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NOTES

TELEVISION NEWSCASTERS AND THE BONA FIDE OCCUPATIONAL QUALIFICATION: A JUSTIFIED EXCEPTION TO TITLE VII

Title VII of the Civil Rights Act of 1964¹ states that it is unlawful for an employer "to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."²

It is not unlawful, however, for an employer to employ an individual "on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a *bona fide occupational qualification* reasonably necessary to the normal operation of that particular business or enterprise."³ The bona fide occupational qualification ("BFOQ") is, therefore, a limited exception to the Title VII prohibition against discrimination in employment on the basis of sex.⁴

This Note will explore the issues that arise in connection with Title VII and the BFOQ exception in the context of the television news anchor person. In particular, it will examine the role Title VII should play in management decisions regarding the hiring of talent for television news programming.

I. STATEMENT OF THE PROBLEM

Television news is a business, the profits of which often help to support a station's entire operation. "In fact," says Barbara Matuson, au-

1. 42 U.S.C. § 2000(c) (1982).

2. *Id.* § 2000(c)-2(a)(1).

3. *Id.* § 2000(c)-2(c)(1) (emphasis added).

4. This "limited right to discriminate," is explicitly allowed for preferences (such as those of consumers or audiences) only when they involve "authenticity or genuineness," as exemplified by the employment of an actor or actress. *See*, 110 CONG. REC. 7213 (1964) (remarks of Representatives Multer and Green), EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2 (a)(2) (1983).

thor of *The Evening Stars: The Rise of the Network News Anchor*, "revenues from local news are the life blood of most stations, accounting for their largest source of income by far."⁵

Advertisements produce these revenues, and the cost of these advertisements is based in large part on the ratings of the program with which the ad runs.

Two private companies, Arbitron and Nielson, measure audience size or "ratings," issuing ratings several times a year in a publication known in the industry as a "ratings book" or simply a book. The great majority of advertising dollars is based on the . . . ratings. A small change in the . . . ratings can mean a substantial increase or decrease in station revenues.⁶

As the ratings of a show fall, the price of advertising on that show falls accordingly. If a station cannot keep its ratings up, it stands to lose a great deal of money. With local news being the "lifeblood" of the station, revenue drops occurring in that department have the greatest impact. Therefore, it is imperative that a station develop an anchor team to maintain high ratings or make frequent changes in an attempt to raise ratings.

Implementing Title VII's prohibitions against sexual discrimination in employment in the television newscasting field, a field that is, in essence, entertainment,⁷ places much too heavy a burden on stations' attempts to keep their ratings, and thus their revenues, as high as possible.

Title VII's constraints, as they currently stand, are vague and uncertain.⁸ Whether television newscasters fall under a BFOQ exception is also uncertain.⁹ In light of these uncertainties, television station management must make important, and usually quick, employment decisions without a complete understanding of their legal consequences. It is impossible to predict whether hiring a particular newscaster would lead to a lawsuit for discrimination, and, if so, what the result of such a lawsuit would be.

This Note will suggest an equitable and certain solution to this problem. But before proceeding to this proposal, it will examine the history and current state of Title VII's prohibitions and exceptions.

5. L.A. Times, Aug. 14, 1983, pt. 4, at 5.

6. Defendant's Brief at 4, *Craft v. Metromedia, Inc.*, 572 F. Supp. 868 (W.D. Mo. 1983).

7. See *infra* notes 50-55 and accompanying text.

8. See *infra* notes 9-19 and accompanying text.

9. No case has ever ruled on this question expressly. Christine Craft, a Kansas City newscaster, sued the management of her employer network for sexual discrimination, claiming she was fired because she was "too old, too ugly, and not deferential to men." Judge Stevens ruled that, based on the facts in the case, there was no sexual discrimination. See *Craft v. Metromedia, Inc.*, 572 F. Supp. 868, 882 (W.D. Mo. 1983).

II. LEGISLATIVE HISTORY OF TITLE VII

The pervasive view is that sex was added as a protected class to Title VII for the purpose of defeating the bill on the House floor by making it unacceptable (and even laughable) to some of its supporters.¹⁰ Norbert A. Schlei, Assistant Attorney General in charge of the Justice Department's Office of Legal Counsel during 1963, wrote:

On the House floor, Title VII was amended *by its enemies* to add sex as a prohibited basis of discrimination. The amendment, offered by Judge Howard Smith of Virginia, then chairman of the Rules Committee, was adopted by a majority most of whose members voted against the legislation as a whole.¹¹

Representative Green, a proponent of the bill who feared that Congress would not pass an over-amended bill,¹² argued that since the primary purpose of Title VII was to prevent employment discrimination against blacks, Congress should not add "sex" without first holding extensive hearings on possible employment-related biological differences between men and women.¹³ Despite this plea, the House did not hold hearings, and passed both the sex amendment¹⁴ and the bill.¹⁵

The belief that the amendment was proposed for ulterior motives, and the fact that the House did not hold hearings as to its implications has led to an almost overwhelming belief that the inclusion of "sex" in Title VII was not terribly important to the Act's ultimate purpose. At least one court has expressed this belief in stating that "Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications."¹⁶ What implications were intended, however, remain entirely unclear.

After Smith's amendment was passed, several Representatives sug-

10. See Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and their Implication for the Issue of Comparable Worth*, 19 DUQ. L. REV. 453 (1980); Smith, *The Law and Equal Employment Opportunity: What's Past Should Not be Prologue*, 33 INDUS. & LAB. REL. REV. 493 (1980); Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 TEX. L. REV. 1025 (1977); *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109 (1970-71).

11. Schlei, *Foreword* to B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* at xi-xii (1976) (emphasis in original). The *Congressional Record* shows the Smith amendment was agreed to by a vote of 168 to 133, but does not identify the voters by name. 110 CONG. REC. 2584 (1964). It is mathematically possible that a majority of the 168 Representatives who voted for the amendment were among the 130 who voted against the civil rights bill. See *id.* at 2804-05; Gold, *supra* note 9, at 453 n.2.

12. See C. BIRD, *BORN FEMALE* 1-7 (1968).

13. 110 CONG. REC. 2584 (1964).

14. *Id.*

15. *Id.* at 14,511.

16. *Willingham v. Macon Tel. Publishing Co.*, 507 F.2d 1084, 1090 (5th Cir. 1975).

gested the inclusion of "sex" in other sections of Title VII as well.¹⁷ Representative Goodell of New York, for example, proposed adding the word "sex" to the section providing for the BFOQ exception.¹⁸ Senator McClellan proposed an amendment stating that an unlawful employment practice would occur where an employer fails or refuses "to hire any individual in those certain instances where the employer involved believes, on the basis of substantial evidence, that the hiring of such individual would not be in the best interests of the particular business or enterprise involved, or for the good will thereof."¹⁹ Although Senator McClellan's amendment did not pass,²⁰ the proposal exemplifies the vagueness and uncertainty of the Title VII legislation, particularly with respect to the issue of sex-based discrimination. Congressional intent regarding the inclusion of sex based discrimination seems haphazard at best. The term "sex" appears to be included or excluded sporadically throughout Title VII, rather than purposefully placed. As such, its meaning remains unclear.

In light of the vagueness of Title VII, the primary responsibility for policymaking in the area of sexual discrimination is shifted to the judiciary. Given the uncertainty of the legislative intent on this issue, the courts are given significant freedom to interpret the law as they see fit. The following section will examine the various patterns of Title VII interpretation presently existing.

III. EXISTING LAW

In general, commentators have offered two polarized views on how to deal with sexual discrimination and Title VII. The "liberal" view expressed by Freed and Polsby interprets the statute's legislative intent to allow employers to claim a BFOQ exception upon a showing of substantial evidence that the hiring of a person of a particular sex would affect their economic interests.²¹ The "orthodox" view, on the other hand, interprets the legislative intent very narrowly to allow employers to claim a BFOQ exception only in the few expressly stated situations.²²

According to Freed and Polsby, the orthodox view "pictures the law of sex discrimination in employment as congruent with the law of race discrimination, or as nearly so as is possible given a statute that

17. Sirota, *supra* note 9, at 1028.

18. 110 CONG. REC. 2718 (1964).

19. *Id.* at 13,825.

20. *Id.* at 13,826.

21. See Freed & Polsby, *Privacy, Efficiency, and the Equality of Men and Women: A Revisionist View of Sex Discrimination in Employment*, 1981 A.B.F. RES. J. 585.

22. See Brilmayer, Hekeler, Laycock & Sullivan, *Sex Discrimination in Employer Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI. L. REV. 505 (1980) [hereinafter cited as Brilmayer].

provides a BFOQ exception for sex classifications but not for race classifications."²³ If this is true, "one of two conclusions is required: either the courts and commentators have been wrong in recognizing a BFOQ in many instances, or the BFOQ concept is broader than the orthodoxy recognizes."²⁴ Freed and Polsby argue further for a broad interpretation of the BFOQ concept, claiming economic efficiency is a sufficient bona fide occupational qualification to permit employer discrimination based on sex upon a showing of substantial evidence that the hiring of a particular sex for a particular position provides greater economic efficiency than hiring the other.²⁵ This economic efficiency justification could be based upon consumer preferences, such as a customer preference for an attractive Playboy bunny;²⁶ or, as this Note will argue, an audience preference for an attractive female television news anchorperson.

Under the orthodox view, as expressed by commentators²⁷ and the Equal Employment Opportunity Commission ("EEOC"),²⁸ the BFOQ exception is extremely narrow,²⁹ and efficiency considerations can never justify exclusions from employment being imposed solely on the basis of sex.³⁰ Employment decisions may not turn upon customers.³¹

The liberal view argues that the congruence of the law in the areas of sexual and racial discrimination is subject to qualification.³² This point is admitted even by those who adopt the orthodox view.³³ The difference between the two views is that those who follow the orthodox view believe the qualifications to be minor, while the liberal camp sees them to be substantial. According to the liberal view, the BFOQ exception explicitly applies to religion, sex and national origin³⁴ and intentionally leaves out race. The proponents of this view believe that "if the statute on its face treats sex classifications and race classifications differently, it is not obvious why the legal congruency of race and sex discrimination ought to be accepted as an *a priori* principle."³⁵

The courts seem to have adopted a position somewhere between these two opposing camps; finding a BFOQ exception to exist more

23. Freed & Polsby, *supra* note 20, at 587.

24. *Id.*

25. *Id.* at 602-04.

26. *St. Cross v. Playboy Club*, App. No. 773, St. Hum. Rts. App. Bd. (N.Y. 1971).

27. *See, e.g., Brilmayer, supra* note 21.

28. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.1-.11 (1983).

29. *Id.* § 1604.2(a). *See also* Sirota, *supra* note 9.

30. Brilmayer, *supra* note 21, at 527-29.

31. 29 C.F.R. § 1604.2(a)(1)(iii) (1983).

32. Freed & Polsby, *supra* note 20, at 589.

33. Brilmayer, *supra* note 21, at 536.

34. 42 U.S.C. § 2000(e)-2(e)(1).

35. Freed & Polsby, *supra* note 20, at 589.

often than the orthodox view and the EEOC would approve, but not whenever the employer decides one sex is more economically efficient for his or her business. For example, in *Griggs v. Duke Power Co.*,³⁶ the Supreme Court, in referring to the EEOC's narrow interpretation of the BFOQ exception,³⁷ stated that "the administrative interpretation of the Act by the enforcing agency is entitled to great deference."³⁸ Five years later, however, in *General Electric Co. v. Gilbert*,³⁹ the Court explicitly rejected the "great deference" standard, saying the EEOC guidelines are merely "entitled to consideration."⁴⁰ In announcing this new standard, the Court relied on *Skidmore v. Swift & Co.*⁴¹ which states: "The weight of such a judgment 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."⁴² The *Gilbert* opinion goes on to state: "In short, while we do not wholly discount the weight to be given the 1972 guideline, it does not receive high marks when judged by the standards enunciated in *Skidmore*. . . ."⁴³ In short, the Supreme Court's attitude toward the BFOQ exception, although not specifically clear, appears to lie somewhere between the positions of the liberal and orthodox camps.

One purpose of a statute prohibiting discrimination based on sex is to create role models which can help lead societal preferences away from discriminatory practices. In creating a BFOQ exception for actors and entertainers, the EEOC has determined that this purpose is either not as important with respect to entertainment, or is outweighed by other concerns such as authenticity or genuineness—qualifications that are "reasonably necessary to the normal operation of that particular business or enterprise."⁴⁴

An actor is a role player, a creator of illusions.⁴⁵ In creating the illusions required by a part, it is not an absolute requirement that, for example, a male actor play a man's role. To have a female play the role would require only that one more illusion be created.⁴⁶ The EEOC has

36. 401 U.S. 424 (1971).

37. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2(a) (1983).

38. 401 U.S. at 433.

39. 429 U.S. 125 (1976).

40. *Id.* at 141.

41. 323 U.S. 134 (1944).

42. *Id.* at 140.

43. 429 U.S. at 143.

44. 42 U.S.C. § 2000 (e)-2(e)(1) (1982).

45. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 22 (1966).

46. This has been done quite effectively, for example, in the film "The Year of Living Dangerously," in which Linda Hunt portrayed the role of Billy Kwan, a male news photographer.

determined, however, that it is not necessary to consider both sexes equally in choosing an actor to play a role.⁴⁷ A director or person in charge of hiring may choose to consider only one sex for a role without violating Title VII.

The courts have expanded the BFOQ for actors and actresses to encompass entertainers, and businesses whose primary function is entertainment. One case has determined that the primary function of the restaurants in Playboy clubs is entertainment,⁴⁸ and that even though the job of Playboy bunnies consists mostly of waitressing duties (a job classification for which no BFOQ exists), the bunnies fall within the BFOQ exception for actors. On the other hand, the primary purpose of an airline has been determined to be transportation, and although a stewardess' job also consists largely of waitressing duties, stewardesses do not fall within the BFOQ exception.⁴⁹

This approach for determining which jobs fall within the scope of the BFOQ exception forces the courts to determine the function of a particular business on a case-by-case basis. The function of television news for the purposes of this categorization will certainly present the courts with an interesting and difficult question. In essence, the question is whether its primary function is to be seen as entertainment or the dissemination of information. Credible arguments exist for both positions.

For many people, television is the only source of news and information about the nation and the world.⁵⁰ Many feel that news is inherently different from the other programs on television in that it is a journalistic recount of facts as they happened, as opposed to a fictional, scripted "pure" entertainment program. Just as a newspaper presents information and a novel provides entertainment, a news program is the presentation of information while a sit-com, drama, or movie is entertainment.

While this is admittedly a rather convincing argument, a perhaps equally convincing argument can be made for the proposition that television news is primarily entertainment. One author has argued that tel-

47. 29 C.F.R. § 1604.2 (a) (1983).

48. *St. Cross v. Playboy Club*, App. No. 773, St. Hum. Rts. App. Bd. (N.Y. 1971).

49. *See Diaz v. Pan Am World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971).

50. In a 1970 study of attitudes toward television and other forms of mass communication, 72% of the respondents said they found television more entertaining than magazines, newspapers, and radio. Fifty-four percent believed that television brings people the latest news most rapidly. Television also received the highest marks for providing the fairest and least biased news coverage. R. BOWER, *TELEVISION AND THE PUBLIC* 14 (1973). *See also* U.S. COMM. ON CIVIL RIGHTS, *WINDOW DRESSING ON THE SET: WOMEN AND MINORITIES IN TELEVISION* (1977).

evision communicates information in such a way as to by-pass the viewer's consciousness.⁵¹ He hypothesizes that the manner in which television images are transmitted—by means of a series of dots flickering across the screen at a rate of thirty times per second—allows the message to be projected into the viewer's mind without first being consciously screened.⁵² Because a viewer does not receive a complete visual image, but only a series of dots which he must recompose in his mind, the message is received without the viewer being able to make conscious sense of it. This manner of transmittal is quite similar to hypnosis.

This television "hypnosis" is enhanced by other factors inherent in television viewing. First, viewers usually watch television with a passive mental attitude.⁵³ Second, the images on television keep coming without providing the viewer with an opportunity to stop, review or reflect on those images. This allows a message to be received and stored without critical engagement or understanding.⁵⁴ This is commonly referred to as entertainment. Information, on the other hand, is generally considered to require a conscious understanding of the matter.⁵⁵

The typical television news program contains a total of only about five thousand words.⁵⁶ Given this low number of words, and the unconscious reception on the viewer's part, television news is, *at best*, only very minimally informative and more closely resembles the entertainment of other television programs. Many anchors do not even write

51. See J. MANDER, *FOUR ARGUMENTS FOR THE ELIMINATION OF TELEVISION* (1978). See also Note, *We Can Share The Women, We Can Share The Wine: The Regulation of Alcohol Advertising on Television*, 58 SO. CAL. L. REV. — (1985).

52. J. MANDER, *supra* note 50, at 192-94.

53. *Id.* at 200.

54. *Id.* at 200-211.

55. See, Note, *supra* note 51 at —. While the dictionary defines information as "the communication or reception of knowledge or intelligence," WEBSTER'S 9TH NEW COLLEGIATE DICTIONARY at 620, legal definitions generally require an element of comprehension by the receiver. "Medical informed consent, for example, is premised on understanding." See *Cobbs v. Grant*, 8 Cal. 3d 229, 245, 104 Cal. Rptr. 505, 515, 502 P.2d 1, 11 (1972), wherein the court wrote, "The patient's right of self-decision is the measure of the physician's duty to reveal. That right can be effectively exercised only if the patient possesses adequate information to enable an intelligent choice." A further example shows that, at least theoretically, the law requires a person to be conscious of information he receives: a defendant may waive his rights under *Miranda v. Arizona*, 348 U.S. 436 (1966), "only if the waiver is made voluntarily, knowingly and intelligently." WHITEBREAD, *CRIMINAL PROCEDURE* 293 (1980).

56. People speak at an average rate of four words per second. There are eight minutes of commercials per half hour of television programming. This leaves twenty-two minutes of news at four words per second, or 5280 words per half hour news program. These 5280 words are divided among "teases" (footage of news to come), reporters, weatherpeople, and "sound bites" (interviews with newsmakers, witnesses, etc.), leaving between two and three thousand words to be split among the anchors.

their own stories. Their stories are scripted by a staff writer. The anchor then reads this script over the air. Little or no substantive difference exists between an anchor delivering these lines and an actor on any other television program who delivers the lines from a script written by the program's staff.

Journalistic training is not a job qualification for newscasters. Christine Craft, for example, had no training in journalism or broadcasting. She received a liberal arts degree in English and anthropology and taught emotionally disturbed children, before pursuing a career in broadcasting.⁵⁷

In light of these factors, it appears that television news is primarily entertainment and should be treated accordingly as falling within the scope of the BFOQ exception.

IV. CRITIQUE OF EXISTING LAW

The biggest problem with the current judicial approach of merely considering the EEOC guidelines⁵⁸ in Title VII claims is its uncertainty. The guidelines themselves are vague and it is impossible to tell how, or if, a court will give meaning to them in any particular case. Leaving the determination of whether an employer can validly claim a BFOQ exception in its line of business to be made on a case-by-case basis forces speculation on the part of an employer that can easily turn out to be wrong or, even if right, can be quite costly.

In the context of television news, where ratings are of such importance, this uncertainty becomes even more detrimental. The job turnover rate for local news anchorpersons is quite high⁵⁹ and vacancies must be filled immediately due to the great visibility of the position. Faced with slipping ratings, station management must be able to make personnel adjustments quickly and easily. A slip in the ratings means a slip in the advertising revenues needed to support the entire station.⁶⁰ Sexual discrimination should not be a factor in these hiring decisions. The only factor that should be considered is a decision's impact upon a program's ratings.

Furthermore, even if the sexual discrimination implications are taken into account, the uncertainty involved in the present approach means that deliberation on the issue of who to hire could continue indefinitely without any indication of what might be a "correct" decision.

The orthodox view that efficiency considerations can never justify

57. See *Craft v. Metromedia, Inc.*, 572 F. Supp. at 870.

58. 29 C.F.R. § 1604.1-.11 (1983).

59. D. MIKS, *BROADCAST NEWS HANDBOOK* 337 (1975).

60. See *supra* note 6 and accompanying text.

sex-based employment decisions⁶¹ does not appear to be the correct approach when trying to develop a more certain standard. First, it is not clear that this was the intent of the legislature in adding the word "sex" to Title VII.⁶² Second, this interpretation is far too narrow for conformity by all employers. Third, and perhaps most important, the Supreme Court has expressly rejected this view.⁶³

Furthermore, both the orthodox view and the EEOC guidelines⁶⁴ recognize that a BFOQ exists for actors and actresses,⁶⁵ and a strong argument exists that a local news anchorperson is, first and foremost, an entertainer or actor.⁶⁶ "In terms of the entertainment value associated with almost all commercial television programming, [the anchorperson] becomes the 'star' of his particular newscasting 'show'."⁶⁷

V. EXTENSION OF THE BFOQ EXCEPTION

In light of the contention that anchorpersons are entertainers, the proposal of this Note is very simple: the BFOQ exception for actors and actresses should be judicially interpreted to include television news anchors. This would enable television station management to base employment decisions on the newscast's ratings. Station management would be able to hire, fire, and reassign anchorpeople in an effort to maximize ratings and advertising revenues.

These employment decisions are generally based upon the findings

61. See Brilmayer, *supra* note 21.

62. See Freed & Polsby, *supra* note 20, at 587.

63. See *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

64. 29 C.F.R. § 1604.1-.11 (1983).

65. *Id.* § 1604.2; Brilmayer, *supra* note 21, at 524.

66. See *supra* notes 56-57 and accompanying text. *But cf.* Note, *Title VII Limits on Discrimination Against Television Anchorwomen on the Basis of Age-Related Appearance*, 85 Colum. L. R. 190 (1985) (anchorpersons are not like actors and thus should not fall within the BFOQ exception).

67. Cathcart, *Viewer Needs and Desires in Television Newscasters*, 4 J. BROADCASTING 55, 56 (1969).

Admittedly, newsshows also fulfill an information role that is not to be discounted. Most Americans get the majority of their information about the world from television news programs. See *supra* note 49. But, as Cathcart notes:

[A]ny news program will provide at least basic information on events of importance to the specific geographic area in question. So why do viewers faithfully watch a *particular* newscaster? Perhaps they like the various segments of the program or the photographic coverage offered, or, more probably there is something that attracts them to the newscaster himself. This could be an attraction to the way the newscaster informs, or perhaps to the way he entertains, or to something about his personality, or to a combination of these and other qualities.

Cathcart, *supra*, at 57.

Therefore, it would appear that while news programs in general fulfill an information function, newscasters perform more of an entertainment function and are thus similar to actors and actresses, to whom the BFOQ exception applies.

of private research companies conducting audience surveys.⁶⁸ The impact of employment decisions based on audience research or ratings would not, under this proposal, be subject to the constraints of Title VII.⁶⁹ Personnel adjustments could be made without fears of sexual discrimination suits and uncertainty as to how a court might ultimately rule on the claim.

Providing a BFOQ exception for television news anchorpeople would remove the biggest problem with the current judicial approach—uncertainty. Particularly in an industry such as television where vacancies need to be filled quickly, this certainty would be highly valued.

This proposed extension of the express BFOQ exception for actresses and actors, since it would be narrowly defined, would not open the floodgates of sexual discrimination. In effect, the proposal calls for a broader interpretation of the definition of “actor” or “actress”, rather than an extension of the BFOQ exception itself. On the basis of the limited nature of this proposal, it might be possible to reconcile the orthodox and liberal views to this extension.

Under this proposal, assuming no problems of proof, station management would be able to hire, fire, pay and assign its anchorpersons in response to the audience share attracted by each. Unfortunately, problems of proof do exist and the market is not supplied with perfect information. Therefore, a line must be drawn between what can and cannot be justified by the ratings “earned” by each anchorperson, and the limitations of this proposal must be noted. Assuming, *arguendo*, that the right to base employment decisions solely on ratings exists, the question becomes to what extent (if at all) a station can treat its male and female newscasters differently.

One obvious area of contention is salary. Can two newscasters (one male, one female) who, in theory, perform the same job be paid different amounts?⁷⁰ To extend the proposal this far could logically result in salary differences based entirely upon the ratings of each newscaster. For example, if newscaster *X* alone draws a market share (or rating) of eight and when co-anchor *Y* joins the program the share rises to seven-

68. For example, KMBC in Kansas City used the research findings of Media Associates in its decision to reassign Christine Craft. *See* *Craft v. Metromedia, Inc.*, 572 F. Supp. 868 (W.D. Mo. 1983).

69. In fact, some administrative decisions have already held that in the broadcasting industry, reliance on ratings and consultants' research reports constitutes a legitimate, non-discriminatory reason for replacing or reassigning an on-the-air newscaster. *See* *Goodman v. Washington Radio*, 29 FED. EMPLOYMENT PRAC. CASES (BNA) 1843, 31 EMPLOYMENT PRAC. DECISIONS (CCH) ¶ 33,375 (D.D.C. 1982); *Haines v. Knight-Ridder Broadcasting, Inc.*, 25 EMPLOYMENT PRAC. DECISIONS (CCH) ¶ 34,650 (D.R.I. 1980).

70. This assumes that no difference exists in training, seniority or contract negotiation. While this assumption is highly unlikely to occur in real life situations, it is useful in exploring the limitations of the proposal.

teen, should *Y* be paid more because he or she generates a larger percentage of the ratings?

This question creates two insurmountable problems, the first of which is the problem of proof. It seems to be nearly impossible to prove that the addition of *Y* is the only reason for the increase in the newscast's ratings. Perhaps changes in the format of the program accompanied the introduction of a co-anchor, or the competing programs changed their format and the audience switchover is a negative reaction to the competition rather than a positive reaction to *Y*. Too many external factors exist to draw the conclusion that *Y* alone is responsible for the increased ratings.

The second obstacle involves the problem of synergy, where the two newscasters' ratings when they perform as a team is greater than the sum of their individual ratings would be were they to anchor a newscast alone. Synergistic effects are also impossible attribute solely to one party. These problems seem to make ratings by themselves an insufficient basis by which to justify salary differentials. Any differences would have to be supported by such additional factors as education, experience and negotiating skill. Salary differences not justified by these factors could still be subject to claims of sexual discrimination.

Another possible area of contention is the distribution of work between newscasters of different sexes. An obvious example of discrimination here would be the assignment of "hard news" to the male and "women's issues" to the female reporter. The major problem is again one of proof. With ratings being only a report of how many televisions are tuned to a particular channel, it is impossible to justify differential treatment solely on the basis of such ratings. In light of this difficulty, the burden of proof should be on the station to show a non-discriminatory reason for the dissimilar treatment.

Another issue that arises concerning possible limitations on this proposal is how "newscaster" is to be defined. The clearest example would be the anchorperson of a television news program, but the term should also include the reporters on the program.

Should the reporters on a television news "magazine" such as *60 Minutes* or *20/20* also be considered "newscasters" under this proposal? Given that the theory underlying this proposal is that newscasters are "actors" falling within the scope of the express BFOQ exception, these reporters are perhaps even more suited to the proposed treatment. The prime-time air spots that these shows occupy, and their relaxed, informal style make them appear to be even more entertainment oriented.⁷¹

71. An even more obvious example would be the host of talk shows such as *A.M. America* or *The Merv Griffin Show*. The hosts of these programs make no pretense of journalistic skill or training. Generally the hosts are actors and would fall under the

CONCLUSION

Because television stations are continually struggling to win "the ratings game," particularly in the lucrative area of news broadcasting, management must be able to hire and fire newscasters with an eye only toward increasing the audience share of their programs. This management decision should not be affected by the possible legal implications of the sex of prospective anchors.

A more definite standard is needed to alleviate the present uncertainty of the application of Title VII to television newscasters. Since newscasters are, in essence, entertainers, the bona fide occupational qualification for actors and actresses should be extended to include television newscasters.

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BFOQ exception as it now stands under any interpretation. As a talk show host, no particular sex is "necessary for the purpose of authenticity or genuineness." 29 C.F.R. § 1604.2(a)(2) (1983). Yet even those of the most orthodox opinion are likely to include this position under the explicit BFOQ.

