"Sex-Plus" Discrimination: A Discussion of Fisher v. Vassar College

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I. INTRODUCTION

Title VII clearly sets forth that an employer may not discriminate on the basis of race, color, religion, sex, or national origin. However, what happens when an employer only discriminates against particular members of a minority group? Suppose an employer regularly hires women, but only white women or unmarried women; is this a violation of Title VII? Under Title VII, an employer may not discriminate on the basis of race, color, religion, sex, or national origin. Yet there is nothing in Title VII that prohibits an employer from hiring only select.

3. 42 U.S.C. § 2000e-2(a) states in pertinent part:
   It shall be an unlawful employment practice for an employer-
   (1) to fail or refuse to hire or to discharge any individual, or otherwise to dis- criminate 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; or
   (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
   Id. § 2000e-2(a).
4. Id. (emphasis added). I emphasize the word "or" because Title VII indicates that an employer may not discriminate on the basis of race or color or religion or sex or national origin. However, the statute does not state that an employer may not discriminate on the basis of race and sex or race and religion, etc. For instance, the use of the word "or" indicates that the employer may not discriminate on the basis of sex, but does not indicate that the employer may not discriminate on the basis of sex and race.
members of a minority group. The doctrine of “sex-plus” discrimination eliminates the loophole in Title VII that allows employers to selectively hire members of a minority group. The meaning of “sex-plus” discrimination cannot be found in a legal dictionary or in the text of Title VII. Instead, the doctrine of “sex-plus” discrimination has grown out of case law, starting with Phillips v. Martin Marietta, and has been defined as occurring in the following two situations:

(1) when an employer discriminates against employees on the basis of an immutable characteristic, such as race, age, and national origin; or

(2) when an employer has one hiring policy for men and another for women, and the policy distinction is based on some fundamental right (e.g., the right to marry, or the right to have children).

“Sex-plus” discrimination is to be contrasted with what this author labels “simple sex” discrimination. “Simple sex” discrimination is the outright refusal by employers to hire women or other minorities because they feel it is their right to do so. This doctrine has been very instrumental in preventing employers from denying women employment on the basis of sexual stereotyping or the employer’s intent to somehow “protect” the women. When the Civil Rights Act of 1964 was originally enacted, employers were permitted to rely on sexual stereo-

5. If taken literally, Title VII does not prohibit an employer from hiring only married women or black men or Asians under the age of forty. As long as the employer hires some women, some blacks, and some Asians, the employer is technically complying with Title VII. However, this comment attempts to demonstrate that such an employer is not complying with the true intent of Title VII.

6. See, e.g., Phillips v. Marietta, 400 U.S. 542, 544 (1971) (holding that an employer may not deny employment to women with pre-school aged children without denying employment to men with pre-school aged children); Dolter v. Wahler High Sch., 483 F. Supp. 266, 271 (N.D. Iowa, 1980) (holding that an employer may not deny employment to unwed mothers without denying employment to unwed fathers).

7. 400 U.S. 542 (1971) [hereinafter Phillips].

8. Willingham v. Macon Tel. Publ. Co., 507 F.2d 1084, 1091 (5th Cir. 1975) (holding that private employers are prohibited from using different hiring policies for men and women only when the distinctions used relate to immutable characteristics (e.g., ethnicity) or legally protected rights (e.g., the right to marry)).

9. Id.

types as a means for circumventing the law. For instance, some employers lawfully denied positions to married women for no other reason than that they considered a wife's place to be in the home with her children. Section II of this Comment explores the doctrine of "sex-plus" discrimination by analyzing both its historical development and recent application by the courts. Section III then provides a detailed analysis of Fisher v. Vassar College, a recent federal case specifically involving the issue of "sex plus" discrimination. Finally, the Comment concludes with an explanation as to why the Second Circuit correctly reversed an earlier court's decision and why the Supreme Court should deny certiorari if the case is brought for appeal.

II. THE DOCTRINE OF "SEX-PLUS" DISCRIMINATION

A. Title VII and the Theory of "Sex-Plus" Discrimination

Title VII, from its inception to the present day, has not always been welcomed with open arms. After all, Title VII interferes with the rights of employers to run their businesses as they see fit. Under Title VII, employers are prohibited from denying employment to women and minorities; in fact, they are now required to hire women and minorities. In spite of this, some employers attempt to undermine Title VII by way of "sex-plus" discrimination.

Taken literally, Title VII does not prevent an employer from hiring only certain types of women or minorities. As a result, some employ-
ers have tried to exclude sub-groups of one sex or race by claiming that they were not qualified employees. These employers simply claim that the discrimination is not based on sex, but rather on some neutral characteristic such as marriage, parenthood, or having long hair. Thus, employers may claim that there was no sex discrimination because the denial was based on a neutral characteristic rather than on gender. It is this denial of employment to a select group of a protected class that has been termed “sex-plus” discrimination.

Title VII is one of eleven titles from the Civil Rights Act of 1964. The Act, as a whole, bars discrimination in public accommodations, federal funding, voting rights, education, and employment. Title VII deals strictly with employment discrimination and bars discrimination on the basis of race, color, religion, sex and national origin. The purpose of Title VII is to eliminate discrimination in employment based on these characteristics.

While the “sex-plus” discrimination theory is grounded within Title VII, it is neither mentioned in nor referred to by the title. As such, the theory was created by the courts as opposed to Congress. Judge Brown coined the term in his dissent to the denial of a petition for rehearing in Phillips v. Martin Marietta. He wrote that without the implied notion of “sex-plus,” the impact of Title VII would be crushed. According to Judge Brown, the theory is necessary in order

19. Id.
20. Id.
21. Id.
23. Id.
24. Id.
27. 416 F.2d 1257, 1260 (5th Cir. 1969) (Brown, J., dissenting).
28. Id. at 1260. Judge Brown stated:
Free to add non-sex factors, the rankest sort of discrimination against women can be worked by employers. This could include, for example, all sorts of physical characteristics, such as minimum weight (175 lbs.), minimum shoulder width, minimum biceps measurement, minimum lifting capacity (100 lbs.), and the like. Others could include minimum educational requirements (minimum high school, junior college), intelligence
to enforce Title VII. The doctrine of "sex-plus" prevents the employer from circumventing Title VII by simply specifying a characteristic that is unprotected by the statute as the basis for denying employment. For example, without the implied protection of "sex-plus", employers could simply decide not to hire women and claim that the reason was the women's physical build rather than their sex.

B. The Phillips-Manhart Rationale

Phillips v. Martin Marietta Corp. is the leading case on the issue of "sex-plus" discrimination. In 1966, Mrs. Ida Phillips' application for the position of assembly trainee at Martin Marietta was denied. She was informed that the employer was not accepting job applications from women with pre-school age children. However, the company did accept applications from men with pre-school age children; therefore, an application supplied by Mr. Phillips would have been accepted. As a result, Mrs. Phillips filed suit alleging that she was denied the position because of her sex.

At the time Mrs. Phillips applied for the job, approximately 70-75% of the applicants were women. Furthermore, 75-80% of those offered the job were women. Therefore, there was absolutely no showing of discrimination against women per se. The question before the court, rather, was whether an employer could institute one hiring practice for women and another for men, or if such a practice constituted a violation of Title VII?

The Supreme Court held that it was a violation of Title VII for Martin Marietta to apply one hiring policy for women with pre-school

tests, aptitude tests, etc.

Id.

29. Id.
30. See, e.g., Phillips, 400 U.S. at 545.
32. Id. at 543.
33. Id.
34. Id.
35. Id.
36. Id.
37. Id.
38. Id.
39. More specifically, the question was whether Martin Marietta could require that female employees not have pre-school-age children while allowing male employees to have pre-school-age children.
age children and another for men with pre-school age children. However, because it was clear that Martin Marietta did not have a bias toward women per se, but rather treated women with pre-school age children differently than men with pre-school age children, Phillips was more than a "simple" sex discrimination case; it was a case of "sex plus" discrimination.

The Phillips court did not hold that it is always impermissible for an employer to use differential hiring policies based on sex. For example, Martin Marietta could have applied different hiring standards if it proved that a woman's family obligations were significantly relevant to her job performance as an assembly trainee, and that as a result of such, she would be unable to perform the job. This would have qualified as a bona fide occupational qualification exception to Title VII. However, Justice Marshall cautioned in his concurring opinion that sexual stereotypes of women should not be used as the basis for a bona fide occupational qualification.

Justice Marshall stated that the bona

41. Id. at 543.
42. Id. at 546. There is an exception if the employer can show that there is a bona fide occupational qualification which justifies not employing members of a protected class. Id.
43. Id. at 545.
44. Id. at 544. If Martin Marietta could prove that a woman with pre-school-age children was unable to perform the job, Martin Marietta could claim that not having pre-school-age children is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." Id. This requirement would then be a bona fide occupational qualification exception to Title VII.

42 U.S.C. § 2000e-2 (c) states in pertinent part:
(1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, 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; and
(2) it shall not be an unlawful employment practice for a school, college, or university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propaganda of a particular religion.

45. Phillips, 400 U.S. at 545.
fide occupational qualification exception should only be applied in situations where the job requires the physical characteristics of only one of the sexes.66

In City of Los Angeles v. Manhart, the Supreme Court expanded upon its earlier decision in Phillips.47 That suit was brought because an employer calculated its employees' monthly pension plan fees based on gender mortality rates which demonstrated that women live longer than men.48 The issue before the Court was whether the existence or nonexistence of discrimination should be determined on a class or an individual basis.49 The Supreme Court held that the language of Title VII clearly requires the focus to be placed on the individual, and not the class from which the individual is a member.50 Therefore, it is unlawful

46. Id. at 545-46. The exception only applies in circumstances where the nature of the job requires the person to be a male or female, for example: fashion model, actor, or actress. Id. at 547. Equal Employment Commission, Guidelines On Discrimination Because of Sex, 29 C.F.R. § 1604.2 (1994) states in pertinent part:

Sex as a bona fide occupational qualification

(a) The commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. Label - "Men's jobs" and "Women's jobs" - tend to deny employment opportunities unnecessarily to one sex or the other.

(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. For example, the assumption that the turnover rate among women is higher than among men.

(ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men less capable of assembling intricate equipment: that women are less capable of aggressive salesmanship. The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not 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 except as covered specifically in paragraph (a)(2) of this section.

(2) Where it is necessary for the purposes of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress.

29 C.F.R. § 1604.2.

47. 435 U.S. 702 (1978) [hereinafter Manhart].

48. Id. at 702.

49. Id. at 708.

50. Id. In reaching this determination the court relied on the fact that Title VII refers to "individuals," not "classes." Id. The court also stated:

Even if the statutory language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes. Practices that classify
for an employer to rationalize its differential hiring practices on the basis of generalizations and stereotypes regarding a class of people.\textsuperscript{51} The goal of Title VII is to provide protection to women and minorities as individuals, not as a group.\textsuperscript{52} Thus, the fact that an employer hires both men and women becomes irrelevant when the employer applies different rules to similarly situated men and women.\textsuperscript{53}

The consequence of \textit{Phillips}, in connection with \textit{Manhart}, is that an employer may not discriminate against individuals within a protected class unless the employer demonstrates that there is an underlying bona fide occupational qualification exception.\textsuperscript{54} However, there is a discrepancy within the lower courts as to when the \textit{Phillips-Manhart} rationale should be applied.\textsuperscript{55} The courts are in agreement that no restrictive rules can be applied to only one of the sexes when both men and women are hired.\textsuperscript{56} The disagreement arises over whether the same principles hold true where the employer only employs members of one sex.\textsuperscript{57} In other words, the courts are split as to whether the same rules govern situations where the employer only hires women, and chooses to discriminate amongst them.\textsuperscript{58}

\begin{footnotesize}
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\item \footnotetext{51.} Therefore, the City of Los Angeles Department of Water & Power's practice of charging women more money for their pension plans was found to be a violation of Title VII. The policy was based on statistical proof that women outlive men. However, this statistical information is a class generalization and not an appropriate justification for such a differential policy. \textit{Id.} at 709-11.
\item \footnotetext{52.} \textit{Manhart}, 435 U.S. at 708.
\item \footnotetext{53.} \textit{SHULMAN & ABERNATHY, supra note 18}, at 5-58 (1990). For example, it is a Title VII violation where an employer refuses to hire married women but willingly employs married men.
\item \footnotetext{54.} \textit{SHULMAN & ABERNATHY, supra note 18}, at 5-57.
\item \footnotetext{55.} \textit{SHULMAN & ABERNATHY, supra note 18}, at 5-57.
\item \footnotetext{56.} \textit{SHULMAN & ABERNATHY, supra note 18}, at 5-57.
\item \footnotetext{57.} \textit{SHULMAN & ABERNATHY, supra note 18}, at 5-57.
\item \footnotetext{58.} See E.E.O.C. v. Delta Airlines, 578 F.2d 115, 117 (5th Cir. 1978) (holding that the no-marriage rule applied to women was not "sex-plus" discrimination on the basis of gender because there were no males hired as stewardesses, the women were not being treated differently than the men; therefore, the discrimination was on the basis of marriage, not sex); Stroud v. Delta Air Lines, 544 F.2d 892, 894 (5th Cir. 1977) (holding that the no-marriage rule did not constitute "sex plus" discrimination because it was only applied to flight attendants who happened to be female); see also Costa v. Markey, 706 F.2d 1 (1st Cir. 1983). \textit{Contra} Sprogis v. United States Air Lines, Inc., 444 F.2d 1194, 1198 (8th Cir. 1971) (holding no-marriage rule applied only to women was sex-plus discrimination).
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C. Sex Plus Marriage

Marriage has often been used as a characteristic to differentiate between male and female employees, particularly in the airline industry. For the most part, courts have held that no-marriage rules must be applied equally to both sexes in order to avoid a Title VII violation. However, as indicated above, there has been some dispute as to whether no-marriage rules violate Title VII when an employer only employs women. Several airlines have required that their flight attendants and ticket agents be unmarried.

Section 1604.4 of EEOC Guidelines on Discrimination Because of Sex provides:

(a) The Commission has determined that an employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is discrimination based on sex prohibited by title VII of the Civil Rights Act. It does not seem to us relevant that the rule is not directed against all females, but only against married females, for so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex.

(b) It may be that under certain circumstances, such a rule could be justified within the meaning of section 703(e)(1) of title VII. We express no opinion on this question at this time except to point out that sex as a bona fide occupational qualification must be justified in terms of the peculiar requirements of the particular job and not on the basis of a general principle such as the desirability of spreading work.

59. See, e.g., Delta Air Lines, 578 F.2d at 115; Stroud, 544 F.2d at 892; Sprogis, 444 F.2d at 1194.

60. See, e.g., Delta Air Lines, 578 F.2d at 117 (holding that a no-marriage rule is permissible only if applied to men as well as women); Sprogis, 444 F.2d at 1198 (holding that the no-marriage rule is impermissible when it is only applied to female employees).

61. See cases cited supra note 58.

62. While those cases concerning no-marriage rules imposed upon female stewardesses are relevant to the discussion of sex-plus discrimination, it should be noted that these cases are no longer as influential as they once were because several courts have since held that being a female is not a bona fide occupational qualification for airline flight attendants and ticket agents. E.g., Hailes v. United Air Lines, 464 F.2d 1006, 1008 (5th Cir. 1972) (holding that being a female was not a bona fide occupational qualification for flight attendants and ticket agents).


64. Id.
While these guidelines clearly set forth that sex plus marriage discrimination should not be tolerated, the message has not always been so clear.65 For instance, Mary Burke Sprogis was discharged as a United Air Lines’ stewardess on June 19, 1966,66 for violating that company’s no-marriage rule.67 At the time, United Air Lines’ policy dictated that they not employ married female stewardesses.68 However, when that policy was changed, Mrs. Sprogis sued United Air Lines.69 The Court of Appeals ruled in Mrs. Sprogis’ favor and held that United Air Lines’ no-marriage policy was a Title VII violation, regardless of the fact that this rule was only applied to female employees working as stewardesses.70

Another influential case in the area of sex plus marriage discrimination was brought by Etta Ruth Stroud in 1977.71 Etta Ruth Stroud had worked as a stewardess for Delta Air Lines for approximately eleven years72 before being forced to resign due to her pending marriage.73 At the time, it was Delta’s policy not to employ married women. By March 1971, Delta elected to rescind their no-marriage policy.74 However, when Mrs. Stroud sought to be reinstated, her application was

65. All cases cited in this Comment illustrate the fact that employers are not aware that “sex-plus” discrimination is a violation of Title VII. If employers fully understood the doctrine of sex plus discrimination, the issue of whether it is lawful to employ different hiring standards based on a person’s gender would not arise.
66. Sprogis, 444 F.2d at 1196.
67. Id. The no-marriage rule was first applied in the 1930’s. Id. The rule required that female stewardesses be single when employed and remain so unmarried under penalty of discharge. Id.
68. Id.
69. In a letter dated November 7, 1968, United Air Lines agreed that, “Marriage will not disqualify a Stewardess from continuing in the employ of the Company as a Stewardess, but any Stewardess who shall hereafter become pregnant shall have her services with the Company permanently severed as a Stewardess.” Id. at 1196 n.2.
70. The court held:
   It is irrelevant to this determination that the no-marriage rule has been applied to only female employees falling into the single, narrowly drawn “occupational category” of stewardess. Disparity of treatment violative of Section 703(a)(1) may exist whether it is universal throughout the company or confined to a particular position. Nor is the fact of discrimination negated by United’s claim that the female employees occupy a unique position so that there is no distinction between members of opposite sexes within the job category. Considerations of the peculiar characteristics of the position only pertain to the claim of a bona fide occupational qualification under Section 703(e)(1).
   Id. at 1198.
72. Id. Etta Ruth Stroud worked from 1956 through April of 1965 with the airline. Id.
73. Id.
74. Id.
denied. Mrs. Stroud then sued Delta, claiming that they had violated her Title VII rights and had refused to reinstate her because she was a married woman.

The court acknowledged that on the surface this might appear to be a "sex-plus" discrimination situation because a certain class of women, married women, were being denied employment. However, the court held that a "sex-plus" discrimination claim can only be made when women are treated differently than men. Until December 1972, it was Delta's policy only to hire women for the position of stewardess; therefore, Mrs. Stroud could not make the claim that she was being treated differently than the men. As a result, the court found that there was no discrimination because Mrs. Stroud was not being treated differently than males. Without a showing of differential treatment based on a sex-neutral characteristic (in this case marriage), there could be no "sex-plus" discrimination.

While the courts in Sprogis and Stroud reached different conclusions, they agreed that a no-marriage rule constitutes a Title VII "sex-plus" violation when it is applied only to women and not to men in the same position. However, the courts differ as to what constitutes the "same position." The Sprogis court defines "same position" as an

75. Id.
76. Mrs. Stroud relied on 42 U.S.C. § 2000e-2(a), which makes it unlawful for an employer: (1) to fail or refuse to hire or to 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; . . .

Id. at 893 (citing 42 U.S.C. § 2000e-2(a)).
77. Id.
78. Id. at 894.
79. Id. at 893. The court held that:

Here, plaintiff is not a member of one of the relevant identifiable classes which has been dispreferred in favor of another class. Rather, certain women - stewardesses who are unmarried - are favored over certain other women - stewardesses who are married. As one of the all-female group of flight attendants employed by Delta, plaintiff suffered a discrimination, but it was based on marriage, and not sex. Men were not favored over women; they simply were not involved in the functioning of the policy.

Id.
80. Id.
81. Id. at 894. Accord Jurinko v. Edwin L. Wiegand Co., 477 F.2d 1038, 1044 (3d Cir. 1973) (holding that the married women were unable to establish discrimination because there was no basis on which the women could be compared to similarly situated men).
82. Sprogis, 444 F.2d at 1198; Stroud, 544 F.2d at 893.
83. Compare Sprogis, 444 F.2d at 1198; Stroud, 544 F.2d at 893 (holding that a no-marriage rule applied only to women was sex plus discrimination) with Stroud, 544 F.2d at 893 (holding that a no-marriage rule applied only to women was not discrimination because since no males were hired as stewards, the women
employee working for the same company, while the Stroud court defines “same position” as someone working in the same occupational position.84

Although married persons as a group are not provided protection under Title VII, they have found relief under Title VII through the “sex-plus” doctrine.85 The same has been true for sexually promiscuous persons.86 Rules concerning sexual promiscuity have been treated very similarly to no-marriage rules by the courts.87 For example, employers may not bar promiscuous females or unwed mothers from unemployment, while employing promiscuous men and unwed fathers.88

D. Sex Plus Grooming & Sex Plus Dress

The “sex-plus” theory has also been applied to employees who have been denied employment or who have been fired for refusing to comply with rules governing employee hair length and proper dress.89 However, these employees have not been very successful in seeking relief under a “sex-plus” theory.90

In Willingham v. Macon Telegraph Publishing Co., for example, Mr. Willingham was denied employment because his hair exceeded the acceptable length set forth in the Macon Telegraph’s grooming code.91 However, the company only applied the code to exclude men with long hair, and not women.92 Therefore, Mr. Willingham argued that Macon

84. Sprogis, 444 F.2d at 1198; Stroud, 544 F.2d at 893-94.
85. See 42 U.S.C. §§ 2000e to 2000e-17. Title VII does not make it unlawful for an employer to discriminate against “married” persons; it only protects individuals from being discriminated against based on race, color, religion, sex, or national origin. Id. § 2000e-2 (a).

87. Id.
89. See infra notes 91-131 and accompanying text.
90. See infra notes 91-131 and accompanying text.
91. Willingham v. Macon Tel. Publ. Co. 507 F.2d 1084, 1087 (5th Cir. 1975). Macon Telegraph’s grooming code required all employees who came into contact with the public to be neatly dressed in accordance with the standards customarily accepted in the business community. Id. The grooming code was originally implemented following the surrounding community’s disapproval of long-haired males. Id.
92. Id.
Telegraph was unlawfully discriminating on the basis of sex because there was no similar hair length restriction for women. Mr. Willingham's theory was that "sex-plus" should include "sex plus any sexual stereotype." Accordingly, since short hair is stereotypically a characteristic possessed by males, requiring this of all men would be a Title VII violation.  

The Court of Appeals rejected Mr. Willingham's argument and held that Macon Telegraph's employee grooming policy did not constitute sex discrimination. The court's reasoning was twofold. First, the court reasoned that it was unlikely that Congress had intended for Title VII to encompass discrimination based on grooming. In the court's opinion, employers have the right to exercise discretion when it comes to the operation of their businesses so long as they do not deny equal access to the job. Second, the court held that the doctrine of "sex-plus" discrimination only bars employers from discriminating on the basis of immutable characteristics (such as race or national origin) and legally protected rights (such as the right to marry or the right to have children). Since hair length is neither an immutable characteristic nor a legally protected right, the court denied Mr. Willingham's sex discrimination claim. In reaching its decision, the court also relied on the fact that Macon Telegraph had a grooming code which applied to both male and female employees.

In its conclusion, the Willingham court carefully noted that its holding should not be misinterpreted as providing support for sexual stereotyping. The court simply expressed its belief that it did not have the authority to expand the protection afforded under Title VII without further congressional action.

93. Id. at 1088. Mr. Willingham based his claim on a theory of sex plus hair length discrimination. Id.
94. Id. at 1089.
95. Id. at 1092.
96. Id. at 1090.
97. Id. The court went on to state that it should not expand the reach of Title VII into a questionable area without a stronger Congressional mandate. Id.
98. Id. at 1092.
99. Id. at 1091.
100. Id.
101. Id. at 1092. Female employees also had to be neatly dressed and groomed. Id. at 1087. However, there was no provisions within the code requiring females to keep their hair short. Id.
102. Id. at 1092. The court did not want to be misunderstood as saying that men with long hair were not as capable of performing the job as men with short hair. Id.
103. Id. Since Title VII does not provide protection to long-haired individuals, the court was not prepared to do so. Id.
The majority of cases involving “sex plus” grooming discrimination have been brought by males. In virtually all of these types of cases, the courts have consistently held that “sex plus” grooming discrimination is not a violation of Title VII because hair length is not an immutable characteristic. Accordingly, “sex plus” grooming can be distinguished from “sex plus” marriage because the latter denies a legally enforceable right, namely marriage.

Employees have been more successful applying the “sex-plus” theory to dress codes. In EEOC v. Sage Realty Corp., Margaret Hasselman worked as a lobby attendant in a Manhattan office building from February, 1973 until June 4, 1976. Ms. Hasselman’s position required her to handle the building’s security, safety, and maintenance. She was also responsible for offering assistance and providing information to visitors when they first entered the building.

Ms. Hasselman’s uniform was both selected and paid for by Sage Realty Corporation. The company required her to wear the uniform at all times and provided a new uniform every six months. On May 12, 1976, Ms. Hasselman was given a new uniform, the “Bicentennial uniform”, to wear. When she tried on the uniform, she found that

104. See, e.g., Barker, 549 F.2d at 401; Longo, 537 F.2d at 685; Earwood, 539 F.2d at 1351; Dodge, 488 F.2d at 1337; Rafford, 348 F. Supp. at 317.
105. See, e.g., Barker v. Taft 549 F.2d 400, 401 (6th Cir. 1977) (holding that an employer’s grooming policy regulating the way men were to have their hair cut and the way women were to have their hair styled was not a Title VII violation); Longo v. DeCoppet 537 F.2d 685, 685 (2d Cir. 1976) (holding that a grooming code requiring only male employees to have short hair was not a Title VII violation); Earwood v. Continental Southeastern Lines, Inc., 539 F.2d 1349, 1351 (4th Cir. 1976) (holding that a grooming code applicable to males was not a Title VII violation); Dodge v. Giant Food Inc., 488 F.2d 1333, 1337 (D.C. Cir. 1973) (holding that the requirement for male employees to keep their hair short was not a Title VII violation); Rafford v. Randle Eastern Ambulance Serv., Inc., 348 F. Supp. 316, 317 (S.D. Fla. 1972) (holding that employer’s grooming policy which required male employees to shave their beards and mustaches was not a Title VII violation).
106. See supra part II.C.
107. See infra notes 108-31 and accompanying text.
109. Id. at 603.
110. Id.
111. Id.
112. Id.
113. The uniform was designed to celebrate the nation’s bicentennial year. Id. at 604. The uniform, which resembled an American flag, consisted of broad red, white, and blue stripes. Id. It was shaped like an octagon and contained an opening for the attendant’s head. Id. The uniform was supposed to be worn as a cape that would drape over the shoulders and snap at the wrists. Id. It was otherwise open at the sides. Id. Underneath the cape the lobby attendants were expected to wear blue dancer pants with sheer stockings. Id. The attendants were not permitted to wear any-
it was too short and revealing.\textsuperscript{114} Even after the uniform was altered, it "was uneven and remained as revealing as it had been in its unaltered form."\textsuperscript{115}

As a result of her wearing this uniform, Ms. Hasselman was subjected to repeated harassment.\textsuperscript{116} The situation was so upsetting to Ms. Hasselman that she found it difficult to perform her job properly.\textsuperscript{117} Ms. Hasselman persisted in trying to have the uniform altered, but no adequate accommodation was made.\textsuperscript{118} Finally, on June 4, 1976, Ms. Hasselman decided not to wear the uniform.\textsuperscript{119} On June 7, 1976, Ms. Hasselman was given an ultimatum: she was either to wear the uniform or sign a "layoff" letter.\textsuperscript{120}

The issue before the court was whether the requirement to wear the "Bicentennial" uniform constituted sex discrimination under Title VII.\textsuperscript{121} The court ruled in Ms. Hasselman's favor after reasoning that the dress requirement in this situation was an infringement on Ms. Hasselman's privacy rights; thus distinguishing her case from those involving grooming restrictions.\textsuperscript{122} The court also rejected Sage Realty's argument that the wearing of the "Bicentennial" uniform was a bona fide occupational qualification.\textsuperscript{123} The court concluded that while there was no sex discrimination per se in the dress code, the code still constituted a Title VII violation because it subjected Ms. Hasselman to sexual harassment.\textsuperscript{124}

In Carroll v. Talman Federal Savings and Loan Ass'n,\textsuperscript{125} the Court of Appeals was faced with a sex plus dress claim brought by fe-

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\textsuperscript{114} Id. Although the female lobby attendant wore different sizes, the uniform came in only one size. \textit{Id.}

\textsuperscript{115} Id. Portions of Ms. Hasselman's thighs and buttock could be seen. Also, when she moved in certain positions (that her job required) her waist was visible. \textit{Id.}

\textsuperscript{116} Id. at 605.

\textsuperscript{117} Id. She was sexually propositioned and was the subject of lewd comments and gestures. \textit{Id.}

\textsuperscript{118} Id. at 605-06.

\textsuperscript{119} Id. at 606.

\textsuperscript{120} Id. at 607.

\textsuperscript{121} Id. at 610.

\textsuperscript{122} Id. at 609 n.15. It should be noted that the court recognized the fact that Ms. Hasselman was not being treated differently than male employees because no males were employed as lobby attendants at that time. \textit{Id.} However, the court was convinced that had males been employed, they would not have had to wear the "Bicentennial" uniforms. \textit{Id.}

\textsuperscript{123} Id. at 611.

\textsuperscript{124} Id.

\textsuperscript{125} 604 F.2d 1028 (7th Cir. 1979).
male bank tellers. The uniforms in question did not subject the female employees to sexual harassment. However, the differing dress codes required the female employees to incur additional costs that the male employees did not have to pay.

The Second Circuit found in favor of the female employees and held that while employers have the right to require their employees to wear a uniform, they cannot exercise this right in a discriminatory manner. The court reasoned that when males and females perform the same job, it is not permissible to allow the men to wear normal business attire while requiring the females to wear uniforms. Although the facts in Talman are quite different from the facts in Sage Realty Corp., both courts held that “sex plus” dress discrimination will not be tolerated under Title VII.

E. Sex Plus Stereotyped Characteristics

Another area in which the “sex-plus” theory has been applied is sex plus sexual stereotyping discrimination. The application of the “sex-plus” doctrine in this area has successfully established that a bona fide occupational qualification cannot be based on a stereotyped classification of groups protected under Title VII.

In 1969, the female employees at Colgate-Palmolive sued the company alleging sex discrimination. Their claim was based on the company’s differential job distribution policy. Due to the nature of the business, Colgate-Palmolive assigned employees to different jobs

126. Id. at 1029. Talman Savings and Loan required its female employees to wear a uniform, but only required that male employees dress in a business like manner. Id.
127. See id. at 1030.
128. Id. The cost of the uniform was considered to be part of the women’s salary. Also, the female employees had to pay for the cleaning and maintenance of their uniforms. Id. In addition, if the women wanted additional parts of the uniform so they did not have to wear the same uniform everyday, they had to pay these expenses as well. Id. The male employees, on the other hand, were not required to wear a company uniform (although they were required to do so until 1968). Id.
129. Id. at 1032.
130. Id. The court went one step further and held that there could be no bona fide occupational qualification defense because it is clear that women could just as easily dress in a business-like manner without wearing uniforms. Id.
131. Talman, 604 F.2d at 1033; Sage Realty Corp., 507 F. Supp. at 611.
132. See infra notes 134-51 and accompanying text.
133. See infra notes 134-51 and accompanying text.
135. Id. at 714.

There were two classes of jobs from which the employees were assigned, male jobs and female jobs. The male employees could request jobs from either classification, but the female employees were only eligible to perform the female jobs. The women were restricted to jobs that did not require the lifting of objects weighing over thirty-five pounds.

The Seventh Circuit held that Colgate-Palmolive’s differential job distribution policy constituted sex discrimination because the policy did not consider its female employees as individuals, but rather as a weaker class. The court further held that Colgate-Palmolive was free to enforce a thirty-five pound weight lifting requirement on all of its employees as long as it screened both men and women.

Another influential case in the area of sex plus stereotyped characteristics discrimination was brought by Ms. Lorena Weeks in Weeks v. Southern Bell Telephone & Telegraph Co. Ms. Lorena Weeks had worked for Southern Bell for nineteen years when she applied to be a switchman. Ms. Weeks submitted her application on March 17, 1966, and on April 18, 1966, she was informed that Southern Bell had decided not to employ women as switchmen. As a result, Ms. Weeks filed a complaint with the Equal Employment Opportunity Commission and shortly thereafter, she filed a suit against Southern Bell.

It was undisputed that Ms. Weeks was denied the position because she was a woman. The switchman position was given to the only other employee who applied, a man with less seniority. However, Southern Bell’s decision not to hire Ms. Weeks was not based on its perception of her as an individual. Rather Southern Bell refused to hire her because they did not believe any woman was capable of performing

136. Id. at 715.
137. Id.
138. Id.
139. Id.
140. Id. at 717-18. Colgate-Palmolive based the policy on its belief that women were not capable of lifting as much weight as men. Id.
141. Id. at 718.
142. Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969) [hereinafter Southern Bell].
143. Id. at 230.
144. Id.
145. Id.
146. Id. at 231.
147. Id.
the job. Southern Bell took the position that the job of switchman was too strenuous for a woman.\textsuperscript{148} The company felt that it would be too difficult for a woman to lift equipment weighing over thirty pounds and to be on call twenty-four hours a day.\textsuperscript{149}

The Seventh Circuit found in favor of Ms. Weeks and held that Southern Bell's refusal to hire women as switchmen was based on a stereotyped characterization of women, rather than on a woman's individual and actual abilities.\textsuperscript{150} The court reasoned that reliance on stereotyped characterizations only helps to perpetuate the very evils Title VII was formed to eliminate.\textsuperscript{151} Therefore, Southern Bell's policy was held to constitute sex discrimination in violation of Title VII.\textsuperscript{152}

III. \textit{Fisher v. Vassar College}\textsuperscript{153}

A. Procedural History and Procedural Posture

1. District Court Decision

On June 14, 1993, Dr. Fisher, then a faculty member of Vassar College, appeared before the Southern District Court of New York.\textsuperscript{154} She filed a suit against Vassar College alleging violations of Title VII,
the Age Discrimination in Employment Act ("ADEA"), and the Equal Pay Act. After a bench trial, the district court held that: (1) Fisher established that she was denied tenure in violation of Title VII; (2) Fisher established that she was denied tenure in violation of the ADEA because of her age; and (3) Fisher established that she was denied equal pay for equal work.

The district court further held that Fisher was entitled to recover back pay with interest less any amounts earned during the period from 1986, when she was discharged, until the present. She was also entitled to recover double damages under the Equal Pay Act and the ADEA. However, the court ruled that it was up to Fisher to determine the form of damages she wanted to recover because she was only entitled to one type of monetary recovery. The court also held that Fisher was entitled to receive attorney’s fees and costs. Furthermore, the court ordered that Dr. Fisher was entitled to reinstatement as an Associate Professor of Biology with tenure, but that after two years, she would be subject to the college’s evaluation process.

2. Appeal and Cross-Appeal

Both Fisher and Vassar College appealed the district court’s decision. Vassar argued that the district court committed reversible error and based its appeal on three grounds. First, that Dr. Fisher had failed to sustain her burden of proving intentional discrimination. In addition, the court’s “sex-plus” analysis was faulty because the court failed to compare Dr. Fisher to similarly situated married men; the court had compared her to only single women. Second, the statistical proof relied on by the court was fundamentally flawed and clearly

155. Id.
156. Id. at 1230.
157. Id. at 1231.
158. Id. at 1232.
159. Id. at 1234.
160. Id.
161. Id.
162. Id. at 1235.
163. See Appellee's Brief, Fisher (No. 94-7737); Appellant’s Brief, Fisher (No. 94-7737).
164. Appellant’s Brief at 1-2, Fisher (No, 94-7737).
165. Id.
166. Id.
Third, the district court's findings as to the age discrimination claim and the violation of the Equal Pay Act, along with the resultant remedies imposed, all constituted reversible error.168

Dr. Fisher's cross-appeal was predicated on two grounds.169 First, the district court failed to rule, based upon the facts actually found by the court, that there was a prima facie case of "simple" sex discrimination. Second, it was an error for the court, in an attempt to make Dr. Fisher "whole," to grant relief in the form of her reinstatement as an Associate Professor of Biology with tenure for a period of two years, only thereafter to subject her to an evaluation process similar to the one that initially led to the lawsuit.170

3. Second Circuit Decision

On September 7, 1995, the Second Circuit dismissed Dr. Fisher's lawsuit.171 The court vacated the judgments of the district court and held that the district court's conclusions of liability on the sex discrimination claim, the age discrimination claim, and the Equal Pay Act claim were clearly erroneous.172 The court concluded that Dr. Fisher was not entitled to attorney's fees since none of her claims were successful.173 Furthermore, the court affirmed the district court's rejection of Dr. Fisher's "simple" sex discrimination claim and therefore, held that it was not necessary to address Dr. Fisher's cross-appeal regarding the terms of her reinstatement.174

IV. DR. FISHER

Dr. Fisher is a married woman who was fifty five years old when she was denied tenure.175 At that time she also had two daughters, ages twenty and seventeen.176 She holds a Bachelor's degree from the University of Wisconsin, and Master's and Ph.D. degrees in Zoology

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167. Id. at 2. In addition, the college claimed that stray anecdotal remarks by non decision-makers were improperly considered. Id.
168. Id.
169. Appellee's Brief at 3, Fisher (No. 94-7737).
170. Id.
171. Fisher, 1995 WL 527804 at *34.
172. Id.
173. Id.
174. Id.
175. Appellee's Brief at 3, Fisher (No. 94-7737).
176. Id.
from Rutgers University. Dr. Fisher engaged in post doctoral work at Rutgers Medical School from 1963 to 1965. After she finished her academic work in 1965, she remained at home with her daughters and kept in touch with the field of zoology by reading journals and keeping up with work in the field of biology. This “hiatus” terminated in 1974, when she returned to teaching biology at Marist College in Poughkeepsie, New York. She was at Marist until 1977, when Vassar College hired her as a Visiting Assistant Professor in the Biology Department.

Dr. Fisher remained in the Vassar Biology department as an Assistant Professor, and was promoted to a tenure-track position in 1980. Her performance was reviewed in 1982, at which time she received a contract extension and a contract renewal for three years, which brought her up for tenure review in 1985. She was denied tenure on March 29, 1985.

At the time of her tenure review, Dr. Fisher had seven peer-reviewed publications and a completed manuscript, which was subsequently published in a peer-reviewed journal. She had secured three financial grants to support this work prior to accepting her position with Vassar College. While at Vassar, she went on to secure five substantial grants from the National Science Foundation (“NSF”) as well as several intramural grants. Dr. Fisher also had significant consulships with the NSF and the National Institute for Health.

V. DISTRICT COURT’S ANALYSIS OF THE TITLE VII CLAIM

A. Simple Sex Claim

Dr. Fisher alleged that she was discriminated against “because of her
The district court considered Dr. Fisher's claim as both a simple sex discrimination claim and a sex plus marriage claim. \textsuperscript{189}

However, the district court held that Dr. Fisher failed to establish a valid claim of simple sex discrimination.\textsuperscript{190} In reaching this determination, the court relied on the following facts.\textsuperscript{191} First, another female professor in the Biology Department who was considered for tenure at the same time as Dr. Fisher was granted tenure.\textsuperscript{192} Second, a male professor who was considered for tenure at the same time as Dr. Fisher was denied tenure.\textsuperscript{193} Third, Vassar College’s tenure review committee was comprised of several female professors from within the Biology Department.\textsuperscript{194} Fourth, several women in the Biology Department had been previously tenured.\textsuperscript{195} The district court found that these factors prevented Dr. Fisher from establishing a prima facie case of simple sex discrimination.\textsuperscript{196}

**B. Sex Plus Marriage Claim**

Dr. Fisher presented the following evidence in support of her sex plus marriage claim: evidence distinguishing between the “hard” sciences departments (including Mathematics, Physics, Chemistry, Geology, Biology, and Computer Science) and the college’s other departments,\textsuperscript{197} evidence that the “hard” sciences’ faculties had traditionally been composed of men, both married and single, and women (single only);\textsuperscript{198} evidence that although married women constituted fifty-two percent of the women in the sciences nationally, no married women had

\textsuperscript{188} Fisher, 852 F. Supp. at 1224. According to the court: Discrimination “because of . . . sex,” as used in Title VII, does not refer only to discrimination due to sex alone. The scope of Section 703 (a)(1) is not confined to explicit discrimination based ‘solely’ on sex. In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.

\textsuperscript{189} Id.

\textsuperscript{190} Id. at 1224-25.

\textsuperscript{191} Id. at 1225.

\textsuperscript{192} Id. at 1224.

\textsuperscript{193} Id. at 1225.

\textsuperscript{194} Id.

\textsuperscript{195} Id.

\textsuperscript{196} Id. Ms. Fisher showed that she was a member of protected class and that she was qualified for the job, but she failed to show that similarly situated men were being treated any differently.

\textsuperscript{197} Id. at 1225-26.

\textsuperscript{198} Id. at 1226.
ever been tenured in any of the “hard” sciences departments at Vassar College.\textsuperscript{199} The essence of Dr. Fisher’s sex plus marriage allegation was her assertion that the decision to deny her tenure was based on the fact that she had left academia for eight years to raise a family.\textsuperscript{200} Vassar College rebutted Dr. Fisher’s allegations by presenting evidence to show that she was denied tenure due to the unfavorable tenure evaluations she had received.\textsuperscript{201} In addition, Vassar argued that the professors who had received tenure were more qualified and better fulfilled the needs of the department than Dr. Fisher.\textsuperscript{202} The district court found in Dr. Fisher’s favor and held that Vassar was guilty of “sex-plus” discrimination in violation of Title VII.\textsuperscript{203} The court reached this determination based on the following findings. First, Dr. Fisher was a member of a protected class under Title VII. Second, Dr. Fisher was qualified for tenure. Third, Dr. Fisher was rejected under circumstances that gave rise to an inference of unlawful discrimination.\textsuperscript{204} The court further found Vassar’s affirmative defense to be merely a pretext for discrimination because its standards were arbitrary and in many cases unwritten.\textsuperscript{205}

C. Arguments Against the District Court’s Holding in \textit{Fisher}

The district court’s findings with respect to Dr. Fisher’s sex-plus marriage claim were erroneous for two primary reasons. First, the factual and logical interpretation of the case was inaccurate, and second, the tenure selection rights of a private university should not be evaluated by the courts.

Dr. Fisher based her “sex-plus” claim largely on the fact that prior to joining the Vassar faculty, she had taken a hiatus from her career to raise a family.\textsuperscript{206} Her argument is that Vassar College interpreted this to mean that she was more committed to her family than to her career,

\begin{itemize}
\item \textsuperscript{199} \textit{Id.}
\item \textsuperscript{200} \textit{Id.} From 1965-1974, Dr. Fisher left her academic career to raise her family.
\item \textsuperscript{201} \textit{Id.} at 1227.
\item \textsuperscript{202} \textit{Id.}
\item \textsuperscript{203} \textit{Id.} at 1229.
\item \textsuperscript{204} \textit{Id.} at 1226. Ms. Fisher presented “evidence that prior to, contemporaneous with, and subsequent to her denial of tenure, the Biology Department at Vassar College tenured only faculty members who were not married women (single women, single men, and married men) and who had qualifications less than or equal to hers.” \textit{Id.} at 1227.
\item \textsuperscript{205} \textit{Id.} at 1228.
\item \textsuperscript{206} \textit{Id.} at 1226.
\end{itemize}
and therefore, they denied her tenure.  

Her argument is unpersuasive in light of the following facts. Dr. Fisher’s hiatus was from 1965 to 1974; she was not offered a position at Vassar College until 1977. At the time Dr. Fisher was denied tenure, her daughters were ages seventeen and twenty. Thus, the suggestion that Vassar based its decision on a hiatus taken by Dr. Fisher prior to her employment at Vassar was not supported by any facts presented in the case. The mere fact that she took her hiatus prior to working at Vassar also makes it appear illogical that the college would decide to deny her tenure on this basis. Further, if Vassar had relied on this event as a determinative factor in its decision, it seems that it would have been viewed favorably rather than negatively because the fact that Dr. Fisher had already raised her family eliminated the risk that she would one day decide to leave Vassar to do so.

Dr. Fisher’s sex plus marriage claim implied that Vassar College discriminated against married women because of a stereotypical view of the wife and mother. However, the particulars of Dr. Fisher’s situation placed her in a position quite contrary to that of the stereotypical wife and mother. The fact that she had already raised her family, and the fact that her daughters were young adults suggested that Dr. Fisher was in a perfect position to dedicate her time to her career.

Secondly, the district court’s holding was erroneous because it relied on the fact that some of the college’s tenure standards were unwritten and arbitrary. Vassar is a private college, and as such its freedom to make tenure decisions should not be disturbed by the courts. As a private institution, Vassar has every right to develop its own tenure policy, and what might appear to be arbitrary to the court might be perfectly clear to those faculty members presiding on the tenure review committee. While it would have been better if all the standards were in writing so as to give notice to the faculty, Vassar’s rights as a private university were improperly weighed by the court.

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207. Id.
208. Id.
209. See id. at 1227.
210 The fact that Dr. Fisher’s daughters were ages 17 and 20 is also relevant because children of this age, as opposed to infants and young children, do not need to be attended to by their mother at all times. The fact that Dr. Fisher’s children were not infants was something that Vassar, in all likelihood, would once again look at favorably rather than negatively.
VI. SECOND CIRCUIT’S ANALYSIS OF THE TITLE VII CLAIM

In drawing it’s conclusion that Vassar had discriminated against Dr. Fisher based on a theory of “sex-plus” discrimination, the district court relied on the following evidence: anecdotes; perceived admissions from members of the Vassar tenure committee; statistics; and expert testimony.212 The Second Circuit held that taken together or individually, none of the evidence provided sufficient proof for a finding of “sex-plus” discrimination.213

According to the Second Circuit, Vassar successfully responded to Dr. Fisher’s allegation of discrimination by showing a non-discriminatory basis for the denial of tenure to Dr. Fisher.214 As indicated in the tenure committee’s fourteen page report, Dr. Fisher was denied tenure due to her lack of scholarship, teaching, ability, service, and leadership.215

Dr. Fisher was unsuccessful in showing that Vassar’s basis for her rejection was simply a pretext for an underlying motive of either sex or sex plus marriage discrimination.216 Therefore, Dr. Fisher failed to meet her burden of proof under the McDonnell Douglas test.217 In order to succeed on her sex plus marriage theory, Dr. Fisher needed to demonstrate by a preponderance of the evidence that Vassar’s claims of lack of scholarship, teaching ability, service, and leadership were a pretext for its discrimination against married women.218 However, the Second Circuit found Dr. Fisher’s use of anecdotal evidence to be

213. Id. at *26.
214. Id. at *10.
215. Id. The report stated, “[o]verall [the department was] not satisfied by Ms. Fisher’s service to the college may be adequate it is in no way outstanding . . . [and] not of sufficiently high quality for promotion.” Id.
216. Id.
217. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In McDonnell Douglas, the Supreme Court devised a three part test for applying Title VII. First, the plaintiff must present a prima facie case of discrimination by showing: (a) that the plaintiff is a member of a protected class; (b) that the plaintiff applied for and was qualified for an available position and; (c) that the plaintiff was denied the position; and (d) that the position remained open and that applications for the position were still being accepted. Id. at 802. Second, once the plaintiff has set out a prima facie case, the employer has the burden of providing a “legitimate non-discriminatory” basis for the denial of employment. Id. Third, if the employer satisfies this burden, the plaintiff then has the burden of showing that the reason stated by the employer is pretextual. Id. at 804.
218. See Fisher, 1995 WL 527804 at *9 (citing St. Mary’s Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993)).
insufficient to meet this burden because the anecdotes she offered did not involve married women who were being considered for tenure and the Vassar staff members that Dr. Fisher spoke of did not have any influence over her tenure decision.\footnote{219}

Dr. Fisher’s party admissions\footnote{220} also failed to meet her burden of proof because she relied on a note which the district court had erroneously construed.\footnote{221} In addition, the Second Circuit failed to accept Dr. Fisher’s statistics of discrimination because they amounted to “mere organized anecdotes”\footnote{222} and could not “be credited or relied on to support a result.”\footnote{223} Finally, the court refused to accept the expert testimony of Dr. Simon, Dr. Fisher’s only expert witness, as evidence of pretext because Dr. Simon’s testimony was based on her review of Dr. Fisher’s statistics and Dr. Simon’s own nationwide study of female science professors.\footnote{224}

However, the Second Circuit concurred with the district court that the reasons proffered by Vassar were pretextual.\footnote{225} Nevertheless, the Second Circuit held that the likeliest basis for Vassar’s pretext was the department’s dislike of and lack of respect for Dr. Fisher.\footnote{226} Therefore, the evidence of pretext was weak, and without affirmative proof of discrimination, the Second Circuit was left with little choice but to reverse the district court’s decision.\footnote{227}

\footnote{219. \textit{Fisher}, 1995 WL 527804 at *14-18.}
\footnote{220. The term “party admission” refers to statements made by faculty members at Vassar that Dr. Fisher was offering as evidence of unlawful discrimination.}
\footnote{221. \textit{Fisher}, 1995 WL 527804 at *17-20. Dr. Fisher presented a copy of her Faculty Record Card on which the Dean commented that there was “overkill on the dept’s part.” \textit{Id.} at *19. Dr. Fisher offered, and the district court interpreted this, as evidence of the Dean’s belief that the department acted may have acted with a bias toward Dr. Fisher. \textit{Id.} However, the Second Circuit concluded that the use of the word “overkill” could simply have meant that the Dean believed the report was vehement. \textit{Id.} Moreover, the court held that the notation presented no evidence that the department acted out of any bias toward Dr. Fisher. \textit{Id.}}
\footnote{222. \textit{Id.} at *25.}
\footnote{223. \textit{Id.}}
\footnote{224. \textit{Id.}}
\footnote{225. \textit{Id.} at *13.}
\footnote{226. \textit{Id.} at *14.}
\footnote{227. \textit{Id.} at *14. As a result of the Second Circuit’s holding, Dr. Fisher has lost more than one million dollars in damages and attorney’s fees in addition to her reinstatement to a tenure-track position at Vassar College. Jeffrey S. Klein & Nicolas J. Pappas, \textit{Discrimination in Tenure Decisions}, N.Y. L.J., Oct. 2, 1995, at 3.}
VII. CONCLUSION

A. On the Theory of "Sex-Plus" Discrimination

Title VII was passed to provide equal rights in employment, and its passage opened thousands of doors for women and minorities. However, Title VII also took away some rights. For example, Title VII eliminated the right of employer's to autonomously decide their hiring practices. Unsurprisingly, Title VII was not well received by all employers, and on several occasions, employers have attempted to circumvent Title VII by claiming that their discriminatory treatment was based on a non-protected characteristic (such as marital status or dress). Unfortunately, Title VII did not account for such employer behavior and, under a strict reading of Title VII, such behavior is permissible.

The theory of "sex-plus" was developed as means to end this type of employer circumvention of the statute. For instance, "sex-plus" discrimination has successfully prevented employers from using non-protected characteristics (such as dress, marriage, and stereotypes) as justifications for their true discriminatory intent.

B. On Fisher

As a member of a protected class, this author finds the doctrine of "sex-plus" discrimination to be very reassuring because the doctrine sends out a very clear message that discrimination will not be tolerated. However, the Fisher case is troubling because the district court's holding illustrates some of the consequences that may result from employees' abuse of the doctrine. The "sex-plus" argument is very much analogous to the bona fide occupational qualification contained within Title...
"Sex-plus" allows an employee/applicant to find an immutable characteristic about herself, which she can then add to her protected status, and then use that characteristic to claim discrimination. Similarly, the bona fide occupational qualification exception allows an employer to take a characteristic about an employee, and use it a basis to refute a discrimination claim. Just as employers can abuse the bona fide occupational exception to Title VII, so can employees abuse the "sex-plus" doctrine.

Dr. Fisher abused the "sex-plus" doctrine because her claim of sex plus marriage discrimination was both invalid and illogical. However, as the district court pointed out in its decision, she may have been able to bring a prima facie simple sex discrimination claim if she could have demonstrated disparate impact.

While there may be universities in this country where women and minorities go virtually unrepresented on the faculty, Vassar College does not appear to be one of those institutions. Both Dr. Fisher and the district court used the doctrine of "sex-plus" discrimination to an abusive extent at the expense of Vassar College. Civil rights advocates and women organizations should choose their battles more carefully. The Fisher case demonstrates the dangers of not being prepared for the battle you have undertaken.

In December of 1995, Dr. Fisher will likely file a writ of certiorari to the Supreme Court to have her case reheard. The Supreme Court

234. Section 2000e-2 (e) states in pertinent part:
(I) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or to refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those instances were religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .


235. For example, a particularly short woman who is denied a position can claim that she was denied the position not for being a woman, but for being a short woman. The fact that she is short is the immutable characteristic and the fact that she is a woman places her in a protected class.

236. For example, if there is a job opening for a male model, an employer does not have to accept applications from any female applicants because being a male is bona fide occupational qualification. The employer under these circumstances would have a valid bona fide occupational qualification defense to any potential discrimination claims made by female applicants.

should deny her petition because the Second Circuit clearly resolved all of the issues in the case on a very sound factual basis.

Wendi Barish