IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-422

E. C. DOTHARD, et al.,

Appellants,

v.

BRENDA M. MIETH, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF FOR THE APPELLEES

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JURISDICTION

This is an action to enjoin the use of minimum height and weight requirements for prison guards and the exclusion of women from contact positions in male penitentiaries as sexually discriminatory in violation of Title VII of the Civil Rights Act of

1964, as amended, 42 U.S.C. § 2000e. It was filed in the United States District Court for the Middle District of Alabama, Northern Division. A three-judge court (Rives, Circuit Judge, and Johnson and Varner, District Judges) was properly convened pursuant to 28 U.S.C. § 2281.

In a unanimous opinion, issued on June 8, 1976, the District Court held that both the height and weight minimums and the exclusionary policy violated Title VII and entered an order accordingly.

Notice of appeal was filed on July 23, 1976, and on November 29, 1976, this Court noted probable jurisdiction. Jurisdiction is conferred by 28 U.S.C. § 1253.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Equal Employment Opportunity Act of 1972, which extended the benefits of Title VII to state and local government employees, is a valid exercise of congressional power under the Commerce Clause and/or the enabling clause of the

Fourteenth Amendment.

2. Whether minimum height and weight requirements, which have a substantial disparate impact on women and are not shown to be job related, violate Title VII's prohibition against sex discrimination in employment.

3. Whether, on the evidence presented, the exclusion of women from contact guard positions in male penitentiaries, embodied in Administrative Regulation 204, is within the permissible scope of the bona fide occupational qualification exception to Title VII.

STATEMENT OF THE CASE

Upon being rejected for consideration as a prison guard solely because she was five pounds under a statutorily imposed 120-pound weight minimum, Appellee Dianne K. Rawlinson initiated this class action, contending that the 5'2", 120-pound minimum height and weight requirements discriminated against women in violation of Title VII.[1/] While the suit

was pending, Defendant Board of Corrections promulgated Administrative Regulation 204, which provided that women would not be hired for contact positions in Alabama's male prisons and men would not be hired for contact positions in Alabama's lone female prison. Plaintiff Rawlinson then amended her complaint to include an allegation that Regulation 204 violated Title VII.

The District Court, relying on *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), held that plaintiff established a prima facie case of sex discrimination by showing that the height and weight requirements eliminated approximately 41 percent of the women and less than one percent of the men, shifting the burden to defendants to prove that the height and weight criteria were job related.

The only testimony offered by defendants in support of the height and weight standards was Defendant Locke's unsubstantiated assertion that

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1/ Appellee Rawlinson had complied with the procedural requirements necessary to bring a claim under Title VII. (J.S. 32.)

they were related to strength. Plaintiff, on the other hand, submitted testimony from two expert witnesses that height and weight requirements bear absolutely no relationship to the ability to perform as a prison guard. Noting that more reliable methods were available to the State if it was really interested in testing strength, the District Court held that defendants failed to prove that the height and weight restrictions were job related and enjoined their use.

Defendants did not deny that Regulation 204 discriminated on the basis of sex. Instead, they sought to justify the discrimination by relying on the bona fide occupational qualification exception to Title VII, contending that women could not perform adequately as guards in male prisons and that their presence would infringe on inmate privacy. The District Court held that the burden of demonstrating a bfoq required "some objective, demonstrable evidence that women cannot perform the duties associated with the job." (J.S. 34.) Since the State employed women in contact positions at all-

male institutions other than penitentiaries, the court held that this burden was not met. In addition to the fact that the use of women in contact positions elsewhere in the system was "totally inconsistent" with the State's expressed concern for inmate privacy, the District Court found that any legitimate concerns about inmate privacy could be handled by means short of denying women the job, such as promulgating selective work responsibilities. Accordingly, the court enjoined the enforcement of Regulation 204.

SUMMARY OF ARGUMENT

This case raises issues of importance relative to the construction of Title VII's prohibition against sex discrimination. As a threshold matter, however, appellants now urge that Title VII, as applied to state and local government employees, is unconstitutional as beyond Congress' power. Apart from the fact that this question is not properly before the Court since it was not raised in the

District Court nor in the jurisdictional statement, *see, e.g., J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), there is no merit to appellants' contention.

The 1972 Amendments to Title VII are within Congress' authority under the Commerce Clause and the enabling clause (§ 5) of the Fourteenth Amendment. Since Congress' power over commerce is clearly broad enough to encompass state and local government employees, its expansion of Title VII's coverage is supported by the Commerce Clause unless it unconstitutionally infringes on state sovereignty. *Cf. National League of Cities v. Usery*, ____ U.S. ____, 49 L.Ed.2d 245 (1976). The power to discriminate invidiously not being a legitimate "attribute of state sovereignty," the Title VII Amendments do not transgress an affirmative limitation on Congress' power and are thus valid under the Commerce Clause.

The legislative history of the 1972 Amendments indicates that Congress primarily relied on its power under § 5 of the Fourteenth Amendment. That amendment is the "centerpiece" of "the basic alteration in our federal system wrought in the

Reconstruction era." *Mitchum v. Foster*, 407 U.S. 225, 238-9 (1972). Accordingly, this Court consistently has recognized the impact of the Fourteenth Amendment on federal-state relationships, most recently in holding that "the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provision of § 5 of the Fourteenth Amendment." *Fitzpatrick v. Bitzer*, ____ U.S. ____, 49 L.Ed.2d 614, 621 (1976). (Citation omitted.)

In upholding the constitutionality of § 4(e) of the Voting Rights Act of 1965, this Court explicitly rejected the argument that legislation under § 5 prohibiting the enforcement of state law may be sustained only if the judicial branch determines that the state law violates the Equal Protection Clause. *Katzenbach v. Morgan*, 384 U.S. 641, 648-9 (1966). *Katzenbach* thus forecloses any suggestion that the application of Title VII to the states may be upheld only to the extent that Title VII prohibits that which is unconstitutional. The 1972 Amendments are "appropriate" under § 5 if there is a rational basis

for Congress' conclusion that the amendments were necessary to further the aim of the Fourteenth Amendment. Since Congress had before it ample evidence of widespread discrimination by state and local government employers, its expansion of Title VII's coverage is rationally based and within the power granted to it by § 5 of the Fourteenth Amendment.

Turning to the Title VII claims,[2/] appellee submits that the District Court was correct in holding that the substantial disparate impact of the height and weight requirements on female applicants established a prima facie case of sex discrimination under Title VII. As this Court announced in *Griggs*, *supra*, "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply

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[2/] Since the District Court correctly did not reach the constitutional claims because it disposed of the case on statutory grounds, *see, e.g.*, Rosado v. Wyman, 397 U.S. 397, 402 (1970); Ashwander v. TVA, 297 U.S. 288 (1936), appellee has not briefed the constitutional questions. Should this Court reverse the District Court's resolution of the statutory claims, the case should be remanded for consideration of the constitutional issues. *See, e.g.*, Goldfarb v. Virginia State Bar, 421 U.S. 773, 791 (1975); Burns v. Alcala, 420 U.S. 575 (1975).

the motivation." 401 U.S. at 432. (Emphasis in the original.) That *Griggs* correctly interpreted Congress' intent is clear from the legislative history of the 1972 amendments, wherein Congress expressly approved of *Griggs* because of its focus on the absence of predictiveness of job performance when disparate impact was shown.[3/]

Once a prima facie case is made out, the burden shifts to the employer to prove that the disqualifying employment practice has a "manifest relationship to the employment in question." *Id.* Here the employer's sole contention concerning the job relatedness of the height and weight requirements was that they were related to strength. The State, however, failed to prove that strength would result in greater safety or efficiency on the job or that height and weight actually measures or predicts strength. In addition, plaintiff's experts testified that height and weight bear no relationship to the duties of a prison guard.

3/ *See, e.g.*, H.R. Rep. No. 238, 92d Cong., 1st Sess. 8, 21 (1971); S. Rep. No. 415, 92d Cong., 1st Sess. 14 (1971); 117 Cong.Rec. 31961 (1971) (Remarks of Rep. Perkins).

The height and weight restrictions were thus revealed to be precisely the "artificial, arbitrary, and unnecessary barriers to employment" which *Griggs* forbids. *Id.* at 431.

Regulation 204 is a sex-based classification because it uses sex as the sole definitional factor in creating two classes: one to work in male prisons and the other in the female prison.[4/] Defendants attempted to justify this discrimination by relying on the bfoq exception to Title VII. As this Court has noted, "Any exemption from . . . humanitarian and remedial legislation must . . . be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress." *Phillips Inc. v. Walling*, 324 U.S. 490, 493 (1942).

This Court has not had occasion to interpret the bfoq exception, but it is clear that the applicability of the exception is "a matter of evidence."

4/ In any event, the Regulation has a discriminatory effect since it excludes women from nearly 77 percent of all the correctional counselor positions within the Alabama Prison System. (J.S. 32.)

Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971). Where, as here, an employer attempts to come within the exemption by asserting that women are physically unable to perform the duties associated with the job, the employer should be required to offer factual data to support the assertion and should be required to show that it is not possible or practical to assess the physical capabilities of female applicants on an individual basis. The evidence in this case falls far short of the requisite showing.

Nor does the evidence establish that the need for inmate privacy brings the job within the bfoq exception. Appellee does not dispute the suggestion that there are certain duties associated with the job, such as strip searches, which normally require like-sexed guards for their performance. This fact standing alone, however, does not qualify the job for the exception. There must be a showing that it is implausible to separate the sexual from the non-sexual aspects of the job. The State offered no evidence at all that it could not resolve the problem as the District Court suggested, *i.e.*, by selective

work responsibilities. Moreover, as this Court has said with respect to the censorship of prisoner mail, "[T]he legitimate governmental interest in the order and security of penal institutions justifies the imposition of certain restraints on inmate correspondence." *Procunier v. Martinez*, 416 U.S. 396, 412-13 (1974). Surely the governmental interest in equal employment opportunities justifies certain limited infringements on inmate privacy.

The decision below should be AFFIRMED.

ARGUMENT

I.

INTRODUCTION

As this Court has observed, the legislative history relative to the inclusion of sex discrimination in Title VII of the Civil Rights Act of 1964 "is notable primarily for its brevity." *General Electric Co. v. Gilbert*, ____ U.S. ____, 45 L.W. 4031, 4036 (December 7, 1976). It is also true, however, that "over the past decade, Congress has

manifested an increasing sensitivity to sex discrimination." *Frontiero v. Richardson*, 411 U.S. 677, 687 (1973). This increased sensitivity is clearly reflected in the House Report on the Equal Employment Opportunity Act of 1972,[5] which amended Title VII in an effort to strengthen its effectiveness. Noting that "there exists a profound economic discrimination against women workers," the Report states:

> Such blatantly disparate treatment is particularly objectionable in view of the fact that Title VII has specifically prohibited sex discrimination since its enactment in 1964. . . . Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination. [6]

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[5] Pub.L. 92-261, 86 Stat. 103 (March 24, 1972).

[6] H.R. Rep. No. 238, 92d Cong., 1st Sess. 4-5 (1971). Other enactments which reflect Congress' cognizance of pervasive sex discrimination include Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 et seq., which prohibits sex discrimination in any "education program or activity receiving federal financial assistance;" the 1976 Amendments to the Omnibus Crime Control and Safe Streets Act, Pub.L. 94-503, 90 Stat. 2418 (Oct. 15, 1976), which permit the cutoff of federal funds to any state or local agency found to be engaged in sex discrimination; and the Equal Rights Amendment. An ERA had been

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It is thus too late in the day to contend that Congress' inclusion of sex discrimination in Title VII represents a frivolous addition to an otherwise historic legislative enactment. To the contrary, Congress has recognized that sex discrimination in employment is a social and economic problem of nationwide proportions,[7] and Title VII is the vehicle it has chosen to combat the problem.

Appellee's position with respect to both the height and weight requirements and Regulation 204 is consistent with the congressional purpose behind Title VII's prohibition of sex discrimination. Congress has expressed a desire to improve female

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introduced in every Congress since 1923 but seldom brought to the floor. In 1971 it passed the House by a vote of 354-23 and on March 22, 1972, the Senate passed it by a vote of 84-8. U.S. Dept. of Labor, *1975 Handbook on Women Workers*, Bull. 297, pp. 361-62.

[7] Between 1950 and 1974 the number of women in the nation's civilian labor force doubled. By 1974, they accounted for two-fifths of all workers with the vast majority of them working because of economic need. *Handbook, supra*, at 9, 124. Their disadvantageous position within the work force is well-documented. For example, in 1974 women who worked full time had median weekly earnings of $124, about 61 percent of the $204 earned by men. *Id.* at 126.

employment by requiring employers to use sex blind standards in hiring and assignments, except in narrowly defined circumstances. A substantial disparate impact on female applicants triggers the application of Title VII because it shows that women's job opportunities are being restricted by the hiring standard in question. Since an employer's interest in a non-job-related standard is minimal or nonexistent, it is proper at that point to require the employer to prove job relatedness. If he cannot do so, it means that he has been unduly restricting the pool of applicants, thus thwarting the congressional desire to maximize human resources.

In addition to fostering optimum use of our labor resources, Congress sought through Title VII to establish the principle that an applicant is to be evaluated on the basis of individual capability. Appellee and the class ask no more than when an employer attempts to deviate from this principle by invoking the bfoq exception, he be held to a burden of proof which prevents the exception from swallowing the rule.

II.

THE CONSTITUTIONALITY OF CONGRESS' EXPANSION OF TITLE VII TO STATE AND LOCAL GOVERNMENT EMPLOYERS IS NOT PROPERLY BEFORE THE COURT.

The long-standing principle that this Court will not consider issues neither raised in the court below nor presented in the jurisdictional statement is embodied in the rules of this Court[8/] and in its decisions.[9/]

That principle should be invoked with respect to the constitutionality of the extension of Title VII's coverage, which appellants did not raise before the District Court or in their jurisdictional statement but are now asking this Court to decide.[10/]

8/ Rule 15(1)(c) provides in pertinent part: "Only those questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the Court." Rule 40(1)(d)(2) admonishes that "the brief may not raise additional questions or change the substance of the questions already presented in [the jurisdictional statement]."

9/ *E.g.*, Adickes v. Kress & Co., 398 U.S. 144, 147 (1970); J.I. Case v. Borak, *supra*; Lawn v. United States, 355 U.S. 339, 363 (1958); General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, 179 (1938).

10/ Brief for Appellants at 16-29.

The salutary reasons behind the existence of the policy are especially apparent when the issue urged upon the Court concerns the constitutionality of a major Act of Congress. Apart from the fact that all constitutional questions should be presented with clarity and definiteness,[11] a requirement necessarily lacking when the lower court has not considered, much less decided, the issue, the United States has not had an opportunity to argue the question of Title VII's constitutionality as provided by 28 U.S.C. § 2403.[12]

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[11] *Cf.* Rescue Army v. Municipal Court, 331 U.S. 549, 568 (1947), where the Court in discussing its policy of strict necessity in disposing of constitutional issues, stated: "The same policy has been reflected continually not only in decisions but also rules of court and in statutes made applicable to jurisdictional matters, including the necessity for reasonable clarity and definiteness, as well as for timeliness, in raising and presenting constitutional questions."

[12] 28 U.S.C. § 2403 provides as follows: "In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to

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Under these circumstances, this Court should proceed directly to the merits of the Title VII claims presented herein.

III.

THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, WHICH EXTENDED THE BENEFITS OF TITLE VII TO STATE AND LOCAL GOVERNMENT EMPLOYEES, IS A VALID EXERCISE OF CONGRESSIONAL POWER UNDER THE COMMERCE CLAUSE AND/OR THE ENABLING CLAUSE OF THE FOURTEENTH AMENDMENT.

A.

THE COMMERCE CLAUSE

"It is established beyond peradventure that the Commerce Clause of Art I of the Constitution is a grant of plenary authority to Congress." *National League of Cities, supra,* at 251. It is

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intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality."

also clear that "[e]ven activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States. . . ." *Fry v. United States*, 421 U.S. 542, 547 (1975).

It cannot be seriously argued then that Congress' power over the labor market is not broad enough to embrace state and local government employees. Unless Congress has transgressed an affirmative limitation on the exercise of its power, its expansion of Title VII's coverage is a valid exercise of congressional authority under the Commerce Clause.13/

Congress' extension of the minimum wage and maximum hour provisions of the Fair Labor Standards Act to employees of states and their political subdivisions was challenged in *National League of Cities*.

13/ The legislative history indicates that in enacting the 1972 Amendments to Title VII to extend coverage to the States as employers Congress exercised its power under § 5 of the Fourteenth Amendment. Fitzpatrick v. Bitzer, *supra*, at 620 n.9. There also are references to the Commerce power. *E.g.*, 118 Cong. Rec. 1070, 1839 (1972).

The challengers, while admitting that the FLSA Amendments were within the scope of the Commerce Clause, contended that they were nonetheless an invalid restriction on state sovereignty. This Court said:

> We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress . . . . One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime. 49 L.Ed.2d at 253-4.

The Court went on to hold that these "determinations are 'functions essential to separate and independent existence,' so that Congress may not abrogate the States' otherwise plenary authority to make them." *Id.* at 254. (Citations omitted.)

The States' power to discriminate invidiously is hardly a legitimate "attribute of sovereignty," let alone a "function essential to the States' separate and independent existence." The reasoning employed in *National League of Cities* to invalidate

the FLSA amendments thus has no application to the Title VII amendments.[14/]

B.

THE FOURTEENTH AMENDMENT

The Fourteenth Amendment is by far the most prolific source of limits on the States.[15/] In addition to the self-executing impact of the Amendment, Congress is given the power under § 5 "to enforce, by appropriate legislation," the Amendment's provisions. The question here is whether Congress' expansion of Title VII's coverage to include state and local government employers is "appropriate legislation" to enforce the Equal Protection Clause.[16/]

[14/] *Cf.* Christensen v. Iowa, 45 L.W. 2086 (N.D. Ia., August 4, 1976), holding the equal pay provisions of the FLSA applicable to state employers notwithstanding *National League of Cities*. *Accord*, Brown v. County of Santa Barbara, 45 L.W. 2351 (C.D. Cal., January 14, 1977).

[15/] G. Gunther and N. Dowling, *Constitutional Law* 786 (8th ed. 1970). The Amendment is the "centerpiece" of "the basic alteration in our federal system wrought in the Reconstruction era." Mitchum v. Foster, *supra*.

[16/] United States v. New Hampshire, 45 L.W. 2087

This Court already has upheld the award of money damages and attorney's fees against a state government found to have violated Title VII, holding that "the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." *Fitzpatrick v. Bitzer*, *supra*. The propriety of the application of the substantive, as well as the remedial, provisions of Title VII to state governments follows from this and other decisions of the Court.

Almost one hundred years ago, in examining the reach of congressional power under § 5, this Court said: "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality against State denial or invasion, if not prohibited, is brought within the domain of Congressional power." *Ex parte Virginia*, 100 U.S. 339, 345-6 (1880).

More recently, this Court said, "By including

§ 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause, Art I, § 8, cl 18." *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966). Accordingly, *Katzenbach* held that the formulation of the reach of the Necessary and Proper Clause established in *M'Culloch v. Maryland* was the measure of what constitutes "appropriate legislation" under § 5 of the Fourteenth Amendment:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional. 4 L.Ed. 579, 605 (1819).

Applying this standard, *Katzenbach* sustained the constitutionality of § 4(e) of the Voting Rights Act of 1965 as a valid exercise of Congress' power under the enforcement clause of the Fourteenth Amendment. In so doing, the Court explicitly held that an independent judicial determination of the unconstitutionality of the state law precluded

by Congress was not required to uphold the congressional enactment. In other words, the fact that a violation of Title VII may not in each instance make out a violation of the Fourteenth Amendment,[17] does not render Title VII's application to state employers beyond Congress' power under the Fourteenth Amendment.[18] As this Court said in *Katzenbach*:

> A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the "majestic generalities" of § 1 of the Amendment. 384 U.S. at 648-9.

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[17] *See* Washington v. Davis, ____ U.S. ____, 48 L.Ed.2d 597 (1976).

[18] This is not to suggest that Congress' power under § 5 is unlimited. In Oregon v. Mitchell, 400 U.S. 112 (1970), the Court held, by a 5-4 vote, that § 5 did not give Congress the authority to lower the voting age for state elections. That congressional enactment, however, is clearly distinguishable from Title VII. For one thing, the Court emphasized the power of States to

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With respect to the statute before it, which had the effect of enfranchising certain Puerto Rican voters, the *Katzenbach* Court held that Congress rationally could conclude that it was an appropriate means of remedying discriminatory treatment in public services and was thus within Congress' power to enact.19/

The test for determining the validity of Title VII's application to state governments, then, is whether Congress could conclude that Title VII was an appropriate means of remedying discriminatory treatment in public employment.20/ Congress had before it ample evidence of the presence of employment discrimination in state and local governments.21/

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determine age qualifications for voting in their own elections. Secondly, the legislation was not aimed at a "discrete and insular minority." 400 U.S. at 296 (separate opinion).

19/ As an alternative ground for upholding the statute, the Court said that Congress had a rational basis for determining that the statute was necessary to eliminate an invidious discrimination.

20/ Under the alternative ground, *supra*, n.19, the question would be whether Congress could conclude that the state practices at which Title VII was aimed constituted invidious discrimination.

21/ *See, e.g.*, S. Rep. No. 415, 92d Cong., (cont'd)

It also had evidence that "the single largest group of employees in the nation are those employees who are employed by State, County and local governments"22/ and that "[f]ew of these employees . . . are afforded the protection of an effective Federal forum for assuring equal employment opportunity."23/ Moreover, it hardly could be argued that Title VII represents an unwarranted federal intrusion upon any legitimate state interests since the denial of employment on the basis of "race, color, religion, sex, or national origin" does not promote the States' legitimate interest in assuring competent and responsible public employees.

Since Congress rationally determined that "employees of State and local governments are entitled to the same benefits and protections in equal employ-

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1st Sess. (1971). Indeed, one study upon which Congress relied indicated that "employment discrimination in State and local governments is more pervasive than in the private sector." *Id.*

22/ 118 Cong. Rec. 1393 (1972)(Testimony of William H. Brown III).

23/ S. Rep. No. 415, *supra*.

ment as the employees in the private sector of the economy,"[24/] the expansion of Title VII's coverage was within the reach of congressional authority under § 5 of the Fourteenth Amendment.

IV.

MINIMUM HEIGHT AND WEIGHT REQUIREMENTS, WHICH HAVE A SUBSTANTIAL DISPARATE IMPACT ON WOMEN AND ARE NOT SHOWN TO BE JOB RELATED, VIOLATE TITLE VII'S PROHIBITION AGAINST SEX DISCRIMINATION IN EMPLOYMENT.

A.

THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFF ESTABLISHED A PRIMA FACIE CASE OF SEX DISCRIMINATION UNDER TITLE VII BY SHOWING THAT THE MINIMUM HEIGHT AND WEIGHT REQUIREMENTS HAVE A SUBSTANTIAL DISPARATE IMPACT ON WOMEN.

In *Griggs v. Duke Power Co.*, *supra*, this Court held that the requirement of a high school diploma or of passing a standardized general intelligence test as a condition of employment violated Title VII where each requirement operated to disqualify

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[24/] *Id.*

blacks at a substantially higher rate than white applicants. In so doing, the Court rejected the lower court's conclusion that a subjective test of the employer's intent should govern and that, because there was no showing of a discriminatory purpose in the adoption of the diploma and test requirements, there was no violation of Title VII:

> [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability. . . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question. 401 U.S. at 432. (Emphasis in the original.) [25/]

[25/] That the *Griggs* rationale applies to all forms of prohibited discrimination under the Act and not just racial discrimination is clear from several of the opinion's passages: "What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial *or other* impermissible classification." 401 U.S. at 431. "Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that *race, religion, nationality, and sex* become irrelevant." *Id.* at 436. (Emphases supplied.)

Thus, although the Court recently has held that a discriminatory purpose is necessary to establish a constitutional violation,[26] the test under Title VII is one of impact and not intent.[27] The correctness

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[26] Washington v. Davis, *supra*.

[27] Neither Washington v. Davis, *supra*, nor General Electric Co. v. Gilbert, *supra*, repudiates *Griggs'* "effect only" test. In *Washington* the Court said, "Because the Court of Appeals erroneously applied the legal standards applicable to Title VII cases in resolving the constitutional issue before it, we reverse its judgment. . . ." 48 L.Ed.2d at 606. In *Gilbert* the Court said, "[O]ur cases recognize that a prima facie violation of Title VII can be established in some circumstances upon proof that the *effect* of an otherwise facially neutral plan or classification is to discriminate against members of one class or another." 45 L.W. at 4034. (Emphasis in the original.) Moreover, in concurring opinions, two members of the six-man majority in *Gilbert* specifically reaffirmed the continuing vitality of *Griggs*. *Id.* at 4037. (Concurring opinions of Justices Stewart and Blackmun.) The principle of stare decisis, as it applies to matters of statutory construction, also strongly counsels in favor of *Griggs'* continued vitality. As Mr. Justice Brandeis said, "Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule be settled than that it be settled right. . . . This is commonly true even where the error is a matter of serious concern, providing correction can be had by legislation." Burnet v. Coronado Oil and Gas Co., 285 U.S. 393, 406 (1932) (dissenting opinion). Here Congress not only has not seen fit to correct the rule of law announced in *Griggs*, it has expressly approved it. *See* n.30, *infra*, and text thereto.

of *Griggs'* holding that intent is not required to establish a prima facie violation of the Act is abundantly clear.

Section 706(g), 402 U.S.C. § 2000e-5(g), provides in pertinent part: "If the Court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . , the Court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, ..." The lower courts consistently have interpreted this to mean that Title VII requires only an intention to engage in the challenged practices, not an intention to use those practices to discriminate,[28] and the legislative history

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[28] Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, 1006 (9th Cir. 1972); Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1201 (7th Cir. 1971), *cert. denied*, 404 U.S. 991 (1971); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 250 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971); Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980, 996 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

supports this view.[29]

Even more important, Congress, in revising Title VII in 1972, expressly endorsed the use of the "effect only" test enunciated in *Griggs*, noting the "increasingly complex" "forms and incidents of discrimination" that "may not appear obvious at first glance."[30] Moreover, the Conference Report on

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[29] "The express requirement of intent is designed to make it wholly clear that inadvertent or accidental discrimination will not violate the title or result in entry of court orders." 110 Cong. Rec. 12724 (1964)(Remarks of Sen. Humphrey). Senator Dirksen introduced an amendment proposing that only willful discrimination be prohibited: "The words 'willful' and 'willfully' as ordinarily employed, mean nothing more than the person, of whose actions or default the expressions are used, knows what he is doing, intends what he is doing, and is a free agent. . . . The terms are also employed to denote an intentional act . . . as distinguished from an accidental act. . . ." 110 Cong. Rec. 8194 (1964). Although his amendment was defeated, Senator Dirksen was the co-author of the bill that ultimately passed and his view of intention no doubt prevailed in the final version.

[30] *See* H.R. Rep. No. 238, 92d Cong., 1st Sess. 8 (1971).

the 1972 Amendments to Title VII states:

> In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII. 118 Cong. Rec. 7166.

Griggs' "effect only" test is thus consistent with clearly expressed congressional intent. The only question is whether it was correctly applied in the instant case.

The District Court held that plaintiff established a prima facie case by showing that when the height and weight restrictions are combined, they disqualify approximately 41 percent of the women in the United States between the ages of 18-79 compared to less than one percent of the men. (J.S. 32.) Understandably, appellants do not deny that this satisfies the "markedly disproportionate impact" required by *Griggs*.[31] They contend only that the

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[31] The Court has not numerically defined the showing required to prove a "markedly disproportionate impact." In *Griggs*, however, census statistics showed that while 34% of white males had completed high school only 12% of black makes had done so, 401

statistical proof fails because it does not show comparative results, *i.e.*, the effect of the height and weight restrictions on actual applicants. As one commentator has noted, however:

> A self-defining "test" such as height is easily ascertainable by anyone considering applying for the position . . . . Unlike failure to pass an aptitude or physical agility test or interview, the certainty of success or failure with regard to a height standard can be pre-determined by would-be applicants. Thus, almost all of the individuals who actually make application will most likely be drawn from that group which collectively meets or is very close to meeting the height standard.32/

In other words, minimum height and weight requirements do not discriminate solely against applicants who are not hired, but also against all who learn of the requirements and do not apply

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U.S. at 430 n.6, which is a lesser disparity than that shown in the case *sub judice*.

32/ Note, *Height Standards in Police Employment and the Question of Sex Discrimination: The Availability of Two Defenses for a Neutral Employment Policy Found Discriminatory Under Title VII*, 47 So.Cal.L.Rev. 585, 599 (1974).

because they fail to meet them.33/ Since the impact of the requirements on potential employees cannot

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33/ This fact illustrates the correctness of the District Court's conclusion that the waiver provision contained in the statute did not negate the operative discriminatory effect of the height and weight standards. The court found that the Board of Corrections had "no standard procedure to inform the applicant of his or her right to request a waiver." (J.S. 30.) Since potential applicants had no way of knowing that the requirements could be waived, their very existence would discourage a person who knew of the requirements and failed to meet them from ever applying. Although the Director of the Alabama Peace Officers Standards and Training Commission testified that either an individual applicant or the hiring agency could request a waiver (A. 165), the record shows that Appellee Rawlinson was never notified to that effect. Her rejection letter stated, "Since you do not meet the minimum weight requirements . . . , we regret that it was necessary to turn down your application . . . ." No mention was made of the fact that she could seek a waiver. (Pl. Ex. 17; R. 400, 1056; J.S. 30.) Moreover, the District Court found that the Board of Corrections had never requested a waiver of the height and weight requirements. (J.S. 30.) Finally, the evidence is surely adequate to support the District Court's finding that the "waiver provided by the statute has developed into a remarkably informal and subjective administrative procedure" that "hardly comports with fundamental fairness." (J.S. 41-2.)

be discerned by searching the employer's records, the proper approach is to measure the at-large percentage against the height and weight criteria at issue.[34/]

The District Court having correctly held that plaintiff made out a prima facie violation of Title VII by showing that the height and weight requirements have a substantially disproportionate impact on women, the burden shifted to the State to prove that the requirements have a "manifest relationship to the employment in question." *Griggs, supra,* at 432.

34/ The fact that the height and weight requirements disqualify 41% of the female population and only 1% of the male is thus sufficient to establish a prima facie case. Moreover, in the instant case the existence of a prima facie violation was bolstered by proof that while females comprise 37% of Alabama's labor force in the 20-44 year age bracket, they occupy only 13% of the correctional counselor positions in the entire Alabama prison system and only 4% of the correctional counselor positions at the all-male penitentiaries. (J.S. 31-2.) In addition, until 1974 no females were hired for correctional positions in other than the female prison. (A. 107, 289.)

B.

THE DISTRICT COURT CORRECTLY HELD THAT DEFENDANTS FAILED TO MEET THEIR BURDEN OF PROVING THAT THE HEIGHT AND WEIGHT REQUIREMENTS ARE JOB RELATED.

When this Court ruled that a disqualifying employment practice must be shown to be job related in order to survive a Title VII challenge, it said, "The touchstone is business necessity." *Griggs, supra,* at 431. Clearly, then, it is not enough that the employer simply articulate some reason for the existence of the practice. He must offer proof that the practice is necessary to safe and efficient job performance. In the present case the employer made no such showing.

The Director of the Alabama Peace Officers Standards and Training Commission, the body charged with administering the height and weight standards, testified that he had no idea how 5'2" and 120 pounds were determined to be appropriate limits.[35/]

35/ *Cf. Griggs, supra,* at 431: "Both [the diploma and test requirements] were adopted . . . without meaningful study of their relationship to job performance ability."

(A. 164.) He further testified and the District Court found that the Commission has never obtained the services or advice of experts in the field of law enforcement as to the pertinence of the height and weight standards.[36] (A. 165, J.S. 40.) In fact, the Commission has never reviewed or even discussed the 5'2", 120 pounds limits.[37] (A. 163, J.S. 40.)

The only testimony the defendants did offer in support of the job relatedness of the height and weight requirements was the unsubstantiated assertion of Defendant Locke that the requirements were related to strength.[38] (A. 114.) Apart from the fact that

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[36] Under the statute "the Commission has the power to obtain the services and advice of experts in the field of law enforcement for the purposes of aiding the Commission in its studies, considerations, reports and recommendations, and the adoption of standards, rules and regulations." (A. 165.)

[37] The statute provides that "the Commission has the power to review from time to time the minimum standards hereinafter described for applicants for and appointees as law enforcement officers." (A. 161.)

[38] Appellants' statement that "[t]he court below apparently assumed that the entire burden of justifying the act was upon the shoulders of Commissioner Locke" (Brief for Appellants at 32) amounts to an admission that they not only failed to offer any other evidence to support the height and weight (cont'd)

defendants failed to prove that physical strength was a necessary requirement for effective job performance, they did not establish that height and weight either measures or predicts strength. Even assuming, *arguendo*, that strength is a facet of effective job performance and that height and weight bear some relationship to strength, defendants did not justify their 5'2", 120 pounds cutoffs.[39] The District Court said, "[W]e are unconvinced that a person below an arbitrarily defined level would invariably lack the necessary strength to perform the required tasks."[40] (J.S. 40.)

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requirements, but also that Locke's testimony was inadequate to sustain their burden of proof.

[39] Indeed, if there were merit to Defendant Locke's "bigger is better" rationale, it is strange that the Board of Corrections did not elect to raise the minimum height and weight requirements for prison guards, as the Department of Public Safety elected to do with respect to State Troopers.

[40] The District Court also noted that "[i]f strength is an important qualification for a prison guard, then the Board of Corrections should adopt a test for its applicants that does in fact measure strength." (J.S. 41.)

While defendants failed to offer any expert testimony in support of the height and weight requirements, plaintiff "submitted testimony from two expert witnesses that height and weight have absolutely no relationship to the duties performed by a correctional counselor."41/ (*Id.*)

Far from being job related, the height and weight requirements were thus revealed to be "artificial, arbitrary and unnecessary barriers to employment" forbidden by *Griggs*. 401 U.S. at 431.

41/ Appellants state that one of these experts, Mr. Raymond Nelson, "agreed that the job was sufficiently physical to require some limitation on size," citing pp. 55-56 of his deposition. (Brief for Appellants at 44.) An examination of that portion of Warden Nelson's testimony reveals that he had reference to a hypothetical person standing four feet tall and weighing seventy-five pounds. (A. 211.)

V.

ON THE EVIDENCE PRESENTED, THE EXCLUSION OF WOMEN FROM CONTACT GUARD POSITIONS IN MALE PENITENTIARIES, EMBODIED IN ADMINISTRATIVE REGULATION 204, IS NOT WITHIN THE PERMISSIBLE SCOPE OF THE BONA FIDE OCCUPATIONAL QUALIFICATION EXCEPTION TO TITLE VII.

A.

THE EXCLUSION OF WOMEN FROM CONTACT GUARD POSITIONS IN MALE PENITENTIARIES, EMBODIED IN REGULATION 204, VIOLATES TITLE VII UNLESS IT IS WITHIN THE PERMISSIBLE SCOPE OF THE BFOQ EXCEPTION.

It is clear that "[plaintiff], who seek[s] to establish discrimination, [has] the traditional civil litigation burden of establishing that the acts [she] complains[s] of constituted discrimination in violation of Title VII" and that "[a]bsent a showing of gender-based discrimination, as that term is defined in *Geduldig*, or a showing of gender-based effect, there can be no violation of § 703(a)(1)."42/

42/ General Electric Co. v. Gilbert, *supra*, at 4034 n.14, 15.

Appellants now argue that Regulation 204 does not violate Title VII because, while it prohibits women from working in contact positions in male penitentiaries, it also excludes men from contact positions in the female prison. There is no merit to this contention.

Geduldig v. Aiello, 417 U.S. 484 (1974), involved a claim that California's exclusion of pregnancy-related disabilities from its insurance program constituted sex discrimination.[43] In rejecting the claim, this Court said:

> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups -- pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. 417 U.S. at 497 n.20.

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[43] *Geduldig* arose under the Fourteenth Amendment. A similar claim, grounded on Title VII, was rejected in General Electric Co. v. Gilbert, *supra*.

There is no "lack of identity" between the excluded jobs and "gender as such" under Regulation 204. The Regulation divides potential employees into two groups -- male and female.

Moreover, as *Geduldig* recognized, even the lack of sex-based discrimination as such does not end the analysis, should it be shown "that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other." *Id.* In the instant case, the District Court found that "Regulation 204 is the administrative means by which the board's policy of not hiring women as correctional counselors in contact positions in all-male penitentiaries has been implemented" (J.S. 25) and there is ample evidence in the record to support this finding.[44]

Finally, plaintiff clearly has demonstrated

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[44] *See, e.g.*, A. 128, 134. In this connection it is worth noting that Alabama has even seen fit to employ a male *warden* at its lone female prison. (A. 283.)

a gender-based discriminatory effect resulting from the operation of Regulation 204. The District Court found that of the total number of correctional counselors hired by the Alabama Prison System, 77 percent are employed in the four all-male penitentiaries.45/ (J.S. 32.) Since the vast majority of these jobs involve contact with inmates, Regulation 204 operates to exclude women from nearly 77 percent of the available guard positions.

Since plaintiff has met her burden of proving that Regulation 204 constitutes sex discrimination in violation of Title VII, the Regulation cannot stand unless it is within the scope of the Act's bfoq exception.

B.

THE BFOQ EXCEPTION MUST BE NARROWLY CONSTRUED.

As this Court has stated with respect to the

45/ By contrast, only 26, or 6%, of the 435-member guard force, are employed at the all-female prison. (J.S. 26.)

Fair Labor Standards Act:

> Any exemption from such humanitarian and remedial legislation must . . . be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people. *Phillips Inc. v. Walling, supra.*

A narrow construction of Title VII's bfoq exception is supported by both the statutory language and the legislative history, as well as by lower court decisions and EEOC guidelines.

In pertinent part § 703(e) provides as follows: "It shall not be an unlawful employment practice for an employer to hire and employ employees, . . . on the basis of . . . sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, ..." Close scrutiny of the language of the exception compels the conclusion that it should be construed narrowly. As one commentator has

said:

> [T]he sentence contains several restrictive adjectives and phrases: it applies only "in those certain instances" where there are "bona fide" qualifications "reasonably necessary" to the operation of that "particular" enterprise. The care with which Congress has chosen the words to emphasize the function and to limit the scope of the exception indicates that it had no intention of opening [an] enormous gap in the law 46/

The same conclusion is gleaned from the legislative history. Judging by the few examples offered where sex would be a bfoq, Congress saw the exception as a limited one. For example, Senators Clark and Clifford, the floor managers of the Act, submitted an interpretative memorandum of Title VII which stated: "This [bfoq] exception is a limited right to discriminate on the basis of religion, sex, or national origin where the reason for the discrimination is a bona fide occupational qualification. Examples of such legitimate discrimination would be . . . the preference of a professional baseball team for male players." 110 Cong.Rec. 7213 (1964). Similarly, very few examples of sex as a bfoq were cited during the floor debate. *Id.* at 2549-50.

Moreover, as noted earlier, the Conference Report on the 1972 Amendments to Title VII states: "In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII." 118 Cong. Rec. 7166. In making this statement, Congress presumably was aware that the courts had interpreted the bfoq exception very narrowly.47/

Finally, a narrow construction of the bfoq exception is consistent with the guidelines of EEOC.48/ Starting with the proposition that "the

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46/ White, *Women in the Law*, 65 Mich.L.Rev. 1051, 1103 (1966).

47/ *E.g.*, Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (7th Cir. 1971); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir. 1971); Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228 (5th Cir. 1969).

48/ While this Court has held that EEOC guidelines are entitled to "great deference" in construction of the Act, *Griggs*, *supra*, at 433-4, the Court, in deciding *Gilbert*, *supra*, refused to follow the EEOC (cont'd)

bona fide occupational qualification exception as to sex should be interpreted narrowly," the guidelines provide in pertinent part:

> (1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:
>
> (i) The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general. . . .
>
> (ii) The refusal to hire an individual

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guideline in question there. In so doing, the Court cited Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944), where it was said: "The weight of [an agency guideline] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." The EEOC guideline before the *Gilbert* Court "[did] not receive high marks when judged by the standards enunciated in *Skidmore*," 45 L.W. at 4036, because it was not a contemporaneous interpretation of Title VII (first having been promulgated in 1972) and because it conflicted with earlier pronouncements of the agency. Moreover, as the Court noted, "The EEOC guideline . . . stands virtually alone." *Id.* The guideline at issue here suffers from none of these defects. It was issued on November 24, 1965, and its pertinent provisions have never been contradicted by the agency. *See* 29 CFR § 1604.1 (1966). Far from "standing alone," the guideline is consistent with other indicia of the proper interpretation of the bfoq exception.

> based on stereotyped characterizations of the sexes. . . . The principle of non-discrimination requires that individuals be considered on the basis of any characteristics generally attributed to the group.
>
> (iii) The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers . . . . 29 CFR § 1604.2(a).

Against this background, the District Court's determination that sex is not a bfoq for the job of prison guard is manifestly correct.

C.

DEFENDANTS DID NOT MEET THEIR BURDEN OF PROVING THAT WOMEN ARE UNABLE TO PERFORM THE DUTIES ASSOCIATED WITH THE JOB.

In attempting to defend Regulation 204 as within the bfoq exception, defendants primarily relied on the contention that "women would not be able to perform adequately and safely within the setting of an all-male penitentiary." (J.S. 43.)

The District Court held, as a matter of law, that "labeling a job as 'strenuous' and then relying on the stereotyped characterization of women will

not meet the burden of demonstrating a bfoq" and that "there must be some objective, demonstrable evidence that women cannot perform the duties associated with the job." (J.S. 34.) The Court's conclusion is clearly consistent with congressional intent and with EEOC guidelines. *See* pp. 44-49, *supra*. To permit an employer to rely on sexual stereotypes in place of factual data would allow the exception to swallow the rule.[49/]

[49/] This Court consistently has refused to accept sexual stereotyping as a justification for statutory classifications that distinguish between males and females when such statutes have been challenged under the Equal Protection Clause. Summarizing these decisions, the Court recently stated: "[I]ncreasingly outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas' were rejected as loose-fitting characterizations incapable of supporting state statutory schemes that were premised upon their accuracy. In light of the weak congruence between gender and the characteristic or trait that gender purported to represent, it was necessary that the legislatures choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered generalization actually comported to fact." Craig v. Boren, ____ U.S. ____, 45 L.W. 4057, 4059 (December 20, 1976). (Citations omitted.)

Appellee would urge further that the employer be required to show that it is not possible or practical to assess the physical capabilities of female applicants on an individual basis. Title VII provides a foundation in law for the principle of non-discrimination. "The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group." 29 CFR § 1604.2(a)(1)(ii). Thus, even if it is correct to assume that *some* women would be physically unable to perform a given job, that should not be a permissible basis for excluding *all* women from consideration unless the employer can show that it is impossible or impractical to evaluate each female applicant individually. This is particularly true where, as here, it is safe to assume that some men are physically unable to perform the job in question.

Judged by these standards, the evidence presented here fails to establish that sex is a bfoq. At the outset, it should be noted that

defendants offered no evidence as to women's asserted lack of ability other than their own and their employees' testimony. Much of their evidence thus amounts to nothing more than employer "preferences."[50] Such preferences do not, under 29 CFR § 1604.2(a)(1)(iii), warrant the application of the bfoq exception and are no substitute for objective, demonstrable evidence.

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[50] *E.g.*, "If I am going to go down here into a riotous situation, I want a male with me." (Locke Deposition, A. 151.) The impropriety of relying on employers' preferences or subjective doubts is illustrated by the experience of Raymond Nelson, one of plaintiff's expert witnesses. Mr. Nelson had 17 years of correctional experience before assuming his position as Warden of the Metropolitan Correctional Center (A. 178), during which time he had never utilized women as correctional officers in a male correctional facility (A. 183). He testified that he had "personal doubts" about using women when he started his job at Metropolitan: "I had some concerns as to what kind of positions they could work in with men. I was concerned about whether they could work isolated on a unit . . . and work there by themselves. I was concerned about whether they could work the shifts . . . . I was concerned about them working in an open dormitory . . . . And, I was concerned about them working in our isolation unit." *Id.* He now says about his female officers, who perform the same duties as their male counterparts with the exception of strip searches, "The performance of the women is very satisfactory and you cannot compare them as one sex to another." (A. 185.) His "very strong feelings" of six months before "have proven not to be too valid." (A. 187-188).

Moreover, the testimony clearly reveals that defendants' doubts about the ability of women to perform the work involved are based in large part on impermissible stereotypes. When Defendant Locke was asked why women were limited to non-contact positions, he replied:

> Because there is a basic difference in the -- between a female and a male, which renders her less capable of physically subduing or protecting herself or subduing an inmate, . . . and also . . . her mere physical presence, in my opinion, . . . would incite trouble and there is a sexual connotation which should go without saying. She is a sex object. (A. 111.)

At other points in his testimony, Defendant Locke relied on "the general opinion of the public toward a woman, a mother image vs. the male" (A. 144); "the mental attitude that the male has, his male ego vs. the female" (A. 147); and "the superior feeling that a man has, historically, over that of a female." (A. 153.) Similarly, Bill Gilmore, Director of the Frank Lee Youth Center, explained why a woman cannot work effectively thusly: "[The male inmate] recognizes probably softness on her

part to start with. It is synonymous with your mother-father situation. Often times we will argue and sometimes can get away with more with our mothers. But when your father is involved, you tend to go ahead and fall in line earlier," adding, "I think most of [the inmates] have . . . a certain feeling about the role of a female and where her function is in society. I think this is something that they share with most males." (A. 291-292.)

The defendants also sought to rely on "[t]he overcrowding, violence, and other deplorable conditions [in Alabama's prisons] that led to the court order in *James v. Wallace.*" (J.S. 43.) *James v. Wallace*, 406 F.Supp. 318 (M.D. Ala. 1976), was tried and decided by Judge Frank M. Johnson, Jr., one of the members of the three-judge court in the case *sub judice.*[51/] The court below was thus intimately

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[51/] It might be noted that the court order in James v. Wallace is going to result in substantial improvements in the Alabama Prison System, a fact which defendants readily admitted. (A. 120-121.) Among other things, the prison administrators were ordered to implement a classification system, 406 F.Supp. at 333, and to hire additional guards. *Id.* at 335. Appellants' reliance on Warden Nelson's (cont'd)

familiar with conditions in Alabama's prisons, a factor which accords special weight to its determination that those conditions do not dictate the exclusion of women as guards.[52/]

The District Court found that the State "employ[s] females in contact positions at all-male institutions other than the four large penitentiaries. . . . who perform the identical duties of their male colleagues, with the exception [of] naked searches and frisks . . . ." (J.S. 43.) The court regarded the satisfactory performance of women at the other male institutions[53/] as persuasive

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response to a "hypothetical about the use of women" (Brief of Appellants at 52) is thus misplaced because the hypothetical does not take into account the changes in Alabama's prisons pursuant to the court order.

[52/] *Cf.* Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 621 n. 20 (1974), where the Court refers to the "salutary principle that great weight should be accorded findings of fact made by district courts in cases turning on peculiarly local conditions and circumstances."

[53/] At one of the all-male institutions a female was on patrol alone in a dormitory three nights a week and had been for 8-9 months, with no resultant security problems. (A. 299.) The Director of

evidence that women could perform adequately in the male penitentiaries. Appellants' assertion that the court failed to consider the difference between supervising "inmates of proven adaptation to society" versus "those of vicious propensities in a penitentiary setting" (Brief of Appellants at 52-53) is groundless since, as noted above, the District Court possessed intimate knowledge of Alabama's penitentiaries and their inmates.

The correctness of the District Court's holding that a bfoq was not established is further supported by the testimony of plaintiff's expert witnesses. As discussed. *supra*, n.50, Mr. Raymond Nelson, who has twenty years' experience in the corrections field (J.S. 40) and presently supervises female guards in a male maximum security facility (A. 179-180),

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another all-male institution testified that one of the two female guards under his supervision "is a good employee." (A. 270.) The District Court found that his opinion that women do not perform as well as men "seems in large measure attributable to the performance of one female correctional counselor under this supervision," and noted, "This is no reason, . . . that all women cannot adequately perform." (J.S. 43.)

testified that "[t]he performance of the women is very satisfactory and you cannot compare them as one sex to another. I would say, if you were comparing sex, there is no difference."[54/] (A. 185.) Mr. Robert Sarver, an experienced prison administrator who is personally familiar with the Alabama Prison System (A. 73, 79-80) testified that there is no reason why women should not be hired and assigned as correctional officers in the Alabama system on an equal basis with men. (A. 84.)

The evidence thus fails to establish that defendants' assertion that women are unable to perform adequately and safely in an all-male penitentiary, actually comports to fact. Moreover, to the extent that some women may not be able to perform the duties associated with the job, defendants

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54/ Warden Nelson's testimony directly contradicts defendants' contention that female guards are a disruptive factor and do not command the respect of male inmates. He testified that "[t]he reaction of inmates [to female guards] is generally positive" (A. 186) and that "the inmates are almost responding without command from the woman detail officer." (A. 213.)

made no showing that it is impossible or impractical to assess the capabilities of female applicants on an individual basis.55/

Appellants state, "Notwithstanding the obvious failing of plaintiff's case . . . , the court below enjoined the enforcement of Regulation 204." (Brief of Appellants at 52.) The burden of proving a bfoq was on defendants, not plaintiff, and it is they who failed to prove their case.

D.

DEFENDANTS DID NOT ESTABLISH THAT THE NEED FOR INMATE PRIVACY BRINGS THE JOB WITHIN THE BFOQ EXCEPTION.

As a secondary ground in support of Regulation 204 defendants advanced the prisoners' right of privacy. In addition to the fact that the use of women in contact positions elsewhere in the system was "totally inconsistent" with the State's

55/ Even Tony Sewell, Director of the Mobile Work Release Center, testified that women should be hired on the same basis as men "if they can establish their ability to have control." (A. 267.)

expressed concern for inmate privacy, the District Court found that "this tension between the individual's right to employment without regard to his or her sex and the inmate's right to privacy can be resolved by selective work responsibilities among correctional officers rather than by selective job classifications."56/ (J.S. 44, 45.)

Again the District Court properly construed the bfoq exception, giving due regard to the plain import of the statutory language and the intent of Congress.57/ The use of the word "necessary" in

56/ After stating that "[t]he only concession to the Board's practical concerns was that the Department of Corrections could use selective work responsibilities among correction officers to preserve the privacy rights of inmates," appellants aver, "[N]o hint is given as to how this could be accomplished . . . if not through a regulation just such as 204." (Brief of Appellants at 53.) This is patently absurd since Regulation 204 does not provide for "selective work responsibilities" but rather totally excludes women from consideration for the job.

57/ The District Court's resolution of this issue is also consistent with this Court's decisions involving prisoners' rights. As this Court has said, "[T]he fact that prisoners retain rights under the [Constitution] in no way implies that these rights are not subject to restrictions imposed by the nature of the regime to which they have been lawfully

(cont'd)

§ 703(e) commands that, where a less restrictive alternative is available short of denying women the job, the court require the employer to avail himself of the alternative. Further, as one commentator has written:

> There [exists] a wide range of jobs which require a multitude of duties, only some of which demand a particular sex for their performance. For such positions, the need for one sex to perform a particular duty is insufficient in itself to qualify for the [bfoq] exception. Were this not the case, employers could too easily avoid the strictures of section 703(a) by so defining their jobs as to include at least one duty capable of fulfillment

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committed. . . . In sum, there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application." Wolff v. McDonnell, 418 U.S. 539, 556 (1974). The use of selective work responsibilities represents a "mutual accommodation" between the objective of promoting equal employment opportunities and the inmates' right to privacy. *See also* Procunier v. Martinez, 416 U.S. 396, 412-13 (1974), where the Court said with respect to the censorship of prisoner mail, "[T]he legitimate governmental interest in the order and security of penal institutions justifies the imposition of certain restraints on inmate correspondence." Surely the governmental interest in equal employment opportunities justifies limited infringements on inmate privacy.

> by only one sex. If an employer can establish that sex is essential to a particular duty, a second level of inquiry should focus on whether it is plausible to require the employer to separate the sexual from the nonsexual aspects of the job.58/

The establishment of a bfoq in situations where, as here, the job has sexual and nonsexual aspects, is thus a two-step process: first, the employer must identify those duties which can only be performed by one sex; then he must show that it is not plausible to separate such duties from those that can be performed by both sexes.59/

In the case *sub judice* defendants in effect admitted that the only duty which requires a male guard is the performance of strip searches -- since

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58/ *Developments in the Law - Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv.L.Rev. 1109. 1183 (1971).

59/ Given the employer's superior knowledge of the job's duties, it would seem proper that the burden be on him to show that it is not plausible to separate the sexual from the nonsexual. If this Court holds, however, that the burden should be on plaintiff to prove that it is plausible to separate the duties, plaintiff here has met that burden.

it is the only duty from which they presently restrict those female guards whom they employ in contact positions in the all-male non-penitentiaries.[60] (J.S. 43.)

The fact that women are so restricted now is evidence that it is plausible to separate this duty from the others. Moreover, the District Court found that "only a small percentage of the correctional counselor work force is involved in conducting systematic strip searches." (J.S. 45.) The four

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[60] Six of the sixteen guards at the all-male Frank Lee Youth Center are females. (J.S. 44.) The court found that "[t]he toilet and shower facilities at this institution are communal and open like those in the large penitentiaries. Duties of these women counselors include walking through the dormitories, making body counts during normal hours and after lights are out, making inspection rounds through the shower room area even during use, and . . . participating in shakedowns that involve frisking and searching the bodies of inmates." *Id.* In any event, the decision below gives the defendants latitude to establish other "selective work responsibilities" in addition to the performance of strip searches. (J.S. 46.) For example, defendants could choose to prohibit female guards from conducting latrine inspections. This aspect of the job could be separated easily, since defendants testified that such inspections occur only "once a day." (A. 105.)

all-male penitentiaries, to which Regulation 204 applies, are Holman Prison, Kilby Corrections Facility, Fountain Correction Center, and Draper Correctional Center. (J.S. 21.) Defendant Locke testified that no systematic strip searches are conducted at either Holman or Kilby. (A. 102, 105.) At Fountain he estimated that only 5-7 guards out of a total of 18-20 perform systematic strip searches and at Draper only 4 out of 18-20.[61] (A. 104.)

The feasibility of separating the sexual from the nonsexual duties of a prison guard is further established by plaintiff's expert testimony. Warden Nelson testified that the only job function not performed by his female guards is the conduct of strip searches and that "this has not presented a problem." (A. 184.) When asked, "From the standpoint of good prison administration, . . . is it . . . possible to restrict the duties of the women,

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[61] "Systematic" strip searches are those which are conducted every day on a regular basis. (A. 103.) "Periodic" strip searches take place only "once every ten days" on an average. *Id.*

as your situation with respect to strip searches, and still utilize women so they perform an effective function within the institution?" Mr. Nelson responded in the affirmative. (A. 219.)

Since the legitimate concern for inmate privacy can be alleviated by procedures short of denying women the job, the District Court was correct in refusing to apply the bfoq exception. The correctness of its decision finds further support in the testimony that "the presence of women contributes to the normalization of the prison environment which has an advantageous psychological effect upon the prisoners." (J.S. 44.) As the District Court found, a recent policy statement by the Federal Bureau of Prisons states: "The Bureau of Prisons is committed to the goal of normalization as a part of improving the correctional facilities. This integration of staff of both sexes into all institutions will promote this development."[62/] *Id.*

62/ Federal Prison System, Policy Statement No. 3713.7, January 7, 1976.

CONCLUSION

For the reasons herein stated, the District Court's holding that both the height and weight requirements and Regulation 204 violated Title VII's prohibition against sex discrimination should be AFFIRMED, and the injunction against their enforcement should continue in force.

Respectfully submitted,

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