Bona Fide Occupation Qualifications and the Military Employer: Opportunities for Females and the Handicapped

Tim M. Callaghan

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BONA FIDE OCCUPATION QUALIFICATIONS AND THE MILITARY EMPLOYER: OPPORTUNITIES FOR FEMALES AND THE HANDICAPPED

I. INTRODUCTION

This article explores the hiring and job placement policies of the United States military departments in light of the concept of the bona fide occupational qualification (BFOQ). In essence a BFOQ criterion is a requisite to the actual performance of an employment task; a potential employee may be refused a position if he lacks an ability or characteristic which can be labeled as a BFOQ.

Although the study of military employment practices may induce emotional argumentation, this article avoids any conclusions based upon traditional roles of potential employees and deals with two classes of potential employees. The first class of employees to be studied is that of the female employee. It should be noted that only labor law principles shall be considered here. The author makes no effort to compare, contrast, or reconcile such principles with statutes which may limit the female role within the military.

The second category of potential employees is that of the physically handicapped worker who is excluded from military service. For the purpose of this study, a handicapped individual shall be defined as "any person who (A) has a physical impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment."

II. MILITARY OPPORTUNITIES FOR FEMALES

A. Legal Standards

In Griggs v. Duke Power Co., an action brought under Title VII of the Civil Rights Act of 1964, the Supreme Court held that "far from disparaging job classifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used measure the person for the job and not the person in the abstract." In his opinion

1 These are defined as the Departments of the Army, Navy, and Air Force, 5 U.S.C. § 102 (1970).
6 401 U.S. at 436 (emphasis added).
written for a unanimous Court, Chief Justice Burger determined that an employer may not require job applicants to take a general intelligence test and submit a high school diploma when the net effect of the requirements is to discriminate against Black applicants, and where these requirements are not indices of ability to successfully perform on the job. Burger declared that the Congressional intention was to aid in "removal of artificial, arbitrary, and unnecessary barriers to employment . . . ." Requirements which appear to be neutral on their face, but which are discriminatory in operation, must be directly related to the job applicant's ability to do the job. Additionally, the Court stated that the absence of discriminatory intent will not suffice as an excuse; the employer has the burden of demonstrating "that any given requirement must have a manifest relationship to the employment in question." This mandate has been closely followed in a series of cases heard before the lower courts.

The impact of *Griggs*, related cases, and the proposed Equal Rights Amendment has clearly been felt within the military community. The Navy's experiments with women and sea duty, the Army's gradual integration of women into previously all-male units, the co-ed officer training program now found in both the Reserve Officer Training Corps and at West Point, and female participation in parachute training serve as examples. Nevertheless, certain jobs are still classified "for males only." A look at Army policies provides a view of this situation as it currently exists for all the military departments.

Most principal occupations found within the Army are assigned a Military Occupational Specialty (MOS) number. Currently, women are

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7 *Id.* at 431.
8 *Id.* at 432.
11 In October 1978, the Army will begin to assign male and female recruits to the same battalions, where they will undergo identical training. But recruits shall still be segregated according to sex at the training company level. Briefs, 23 ARMY RESERVE MAGAZINE 2 (March-April 1977).
12 See 10 U.S.C. §§ 6015, 8549 (Supp. V 1975). However, a bill has been introduced in the Senate, which would open more doors for women. At the request of the Secretary of the Navy, it would modify 10 U.S.C. § 6015 to allow women to serve on hospital and transport ships. The Air Force would be permitted to have female pilots, navigators, and missile launch officers. More combat support positions would be open to Army females. "It will enable each woman to enhance her career, as well as to do a great service to her country. This need to open more doors to women comes from the necessity to utilize this valuable resource, as well as from the movement for social and human equality. Statement of Sen. William Proxmire on S. 1628, 95th Cong. 1st Sess. 123 CONG. REC. S 8996, 97 (daily ed. June 7, 1977).
permitted to serve in 384 of the Army's 419 MOS's. Training for both men and women is largely similar, but a significant difference lies in the area of combat training, which has been divided into "offensive" and "defensive" categories. Women have not been permitted to participate in offensive training, in accordance with the prohibition against female participation in front-line combat units and in the traditional combat roles.

Obviously the offensive/defensive dichotomy has created some difficult problems. Current Army doctrine states that women should be trained and able to defend themselves and their unit, should the enemy penetrate the defensive perimeter. Accordingly, hand-to-hand combat training is permissible, as well as training with those weapons which may be employed in the defensive role, even if those weapons have an offensive capability (such as rifles, machine guns, etc.). But since women have been limited to defensive training, certain items of military hardware have been omitted from their training.

The restriction of women to certain job classifications is not, of course, conducted solely by the military. The military employment picture merely reflects the national employment situation, where barriers of sex still remain, although they are being dismantled gradually.

Sex discrimination in employment has deep roots nurtured by the concept of romantic paternalism. This concept was originally adopted by the Supreme Court in Bradwell v. State in 1872. Romantic paternalism took the form of protective legislation aimed at shielding women from the rigors of the labor market. Legislation limiting the maximum number of hours which women could work was expressly upheld in Muller v. Oregon. Muller dealt with an Oregon statute which provided that no woman could work in certain establishments (i.e., laundries) for more than ten hours a day. The Supreme Court held that such legislation did

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13 See Getting Straight on WACs, 23 ARMY RESERVE MAGAZINE 7, 8 (Jan.-Feb. 1977).
14 Id.
15 For example, hand grenades are used primarily in the offensive role. See id. at 7.
16 With few exceptions, the concepts of romantic paternalism held sway during the first half of this century. This is the concept under which women are stereotyped as "the weaker sex" whose functions are confined to the home, while the male acts as benevolent dictator and sole breadwinner. Essentially Victorian in origin, the concept conflicts deeply with the ideal of the hardy pioneer woman who worked with her man at the plow and held a baby in one hand and a rifle in the other. It also conflicted with the reality of life for many women of the lower socio-economic classes who toiled equally hard on the frontier in the Midwest and the West, the textile mills of the East, and the plantation fields of the South.
17 83 U.S. 130, 141-42 (1872).
18 208 U.S. 412 (1908).
19 1903 Ok. Laws 148 (Feb. 19, 1903).
not violate the equal protection and due process clauses of the fourteenth amendment;\textsuperscript{20} the states have the right under their police power to establish legislation designed to safeguard the health of women because “healthy mothers are essential to vigorous offspring . . . .”\textsuperscript{21}

Seven years later, the Court again upheld such legislation\textsuperscript{22} in \textit{Miller v. Wilson},\textsuperscript{23} based upon the fact that a woman’s “physical structure and a proper discharge of her maternal functions . . . justify legislation to protect her from the greed as well as the passion of man.”\textsuperscript{24} But the Court did warn that such protective legislation could be “pushed to a wholly indefensible extreme.”\textsuperscript{25}

Protective legislation was also declared constitutional in \textit{Goesaert v. Cleary},\textsuperscript{26} a post World War II case in which the Court examined a Michigan statute which forbade a woman from tending bar unless she was the wife or daughter of the male owner.\textsuperscript{27} Although the Court noted that times were changing, it held that a legislature need not “reflect sociological insight, or shifting social standards . . . .”\textsuperscript{28} The Court also stated that women are less capable of self-defense than men.\textsuperscript{29}

On the whole, the current attitude of the courts has shifted against this type of protective legislation. This is due in part to the adoption of various statutes and regulations aimed at eliminating sex-based discrimination in employment.\textsuperscript{30} But there has also been a wholesale modification of philosophy which supports protective legislation.\textsuperscript{31}

\begin{footnotesize}
\begin{enumerate}
\item[20] 208 U.S. 420-22.
\item[21] 208 U.S. at 421.
\item[22] 1911 CAL. STATS. 437 (March 22, 1911).
\item[23] 236 U.S. 373 (1915).
\item[24] \textit{Id.} at 381.
\item[25] \textit{Id.} at 382.
\item[26] 335 U.S. 464 (1948).
\item[28] 335 U.S. at 466.
\item[29] \textit{Id.}
\item[31] Attitudes are changing as the world becomes increasingly dependent upon women in the labor force. National Industrial Conference Board, \textit{THE ECONOMIC ALMANAC 1967-68} at 29 (1967). By 1970, over 45% of the national labor force between the ages of 35 and 44 was female. \textit{UNITED STATES GOVERNMENT PRINTING OFFICE, STATISTICAL ABSTRACTS OF THE UNITED STATES}, table 333 (1971). Furthermore, certain radical feminists have had a definite impact upon American thinking. They are preparing us for a world in which reproduction is going to be only a very minor part of a woman’s life, a world in which men and women are going to have to relate to one another in ways quite removed from reproduction, both in marriage and outside it . . . . I see them as helping us to catch up with revolutions that have
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Although legislatures and courts have been busily chopping away at sex discrimination in the civilian world, this has not necessarily been the case with the military. In *Frontiero v. Richardson,* the Supreme Court did address the equal benefits issue and struck down regulations which used different presumptions in determining the eligibility of male and female soldiers for spousal dependency benefits (increased allowance for quarters). Yet the Court centered its concern only upon sex-based classifications which are made “solely for the purpose of achieving administrative convenience . . .” and employment roles were not examined.

The Court had a second chance to look at military classifications based upon sex in *Schlesinger v. Ballard.* Ballard, a male Navy officer, brought an action alleging that the Navy's mandatory discharge policies differed for male and female officers, and violated the due process clause of the fifth amendment. But the Court upheld the policy, which favored female officers, on the basis that women received fewer promotion opportunities because of their restriction from combat vessels and combat missions.

Justice Brennan was joined in his dissenting opinion by Justices Douglas and Marshall. Brennan noted that the Court's failure to examine the role restrictions placed upon women had perhaps resulted in the majority's using one gender-based regulation to justify another. Although Brennan clearly felt that the Court should have examined the duty limitations placed upon females, he did not analyze these limitations nor declare that such limitations were unconstitutional.

While the Court has failed to examine employment restrictions based upon sex which are found in the military, the military has attempted to change with the times and expand employment opportunities for women.

already occurred or are in process, with revolutions which the technologists have precipitated and which we must come to terms with.


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33 Id. at 678.
34 Id. at 690.
36 See 10 U.S.C. § 6382(a) (1970). “No person shall be held to answer . . . nor be deprived of life, liberty, or property without due process of law . . . .” Because discharge policies differed, Ballard claimed that the mandatory nature of the policy constituted a deprivation of property, on the basis that he held a property interest in continued employment. The issue of “equal protection of the law” was also raised. U.S. CONST. amend. V.
37 In *Frontiero, supra* note 32, the policy favored males.
39 419 U.S. at 511 n.1.
Clearly, there has been an across-the-board reluctance on the part of the judiciary to require the elimination of gender-based discrimination within the military. But the judicial branch is not solely responsible for this state of affairs. Except for the recent move to integrate the military academies, Congress has not demonstrated a willingness to end discrimination within the military structure. This reluctance may well be an illustration of the desire to legislatively protect women from the harsh realities of combat—a carrying over of the concept of romantic paternalism. Or perhaps Congressional sentiment could best be described by the words of the Oregon Supreme Court, which poetically declared in *State v. Hunter* (a case upholding an Oregon statute forbidding wrestling by women) that "there should be at least one island on the sea of life reserved for man that would be impregnable to the assault of women." Whatever be the reason, Congress has been slow in ordering an end to gender-based discrimination within the military. This is clearly evidenced by the *Selective Service Act*, in spite of the fact that the courts have granted some leeway to Congress. In *U.S. v. Fallon*, the Seventh Circuit held that Congress, in formulating a draft policy, was entitled to consider various factors which would both maximize efficiency and minimize the expense of raising an army, as well as avoid the disruption of important civilian functions. Presumably drafting females would be inefficient and expensive, or would constitute a disruption in civilian functions since in *Fallon*, the exclusion of females from the draft was not deemed invalid on these bases. The defendant, in contesting the U.S. draft policy, pointed out that the Selective Service Act "requires the registration of males only" and contended that "[t]his fact alone brands it as a piece of invidiously discriminatory legislation." Moreover, he argued that "[w]omen are just as capable as men at performing a wide range of useful jobs in the military, from punching typewriters to pulling triggers."

But Congress has not ignored the concept of BFOQ's within the military; the *Equal Employment Opportunity Act of 1972* does place restrictions upon military employment practices. This Act prohibits refusing to hire, classifying, segregating, and limiting employment opportunities

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41 208 Or. 282, 300 P.2d 455 (1956).
42 OR. REV. STAT. § 463.130 (1975).
43 208 Or. at 287. The court went on to bemoan female participation in other sports.
45 407 F.2d 621 (7th Cir. 1969), cert. denied, 395 U.S. 908.
46 Id. at 623.
47 Id. (quoting from Defendant's brief).
on the basis of race, color, religion, sex, or national origin.\textsuperscript{49} The Act extends this protection to employees and applicants for employment of the military departments,\textsuperscript{50} which include the Department of the Army, the Department of the Navy, and the Department of the Air Force.\textsuperscript{51} But quite possibly, the provisions of the Act were intended to extend only to the civilian employees of these departments, rather than actual military personnel, since "policing powers" are granted to the Civil Service Commission\textsuperscript{52} (and in the case of the Library of Congress, to the Congressional Librarian).\textsuperscript{53} Nevertheless, military employees of the various departments are not specifically excluded from the Act. Perhaps the better view is that military personnel are not employees of the military departments, but are employees of the United States government.\textsuperscript{54} In the Equal Employment Opportunity Act of 1972, the term employer does not include the federal government,\textsuperscript{55} although employees of executive agencies are covered by the Act.\textsuperscript{56} If military personnel are considered to be employees of the United States, rather than of the military departments, the Act could be interpreted so as to exclude military personnel from coverage under the Act.\textsuperscript{57} Nevertheless, the Department of Defense adheres to a policy of equal employment opportunity for both military and civilian employees.\textsuperscript{58}

Regardless of whether or not military personnel are covered by the Equal Employment Opportunity Act of 1972, it is clear that Congress has intended that in order for an employer to classify jobs on the basis of sex, sex must be a BFOQ.\textsuperscript{59} But when is sex a BFOQ? What guidelines


\textsuperscript{51} 5 U.S.C. § 102 (1970) (defining "military departments").


\textsuperscript{53} \textit{Id.}

\textsuperscript{54} Under this line of reasoning where a soldier is employed by the United States government, he is not a federal employee, a term which commonly describes employees of the executive branch. Instead he falls under a separate and distinct classification.


\textsuperscript{56} \textit{Id.} at § 717, 42 U.S.C. § 2000e-16.

\textsuperscript{57} Also, the "military department" wording found in the Act is lifted directly from Exec. Order No. 11478, § 6, 34 Fed. Reg. 12,985-86 (1969).

\textsuperscript{58} "Equal Opportunity and treatment shall be accorded all military members and civilian employees of the Department of Defense irrespective of their race, color, religion, sex, or national origin consistent with requirements for physical capabilities." 32 C.F.R. § 191.3(a) (1976).

\textsuperscript{59} The requirement of a particular gender for a position of employment constitutes sex discrimination unless BFOQ standards are met. The general intent of Congress has been to
can be used by the military employer to determine which roles can or cannot be denied on the basis of gender?

B. Application of Military Standards

The Code of Federal Regulations contains guidelines on sex discrimination, but generally, the BFOQ exception as to sex discrimination is interpreted narrowly. Traditional stereotypes are rejected so that refusing a position to women because women are not sufficiently aggressive, or are incapable of assembling intricate equipment, is expressly forbidden.

This limitation does have an effect on military job placement. To better understand this effect, a job classification currently denied to women must be examined, and a good source of these classifications can be found in the typical “combat” positions of any of the armed services, e.g., the infantry rifleman.

A possible reason for denying this role to women is due to the fact that the role requires aggressive action, and women are generally not as aggressive as men. But this stereotype is specifically rejected. While it is true that many women are not sufficiently aggressive to fulfill this role, a determination must be made on an individual basis as to whether or not a particular woman is “sufficiently aggressive.” Such a determination can be made through the administration of standard psychological and personality trait testing devices. Such tests do not conflict with the policy set out in Griggs v. Duke Power Co. since these tests help to measure the qualifications of a particular person for a particular job. “The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of characteristics generally attributed to the group.”

These standards are also applied in determining whether women can be considered for jobs which involve assembling and disassembling weapons and other equipment, which require a certain level of dexterity. Sufficient manual skills would be a BFOQ. But excluding persons on the basis of insufficient manual skills must be done on an individual basis and not by eliminating sex discrimination, as witnessed by Congressional passage of the proposed Equal Rights Amendment. U.S. Const. proposed amend. XXVII, submitted to the states March 22, 1972.
excluding women as a group. Thus, manual abilities should be determined by standard tests.

Tests which are sex-biased, however, are clearly not permissible. An example of sex-biased tests would be an intelligence test or personality inventory which included pictures of tools or devices, or contained technical jargon with which females as a group are generally unfamiliar.\textsuperscript{66} Such tests obviously have a disparate impact on women. Correspondingly, tests which include terms and paraphernalia which are generally unfamiliar to men, are also impermissible.\textsuperscript{67}

Where a particular job may call for a certain level of physical strength and endurance,\textsuperscript{68} the ability to lift a fifty pound weight may be deemed a BFOQ. But in determining whether or not a person is capable of lifting such a weight, the testing procedure must not discriminate against one gender by taking advantage of the particular strengths and weaknesses of muscle groups, as is characteristic of one gender. For example, if the ability to lift fifty pounds is a BFOQ, then the proper test instruction would be: "lift this fifty pound weight," \textit{not} "lift this fifty pound weight using only the arms and shoulders."\textsuperscript{69}

Another employment criterion which may tend to discriminate against women is physical size. If it is determined that the infantry rifleman must be of a certain minimum height and weight, this would be held to be discriminatory against women, since the “average” female is smaller than the average man.\textsuperscript{70} On the whole, minimum height and weight requirements are not permissible, unless they are mandated by business necessity.\textsuperscript{71} A business necessity could consist of the ability to fit into uniform sizes, or the requirement that arms be long enough to balance the standard issue rifle in the weapons arsenal, that a person be tall enough to see over the dashboard of a vehicle, or that a person be short enough to fit into the cockpit of a jet fighter. However, in a civilian case,\textsuperscript{72} a federal court ruled that a minimum weight requirement of 150 pounds, while neutral on its face, discriminated against females. Because eighty percent of all U.S.

\textsuperscript{66} [1973] 2 EMPL. PRAC. GUIDE (CCH) ¶ 6399.
\textsuperscript{67} See generally 29 C.F.R. § 1607.1-13.
\textsuperscript{68} But it should be noted that these attributes actually can be developed through proper exercise and conditioning, during the training process.
\textsuperscript{69} In Bowe v. Colgate Palmolive Co., 416 F.2d 711 (7th Cir. 1969), the court struck down a thirty-five pound weight lifting limitation which applied to women only.
\textsuperscript{70} [1973] EEOC Dec. (CCH) ¶ 6286.
\textsuperscript{71} For an enlightening discussion of the pros and cons of the necessity of a certain physical size in the area of hand-to-hand combat, see Smith v. City of East Cleveland, 363 F. Supp. 1131, 1140-44 (N.D. Ohio 1973).
females age eighteen to twenty-four cannot meet this requirement and seventy percent of U.S. males in the same age bracket can meet this requirement, the requirement was held to be discriminatory in practice.\footnote{Id. at 99-100.}

In Smith v. City of East Cleveland,\footnote{363 F. Supp. 1131 (N.D. Ohio 1973).} the district court also ruled that minimum height and weight requirements of sixty-eight inches and 150 pounds for police officers were discriminatory against female applicants.\footnote{Id. at 1136-37.}

This is \textit{not} to say that the military employer may not base its job placement process on the question of who is better suited for a job. Minimal physical standards may be established for any particular position and additional “weeding procedures” may be used to determine the best qualified applicants. Even where all of those determined to be the best qualified applicants are of one particular gender, there may be no gender-based discrimination involved. An example is where 100 persons seek the same job, fifty of whom are male. A BFOQ of the job is the ability to run two miles, carrying thirty pounds of gear, in less than eighteen minutes, and fifty persons are able to meet this criterion, twenty-five of whom are female. However, only ten positions are available and these are awarded to the ten persons with the fastest qualifying time. Even if all ten are of one gender, no gender-based discrimination is involved.

Nevertheless, three factors prevent this example from being used to explain the exclusion of females from most combat units. First, the example assumes an unrealistically high level of competition for most positions which can be classified as “combat.”\footnote{363 F. Supp. 1131 (N.D. Ohio 1973).} Secondly, once the minimal BFOQ criterion is satisfied by an applicant, additional training can usually “improve” the applicant’s performance to meet the desired level of competence. And thirdly, it is probable to the point of certainty that there are members of either sex who are more than capable of coping with any given situation. Accordingly, an across-the-board restriction from a given set of activities, for members of a particular gender, is not justifiable under the given example.

While one applicant may be better qualified for a position than another applicant, the disparity in ability must be actually demonstrated, rather than assumed. In Pond v. Brainiff Airways, Inc.,\footnote{500 F.2d 161 (5th Cir. 1974).} the Fifth Circuit looked askance both at a minimum height requirement and at a determi-
nation that a male applicant was better suited than a female for a job which required lifting heavy loads.\textsuperscript{78} The Court did not automatically recognize that an employment decision to hire a six-foot four-inch male rather than a five-foot eight-inch female, on the basis that the male was better suited for the job, comes within the BFOQ exception to discrimination. The employer did not give the applicants an opportunity to demonstrate or test their skills.\textsuperscript{79} Therefore, the case was remanded to the district court, to determine whether proper standards were actually applied.\textsuperscript{80} This principle was later supported in the Fifth Circuit opinion of Long \textit{v. Sapp},\textsuperscript{81} where the court determined that if a woman challenges an assumption of the superior physical ability of male applicants, she must be afforded an opportunity to prove her case through objective testing procedures.\textsuperscript{82}

Aside from ability to perform, it is possible that there are instances in which sex itself is a BFOQ. \textit{The Guidelines on Discrimination Because of Sex}\textsuperscript{83} (\textit{Guidelines}) merely state “that the bona fide occupational qualification should be interpreted narrowly.”\textsuperscript{84} Beyond this, the \textit{Guidelines} merely: (1) state that a BFOQ will be found “where it is necessary for the purpose of authenticity or genuineness, \textit{e.g.}, an actor or actress,”\textsuperscript{85} and (2) list what does not constitute a BFOQ. The question then arises of whether the rule of \textit{expressio unius est exclusio alterius} should be applied.

The equal employment opportunity cases have examined two areas which are limited to a particular gender: pregnancy\textsuperscript{86} and draft status.\textsuperscript{87} Although both pregnancy and eligibility for the draft are limited to one sex, the results of claims raised on these two grounds have been dissimilar.

In a case examining a bank’s refusal to hire a male applicant because his draft status made induction likely, the Equal Employment Opportunity

\textsuperscript{78} \textit{Id.} at 166.

\textsuperscript{79} \textit{Id.} at 167.

\textsuperscript{80} \textit{Id.} Braniff did not specifically assert a BFOQ defense in this case. However, the Fifth Circuit determined that the instant case came close enough to the BFOQ to require Braniff to demonstrate that its actions were covered by the BFOQ exception.

\textsuperscript{81} 502 F.2d 34 (5th Cir. 1974).

\textsuperscript{82} \textit{Id.} at 40. \textit{See also} Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.1-.14 (1975).

\textsuperscript{83} 29 C.F.R. § 1604 (1975).

\textsuperscript{84} \textit{Id.} § 1604.2(a).

\textsuperscript{85} \textit{Id.} § 1604.2(a)(2).


\textsuperscript{87} Bank’s refusal to hire male applicant due to his draft status ruled not discriminatory. [1973] EEOC Dec. (CCH) ¶ 6084.
Commission (E.E.O.C.) decided that such a refusal to hire did not constitute gender-based discrimination, even though only males were eligible for the draft. Yet on the issue of pregnancy, the E.E.O.C. has determined that a policy which only offers maternity leave “depending upon the individual circumstances surrounding the incident” is an example of sex discrimination. This position is also found within the Guidelines and has been taken by the Supreme Court. This leaves one underlying principle for the military employer: physical characteristics unique to one sex may not be used to exclude job applicants and employees from particular positions or from employment generally.

Other factors exist which arguably require maintaining a male-only status for combat roles. Probably the most important factor in this regard is that of morale. How would the American soldier react to females in the front lines? Even the military experts can only speculate here; guesses have ranged from a fear of too much interest to a thoroughly negative male reaction, and from indifference to over-protectiveness. But if standard labor law principles are to be applied here, the reaction of male troops is irrelevant, because the military employer could no more refuse to place women in certain positions due to employee preferences, than can a factory refuse to hire women because the male workers do not want to work with women.

Although the general public may not want to see women in combat units, this does not constitute acceptable grounds for such discrimination. An analogy can be drawn between military and civilian employment situations which would juxtapose the wishes of the public with the wishes of customers. Customer preference is not an excuse for discriminating on the basis of sex. Furthermore, in at least one case, the E.E.O.C. determined that an employer could not refuse to hire a female as a courier because females would not exude an adequate "security image" to customers. Thus, it appears that the wishes of the public cannot control employment policies, unless it is so determined by Congress.

88 Id.
89 See [1973] EEOC Dec. (CCH) ¶ 6084.
90 See 29 C.F.R. § 1604.10 (1975).
91 Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974). The determination of a pregnant teacher’s ability to continue teaching must be determined on an individual basis. Arbitrary “cut-off” dates designed for the administrative convenience of school boards are impermissible. Id. at 643-48.
92 29 C.F.R. § 1604.2(a)(1)(iii) (1975). “The refusal to hire an individual because of the preferences of co-workers, the employer, clients, or customers...” does not warrant the application of the BFOQ exception.
93 Id.
The courts have recognized that restricting women to certain job categories amounts to sex discrimination. *Ostapowicz v. Johnson Bronze Co.* presents the proposition that the exclusion of females qua females from certain work categories (e.g., machine operator) cannot be upheld. But the district court also recognized that employers are responsible for hostile acts of supervisory personnel where the basis of such hostility is gender. Supervisors have the power to hinder career advancement, since much of the criteria involved with the evaluation and promotion process is subjective. Accordingly, employers have an affirmative duty to police supervisory personnel in order to prevent this type of sex discrimination. While employers may not have a duty to keep co-workers from expressing or carrying out feelings of hostility toward whole genders, they do have a duty to make sure that employee advancement is not hindered because of such discrimination.

Restricting a gender from a particular employment role, however, may appear rational and yet be illegal. As the court recognized in *Cheatwood v. South Central Bell Telephone and Telegraph Co.*, stereotypes often have a reasonable basis. At least for some employment positions, it may be said that "on the average men can perform these tasks somewhat more efficiently and perhaps somewhat more safely than women." But this rationale cannot be used to exclude all members of a given class from an employment role. Employers deal with individuals, not merely with groups; generalities may not be used as an excuse for sex discrimination.

The parallel to military job classifications is obvious, for while it is conceivable that statistical evidence might bear out the generality that "most women can't," it is possible that certain individuals may be able to handle a given job.

Where a woman was denied an opportunity to become a switchman

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96 Id. at 537.
97 Id. at 536. See also Copeland v. Secretary of Labor, 414 F. Supp. 644 (D.D.C. 1976) (overly subjective evaluation criteria); Taylor v. Safeway Stores, Inc., 365 F. Supp. 468 (D.C. Colo.) aff'd in part, rev'd in part on other grounds, 524 F.2d 263 (10th Cir. 1973) (black employee discriminated against in job duties by foreman playing favorites, was unable to compete with other workers' production quotas); [1973] EEOC Dec. (CCH) ¶ 6308 (assigned females to overly difficult jobs in order to justify firings for inefficiency, or force resignations).
98 369 F. Supp. at 537. See generally Johnson v. University of Pittsburgh, 359 F. Supp. 1002 (E.D. Pa. 1972) (female instructor with virtually the same record as a male instructor was denied tenure while the male was granted tenure); [1973] EEOC Dec. (CCH) ¶ 6290 (male employees refused to assist female employee when the task required a "crew team effort").
100 Id. at 759. But see notes 102, 104 infra.
for a telephone company in *Weeks v. Southern Bell Telephone & Telegraph Co.*, the court held that despite a variety of job requirements ranging from lifting heavy loads, to twenty-four hour duty, a determination of ability to perform had to be made on an individual (rather than on a group) basis. Listing a job as strenuous did not justify an exclusion of females. And again, this holding could be applied to the military employer since even where the degree of job difficulty is greatly increased, women cannot, as a group, be excluded from a position.

Although the great majority of litigation has concerned discrimination against women, the prohibition against sex discrimination also prevents excessive allowances to women. As the Ohio Supreme Court recognized in *Jones Metal Products Co. v. Walker*, special privileges may not be given to females because they are females. Further, special work breaks, meal periods, and facilities may not be denied to male employees if they are granted to female employees.

In *Wilson v. Sibley Memorial Hospital*, the court declared that employment roles which have been traditionally “female” may not be denied to a male applicant. The plaintiff, a male registered nurse, was informed by staff nurses of the defendant hospital that he could not work for female patients. The normal assignment procedure involved a referral service, the Professional Nurses Registry, which did not discriminate in assigning nurses to patients.

However, the plaintiff was forbidden to see his assigned female patients, even though these patients could have rejected the plaintiff for any or no reason at all. This “screening” by staff prevented the plaintiff from receiving payment—which could not have been accomplished by the hospital or by the referral service. The district court held that this deliberate circumvention of anti-discrimination safeguards could not be tolerated.

C. Direct and Indirect Discrimination

Because the BFOQ exception to discrimination on the basis of sex is very narrow, and because either males or females may suffer such dis-
crimination, job assignments based on gender are likely to have two effects: direct and indirect sex discrimination. The first effect (and the more obvious one) is the direct link between sex of the employee and the employee's failure to receive a desired position which the employee is capable of filling, but which is denied to the employee on the basis of sex. For example, Alpha Aardvark Corporation employs 200 workers. Three workers are normally employed as "envelope stuffers." This is classified as a males-only position, due to the hazardous nature of the job. Arlene, a female, applies for this position, but is denied the job on the basis of sex. This is an example of direct sex discrimination.

On the other hand, Alpha Aarkvark Corporation may not deny general employment with the corporation on the basis of sex; all qualified applicants are accepted. Currently, the corporation needs ten new employees, to replace ten retiring workers. The new ten, consisting of seven females and three males, are hired as a group.

However, three of the ten retiring employees were envelope stuffers, a "males-only" position. The other seven retiring workers held jobs which were open to both men and women. Therefore, the three newly hired males are placed in envelope stuffer slots. Two of the three are happy; but one male never wanted to be an envelope stuffer, and wants another position. Yet because he is a male and males are needed as envelope stuffers, he is denied any other position. This is an example of indirect sex discrimination.

It is easy to see how both direct and indirect sex discrimination work within the military employment structure. Due to custom, necessity, or congressional mandate, the various branches of the service have denied combat roles to women—an illustration of direct discrimination—if it is assumed that sex is not a BFOQ for combat roles.

Denying these positions to women directly affects the opportunities of male recruits. The most vital military employment positions are those which are classified as combat. These positions must be filled. If women cannot fill these positions, then the missing female proportion must also come from the pool of male recruits which results in indirect sex discrimination.

Additionally, if women may not fill combat slots, then they must take non-combat positions. Therefore, there is also a disproportionate female to male ratio within the non-combat positions, thereby limiting a male's chances of obtaining non-combat roles.

If indirect sex discrimination does exist within the military, its impact is negligible, because women account for only a small percentage of military personnel. However, if the overall male to female ratio changes in the future, the impact of indirect sex-discrimination may become more significant. In the civilian sector, an analogous situation has arisen. A male employee alleged that he was assigned to duties which involved primarily physical labor, on the basis of sex, in *Utility Workers Local 246 v. Southern California Edison Co.* His employer hired substantial numbers of employees. Males were placed in physical work; females were placed in non-physical and office-work areas. The plaintiff was successful in his challenge of this employment practice. If this situation were analogized to the present placement practices which are found in the armed services, a court might be able to find that such placement practices are discriminatory.

### III. Potential Military Employment of the Handicapped

#### A. Legislative Guidelines

The thrust of recent legislative enactments and judicial determinations has been to limit an employer’s right to deny employment to handicapped job applicants. A handicapped applicant is one who “(A) has a physical or mental impairment which substantially limits one or more of a person’s major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.” Federal law provides that federal employment practices shall not discriminate on the basis of handicap. In fact, federal law demands that each department, agency, and instrumentality of the executive branch and holders of substantial government contracts implement affirmative action plans for the hiring, placement, and advancement of handicapped employees. The statute contains enforcement mechanisms whereby a handicapped employee or job applicant may file a complaint with the Department of Labor, if he believes that such a contractor has not complied with this requirement.
Congress has clearly intended to "promote and expand employment opportunities..." of handicapped individuals in its adoption of the Rehabilitation Act of 1973. United States Senator Cranston stated that employment discrimination is one of the areas which limits a handicapped individual's ability to function in society, and that therefore employment and rehabilitation go hand-in-hand.

B. The Handicapped and Military Standards

The concept of a BFOQ is as useful in determining discrimination based on handicap as it is in determining sex-based discrimination. A handicapped individual may be denied a job if the job is beyond his physical or mental capacity to perform. But all handicapped individuals may not be excluded as a group from employment, if their ability to perform is not affected by the handicap.

As is the case with employment classifications based on sex, ability to perform must be analyzed on an individual basis. Moreover, job requirements cannot be structured in such a manner as to foster or promulgate a disparate impact upon otherwise qualified handicapped job applicants.

Federal regulations issued by the Department of Health, Education, and Welfare (H.E.W.) set forth guidelines which prohibit discrimination against handicapped persons who are qualified to perform the task in question. In many respects, these regulations parallel the E.E.O.C. guidelines on sex discrimination. The H.E.W. regulations require that an employer focus upon the actual job requirements and the applicant's or employee's abilities to perform these requirements, rather than focus upon the handicap itself.

It is manifest that these regulations and the legislation which prohibit such discrimination against the handicapped do not apply to the military department in terms of policies for military personnel. Since physical fitness is a key element of military training and all branches of the service emphasize such physical training, it is easy to see that a person with a handicap could not compete in a regiment which included everything from rifflry to obstacle courses. Even stipulating that a few handicapped persons,

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124 45 C.F.R. § 84.11-18 (1975).
125 29 C.F.R. § 1604 (1975).
127 45 C.F.R. § 84.13(b) (1977).
depending upon the particular handicap, could complete basic training, it is clear that the overwhelming majority could not.

But again, if the H.E.W. guidelines were to be implemented here, the military employer would simply need to employ testing measures and devices which would "accurately reflect the applicant or employee's job skills, aptitude, or whatever other factor . . ." needed to determine whether or not the individual could perform. The H.E.W. regulations recognize that in some instances, the cost of modifying a program to accommodate handicapped employees may be excessive. Accordingly, the regulations only require that affected employers "make reasonable accommodation" to handicapped employees and applicants. Furthermore, if an employer "can demonstrate that the accommodation would impose an undue hardship on the operation of its program," the accommodation need not be made. This provision seems to exempt present military training programs from regulation coverage. It is technologically feasible to develop a training program which most handicapped "recruits" could complete and which would contain the same basic subjects as training for the non-handicapped. For example, blind recruits could learn marksmanship from special "beeping" targets; obstacle courses could be sound-coded to enable completion by blind recruits. But although this technology currently exists or could be easily developed, the cost of instituting such a program would be enormous. The additional time, equipment, and personnel necessary for this type of training would obviously impose an "undue hardship" on the military employer. Therefore, even if the H.E.W. guidelines were extended to include military personnel, the military employer would be under no obligation to include handicapped individuals in the armed forces.

Yet one of the concepts which underlies policies prohibiting discrimination against handicapped employees and applicants is that an individual who lacks the capacity to perform a relatively unimportant part of a job but has the fundamental ability to handle the job should not be precluded from that job. This dichotomy between fundamental and incidental duties was explored in Bevan v. New York State Teachers' Retirement System where a tenured school teacher became totally blind. The

128 Id.
129 Id. § 84.12.
130 Id.
131 A sound emitting baseball is currently in use to enable blind ball players to locate, catch, throw, and hit the ball. This general idea may be modified for the purpose mentioned above.
board of education then called for Bevan's retirement, pursuant to a section of the Education Law\textsuperscript{134} which permitted mandatory retirement of tenured teachers for physical or mental incapacity. The Board of Education based its decision to compel retirement upon the fact that a blind teacher could not: 1) maintain classroom discipline; 2) mark attendance rolls or grade written test papers,\textsuperscript{135} 3) supervise fire and emergency drills, and 4) perform various administrative duties.\textsuperscript{136} In rejecting the Board's action, the court declared that:

none of these disciplinary, administrative or clerical duties relates in the slightest degree to the basic qualifications or fitness to teach. These duties are incidental or peripheral; they are wholly unrelated to the essential ability to teach. True, these incidental duties must be performed. But the board, in furtherance of the fundamental policy of the State with the respect to the employment of blind teachers otherwise qualified, may easily arrange for their performance by other sighted persons, whether such sighted persons be teachers, clerks, or more mature students.\textsuperscript{137}

This appears to require that a school board must tolerate some hardship in order to accommodate handicapped persons. This practice may be applied to a variety of civilian occupations, but may not meet the military requirement that when the chips are down, all soldiers must be able to fight. This issue can only be resolved by determining the definition of "fight."

Obviously a paraplegic individual can not fill the role of infantryman, but he can cope with a variety of clerical and other positions currently listed as military occupational specialties. Blind personnel might make the best operators of sound detection devices; computer programmers need not be superb physical specimens. In short, many military positions simply do not require the physical abilities which are necessary to successfully complete basic training; at best, these abilities are "incidental or peripheral" to the actual performance of the particular duty.

The military, however, presents an insurmountable obstacle to some handicapped persons by requiring that all complete basic training. The discipline, morale, and orientation to the military way of life and doing things (which are taught and instilled during basic training) are fundamental to successfully filling a military position.

\textsuperscript{134} N.Y. Education Law §§ 507(6), 511 (McKinney 1973).

\textsuperscript{135} What the court did not discuss in this case was the possibility of devising alternate procedures (\textit{e.g.,} punch card tests and attendance sheets) which would enable the plaintiff to actually perform these duties. But the court did challenge the Board to develop them. 74 Misc. 2d at 448, 345 N.Y.S.2d at 926.

\textsuperscript{136} Id.

\textsuperscript{137} Id.
This apparent conflict may nevertheless be resolved. All employment positions should have a list of necessary physical and mental pre-requisites, or BFOQ’s. These BFOQ’s must in fact be “good faith”; they must not have a disparate impact upon handicapped individuals. In other words, the listed prerequisite must be inextricably linked to the actual job which is to be performed. Enlistees and inductees would then be subjected to the standard battery of mental and physical tests and examinations. Personnel could then be offered a list of options open to them, according to their abilities and in a nondiscriminatory manner. Actual job placement would, of course, be subject to the needs of the service at that time.

It would be possible to establish a procedure whereby those individuals who would be capable of performing certain duties, but would not be capable of completing basic training, would be presented with their specialty options and sent to a separate special initial training facility. At such a facility, handicapped individuals would receive the “basics” of military life, minus the physical rigors of basic training. Exercise periods would be geared to the abilities of each individual, and military courtesy, custom, drill, and the wearing of the uniform would be instructed. Modified self-defense courses and instruction in various military subjects would be included, but weapons training would be omitted. Upon completion of such special training, handicapped individuals would then be assigned to their specialty school, in order to attend courses on the same basis as non-handicapped personnel. This system would produce soldiers capable of contributing to the national defense, even if not capable of combat duty. In this manner, the military employer could obtain an adequate supply of military personnel, and also avoid discriminating on the basis of handicap.

IV. CONCLUSION

Although the concept of the BFOQ can theoretically be extended to the military employer, substantial obstacles must be overcome before the military departments can actually become equal opportunity employers. Judicial and legislative impediments to the integration of females into the combat arms must be overcome. Until this is accomplished, the military employer is powerless to effectuate the non-discrimination standards which the very same courts and legislatures have promulgated at the civilian level.

Before handicapped individuals can be afforded employment within the military, serious administrative and economic barriers must be removed.

138 Cf. 401 U.S. 424.
139 45 C.F.R. § 84.13(a) (1977).
140 Id. § 84.13(b).
The requirement of basic training must be made more flexible and cost-effective training procedures should be developed.

The key to efficient, effective, and non-discriminatory job placement is accurate testing—testing which measures the ability of each individual to perform the particular task in question. Accurate testing should dispel discrimination and avoid bureaucratically prescribed incompetence since only those who are capable would be placed in a given position, and those who are capable would not be denied a position for an arbitrary reason.

Nevertheless, the question remains of whether some segment of the population should be protected from the rigors of military life, and more specifically, from combat. But in any technologically developed society, there are no non-combatants. Every phase of life is affected by the realities of warfare. Accordingly, the question is moot—society is incapable of totally protecting any group from combat. So the new, as yet unanswered question becomes: are we to share the risks as equals?

TIM M. CALLAGHAN