Chambers v. Omaha Girls Club, Inc.: The Eighth Circuit Opens the Door to Pregnancy Based Discrimination

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Title VII of the Civil Rights Act of 1964 (Title VII) was enacted in order to achieve equality in employment opportunities. The statute provides in pertinent part that it is unlawful for an employer to “discharge any individual, or otherwise 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 . . . .” Specifically, in an employment sex discrimination action under Title VII, the threshold question is whether the challenged behavior of the

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Title VII is directed at the effects of employment practices and policies, not at their motivation. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (act proscribes practices “fair in form, but discriminatory in operation.”); Spurlock v. United Airlines, Inc., 475 F.2d 216, 218 (10th Cir. 1972) (Title VII aimed at consequences of employment discrimination); see also C. J. Antieau, supra, § 370, at 2 (Title VII concerned with consequences of employment practices).


The statute forbids not only blatant discrimination, but conduct which appears to be fair, yet in effect, achieves a discriminatory result. See infra notes 45-47 and 52 which discuss “disparate treatment” and “disparate impact” theories used to establish a Title VII violation. But cf. Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981) (provision does not require employer to give preferential treatment to identified classes). See generally Strota, Sex Discrimination: Title VII and the Bona Fide Occupational Qualification, 55 Tex. L. Rev. 1025, 1025 n.2 (1970) (extensive discussion of methodology behind disparate impact and treatment analyses).
employer was the result of a sex-based classification. In *General Elec. Co. v. Gilbert*, the Supreme Court determined that distinctions based on pregnancy are not sex-based classifications since the class of non-pregnant persons includes both men and women. In response to this decision, and the resulting judicial confusion regarding the deprivation of pregnant women's civil rights in the labor force, Congress enacted the Pregnancy Discrimination Act


5 429 U.S. 125 (1976). In *Gilbert*, women employees of General Electric claimed that the company's employee disability plan which excluded pregnancy-related disabilities from its coverage discriminated on the basis of sex, and therefore violated Title VII of the Civil Rights Act of 1964. *Id.* at 127-28.

6 *Id.* at 136 (distinguishing many circuit court decisions which required only rationally supportable standards to satisfy equal protection). *See, e.g.*, General Elec. Co. v. Gilbert, 519 F.2d 661, 667 (4th Cir. 1975) (court held Title VII allows "no such 'rationality' test . . ."), *rev'd*, 429 U.S. 125 (1976); Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199, 200 (3d Cir. 1975) (court distinguished equal protection and Title VII cases), *vacated on other grounds*, 424 U.S. 737 (1976); EEOC Guidelines, 29 C.F.R. § 1604.10(a)-(c) (1972) (provides that pregnancy based discrimination is a prima facie violation of Title VII).

In *Gilbert*, the Supreme Court found that excluding pregnancy from a disability-benefits plan did not constitute discrimination on the basis of sex under Title VII. *Gilbert*, 429 U.S. at 135-36. Additionally, the Court noted "*Geduldig* is precisely in point in its holding that an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all." *Id.* The Court determined that the concepts of discrimination that had evolved in equal protection cases were sufficiently similar to become the starting point of Title VII analysis. *Id.* at 135. *But see* Washington v. Davis, 426 U.S. 229, 233-38 (1976) (implying that there is no overlap between equal protection and Title VII standards and analysis).

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of 1978 (PDA) as an amendment to Title VII.\(^8\) Under the PDA, it is a prima facie violation of Title VII for an employer to engage
in employment practices which discriminate "on the basis of pregnancy, childbirth, and related medical conditions." 

A Title VII sex discrimination action may be based on one of two theories: "disparate treatment" or "disparate impact." Courts, however, have struggled in determining which standard should apply to discrimination against pregnant working women. 

Recently, in *Chambers v. Omaha Girls Club, Inc.*, the Court of Appeals for the Eighth Circuit held that the employer's challenged business practice, specifically, the "role model rule," did not violate Title VII under the disparate impact or disparate treatment theories since it was justified by a business necessity. Moreover, it was upheld as a bona fide occupational qualification (BFOQ). 

In *Chambers*, a black unmarried woman was employed by the Omaha Girls Club (Club), a private social club established for the purpose of offering young girls guidance and opportunities in reaching their goals. As a staff member, Chambers was trained

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* See 42 U.S.C.A. § 2000e(k) (West 1981); supra note 8 (discusses purpose and intent of PDA). The Senate Report states that the employer should look not to the condition of pregnancy, but to the woman's ability to perform her job while pregnant. S. REP. No. 331, 95th Cong., 1st Sess. 1 (1977). Those who can still perform their jobs should be treated equally. Id.

10 See infra notes 45-47 and accompanying text (discussion of "disparate treatment" theory).

11 See infra note 52 and accompanying text (discussion of "disparate impact" theory).

12 See, e.g., *Davis v. Richmond, Fredericksburg & Potomac R.R. Co.*, 803 F.2d 1322, 1328 (4th Cir. 1986) (plaintiffs in Title VII sex discrimination action prevailed on theories of both disparate treatment and disparate impact); *Spaulding v. University of Washington*, 740 F.2d 686, 700-02 (9th Cir.) (plaintiffs failed to prove violation of Title VII on disparate treatment and disparate impact grounds), cert. denied, 469 U.S. 1036 (1984); *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543, 1553-54 (11th Cir. 1984) (although possibly no liability under disparate treatment theory, Title VII violation established on basis of disparate impact).

The disparate treatment approach and disparate impact approach to Title VII violations are not to be treated as separate claims for relief but as alternate grounds for recovery. See *Coe v. Yellow Freight Sys., Inc.*, 646 F.2d 444, 448 (10th Cir. 1981). See also *Page v. United States Indus.*, Inc., 726 F.2d 1058, 1045-46 (5th Cir. 1984) (if facts allow, disparate treatment and impact theories may both be applied in analysis); *Davis*, 803 F.2d at 1327 (not mandatory that plaintiff elect disparate impact theory in pleading).

13 834 F.2d 697 (8th Cir. 1987).

14 See infra notes 19-21 and accompanying text (role model policy discussed).

15 See *Chambers*, 834 F.2d at 702. See also infra note 53 and accompanying text (discusses business necessity defense).

16 See infra notes 48-49 and accompanying text (discusses BFOQ justification).

17 834 F.2d 697 (8th Cir. 1987).

18 Id. at 698.
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and expected to act as a role model for the girls. Upon becoming pregnant, Chambers was notified that she would be fired due to her condition, pursuant to the Club's "role model rule" employment policy which prohibited the continued employment of single staff members who either became pregnant or caused pregnancy. In addition to several other claims, Chambers brought a Title VII sex discrimination claim against the Club, challenging its employment practices. The district court examined the Title VII claim, incorporating both the disparate impact and disparate treatment analyses. The court employed the McDonnell Douglas shifting of burdens approach with respect to the disparate treatment prong of the Title VII analysis. Upon finding that Chambers had made out a prima facie case of intentional discrimination, the district court shifted the burden of production to the

19 Id. at 699. Chambers was employed as an arts and crafts instructor at the Club. Id.
20 Id. The notice of termination occurred approximately three months after the role model policy was announced. Id.
21 Id. The policy was enacted pursuant to the Club's belief that in serving an all female population, the close relationships associated with the high staff to member ratio required commitment to the Club's philosophies. Id. The Club maintained that the programs directed toward pregnancy prevention were premised upon the expectation that the girls would emulate the behavior of the staff. Id. Consequently, the Club feared that the continued employment of a single parent would frustrate the program's objectives. Brief for Appellees at xxi, Chambers (No. 86-1447).
22 Chambers, 834 F.2d at 629. Chambers brought claims against the Club under 42 U.S.C. § 1983 (dismissed for lack of requisite state action); against the Nebraska Equal Opportunity Commission (dismissed pursuant to defense of absolute immunity); against Governor Thone and Attorney General Paul Douglas (dismissed for failure to state a cause of action); against the Omaha World Herald under 42 U.S.C. § 1985(3) and under state conspiracy charges (dismissed for failure to show conspiratorial agreement); constitutional claims under the first, fourth, fifth, ninth, and fourteenth amendments (dismissed for lack of requisite state action); against the Club under 42 U.S.C. § 1985(3) and under state conspiracy claims (resulted in directed verdict against Chambers for failure to produce evidence that the Club was part of conspiratorial agreement); and against the Club under 42 U.S.C. § 1981 (dismissed for failure to show racial animus).
23 Chambers v. Omaha Girls Club, 629 F. Supp. 925, 929 (D. Neb. 1986). The Title VII action was the only claim to survive to trial level. Id. at 943. Chambers alleged that "black single women" make up the class which was disproportionately affected by the rule. Id. at 944. The district court accepted the combination pleading (race/sex), pursuant to its adoption of the Fifth Circuit holding in Jeffries v. Harris County Community Action Ass'n, 615 F.2d 1025, 1032-34 (5th Cir. 1980) which found there was a congressional intent that Title VII protection may be addressed toward black women as a separate class. Id. at 944 n.34.
24 Chambers, 629 F. Supp. at 945. See also infra notes 47 and 52 and accompanying text (discussing disparate impact and disparate treatment approaches).
25 Chambers, 629 F. Supp. at 945. See also infra note 27, 45, and 47 and accompanying text (further discussing the burden of persuasion and production in Title VII cases).
26 Chambers, 629 F. Supp. at 947. Chambers identified herself as a member of a Title VII
Club which asserted that the role model rule served a legitimate purpose in attempting to discourage teenage pregnancy. The court further found that Chambers failed to establish that a pretextual motive existed for the Club's policy, thereby failing to meet her burden of establishing intentional discrimination.

The district court then examined Chamber's claim under the disparate impact analysis. The court found that Chambers established a prima facie case of disparate impact under the Green formulation traditionally associated with this analysis. However, the Club succeeded in showing that the role model policy bore a manifest relationship to the Club's fundamental purpose, thereby establishing the existence of a BFOQ. The court further held that Chambers failed to rebut the Club's evidence of a BFOQ by way of illustration of a pretextual motive on the part of the Club.

protected class (black); established her qualification for the job, her discharge occurred solely based on her pregnancy and her replacement by a single non-pregnant black woman. See, e.g., Zuniga v. Kleburg County Hosp., 692 F.2d 986, 991 (5th Cir. 1982) (pregnancy discrimination is prima facie violation of Title VII § 2000e(k)).

Chambers, 629 F. Supp. at 947. The Club had established its purpose as necessarily incorporating a "bonding" process between its members and the staff whereby the counselor became a confidant and friend. See Brief for Appellees at xix, Chambers (No. 86-1447). See also supra note 19 and accompanying text (staff member expected to be role model).

The shifting of the burden of production is the second step within the McDonnell Douglas framework. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (burden shifts upon showing of purposeful discrimination); accord Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.8 (1981) (shifting burden standard function at common law).


Chambers, 629 F. Supp. at 948. See also infra note 30 and 52 and accompanying text (discussing elements required to be shown for a cause of action under disparate impact).

Chambers, 629 F. Supp. at 948. Chambers established a case of disparate impact under the first method enunciated in Green, i.e., "that black females of child-bearing age would be excluded from employment under the policy at a higher rate than white females because of their significantly higher fertility rate." Brief for Appellees at 4, Chambers (No. 86-1447). See also supra note 52 and accompanying text.

Chambers, 629 F. Supp. at 949-50. See also supra notes 48-49 and accompanying text (further discussion of BFOQ).

Chambers, 629 F. Supp. at 950-51. See also supra note 50 and accompanying text (discussing "pretext" theory).

The trial court was unpersuaded that less discriminatory alternatives were available. See Chambers, 854 F.2d at 702-03. Chambers suggested a "leave of absence" or a different position within the organization that would isolate her from contact with the members. Id. at 702. The Club responded that a leave would have to be "five to six months" and that a temporary replacement would take that long to locate and train. Id. at 702-03. Addition-
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On appeal, the Eighth Circuit summarily affirmed the district court's holding upon application of the "clearly erroneous" standard of review. The court of appeals found both the disparate impact and treatment analyses employed by the lower court substantiated, notwithstanding the asserted lack of validation of the purported effectiveness of the Club's role model rule. However, in a dissenting opinion, Justice McMillian proposed that the majority's decision was contrary to Title VII and that Chambers had proved discrimination due to her pregnancy under the disparate treatment theory.

It is submitted that given the lack of objective evidence before it, the court of appeals erred in finding a valid BFOQ justification under the disparate treatment analysis and in finding a valid business necessity defense under the disparate impact analysis. It is further submitted that the court erred in its application of the McDonnell Douglas analysis where it found that per se discrimination existed on the facts of the case, and therefore, the discussion of pretext was misplaced. This Comment will address the major issues within the pregnancy discrimination area as well as provide a critical analysis of the court's role as policy maker. Part one will examine the legislative history of the PDA and its subsequent application to a civil rights claim in an effort to discern its proper
function within Title VII. Part two will address the judicial analysis in *Chambers* and suggest that the court went beyond the realm of the evidence, beyond a resolution between the parties themselves and into a dimension of decision-making affecting society as a whole. Additionally, part two will address the ramifications of the *Chambers* decision in light of the appropriateness of an active judiciary.

I. PREGNANCY DISCRIMINATION ACT

A. Legislative History of the PDA

"The decision of the United States Supreme Court in *General Electric Co. v. Gilbert* provided the immediate impetus for the passage of the PDA." In that case, the Court concluded that there was no violation of Title VII sex discrimination where an employer excluded pregnancy-related disabilities from an employee disability plan. A review of the statutory language and the legislative history of the PDA indicates that it was enacted to fulfill two essential purposes: first, to specifically overrule *Gilbert*; and second, to prevent the differential treatment of women in all aspects of employment based on the condition of pregnancy.

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*See infra* notes 39-43 and accompanying text (discussing passage of PDA and its relationship to Title VII).

*See supra* notes 24-32 and accompanying text (discussing *Chambers*).

*See infra* notes 67-72 and accompanying text (discussing the ramifications of a policy-oriented decision).


Prior to 1976, all of the federal courts that addressed pregnancy discrimination held that it qualified as sex discrimination under Title VII. *See, e.g.*, Communications Workers v. AT & T, 513 F.2d 1024, 1026 (2d Cir. 1975) (Title VII prohibits differential treatment of pregnancy related disabilities); Hutchison v. Lake Oswego School Dist., 519 F.2d 961, 965 (9th Cir. 1975) (employer violated Title VII when pregnant employees were refused sick leave benefits); Satty v. Nashville Gas Co., 522 F.2d 850, 854-55 (6th Cir. 1975) (sick leave and seniority programs violated Title VII); Farkas v. Southwestern City School Dist., 506 F.2d 1400, 1402 (6th Cir. 1974) (same).


California Fed. Sav. & Loan Ass'n v. Guerra, 107 S. Ct. 683, 691-92 (1987). The PDA's language and legislative history indicates that the purpose of the amendment is to avoid discriminatory treatment based on pregnancy. *Id. See also* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 678-79 (1983) ("[t]he PDA has now made clear that for all Title VII purposes, discrimination based on women's pregnancy is, on its
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A review of the statements made by House and Senate members during the debates surrounding the enactment of the PDA reveals consideration of the impact of the PDA, with an orientation toward the role of women in today's workforce. Therefore, it was Congress' intent to reject stereotypical notions of women in an effort to establish recognition of "the full participation of women face, discrimination because of her sex"). Carney v. Martin Luther Home, Inc., 824 F.2d 643, 646 (8th Cir. 1987) (discussion of legislative intent to overrule Gilbert and prevent differential treatment of women in all aspects of employment); Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1546-47 (11th Cir. 1984) (same); Zuniga v. Kleburg County Hosp., 692 F.2d 986, 989 n.6 (5th Cir. 1982) (same); Ponton v. Newport News School Bd., 632 F. Supp. 1056, 1065 (E.D. Va. 1986) (purpose to treat women in labor force equally). See generally Thomas, Differential Treatment of Pregnancy in Employee Disability Benefit Programs: Title VII and Equal Protection Clause Analysis, 60 OR. L. REV. 249, 263-64 (1981) (purpose of amendment indicated by sponsor in the Senate, Sen. Williams ("[W]e are saying that the definition of sex discrimination will cover pregnancy discrimination"); Wald, supra note 7, at 599 (amendment intended to fulfill two basic purposes); Note, Employment Discrimination-Wright v. Olin Corp.: Title VII and the Exclusion of Women From the Fetally Toxic Workplace, 62 N.C.L. Rev. 1068, 1072 (1984) [hereinafter Note, Wright v. Olin Corp.].

Noteworthy is the House Report issued by the Subcommittee on Employment Opportunities of the Committee on Education and Labor which suggests that the PDA mandates only equality of treatment of pregnant women in the workplace. See H.R. REP. No. 948, 95th Cong., 2d Sess. 4-5 (1978) [hereinafter Note, Wright v. Olin Corp.] at 4754. Thus, the effect of the PDA was not to elevate sex to a level of primary consideration as a factor in employment. See Ayon v. Sampson, 547 F.2d 446, 451 (9th Cir. 1976) (Title VII designed to eliminate sex as a factor in employment). But see Guerra, 107 S. Ct. at 692 (PDA does not prohibit preferential treatment of pregnant women).

Additionally, the House Report would seem to limit the PDA's scope to the discriminatory impact upon the pregnant woman herself. See H.R. REP. No. 948, 95th Cong., 2d Sess. 3-5, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 4749, 4753. "At the same time, the bill is intended to be limited to effects upon the woman who is herself pregnant ...." Id. See generally 125 CONG. REC. 29, 645 (1977) (statements of PDA proponents); infra notes 42-43 and accompanying text.

in our economic system."

B. Alternative Analytical Approaches to the PDA

In the case of Hayes v. Shelby Memorial Hospital, the court established a legal framework which set forth three theories of analysis relating to a sex discrimination claim under Title VII. The first situation in which a Title VII action may be applied is when

4 See LEGISLATIVE HISTORY, supra note 42, at 61. Statements made by a sponsor of the PDA reveal that most types of employment discrimination resulted from employers' attitudes about pregnancy and their fear of losing their workforce because of pregnancy. Id. See also Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235-36 (5th Cir. 1969) (congressional purpose to eliminate assumptions and traditional stereotypical conceptions of women's ability to do particular work); Bowe v. Colgate Palmolive Co., 416 F.2d 711, 717 (7th Cir. 1969) (same).

Since the crux of gender stereotyping involves the presumption that women will leave their jobs due to pregnancy, resulting in discrimination of such women, it is clear that there is an urgent need that Title VII address this precise type of discrimination. See LEGISLATIVE HISTORY, supra note 42. See also Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 707 (1978) (employment decisions cannot be predicated on myth or stereotyped assumptions of male or female characteristics); Woody v. West Miami, 477 F. Supp. 1073, 1079 (S.D. Fla. 1979) (Title VII prohibits stereotypical culturally-based concepts of ability to perform certain tasks because of sex).

Additionally, the Senate Report stresses that "perhaps the most important effect of [the PDA] is to prohibit employer policies forcing] women who become pregnant to stop working regardless of their ability to continue .... Id. at 6, reprinted in LEGISLATIVE HISTORY, supra note 42, at 43.

As the Supreme Court has succinctly stated, "[t]he reports, debates and hearings make abundantly clear that Congress intended the PDA to provide relief for working women and to end discrimination against pregnant workers." See California Fed. Sav. & Loan Ass'n v. Guerra, 107 S. Ct. 683 (1987), quoted in Carney v. Martin Luther Home, Inc., 824 F.2d 643, 647 (8th Cir. 1987).

4 See Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1547 (11th Cir. 1984). The three theories discussed by the court included "facial" discrimination, "pretext" discrimination and "disparate impact" cases. Id. See also Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (ultimate burden of persuading trier of fact of intentional discrimination remains with plaintiff); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (Supreme Court "blueprint" for prima facie case of discrimination under Title VII); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (unlawful discrimination can be analyzed under theory of adverse impact); infra notes 46-54 and accompanying text (in-depth discussion of each theory). But see Maddox v. Grandview Care Center, Inc., 780 F.2d 987, 990-91 (11th Cir. 1986). "Although these theories provide a framework under which the burdens of persuasion and production can be neatly delegated to the relevant parties, they will not fit every case and were never meant to obscure the fact that the ultimate finding is whether unlawful discrimination occurred." Id. at 990. See generally Wald, supra note 7, at 606-11 (alternative approach in analyzing pregnancy discrimination cause of action, viewing action as class-based discrimination akin to "classifications based on sex, religion, or national origin").

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an employer has engaged in "facial discrimination." This occurs when one group of employees is treated in a prejudicial manner; clearly discriminated against "on the basis of race, religion, national origin, or gender (pregnancy)." To rebut a showing of facial discrimination, an employer's sole defense is to show the existence of a bona fide occupational qualification (BFOQ).

*See Hayes, 726 F.2d at 1548; supra note 26 and accompanying text (definition, discussion and examples of facial discrimination). See generally L. Tribe, American Constitutional Law § 16-14 (1978) (discussion of "facially invidious discrimination" as applied to race and especially Indian tribes).

*See Hayes, 726 F.2d at 1547. "[A] presumption [is established] that if the employer's policy by its terms applies only to women or pregnant women, then the policy is facially discriminatory." Id. at 1548. See also Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 684 (1983) ("for all Title VII purposes discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex"); International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977) ("disparate treatment" theory applied in racial discrimination case where employer treated some people less favorably than others based on race alone); Ponton v. Newport News School Bd., 632 F. Supp. 1056, 1056 (E.D. Va. 1986) ("clear that . . . plaintiff was discriminated against on the basis of her pregnancy, for plaintiff would not have been forced to take the leave of absence if she had not become pregnant").

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas Corp., 411 U.S. at 802 (1973). This method of allocating the burden of production has been adapted to discharge cases. See, e.g., Davis v. Lambert of Ark., Inc., 781 F.2d 658, 660 (8th Cir. 1986) (court followed disparate treatment theory and framework); Worthy v. United States Steel Corp., 616 F.2d 698, 701 (3d Cir. 1980) (court employed appropriate framework for plaintiff to make prima facie case of facial discrimination). But see King v. Yellow Freight Sys., 523 F.2d 879, 882 (8th Cir. 1975) (appropriateness of allocation of burdens doubtful in a discharge case).

Given the aforementioned analysis, the most essential element of the cause of action for facial discrimination is proof of discriminatory motive. See International Bhd. of Teamsters, 431 U.S. at 355 n.15. See also United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983) (burden of showing intentional discrimination remains with plaintiff); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981) (ultimately, plaintiff held to "preponderance of the evidence" standard for showing intentional discrimination); Arlington Heights v. Metropolitan Hous. Corp., 429 U.S. 252, 265 (1977) (court held "proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause").

*See Hayes, 726 F.2d at 1549. See Burdine, 450 U.S. at 254. An employer is expected "to rebut the presumption of discrimination" by showing that there was a "legitimate, non-discriminatory reason" for rejecting the employee. Id. See also McDonnell Douglas Corp., 411 U.S. at 802 (same; further stating that pretext for employer's justification is subjective, not objective); East v. Romine, Inc., 518 F.2d 332, 339-40 (5th Cir. 1975) (defendant's burden must include comparative evidence showing hired employee more qualified than
employer who establishes that religion, sex or national origin is a
"qualification reasonably necessary to the normal operations of
that particular business or enterprise," has established a BFOQ
within the meaning of Title VII.49

one let go or not hired). The BFOQ defense is articulated at 42 U.S.C. § 2000e-2(e)(1)
(West 1981) and provides that it is not an unlawful employment practice 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 [BFOQ] reasonably necessary to the
normal operation of the particular business or enterprise . . . ." Id.

While the legislative history of the BFOQ provision indicates its intended broad applica-
tion of the defense, both the EEOC and courts have established a tradition of limited appli-
cation. See EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2(a)(2)
(1987) (only BFOQ explicitly allowed for third-party preferences relating to "genuineness," e.g., actor or actress employment).

The EEOC guidelines are interpretive in nature and bind only the Commission. See Al-
bemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975) (guidelines lack force of law). But
see Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94 (1973) (guidelines entitled to great defer-
ence except where inconsistent with congressional intent); Griggs v. Duke Power Co., 401
U.S. 424, 433-34 (1971) (same). The Court in Griggs examined BFOQ impact on racially
discriminatory pre-employment testing wherein the court stated that "[s]ince the Act and
its legislative history support the Commission's construction, this affords good reason to
treat the guidelines as expressing the will of Congress." Id. at 434. See also Dothard v.
Rawlinson, 433 U.S. 321, 334 n.19 (1977) (EEOC had "adhered to a position of a narrow
construction of the BFOQ consistently, and this construction given great deference"); In re
Consolidated Pretrial Proceedings in the Airline Cases, 582 F.2d 1142, 1146 (7th Cir.
1978) (extremely narrow construction held most appropriate), rev'd sub nom. Zipes v. Trans
World Airlines, Inc., 455 U.S. 385 (1982); Rosenfeld v. Southern Pacific Co., 444 F.2d
1219, 1225 (9th Cir. 1971) (refusal to allow cultural stereotypes to be justification for sex
based discrimination). But see generally Sirota, supra note 3, at 1027-33 (Congress intended
BFOQ provision specifically pertaining to sex as broad justification for sex discrimination).

It can be noted, however, that in recent years the Supreme Court has rejected the "great
deffERENCE" standard in favor of the weaker "entitled to consideration" standard enunci-
Bhd. of Teamsters v. United States, 431 U.S. 324, 325 (1977) (court rejected EEOC guide-
lines on bona fide seniority systems); Washington v. Davis, 426 U.S. 229, 238-39 (1976)
(court rejected EEOC guidelines on employment selection procedures). See generally
Portwood & Kozia,a, In Search of Equal Employment Opportunity: New Interpretations of Title
VII, 30 LAB. L.J. 353, 354 (1979) (notes that "EEOC interpretations of Title VII require-
ments have implicit judicial approval").

Missouri Pacific R.R. Co., 527 F.2d 1249, 1251 (8th Cir. 1975) (burden on employer to
show BFOQ reasonably necessary to operation of business to justify discriminatory pur-
pose); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235-36 (5th Cir. 1969) (equal
footing is intent of Title VII; BFOQ established if employees otherwise available for posi-
tion disqualified upon showing of individual incapacity, whether male or female); Bowe v.
Colgate-Palmolive Co., 416 F.2d 711, 718 (7th Cir. 1969) (same).

The federal courts have applied a virtually uniform analysis of the requirements of a
BFOQ. See, e.g., Hardin v. Stynchcomb, 691 F.2d 1364, 1370 (11th Cir. 1982) (employer
did not satisfy burden of establishing factual basis for believing all, or substantially all,
women unable to safely and efficiently perform duties of job); Diaz v. Pan Am World Air-
ways, 442 F.2d 385, 388 (5th Cir.) ("discrimination [held] valid when essence of the business
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Another related situation in which a cause of action on sex discrimination in employment may arise is when an employer adopts an essentially neutral facial policy, but upon further examination it is alleged to be a mere "pretext" for forbidden discrimination. Together, the "facial discrimination" theory and the "pretext" theory are referred to as "disparate treatment cases."

The defendant's burden of production requires that the employer establish rationalizations which are "clear and reasonably specific." See Burdine, 450 U.S. at 256. Cf. Loeb v. Textron, Inc., 600 F.2d 1003, 1011-12 & n.5 (1st Cir. 1979) (employer's burden to articulate legitimate reason held not a burden to persuade trier motivation by that reason but, a burden to state a valid reason, to which plaintiff will assert, is merely a "pretext").

The plaintiff's ultimate burden of persuasion may be established in one of two ways, i.e., "directly by persuading the court that a discriminatory reason...motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Burdine, 450 U.S. at 256, quoted in Beatty v. Chesapeake Center, Inc., 818 F.2d 318, 321 (4th Cir. 1987). See also Teal, 457 U.S. at 447 (Court noted even if employer demonstrates his practice was significantly related to job, employee may still prevail if it is shown that practice was being used as mere pretext for discrimination); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (court held plaintiff can show less discriminatory alternatives that employer could use to serve his purpose); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (such showing of other alternatives with less discriminatory effect indicates employer's use of pretext for discrimination); Zuniga v. Kleburg County Hosp., 692 F.2d 986, 988 (5th Cir. 1982) (court found pretextual rationalization).

"See Hayes," 726 F.2d at 1547. Disparate treatment cases are analyzed differently than impact cases, yet both are applicable to a violation of the PDA. Id. Additionally, it is not uncommon for the same set of facts to give rise to both types of theories. Id. See also United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715-16 (1983) (recognized distinction between treatment and impact cases within Title VII analyses); Maddox v. Grandview Care Center, Inc., 780 F.2d 987, 989-90 (11th Cir. 1986) (analysis under treatment theory although opinion noted availability of impact theory). See generally Bartholet, Application of Title VII to Jobs in High Places, 95 Harv. L. Rev. 947, 951 (1982) (discussion of differences in disparate treatment cases and disparate impact cases); Lopatka, 1977 Primer
The third situation for an employment sex discrimination action applies when an "employee concedes that the employer's policy is neutral," but claims that the policy creates a "disparate impact" on a group protected from discrimination under Title VII. An employment practice which has such an adverse impact upon a protected group is "invalid unless the employer can prove that the challenged practice is justified by a business necessity." on the Federal Regulation of Employment Discrimination, 1977 U. Ill. L. Rev. 69, 74 (1977) (distinguished the examination of disparate impact analysis from treatment analysis).

Generally, a plaintiff may establish disparate impact in one of three ways enunciated in the following framework: (1) whether the protected class in a specified geographic area is excluded by the employment practice at a substantially higher rate; (2) whether the percentage of class member employees who are actually excluded by the employment practice is higher than the percentage of non-class members; (3) whether the level of employment of the protected class by the employer is lower than the percentage of the protected class in the relevant labor market or geographic area. See Green v. Missouri Pacific R.R. Co., 523 F.2d 1290, 1293-94 (8th Cir. 1975); Brief for Appellees at 3, Chambers (No. 86-1447).

The business necessity defense is wholly separate and distinct from the BFOQ justification; the BFOQ is statutorily based and is raised in the context of disparate treatment analysis. See Note, Business Necessity in Title VII: Importing An Employment Discrimination Doctrine Into The Fair Housing Act, 54 Fordham L. Rev. 565, 569 (1986). The BFOQ is more
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Additionally, an employer will be estopped from asserting that it had a justified business practice if there exists a "nondiscriminatory alternative means of determining qualification."  

II. THE IMPLICATIONS OF Chambers v. Omaha Girls Club, Inc.

A. Analytical Errors in Chambers

Chamber's discharge, solely on account of her pregnancy, constituted intentional discrimination within the meaning of the PDA. Absent a BFOQ, the pregnancy based distinction must be rejected by the court. The court of appeals found a BFOQ had been established solely on the basis of personal beliefs and assumptions of the Club's board members. It is asserted that where an employer fails to produce objective evidence to substantiate claims that a discriminatory employment practice is related and necessary to the accomplishment of the employer's objectives, that employer has failed to meet his burden of proof and the em-
ployee must prevail.\textsuperscript{59}

It is submitted that the court of appeals erred in its affirmance of the district court's application of the \textit{McDonnell Douglas} analysis. As previously stated, the district court held that Chambers was discharged because of her pregnancy.\textsuperscript{60} Such a holding of \textit{per se} sex discrimination is not subject to the \textit{McDonnell Douglas} analysis.\textsuperscript{61} Rather, the employer must establish a BFOQ.\textsuperscript{62} As this Comment has asserted, the evidence propounded by the Club did not establish a BFOQ, thereby precluding the use of such justification by the Club.\textsuperscript{63}

It is suggested that the \textit{Chambers} court erred in its procedural application of the impact analysis to the sex discrimination claim. The Club raised the business necessity defense to refute Chamber's race discrimination claim under 42 U.S.C. § 1981.\textsuperscript{4} Nonetheless, both the district court and circuit court addressed the business necessity defense with reference to both the race discrimination and sex discrimination claims.\textsuperscript{65} The BFOQ justification and business necessity defense have mutually exclusive evidentiary foundations and thus are not the proper subjects of consolidation by the court.\textsuperscript{66}

\begin{footnotes}
\item[59] \textit{Chambers}, 834 F.2d at 708.
\item[60] See supra notes 58-59 and accompanying text.
\item[61] See Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121-22 (1985) (\textit{McDonnell Douglas} test misplaced where purposeful discrimination is found); Carney v. Martin Luther Home, Inc., 824 F.2d 643, 648 (8th Cir. 1987) (when \textit{per se} discrimination found, inquiry turns to existence of BFOQ); Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1086 n.8 (8th Cir.) (overt discriminatory employment policies violate Title VII absent BFOQ), cert. denied, 446 U.S. 966 (1980).
\item[63] See supra note 58 and accompanying text.
\item[65] \textit{Chambers}, 629 F. Supp. at 932, 943. The district court found that the evidence established a statistical disproportionate impact on Chambers as a black woman. \textit{Id.} at 933. The business necessity defense is addressed where disparate impact is shown. \textit{Id.} at 949. Therefore, the business necessity defense rebutted a showing of racially based discrimination pursuant to section 1981. See \textit{Judicial Dualism}, supra note 53, at 385 (business necessity defense can only be applied to facially neutral rules).
\item[66] See supra notes 49-52 and accompanying text (discussion of BFOQ and business necessity defenses).
\end{footnotes}
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B. The Ramifications of a Policy-Oriented Decision

It has been suggested in this Comment that the Chambers court premised its holding on a tenuous foundation of evidence in an effort to reach a verdict which would promote a desired policy orientation.\(^7\) The appropriateness of such activity by the judicial body remains the subject of heated debate among this nation's leading commentators on the function of the judge in the American adversarial system.\(^8\)

The inquiry concerning the presence of a BFOQ justification or a business necessity defense, with reference to a sociological theory of role emulation, does not lend itself to the traditional methods of establishing such a defense.\(^6\) It is in this context that judicial policy-making becomes relevant.\(^7\) It is suggested that the Chambers court sought to refrain from inhibiting the efforts of organizations, such as the Omaha Girls Club, whose activities have attempted to ameliorate the problem of teenage pregnancy. This Comment suggests, however, that in pursuing this exemplary objective, the court opened the door to intentional discriminatory employment practices based on the status of pregnancy, a policy directly in conflict with the intent of Congress and violative of the

\(^{67}\) See supra note 34 and accompanying text. While the Chambers court may have sought to protect the continued efforts of such organizations as the OGC, the court failed to anticipate the consequences of a decision which allows an employer to inflict purposeful discrimination on his employees absent empirical evidence that such a policy is viable. Brief for Appellants at 37, Chambers (No. 86-1447).

\(^{68}\) See generally A. BICKEL, THE LEAST DANGEROUS BRANCH 55 (1962) (judge's perspective goes beyond the particular and judgments are made within societal interest framework); Johnson, Judicial Activism Is A Duty-Not an Intrusion, in VIEWS FROM THE BENCH 279 (1985) (judge's function necessitates use of interpretive powers). But see United States v. Turkish, 623 F.2d 769, 779 (2d Cir. 1980) (judge performs best when exercising complete impartiality); Inglett & Co. v. Everglades Fertilizer Co., 255 F.2d 342, 350 (5th Cir. 1958) ("adversary properly functioning when judge's role is sharply separated").

\(^{69}\) See Brief for Appellees at 13-15, Chambers (No. 86-1447) ("[t]he impact of a role model is not quantifiable[;] . . . [s]ociological phenomena is not empirical data and cannot be treated as such")


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PDA. It is suggested that employers who simply profess their "belief" that pregnant women pose a threat to their business "objectives," will enjoy the protection of this court's holding. In resorting to a policy-oriented decision, the court's tacit acceptance of a subjective foundation of evidence failed to acknowledge the demand for bare "objectivity" in decision-making.

IV. Conclusion

The above analysis of the Chambers decision reveals the operational framework within which the PDA operates as a function of Title VII. The overriding theme inherent in this discussion is the mandate barring discriminatory employment practices. Absent a BFOQ where discriminatory treatment is shown, or a business necessity where discriminatory impact is shown, an employer may not discriminate against an employee based on the status of pregnancy.

When faced with a discriminatory practice, it is the function of the court to examine the objective evidence set before it. Where such evidence is not readily available, the court may exercise its policy-making function. This Comment has suggested that the Chambers court, in exercising its prerogative to employ its policy-making function, failed to consider the ramifications of its decision, specifically, that an employer may now discriminate against an employee solely on the basis of pregnancy, without fear of liability under the PDA.

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See supra notes 42-47 and accompanying text (discussion of legislative history of PDA).

See Fiss, supra note 70, at 24. "He must be impartial, distant and detached . . . thereby increasing the likelihood that his decision will not be an expression of self interest . . . ." Id. at 14.