validation under the EEOC Guidelines and may be relied upon only where criterion-related validity is not feasible. 29 C.F.R. § 1607.5(a) (1977). In preferring criterion validation over content and construct validation, the EEOC Guidelines incorporate and adopt the position of the American Psychological Association as enunciated in its "Standards for Educational and Psychological Tests and Manuals." By contrast, the FEA Guidelines, although recognizing the three types of validation, contain no explicit preference.

73. The different forms of test validation take one into the murky realm of psychology. Detailed discussion of each validation method is not within the ambitions of this article, which posits that a more rational approach to determining job-relatedness is required than is now in use. For a more technical and complete treatment of this subject, the reader is advised to begin with A. ANASTASI. PSYCHOLOGICAL TESTING (New York, 1976) and L.J. CRONBACH, ESSENTIALS OF PSYCHOLOGICAL TESTING (New York, 1970).

The Title VII experience has been that the Courts too have sought a pragmatic rather than technical approach to the application of the EEOC Guidelines. As one court has noted,

> We do not read *Griggs* as requiring compliance by every employer with each technical form of validation procedure set out in 29 C.F.R., part 1607. Nevertheless, these guidelines undeniably provide a valid framework for determining whether a validation study manifests that a particular test predicts reasonable job suitability. Their guidance value is such that we hold they should be followed absent a showing that some cogent reason exists for noncompliance.

United States v. Georgia Power Co., 474 F.2d 906, 913 (5th Cir. 1973).

Within this framework, a number of Title VII cases have been decided involving the use of physical criteria, in the form of height and weight requirements, that disproportionately exclude women and members of certain nationality groups.[74] In *Dothard v. Rawlinson*,[75] the female plaintiff's application for a job as a correction counselor (prison guard) in the Alabama state penitentiary system was rejected because she did not meet the minimum 120 pound weight requirement established by Alabama law.[76] The applicant challenged the height and weight requirements as violative of Title VII.[77] After determining that the plaintiff had made out a *prima facie* case,[78] the

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The HEW Regulations to the Rehabilitation Act likewise anticipate some flexibility in validation and showing job-relatedness:

> A recipient is no longer limited to using predictive validity studies as the method for demonstrating that a test or other selection criterion is in fact job-related. Nor, in all cases, are predictive validity studies sufficient to demonstrate that a test or criterion is job-related. In addition, § 84.13(a) has been revised to place the burden on the Director, rather than the recipient, to identify alternate tests.

Appendix A to proposed HEW Regulations, 42 Fed. Reg. 22689 (1977).

74. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977) (height and weight requirement for state police and corrections officers invalidated); Davis v. County of Los Angeles, 566 F.2d 1334 (9th Cir. 1977) (fire department height requirement struck); Officers for Justice v. Civil Service Commission of San Francisco, 395 F.Supp. 378 (N.D. Cal. 1975) (municipal police height and agility requirements struck); League of United Latin American Citizens v. City of Santa Ana, 410 F. Supp. 873 (C.D. Cal. 1976) (municipal police and fire department height rules barred); Smith v. Troyan, 520 F.2d 492 (6th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976) (police height requirement sustained as constitutional; weight requirement found unconstitutional; no Title VII claim presented); Meadows v. Ford Motor Co., 62 F.R.D. 98 (W.D. Ky. 1973), *aff'd in part and remanded on other grounds*, 510 F.2d 939 (6th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976) (weight requirement for production jobs found unlawful); United States v. Lee Way Motor Freight, Inc., 7 Empl. Prac. Dec. 6461 (W.D. Okla. 1973) (height and weight requirements for road driver positions, while reasonable, were applied in a discriminatory fashion); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969) (lifting requirement imposed only on women unlawful); Long v. Sapp, 502 F.2d 34 (5th Cir. 1974) (females may not be automatically disqualified as warehousemen because the job requires physical strength). *Cf.* Gerdom v. Continental Air Lines, Inc., 13 Fair Empl. Prac. Cas. 1205 (D.C. Cal. 1976) (weight and personal appearance standards applied to both male and female employees with equal impact were upheld). *But see* Boyd v. Ozark Air Lines, Inc., 419 F. Supp. 1061 (E.D. Mo. 1976) and Jarrell v. Eastern Airlines, Inc., 420 F. Supp. 884 (E.D. Va. 1977).

75. 433 U.S. 321 (1977).

76. 433 U.S. at 323-24. The statute also required that the applicant be at least 5 feet 2 inches tall. *Id.*

77. The plaintiff in *Dothard* also challenged a regulation which established express gender based criteria for assigning guards to "contact" positions in maximum security institutions. 433 U.S. at 325-26. *See also* text accompanying notes 75-81 *infra*.

78. 433 U.S. at 329-31. The defendants had argued that a *prima facie* case was not made out because the plaintiffs had used national statistics on the height and weight of women and not statistics adduced from actual applicants for correctional facility positions. The Court rejected this argument, 433 U.S. at 330, noting that many applicants might have been deterred from applying by knowledge of the requirements, *see* International Bhd. of Teamsters v. United States, 431 U.S. 324, 365-68 (1977), and that there was no reason to believe that national statistics would vary greatly from those in Alabama.

Court turned to whether the defendants had effectively rebutted it. As justification for the challenged requirements, the defendents offered no study, professional or otherwise. Instead, the height and weight criteria were said to "have a relationship to strength, a sufficient but unspecified amount of which is essential to effective job performance as a correctional counselor."[79] The Court flatly rejected this attempt to justify discriminatory criteria without compliance with *Griggs*:

> If the job-related quality that the appellants identify is bona fide, their purpose could be achieved by adopting and validating a test for applicants that measures strength directly. Such a test, fairly administered, would fully satisfy the standards of Title VII because it would be one that "measure[s] the person for the job and not the person in the abstract." *Griggs v. Duke Power Co.*,. . . .But nothing in the present record even approaches such a measurement.[80]

In dealing with physical criteria that discriminate on the basis of sex, then, Title VII requires the same strict showing of job-relatedness that comes into play when racially discriminatory criteria are utilized.[81]

In the Title VII cases, the physical criteria challenged are always related in some way to prohibited discrimination based upon race, sex or national origin. If the Title VII analysis is applied to the handicapped cases, a similar link must also be shown by the aggrieved party. The physical criteria challenged must be shown to relate in some way to prohibited discrimination against the handicapped. That accomplished, the burden then shifts to the employer to show that the challenged criteria are job-related.

Bona Fide Occupational Qualifications

Under Title VII, the exclusion of persons from employment based expressly upon religion, sex or national origin is permitted only if the employer can show that religion, sex or national origin is a bona fide occupational qualification for the job in question.[82] Three obvious examples of BFOQ's are the requirements that an actor be a man, an actress be a woman, or that a wet nurse be a woman.[83] Unfortu-

79. 433 U.S. at 331.

80. *Id.* at 332. In a footnote, the Court cited the EEOC Guidelines. *Id.* n.15.

81. Prior to *Dothard*, some defendants had argued that *Griggs* was applicable only to cases involving racial discrimination. *See, e.g.*, Yuhas v. Libbey-Owens-Ford Co., 562 F.2d 496 (7th Cir. 1977). Such an argument ran against the great weight of contrary lower court authority that had accumulated prior to *Dothard* and is now, of course, laid to rest by *Dothard*.

82. 42 U.S.C. § 2000e-2(e) (1970).

83. *See* Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1224 (9th Cir. 1971).

nately, the BFOQ's that have been the subject of litigation have not been quite so obvious.

It is now well settled that, at least in the context of sex discrimination, the BFOQ qualification is to be narrowly construed. As the Supreme Court noted in *Dothard v. Rawlinson*,[84]

> We are persuaded by the restrictive language of §703(e), the relevant legislative history, and the consistent interpretation of the Equal Employment Opportunity Commission—that the BFOQ exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex.[85]

In practice, the exception has operated only when physical features of one sex are essential to performance of the job,[86] when sex authenticity is required,[87] or when the interests of decency or privacy are involved.[88]

The BFOQ defense is not available when the exclusion is based upon traits or characteristics, such as strength, that are non-sexual but nonetheless identified more strongly with one sex than

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84. 433 U.S. 321 (1977).

85. *Id.* at 334 (footnotes omitted). The Court's conclusion was supported by the EEOC's interpretation of the statute, 29 C.F.R. § 1604.2(a) (1977), as well as the case law that had developed in the lower courts. Gillin v. Federal Paper Bd. Co., 479 F.2d 97 (2d Cir. 1973); Jurinko v. Edwin L. Wiegand Co., 477 F.2d 1038 (3d Cir. 1973); Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Meadows v. Ford Motor Co., 62 F.R.D. 98 (W.D. Ky. 1973), *modified on other grounds*, 510 F.2d 939 (6th Cir. 1975). Additionally, the Court cited, with apparent approval, language from Diaz v. Pan American World Airways, 442 F.2d 385, 388 (5th Cir. 1971) ("discrimination based on sex is valid only when the *essence* of the business occupation would be undermined by not hiring members of one sex exclusively") 433 U.S. at 333 (emphasis supplied by the Court of Appeals).

86. The wet nurse is the primary example. *See* Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1224 (9th Cir. 1971). This standard also seems to be the basis for the Supreme Court's decision on the BFOQ issue in Dothard v. Rawlinson, 433 U.S. 321 (1977). *See* text accompanying notes 84-98 *infra*.

87. *See* Button v. Rockefeller, 76 Misc. 2d 701, 351 N.Y.S. 2d 488, 490 (Sup. Ct. 1973) (holding that sex was a BFOQ for female state troopers for search of female prisoners and for undercover work); and EEOC Guidelines, 29 C.F.R. § 1604.2(a) (2) (1977) ("Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress.").

88. The applicable EEOC Guidelines, 29 C.F.R. § 1604.2 (1977), do not expressly recognize "decency" or "privacy" as a BFOQ, but other administrative agencies, as well as arbitrators, have. *See e.g.*, N.Y. Guidelines for Applying Sex Discrimination Law, § D(1) (b), EMPL. PRAC. GUIDE (CCH) ¶ 29,053; Corn Products Co. Int'l Inc. v. Atomic Workers Local 7-662, 70-1 Lab. Arb. ¶ 8432 (1970) (Gross, Arb.)

Under Title VII, when the potential for infringements upon privacy has been slight, the BFOQ has not attached. *See e.g.*, Wilson v. Sibley Memorial Hosp., 340 F. Supp. 686 (D.D.C. 1972), *rev'd and remanded on other grounds*, 488 F.2d 1338 (D.C. Cir. 1973) (Refusal to hire male nurse to treat female patients states claim under Title VII).

another.[89] Such stereotypical assumptions, if not proven in fact, have been invalidated.[90] Thus, if the narrow construction given the gender exception by the courts under Title VII is applied to the handicap cases, alleged BFOQ's based upon stereotypical assumptions of what the handicapped can and cannot do should fail as defenses.[91]

The Supreme Court spoke to the merits of the BFOQ defense asserted in *Dothard v. Rawlinson*,[92] in which the Alabama Board of Corrections excluded all women from serving as prison guards in "contact" positions in all-male penitentiaries.[93] Although agreeing that the BFOQ exception should be narrowly construed,[94] the Court concluded that in the "particular factual circumstances of this case," sex was indeed a BFOQ.[95] These circumstances included a peculiarly inhospitable environment in the male prisons in which twenty percent of the inmates were estimated to be sex offenders.[96] The Court credited expert testimony that women in contact positions

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89. *See, e.g.*, Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Cheatwood v. South Cent. Bell Tel. & Tel. Co., 303 F. Supp. 754 (M.D. Ala. 1969).

90. For example, in Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969), the employer prohibited all female employees from working in jobs which required lifting weights over 35 pounds. The court found that this prohibition violated Title VII, and noted:

> If anything is certain in this controversial area, it is that there is no general agreement as to what is a maximum permissible weight which can be safely lifted by women in the course of their employment.

Id. at 717. The court went on to hold that although Colgate could retain the lifting requirement "as a general guideline for all of its employees, male and female," *id.* at 718, it had to allow each employee to demonstrate his or her ability to satisfy the requirement. The court did not inquire into the validity of the weight lifting requirement or question its job-relatedness.

91. A harbinger of such a narrow interpretation of the BFOQ exception in the handicap context is found in Gurmankin v. Costanzo, 556 F.2d 184 (3d Cir. 1977), in which the court refused to indulge in the school district's assumption that blind teachers were not competent to teach sighted students. *See* text accompanying notes 37-40 *supra*.

92. 433 U.S. 321 (1977).

93. Men were likewise excluded from contact positions in all female institutions. 433 U.S. at 325 n.6, 332-33 n.16. However, the regulation excluded women from 75% of available jobs. 433 U.S. at 333 n.16.

94. 433 U.S. at 334.

95. *Id.*

96. 433 U.S. at 335, *citing* Weeks v. Sôuthern Bell Tel. & Tel. Co., 408 F.2d 228, 232-36 (5th Cir. 1969). The Court noted that, normally, whether or not to take a job that may be uncomfortable or dangerous is a question to be decided by the job applicant. Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 717-18 (7th Cir. 1969); Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971). However, here the Court concluded that the woman's ability to maintain security would be directly affected by her womanhood and the work environment hostile to it. 433 U.S. at 335.

would pose substantial security problems directly related to their sex.[97]

By basing the BFOQ in large part upon the nature of the inmate population and noting the "particular factual circumstances" of the case, the Court seems to have limited the holding to its facts, as the dissent does note.[98] Nonetheless *Dothard* does underscore two important, and somewhat contradictory, points about the BFOQ exception. First, it is to be read narrowly. And second, unlike job-relatedness, the existence of a BFOQ is determined more by the individual notions of the judges deciding the issue than by professional validation. Thus, although the BFOQ is a rarely used sword, when it is used it is difficult to predict how it will cut.

USE OF TITLE VII STANDARDS IN HANDICAP DISCRIMINATION CASES.

Job-Relatedness

Applying Title VII standards in determining job-relatedness to handicap cases is not without its problems. It is obvious that the Title VII experience does not lend itself to a wholesale application. Nonetheless, selective application of sufficiently analagous Title VII principles may prove fruitful.

One Title VII principle that is not readily transferable is the *prima facie* case. Proof of such a case of discrimination is generally made out under Title VII by showing a statisically significant disparity between the rates at which various groups satisfy selection criteria.[99] However, in the handicap cases, the number of handicapped applicants may not be a large enough base for a traditional statistical study.[100] Even though alternative approaches are available under Title VII,[101] such as the use of national statistics, rather than specific applicant

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97. *Id.* at 336. Mr. Justices Marshall and Brennan joined in strong dissent from this part of the majority opinion, *Id.* at 340-47, noting, "It appears that the real disqualifying factor in the Court's view is '[t]he employee's very womanhood'" *Id.* at 345 (citation omitted). The dissenters saw danger that the majority opinion might continue the "'romancic paternalism' and persisting discriminatory attitude that the Court properly eschews." *Id.* at 345-46. The dissent concluded by noting that the majority opinion may well be limited to the particular factual circumstances of the case, *i.e.*, "the shockingly inhuman conditions in Alabama prisons." *Id.* at 347.

98. *Compare* 433 U.S. at 346-47 *with* 433 U.S. at 334.

99. Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). *See* notes 65-69 and accompanying text *supra*.

100. This problem was recognized by the promulgators of the HEW Regulations under the Rehabilitation Act. *See* note 69 *supra*.

101. *See* note 68 and accompanying text *supra*.

figures,[102] the better approach seems to be that offered by the HEW Regulations under the Rehabilitation Act. The Regulations require a showing of job-relatedness as to any "selection criterion that screens out *or tends to* screen out handicapped persons or any class of handicapped persons."[103] By contrast, the Title VII doctrine that shifts the burden to the employer to show job-relatedness once a *prima facie* case is made is readily applicable to handicap cases. In fact, the majority of the handicap cases decided to date have applied this principle.

It is in the gray area of validation itself that application of Title VII standards becomes difficult. Although the burden of showing job-relatedness may be placed upon the employer, the extent of that burden is not so easily delineated. In many instances the criterion-related validity study favored by the EEOC Guidelines will be impractical, if not impossible, to apply to the handicap context due to a lack of a significant number of handicapped test takers in the sample. The HEW Regulations recognize this problem, and accordingly neither require predictive criterion validation nor endorse it as a legal defense to a claim of discrimination.[104]

Alternative related solutions to the validation problem are available, however. One is found in the FEA Guidelines,[105] which provide that where technical validation is not feasible or appropriate a test must be modified to minimize its discriminatory impact.[106] In the handicap context, such modification would take two forms. The first is obvious, and relates to the way the test is administered. For example, if an applicant is blind, the questions would have to be given orally or in braille.[107] The second such modification would

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102. *See* Dothard v. Rawlinson, 433 U.S. 321 (1977).

103. 45 C.F.R. § 84.13(a) (1977) (emphasis added). The promulgators of the HEW Regulations noted that under this provision, "once it is shown that an employment test substantially limits the opportunities of handicapped persons, the employer must show the test to be job-related." 42 Fed. Reg. 22689 (1977). This subjective approach obviously lacks the precision of a more complex statistical analysis, but in the handicap context it is probably the only workable procedure.

104. Comments following the HEW Regulations note,

> A recipient is no longer limited to using predictive validity studies as the method for demonstrating that a test or other selection criterion is in fact job-related. Nor, in all cases, are predictive validity studies sufficient to demonstrate that a test or criterion is job-related.

Appendix A to proposed HEW Regulations, 42 Fed. Reg. 22689 (1977).

105. *See* note 64 *supra*.

106. Section 3 (b)(i) and (ii), 41 Fed. Reg. 51752-53 (1976).

107. The HEW Regulations also require this type of modification:

> A recipient shall select and administer tests concerning employment so as best to ensure that, when administered to an applicant or employee who has a handicap

involve weighting the handicapped applicant's performance on those aspects of the test that he is able to satisfy without regard to his handicap, and correspondingly reducing the adverse weight accorded his failure to satisfy those test components that are related to his handicap (but not necessarily to the job). As an example, consider a person with hand prostheses who applies for a job as a road mender, and assume that the employer requires that he be able to operate a road grader and have the appropriate driver's license, both of which requirements he satisfies, and also that the employer requires that he be able to lift 75 pounds, when the applicant can in fact only lift 50. In the absence of a clearcut showing by the employer of job-relatedness of the lifting requirement, the handicapped applicant's satisfaction of the license and experience requirements would be given extra weight to offset his ability to satisfy only two-thirds of the lifting requirement. In cases in which the above modification procedure would be impractical, on the job trial periods might be substituted for handicapped applicants who satisfy all job requirements except those related to their handicaps.

Of course, even in the handicap context, professional validation may often be possible, and in fact may be the best way to determine job-relatedness. Such situations include those cases in which the challenged criteria exclude not only handicapped applicants, but also broader categories, such as women. Lifting and other strength requirements are examples.[108] In such cases a showing of job-relatedness[109] would probably exonerate an employer from charges of sex-discrimination, and possibly from those of handicap discrimination as well. (Of course, a handicapped applicant might still prevail, if, with reasonable employer accomodation, he could substantially perform the job.[110]) Conversely, a failure to show such criteria to be job-related would invalidate them for use in excluding handicapped as well as female applicants.

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that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's job skills, aptitude, or whatever other factor the test purports to measure, rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

45 C.F.R. § 84.13(b) (1977).

108. *See* cases cited in note 74 *supra*.

109. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971); United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973).

110. *See* note 117 *infra*.

Although Title VII standards of job-relatedness cannot be the *sine qua non* for compliance with law in the handicap field, they do provide a good point of reference from which the courts may proceed to determine the legality of criteria that exclude the handicapped from employment. As the case law develops, more precise principles applicable to the handicapped probably will be produced. These probably will be hybrids of the Title VII standards and the standards that have evolved in the due process and equal protection cases.

Bona Fide Occupational Qualifications

As indicated, the BFOQ exception under Title VII is a narrow one,[111] limited to cases in which a particular sex, religion or national origin is actually part and parcel of the job in question.[112] There may be some doubt that the enactors of handicap discrimination legislation intended the BFOQ exception to be read so narrowly. Nonetheless, a narrow reading of the exception is in order.

Remedial legislation, such as that prohibiting employment discrimination, is always to be read broadly, with an eye toward protecting the individuals that the particular statute seeks to protect.[113] Conversely, exceptions to such legislation are to be read narrowly. Thus, in the context of sex discrimination, the courts have read Title VII to prohibit any classification based upon sex, religion or national origin unless those attributes are essential to the performance of the job. The handicapped person is similarly situated to those protected by Title VII; his rights are subject to infringement because of characteristics determined by means outside of his control. In such instances, exclusion can only be justified by weighty considerations, and only narrow exceptions are in order.[114]

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111. *See* Dothard v. Rawlinson, 433 U.S. 321 (1977).

112. *See* notes 82-98 and accompanying text *supra*.

113. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977); Rosenfeld v. Southern Pac. Co. 444 F.2d 1219 (9th Cir. 1971); Wilson v. Sibley Memorial Hosp., 340 F. Supp. 686 (D.D.C. 1972), *rev'd and remanded on other grounds*, 488 F.2d 1338 (D.C. Cir. 1973); Button v. Rockefeller, 76 Misc. 2d 701, 351 N.Y.S. 2d 488 (Sup. Ct. 1973).

114. Such has been the case in the equal protection cases. As the Supreme Court noted in Frontiero v. Richardson, 411 U.S. 677 (1973),

> Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some reasonable relationship to individual responsibility. . . ." Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972).

Id. at 686.

Still a problem, however, is the delineation of the BFOQ exception even after it has been narrowed. This problem is manifested in *Dothard v. Rawlinson*, [115] in which the Supreme Court acknowledged the limited scope of the exception, but allowed its application nonetheless. In *Dothard*, the Court was guided by what many, including the dissent, consider to be stereotypical and paternalistic attitudes towards women.[116] The same danger exists in applying the BFOQ standard to the handicap cases.

The Courts and the litigants, therefore, would be well advised to consider in each case what the handicapped worker can do before determining that lack of a particular handicap is a bona fide qualification for the job. Complex studies of job-relatedness and validity should not be necessary in the BFOQ context, since the narrowness of the exception places a burden on the employer to clearly prove that the handicap should be exclusionary. This does not, however, eliminate the Court's obligation to examine empirically the facts of the case—the job on the one hand, and the applicant's handicap on the other—in order to determine whether the exception is appropriate.

Finally, given the limited scope of the exception, in close cases the balance should be struck in favor of the handicapped worker. Any competing interest on the part of the employer might be served, in such close cases, by a probationary period during which competence can be shown.[117]

CONCLUSION

The handicap cases should develop a specialized and unique approach to the issues of job-relatedness of employment selection criteria and bona fide occupational qualifications. Although the Title VII approach, with respect to these issues, is not applicable wholesale to the emerging body of employment discrimination law involving the handicapped, many of the principles developed under Title VII are applicable. The Title VII experience as a whole is highly instructive. Accordingly, the courts and the litigants in handicap cases are well advised to look to Title VII and its cases as a starting point when confronted with job-relatedness and BFOQ issues.

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115. *See* notes 92-98 and accompanying text *supra*.

116. Dothard v. Rawlinson, 433 U.S. at 345-46.

117. In appropriate cases, such as those under the coverage of the Rehabilitation Act of 1973, accommodation during this period and after would be required.

It can be expected that the emerging approach in the handicap cases will show a reliance upon Title VII doctrines for establishing basic principles. Such a reliance would indicate judicial sensitivity for the specific problems of the handicapped who, like other minorities, seek a fair opportunity to show their qualifications for employment and a desire to be judged by standards that accurately reflect those qualifications.