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Pregnancy Discrimination in Show Business: *Tylo v. Spelling Entertainment Group*

Diane Klein*

I. INTRODUCTION

Is a slender, non-pregnant body a “bona fide occupational qualification” (BFOQ) for employment on a steamy, night-time soap opera, or is the termination of an actress who becomes pregnant impermissible discrimination on account of sex or pregnancy, in violation of Title VII¹ as amended by the Pregnancy Discrimination Act (PDA)?² Do considerations of “authenticity” rule out the portrayal of a seductive adulteress by a pregnant woman? Is the offer of another role the following season, should the show be renewed, a satisfactory substitute for the promised role? Or would “shooting around” a woman’s pregnancy (or the use of a body double) be a reasonable accommodation for the producers to make? These questions, and others raised in *Hunter Tylo v. Spelling Entertainment Group, Inc.*³ form the subject of this Comment.

It is not disputed that Hunter Tylo’s pregnancy led to the termination of her contract with defendant Spelling Entertainment Group, Inc. (SEG) from her contracted-for role on Fox’s “Melrose Place,” a night-time soap opera watched by approximately eight

* J.D. 1997, UCLA School of Law. The author wishes to thank Professor Chris Littleton for her support, guidance, and encouragement, and Brian Draves of the Entertainment Law Review for his patience and forbearance in working on this rather unconventional project. This paper is dedicated to the beautiful and talented Hunter Tylo and her team of dedicated attorneys, for their courage on the front lines of the continuing battle against employment discrimination and gender discrimination in all its forms.

¹ Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-17.

² Pub. L. 95-555, § 1, 92 Stat. 2076 (Oct. 31, 1978), revising section 701, 42 U.S.C. § 2000e(k).

³ No. BC149844 (California Superior Court, Los Angeles County).

million households each Monday night.⁴ As Sally Suchil, Senior Vice President, General Counsel and Secretary of Spelling Television announced, the Company “has made the decision not to use Hunter Tylo in one of the roles on ‘Melrose Place’ for the upcoming 1996-97 season. Although she was the Company’s choice for the role, we were later informed by her agent that she was pregnant.”⁵

CNN has called this a case with “groundbreaking potential” for Hollywood’s hiring practices,⁶ and devoted almost three minutes to the story on its “Headline News” program.⁷ (On October 3, 1996, television station WRC of Washington, D.C. named it “The Trial of the Week.”⁸) Why? It “is believed to be the first pregnancy discrimination case of its kind in the entertainment industry.”⁹ Attorneys on both sides say this is the first such test of the PDA,¹⁰ and Ellen J. Vargyas, legal counsel for the Equal Employment Opportunity Commission, acknowledges that there are no precedents for the case.¹¹

Whether the BFOQ exemption for non-pregnancy will be available to entertainment employers is an open question. According to Vargyas, “such exemptions are rare and must go to the essence of the business.” Vargyas calls Tylo’s case “an interesting one” for its focus on authenticity: “For example, could you refuse to hire a woman to play Hamlet? How about a pregnant woman? In the entertainment business, those issues are certainly out there.”¹² As feminist attorney and activist Gloria Allred put it, “Many entertainment industry employers are now shaking in their boots and wondering whether what

⁴ JoAnne Weintraub, *You’ve Met Fox and the Peacock, Now Say Hello to the Frogman*, MILWAUKEE J. SENTINEL TV, Mar. 9, 1997 at 2.

⁵ *Termination of Hunter Tylo’s Services as a Performer*, PR NEWSWIRE, May 13, 1996, available in LEXIS, Nexis Library, Curnws File.

⁶ *Showbiz Today: Actress’ Files Pregnancy Discrimination Suit* (CNN Television Broadcast, Aug. 20, 1996, Transcript #1169-1) [hereinafter *Showbiz Today*].

⁷ *Headline News* (CNN cable television broadcast, Aug. 21, 1996).

⁸ *News 4 at 4* (WRC television broadcast, Oct. 3, 1996).

⁹ *Showbiz Today*, *supra* note 6.

¹⁰ Pamela Warrick, *Acting on a Legality: When the Real World Intrudes on Hollywood, Who Wins? An Actress Who Lost a “Melrose Place” Role Because of Her Pregnancy Plans to Find Out*, L.A. TIMES, Aug. 12, 1996, at E1.

¹¹ *Id.*

¹² *Id.*

they always took for granted as a right, the right to fire someone because she became pregnant, in fact is really legally permissible.”¹³

Even while acknowledging the marketplace realities of the entertainment business, and the special prerogatives of those who hire on-screen performers to make selections on the basis of appearance, to take proper account of the employment protection extended by law to pregnant women (including actresses), producers must make considerably greater accommodation to a female performer's pregnancy than would be required with respect to other appearance-altering events. Because the producers of “Melrose Place” did not do this, they should be held liable.

Part II of this Comment relates the facts of the case. Part III covers the history and present status of pregnancy in the employment law context. Coordinate with the evolving standards is an evaluation of how a claim like Tylo's might have fared under then-prevailing law. Part III also lays out the current law, including the leading cases under the Pregnancy Discrimination Act of 1978. Part IV presents the legal and policy reasons generally given for the non-applicability of the PDA to the performing arts; in essence, the argument is that a pregnant woman would be unable to perform the job of portraying a character like the one for which Tylo was selected, because pregnancy-related changes in her appearance would make her unsuitable for it. Part V presents arguments to the contrary: that female television performers should be brought within the ambit of PDA protection, and in particular, that a pregnant woman's apparent inability to do the job can be almost completely ameliorated by accommodations her employer would find minimally burdensome. This Part also calls into question the fundamental assumption about the sorts of roles for which a pregnant woman is or is not suitable. Finally, Part VI experiments with some less conventional approaches, “roads not (yet) taken” in the protection of pregnant women from employment discrimination.

¹³ *Showbiz Today*, *supra* note 6.

II. THE FACTS UNDERLYING *TYLO V. SEG*

Hunter Tylo is a beautiful, 34-year-old brunette soap opera actress and former model. Born and raised in Fort Worth, Texas, she appeared on the daytime soap operas "All My Children" and "Days of Our Lives" before landing the role of Dr. Taylor Hayes Forrester on the CBS serial "The Bold and the Beautiful." She has worked on "B & B," as it is known to its fans, for the past six years. Since 1987, she has been married to Michael Tylo, formerly of "The Young and The Restless," who now plays Quinton on another CBS soap, "Guiding Light." The two have an eight-year-old son, Micky, and Mrs. Tylo has another son, Christopher, 15, from a prior marriage that ended in 1983.¹⁴

Tylo's complaint alleges that, on February 12, 1996, she and SEG entered into an employment agreement whereby she would be hired as an actress for the Fox television series "Melrose Place" for the 1996-97 season for a total of eight episodes, and SEG had the option to require her to render exclusive services in the recurring as-yet unnamed role for an additional three years, for an aggregate of four years. She claimed she was told by SEG that no specific character for her role on the series had yet been written. In reliance on her agreement with SEG, she announced her departure from "The Bold and the Beautiful,"¹⁵ and she was consequently written out.

In March, 1996, Tylo learned she was three weeks pregnant,¹⁶ and her business manager immediately informed co-defendant Frank South, executive producer of "Melrose Place," so that the writers would have every opportunity to account for her pregnancy in

¹⁴ Edwards Decl., July 16-17, 1996 Deposition of Hunter Tylo, at Vol. 1-60 (age, marital history); Eli Witner, *Glorious Days of Their Lives*, THE TORONTO SUN, Dec. 31, 1995, at TV5 (TV Magazine); *The 50 Most Beautiful People in the World*, PEOPLE, May 3, 1993, at 120.

¹⁵ *CA Court Refuses to Dismiss Suit Filed by Pregnant Actress: Breach of Contract; Tylo v. Spelling Entertainment Group*, ENT. LITIG. REP. Aug. 30, 1996.

¹⁶ Ray Richmond, *Pregnant Actress Sues Spelling Ent.*, DAILY VARIETY, May 14, 1996, at 28.

developing her character. (Isabella Gabrielle Tylo was born November 11, 1996.¹⁷)

In a letter dated April 10, 1996, SEG's counsel informed Tylo of her termination. She received a letter from Spelling Television lawyer Cortez Smith notifying her that the show's agreement with her was terminated. The letter read in part, "Although we wish you much joy in this event, your pregnancy will result in a material change in your appearance. Your material change does not conform with the character you have been engaged to portray. This character is by necessity not pregnant."¹⁸ SEG attorney Sally Suchil said Tylo's character, "a seemingly happily married woman who betrays her husband, is simply incompatible with her pregnancy."¹⁹ "It's a creative decision, no more, no less. And it is entirely legal."²⁰ According to Suchil, SEG is also investigating the possibility that "there may have been some misrepresentation" on Tylo's part while she negotiated in February and that she knew of the pregnancy when she entered into the contract.²¹ SEG offered her a part during the 1997-1998 season, should "Melrose Place" be renewed for a sixth season.²² Tylo claims this was just an attempt to keep her from joining another show.²³

On May 13, 1996, a complaint on behalf of Tylo was filed by Gloria Allred, Michael Maroko and Dolores Y. Leal of Allred,

¹⁷ Candace Havens, *ABC To Yank "The City" Soap*, THE STUART (FL) NEWS, Dec. 22, 1996 at P8.

¹⁸ Warrick, *supra* note 10.

¹⁹ *Actress Sues After Removal from 'Melrose Place'*, THE LEGAL INTELLIGENCER, May 15, 1996, at 4.

²⁰ Warrick, *supra*, note 10.

²¹ Ray Richmond, *Pregnant Actress Sues Spelling Ent.*, DAILY VARIETY, May 14, 1996, at 28. SEG is using this familiar "blame the victim" approach in defending against Tylo's negligent misrepresentation claim, by arguing that Tylo may have defrauded SEG by implicitly misrepresenting herself as not pregnant, and that the burden of notification was on her. Tylo's claim is that if SEG had a no-pregnancy policy, its failure to mention it to her amounted to negligent misrepresentation. Moreover, the birth of the baby almost nine months to the day after the contract was signed seems to make it highly unlikely that Tylo was aware of the pregnancy at that time.

²² Peter Hartlaub, *Melrose Place*, CITY NEWS SERV., May 13, 1996.

²³ *Television*, THE (BERGEN) RECORD, June 30, 1996, at 23. "They wanted to reserve me so I wouldn't join another show."

Maroko & Goldberg of Los Angeles.²⁴ Tylo's complaint contained causes of action for employment discrimination, wrongful termination, breach of employment contract, breach of implied covenant of good faith and fair dealing, and negligent misrepresentation. It sought general, compensatory and punitive damages, prejudgment interest, attorneys' fees and costs of suit.

According to a statement read by Allred at a press conference held the same day, Tylo claimed she had "not only departed her role on 'B-and-B,' but also turned down a role in a Disney prime-time series tentatively titled 'Daytona Beach.'"²⁵ She also sold her home in Las Vegas, Nevada and moved with her family to Valencia, California in anticipation of the role.²⁶ Tylo described her position after the termination this way: "That was a five-year [sic] commitment that we had, and I rearranged my whole life and left another job, turned down other jobs, for these people. I made my half of my commitment, and my opinion is that they should make theirs."²⁷

Suchil stated, on behalf of SEG, that, "This decision was completely based on the character in the show. It had nothing whatsoever to do with the company's using or retaining pregnant women on the show, or having a pregnancy portrayed on the show. Indeed, last season 'Melrose Place' had a pregnant character."²⁸

On July 22, 1996, Los Angeles County Superior Court Judge Daniel Curry denied SEG's motion to dismiss the breach of contract and wrongful termination suit.²⁹ Dolores Leal, the law partner of Tylo's lead attorney, Gloria Allred, explained, "We've had five different claims (pregnancy discrimination, wrongful termination in violation of public policy, breach of employment contract, breach of implied covenant of good faith and fair dealing, and negligent misrepresentation). None of the claims against Spelling Television

²⁴ Lisa Kay Greissing, *Passages*, PEOPLE, June 3, 1996 at 59; see also Tony Gieske, THE HOLLYWOOD REP., July 30, 1996.

²⁵ Richard M. Simms, *Soap Scoop*, BINGHAMTON PRESS AND SUN-BULLETIN, June 4, 1996.

²⁶ Hartlaub, *supra* note 23.

²⁷ *Showbiz Today*, *supra* note 6.

²⁸ Hartlaub, *supra* note 23.

²⁹ *CA Court Refuses to Dismiss Suit Filed by Pregnant Actress*, ENT. LITIG. REP. Aug. 30, 1996.

and SEG were dismissed. They remained in their entirety.”³⁰ All but the last survived a second summary judgment motion as of June 20, 1997. Leal says Tylo will be the key witness on the stand. As explained in *Soap Opera Weekly*, Tylo’s lawyers are currently in the midst of discovery,³¹ and a trial date has been set for November 4, 1997.³² After leaving in May, Tylo returned to the cast of “The Bold and The Beautiful” in August, 1996.³³

III. PREGNANCY AND EMPLOYMENT LAW THEN AND NOW—THE LEGAL FRAMEWORK

Since the early 1960s, the employment status and job security of a pregnant worker has improved considerably. Like gender itself, pregnancy has become a less and less legitimate reason for the denial of equal employment opportunity. This progress has been accomplished largely under the auspices of anti-sex discrimination law, codified in Title VII of the Civil Rights Act of 1964. While Title VII prohibits discrimination, however, it does not require an employer to be sex-blind in every case.

Although § 703(a) of Title VII states that “[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual’s . . . sex,”³⁴ an employer may nevertheless “hire and employ employees . . . on the basis of his [or her] . . . sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of that particular business or enterprise.”³⁵ In practice, sex has been regarded sometimes, but not always, as a BFOQ. Thus, for example, the Supreme Court upheld a men-only

³⁰ *Tylo Vs. Spelling: Round Two*, SOAP OPERA WEEKLY/SOAP OPERA DIGEST, Aug. 20, 1996.

³¹ *Id.*; Ann O’Neill, *The Court Files*, L.A. TIMES, June 29, 1997 at B1; *C.A. Limits Questioning of Actress in Wrongful Filing Suit, Cites Privacy*, METROPOLITAN NEWS-ENTERPRISE, June 25, 1997 at 3.

³² *C.A. Limits Questioning*, *supra* note 31 at 3.

³³ Candace Havens, *Changes Are in Store for Kelker-Kelly, Tylo*, THE STUART NEWS, July 28, 1996 at P8.

³⁴ 42 U.S.C. § 2000e-2(a).

³⁵ 42 U.S.C. § 2000e-2(e).

rule in *Dothard v. Rawlinson*³⁶ (Alabama prison guards), but a women-only rule was struck down in *Diaz v. Pan Am. World Airways*³⁷ (airline stewardesses). In those cases in which sex is a BFOQ, the exclusion of members of the other gender is therefore not grounds for a sex discrimination action under Title VII. One question squarely raised by *Tylo v. SEG* is whether, for a job in which belonging to the female sex is a BFOQ, the employer may further specify non-pregnancy as an additional BFOQ, thereby excluding not only men but some women from the opportunity to perform the job.

The PDA of 1978 amended Title VII, and explicated the phrase "because of sex" to include "pregnancy, childbirth, or related medical conditions."³⁸ Under the PDA, employers must treat women so affected but otherwise "similar in their ability or inability to work"³⁹ the same as other employees. The PDA thus had at least two important effects: it established pregnancy discrimination as a form of sex discrimination, actionable under Title VII; and it required employers to base any differential treatment of pregnant workers exclusively upon those women's ability to work. To the extent that her pregnancy rendered Tylo unable to work at the job SEG hired her for (portraying a sexy adulteress), SEG would not be bound by the PDA to treat her the same as employees who are able to work, and her termination would not be an impermissible act of discrimination but a wholly legitimate business decision on the part of SEG to terminate an employee who was unable to do the job. Indeed, this is precisely what SEG maintains.

A. Title VII Before the PDA: the "Sex-Plus" Doctrine

Tylo's contract to play a wandering wife was terminated not because she is a woman, of course, but because of her status as an expectant mother. Among the group of women who had contracted for roles on "Melrose Place," only the pregnant Tylo was fired, and her role filled by another woman, Lisa Rinna (formerly of "Days of

³⁶ 433 U.S. 321 (1977).

³⁷ 442 F.2d 385 (5th Cir.), cert. denied, 404 U.S. 950 (1971).

³⁸ Revised section 701, 42 U.S.C. § 2000e(k).

³⁹ *Id.*

Our Lives"). Had the case arisen before the PDA, it would have belonged to a group of cases concerned with exclusion of a sub-group within one gender, the so-called "sex-plus" doctrine.

In *Phillips v. Martin Marietta*,⁴⁰ the defendant excluded only women with preschool-age children from consideration for the job of assembly trainee. The Fifth Circuit held that there was no sex discrimination here, for women in general were not discriminated against, and there was therefore no discrimination "solely" on the basis of sex as that court read Title VII to require.⁴¹ Favoring one subgroup within a gender did not meet the standard. Reconsideration *en banc* was denied, although three dissenters argued against reading Title VII to permit such so-called "sex plus" standards. The last paragraph of the dissent could apply as well to Tylo's case: "A mother is still a woman. And if she is denied work outright because she is a mother, it is because she is a woman. Congress said that could no longer be done."⁴² Ultimately, the Supreme Court vacated and remanded the case, rejecting the ruling that a sex-plus policy does not violate § 703(a).

However, only Justice Thurgood Marshall interpreted Title VII broadly enough to require equal treatment of mothers and fathers: "When performance characteristics of an individual are involved, even when parental roles are concerned, employment opportunity may be limited only by employment criteria that are neutral as to the sex of the applicant."⁴³ In other words, mothers of preschoolers could be excluded only if fathers of preschoolers were excluded as well, a step few companies would be likely to take. In Tylo's case, such a "neutral" application of SEG's rule would have required the firing of expectant father Rob Estes, hired at the same time as Hunter Tylo, to play her cheated-on spouse "Kyle."⁴⁴ Nevertheless, under the approach of *Phillips* Tylo would have been unlikely to prevail. As

⁴⁰ 411 F.2d 1 (5th Cir. 1969).

⁴¹ *Id.* at 3-4.

⁴² 416 F.2d 1257, 1262 (5th Cir. 1969).

⁴³ 400 U.S. 542, 547 (1971).

⁴⁴ Estes' pregnant wife, Josie Bissett, who has played "Jane Mancini," another character on "Melrose Place," for four and a half years, has elected to resign from the show. Warrick, *supra* note 10.

between *expectant* mothers and fathers who are television performers, pregnancy plausibly gives rise to “obligations demonstrably more relevant to job performance for a woman than for a man,”⁴⁵ probably permitting SEG’s action.

B. *Sex-Based BFOQs Up to and Including Rawlinson*

Sex-segregated job classifications were an early target of sex discrimination litigation. Employers who wished to preserve such classifications were hard-pressed to justify them, and most were ultimately unable to do so. (Thus, for example, the classified advertisements no longer feature the headings “Help Wanted—Male” and “Help Wanted—Female.”) Yet the law left open some space for single-sex hiring, so long as the practice was based on “individual capacities” rather than “stereotyped characterizations.” The EEOC’s guidelines for sex-based BFOQs specify that:

(1) [T]he following situations do not warrant the application of the bona fide occupational qualification exception: . . .

(ii) The refusal to hire an individual based on stereotyped characterizations of the sexes 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.⁴⁶

1. *Weeks* and *Diaz* on Individuals and Groups

In *Weeks v. Southern Bell Tel. & Tel. Co.*,⁴⁷ the Fifth Circuit explained the relationship between individual capacities and group characteristics. Giving “considerable deference” to the EEOC guidelines, the *Weeks* Court held that:

[T]he principle of nondiscrimination requires . . . that in order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual

⁴⁵ 400 U.S. 542, 544 (1971).

⁴⁶ 29 C.F.R. § 1601.1(a)(1)(ii), also cited as 29 C.F.R. § 1604.1(2).

⁴⁷ 408 F.2d 228 (5th Cir. 1969).

basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.⁴⁸

In other words, to get beyond mere "stereotype," composed of traits "generally attributed" to the group perhaps on the basis of nothing more than outmoded prejudice, the employer who wishes to exclude one gender must find characteristics which can be attributed to "substantially all" of its members on a factual basis. The law will not protect the employer who relies on stereotypes, but neither will it protect the exceptional employee. Under *Weeks*, the unusual woman who can do a job few women can has no recourse if the employer has a factual basis for believing substantially all women cannot do it⁴⁹ and individual testing is impracticable.⁵⁰

In *Diaz v. Pan Am. World Airways, Inc.*,⁵¹ the Fifth Circuit took the next step toward protecting the exceptional case. It struck down Pan Am's policy of hiring only women as flight attendants, explicitly stating that "Pan Am cannot exclude *all* males simply because *most* males may not perform adequately."⁵² How is this relevant to the Tylo case? It might appear that the characteristic of pregnant women SEG relied on in its termination decision—their expanding girth—is not a mere stereotype or generalization, to which Tylo may be an exception, but a fact which justifies a general ban. This appearance may be deceiving. SEG might be assuming Tylo would "show" by the fourth month, or not recover her figure for six months after delivery. Some tall, slender women do not look very pregnant until well into the second trimester, and do not look pregnant at all from behind. Some women are back in their pre-pregnancy jeans six weeks post-partum. Tylo was not even given the opportunity (perhaps by

⁴⁸ 408 F.2d 228, 235 (5th Cir. 1969).

⁴⁹ One wonders how far this decision has really come from Justice Bradley's opinion that "the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases." *Bradwell v. Illinois*, 83 U.S. 130 (1873).

⁵⁰ *Western Airlines, Inc. v. Criswell*, 472 U.S. 400 (1985).

⁵¹ 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

⁵² *Id.* at 388. The Ninth Circuit held similarly: "Equality of footing [between the sexes] is established only if employees otherwise entitled to the position, whether male or female, are excluded only upon a showing of *individual* incapacity." *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219, 1225 (9th Cir. 1971) (emphasis added).

presenting photographs from earlier pregnancies) to prove that her pregnancy would be relatively easy to conceal and/or quickly recovered from. While the *Weeks* standard would have required only that the employer reasonably believed substantially all pregnant women could not do the job, *Diaz* might at least have entitled Tylo to more individualized consideration.

2. *Diaz*, *Geduldig*, *Gilbert*, and “Business Necessity”

In *Diaz*, the Fifth Circuit also held that “discrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively,” what the *Diaz* Court described as a “business necessity test”⁵³ for understanding BFOQs. In so doing, it rejected Pan Am’s argument that generalizations about male and female characteristics legitimized the exclusion of all men from the position of flight attendant. That it was convenient or efficient for Pan Am not to have to evaluate the particular characteristics of male applicants was not considered an adequate justification for the discriminatory policy.⁵⁴

Since *UAW v. Johnson Controls, Inc.*,⁵⁵ the “business necessity” defense is applicable only in disparate *impact* cases, in which facially neutral policies or practices (like tests) operate to the detriment of a particular group. The exclusion of pregnant women appears to be a facially discriminatory policy, but that is not necessarily so.

Should SEG be forced to concede that it does, in fact, have a “no pregnancy” policy for “Melrose Place,” it might nevertheless defend itself against a sex discrimination charge by relying on notorious footnote 20 in *Geduldig v. Aiello*⁵⁶ to claim that “Melrose Place” employs “nonpregnant persons” of both sexes, and that discrimination in favor of the nonpregnant is not discrimination “based on gender as

⁵³ 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

⁵⁴ *Id.*

⁵⁵ 499 U.S. 187 (1991).

⁵⁶ 417 U.S. 484 (1974).

such.”⁵⁷ Such an argument would convert Tylo’s claim into a disparate impact claim, on the basis that discrimination against pregnant persons burdens women exclusively and therefore disproportionately. Unfortunately for Tylo, had she brought suit before the PDA, precedential cases would have been squarely against her. The Court in *General Elec. Co. v. Gilbert*⁵⁸ rejected just such a claim in the temporary disability context, raising “a heavy bar to the use of disparate impact doctrine in the pregnancy context.”⁵⁹

3. *Rosenfeld*, Sexual Characteristics, and “Authenticity”

In *Rosenfeld v. Southern Pac. Co.*,⁶⁰ the Ninth Circuit took a somewhat different approach, one which narrowed the possibilities for a sex-based BFOQ still further. The *Rosenfeld* Court, relying to some extent on the EEOC guidelines quoted above, held that “sexual characteristics, rather than characteristics that might, to one degree or another, correlate with a particular sex, must be the basis for the application of the BFOQ standard.”⁶¹ The Ninth Circuit gave an

⁵⁷ *Geduldig* was a sex-discrimination suit about the exclusion of pregnancy from California’s disability insurance program which reached the Supreme Court. In footnote 20 of Justice Stewart’s opinion, he argues that the insurance program does not exclude on the basis of gender, but of pregnancy, remarking that:

While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes.

Id. at 497 n.20. It is not clear why this does not simply amount to a resurrection of the rejected “sex-plus” doctrine of *Phillips*, in which discrimination *among* women is thus held not to be discrimination *against* women. This passage has become notorious among feminists for its disconnection of (female) “gender as such” and pregnancy, as if the capacity to become pregnant were not one of the defining characteristics of the female gender as such.

⁵⁸ 429 U.S. 125 (1976).

⁵⁹ BARBARA BABCOCK et al., *SEX DISCRIMINATION AND THE LAW: HISTORY, PRACTICE, AND THEORY* 796 (2d ed. 1996).

⁶⁰ 444 F.2d 1219 (9th Cir. 1971).

⁶¹ *Id.* at 1225.

explicit example of a case in which “the sexual characteristics of the employee are crucial to the successful performance of the job”: the wet nurse.⁶² Almost three decades later, we might add egg or sperm donor and gestational surrogate to that list, but it seems likely always to be short. To the extent that our society strictly limits the legitimate commercialization of sexual and reproductive function, this form of “sex discrimination” will be coordinately rare.

However, the Ninth Circuit also followed the EEOC’s lead and incorporated an additional guideline offered by the EEOC about sex-based BFOQs: “Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, *e.g.*, an actor or actress.”⁶³ Thus the *Rosenfeld* Court made the BFOQ exemption available where “there is a need for authenticity or genuineness,” and made the theatrical performer the exemplar of this sort of BFOQ.⁶⁴ When gender-bending is not the point of the film,⁶⁵ the appearance associated with a particular sex is regarded as going to the “essence” of the position in a way justifying auditioning and casting only members of that gender. Thus, although one can distinguish occupations which are actually sex-linked (involving reproductive capacities) from those where the concern is simply that one appear to belong to a particular gender, employers in both categories are able to employ sex as a BFOQ. (The concept that a television actress’ pregnancy poses a threat to her authenticity in a particular role will be discussed in detail in Parts IV.3 and V.2, *infra*.)

⁶² *Id.* at 1224.

⁶³ 29 C.F.R. § 1604.2(a)(2).

⁶⁴ 444 F.2d at 1224.

⁶⁵ Recent examples include *Mrs. Doubtfire* (Twentieth Century-Fox, 1993), starring Robin Williams as a nanny in the title role, and *The Crying Game* (Miramax Films, 1992), featuring Jaye Davidson, a man, as a transvestite with whom the ostensibly straight male lead has an affair. Two thematically-similar films from the 1980s are *Victor/Victoria* (MGM/United Artists, 1982), starring Julie Andrews in the title role as a woman impersonating a man impersonating a woman, and *Tootsie* (Columbia Pictures, 1982), starring Dustin Hoffman as a frustrated actor who finds success as an actress.

4. *Rawlinson* and a Pregnant Woman's "Very Womanhood"

In *Dothard v. Rawlinson*,⁶⁶ the Supreme Court upheld a men-only requirement for Alabama prison guards as falling "within the narrow ambit of the BFOQ exception."⁶⁷ Due to the possibility of heterosexual sexual assault on women guards by male prisoners, the Court reasoned, a female guard's "very womanhood would thus directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility."⁶⁸ Thus the State of Alabama was permitted to exclude all women from this job classification. Justice Marshall, in dissent, rejected this proposition factually and in principle, criticizing it for "regrettably perpetuat[ing] one of the most insidious of the old myths about women—that women, wittingly or not, are seductive sexual objects."⁶⁹

Though the issues in *Rawlinson* differ greatly from those in *Tylo*,⁷⁰ the opinions reveal something about how the law understands sexual attractiveness. Current thinking about *Tylo* and the idea of a non-pregnancy BFOQ may reflect the same attitudes, as it were "in reverse." In *Rawlinson*, women as such were considered "too sexually attractive" to perform the job of prison guard. If the phrase "a woman's very womanhood" can be given any meaning at all, it is Hunter Tylo's "very womanhood," her fully functioning female reproductive system, which was a *sine qua non* for her pregnancy and

⁶⁶ 433 U.S. 321 (1977).

⁶⁷ *Id.* at 334.

⁶⁸ *Id.* at 335.

⁶⁹ *Id.* at 345 (Marshall, J., dissenting).

⁷⁰ Throughout this Comment, arguments about non-pregnancy as a BFOQ based on safety (maternal, fetal, or those affected by a pregnant woman's incapacity) are omitted. No such argument was made by SEG, nor would one be plausible. Nevertheless, it should be noted that a non-pregnancy BFOQ was found permissible in the flight attendant context. *See, e.g., Levin v. Delta Air Lines, Inc.*, 730 F.2d 994 (5th Cir. 1984). *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985) established a three-part BFOQ test which such future regulations would presumably have to meet: (1) the job qualification must relate to the essence of the business; (2) there must be a factual basis for believing that all or substantially all excluded employees would be unable to perform safely and efficiently the duties of the job; and (3) it must be impossible or highly impractical to evaluate excluded employees on an individual basis. Nevertheless, the legitimacy of considering third-party safety was reaffirmed in *UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991).

in turn her termination by SEG. Yet Tylo was considered, in effect, “not sexually attractive enough” to perform her job. It is somewhat ironic for SEG to maintain, as they must, that her “very womanhood” unsuits her for the role of a sexually attractive woman. However, *contra* Justice Marshall, in Tylo’s case, the insidious old myth is the desexualization of the pregnant woman, and thus her disqualification from a job which requires her to be a “seductive sexual object.”

What the Justices in the *Rawlinson* majority assume women necessarily and essentially are—even if they are burly enough to meet the objective strength requirements attaching to the job of prison guard—is just what Tylo has to fight for the right to be: a sexually desirable person. And not because she is sexually deviant—for example, a transvestite, a transsexual, or a lesbian—but because she is a married heterosexual woman whose “very womanhood” is on display in the most conventional possible manner. Even the sympathetic Justice Marshall may underestimate the complexity of the construction of permissible forms of female sexuality in this culture, and the ways in which a woman’s sexual attractiveness is posited as determined always by someone other than the woman herself, both of which may render the law a rather blunt instrument for combating sexual stereotyping.

C. *The Pregnancy Discrimination Act*

As noted above, Title VII was amended by the PDA, by which Congress overturned the core holding of *Gilbert*. The PDA explicates the phrase “because of sex” in Title VII as follows:

The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work⁷¹

⁷¹ Revised section 701, 42 U.S.C. § 2000e(k).

1. *Cal Fed* and Treatment As An Equal

In *California Fed. Sav. and Loan Ass'n v. Guerra*,⁷² the Supreme Court read the PDA to contain a powerful substantive conception of equality which is potentially very favorable to Tylo. Narrowly, *Cal Fed* was concerned with a disability policy which "favored" pregnant women over employees temporarily disabled in other ways by giving them additional job security. However, the language of the majority opinion sets the context for PDA enforcement more generally. The Court endorsed as the aim of the PDA a quote from the legislative history: guaranteeing "women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life."⁷³ The theory that it was impermissible favorable treatment to provide additional job security to women on pregnancy leave, but not to workers "temporarily disabled" in other ways, was rejected. Instead, the Court upheld the particular California statute in question on the grounds that it "allows women, as well as men, to have families without losing their jobs."⁷⁴ Because expectant fathers do not lose their employment, what the equality guaranteed by the PDA seems to require is that pregnant women not lose it either, at least on any weaker showing than that non-pregnancy is a BFOQ as used in Cal. Code § 12945(b)(2).

Justice Stevens' approach in concurrence also includes some useful language borrowed from *Griggs*. In that case the Court characterized one goal of Title VII as "remov[ing] barriers that have operated in the past to favor an identifiable group of . . . employees over other employees."⁷⁵ A policy or practice of firing pregnant women from appearance-oriented positions clearly disfavors pregnant female employees. It also disfavors women who want to or might become pregnant, who know they will lose their jobs if they do so, and even women who will never be pregnant, but who may be seen by their supervisors as possibly pregnant in the future, and so not worth

⁷² *California Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272 (1987).

⁷³ *Id.* at 289.

⁷⁴ 479 U.S. 272, 289 (1987).

⁷⁵ *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) (cited in *Cal Fed*, 479 U.S. at 288).

training or promoting now. These issues help make clear the ways pregnancy discrimination harms all women.

2. *Johnson Controls*: The Exclusion of Fertile Women Struck Down

In *UAW v. Johnson Controls, Inc.*,⁷⁶ the most recent Supreme Court PDA and sex-based BFOQ case, *Johnson Controls*' exclusion of fertile women (including but not limited to pregnant women) from jobs involving lead exposure was struck down. The narrow question was whether the employer's desire to protect female employees' as-yet unconceived children justified discriminating against all women, on the basis of "their ability to become pregnant."⁷⁷ The Court answered that it did not.⁷⁸ More generally, the Court laid out the standard for pregnancy-related BFOQs: "[T]he BFOQ provision [of Title VII] and the PDA which amended it . . . prohibit an employer from discriminating against a woman because of her capacity to become pregnant unless her reproductive potential prevents her from performing the duties of her job."⁷⁹ Thus, although *Johnson Controls*' policy was clearly based on a safety concern (however discriminatorily or misguidedly applied), the company still was unable to defend it as falling under the safety exception to the BFOQ requirement, because "the unconceived fetuses of *Johnson Controls*' female employees [are not] parties whose safety is essential to the business of battery manufacturing."⁸⁰ The impact of pregnancy on ability to "perform the duties of her job" is the only relevant standard.

IV. PREGNANCY IN APPEARANCE-ORIENTED POSITIONS

Johnson Controls and *Rosenfeld* focus attention on "ability to work" and "authenticity," two closely related ideas implicated in determining whether firing a night-time soap opera actress who

⁷⁶ *UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991).

⁷⁷ *Id.* at 196.

⁷⁸ *Id.* at 211.

⁷⁹ *Id.* at 206.

⁸⁰ *Id.* at 203.

unexpectedly becomes pregnant violates Title VII and the PDA, or instead is the legitimate application of non-pregnancy as a BFOQ in that employment setting. In no other industry are these two notions as closely intertwined as in the performing arts.

The strongest argument for the inapplicability of the PDA to the entertainment context (for on-screen talent) depends upon understanding an actress's "ability to work" as crucially related to the maintenance of a particular appearance. SEG's strongest argument in support of a non-pregnancy BFOQ rests on the concept of "authenticity" as the EEOC describes it. These two arguments are so closely conceptually related that although discussed in turn, much of what is said about one applies to the other as well.

A. *"Appearance-Oriented" Positions and/or Industries Defined*

To facilitate this discussion, consider the idea of "appearance-oriented" positions and industries. As used herein, an "appearance-oriented" position is a job or job classification in which having a particular appearance goes to the essence of the job function. Persons are selected and retained in such positions wholly or substantially on the basis of appearance, and penalized or terminated for failure to maintain a certain appearance. Typically, though not always or necessarily, the "appearance" is a conventionally heterosexually attractive one. Sometimes, however, the sought-after look is not beautiful. Babies in diaper advertisements, dirty kids in laundry advertisements, and the funny-looking people in humorous advertisements all occupy "appearance-oriented" positions. An "appearance-oriented" industry is one in which appearance-oriented positions predominate (by numbers or analytically).

Although an attractive appearance is a benefit to both women and men in all job classifications,⁸¹ it is nevertheless possible to distinguish those in which a particular appearance is an enhancement, or a "plus," from those in which it is inextricably linked to job

⁸¹ See, e.g., Ray Bull and Nichola Rumsey, *THE SOCIAL PSYCHOLOGY OF FACIAL APPEARANCES* (1988); the work of Daniel Hamermesh (University of Texas) and Jeff Biddle (Michigan State University), reported in *COSMOPOLITAN*, Dec. 1994 (attractive people earn 5% per hour more).

function. Although attractive salespeople, trial lawyers, and executives tend to be more successful at their jobs than their less-attractive colleagues, those jobs are not “appearance-oriented” in the way intended here. Nor are those in which a particular appearance is a natural concomitant of ability to perform a job task, like the massive muscularity of the professional fullback or the long-limbedness and extraordinary height of the professional basketball player. These athletes are not hired or retained on the basis of appearance, despite the fact that most people in the job share certain features of physical appearance and persons lacking those features are unlikely to succeed at it.

Although most appearance-oriented positions are in “show business” or the entertainment industry broadly speaking, many are outside it. For example, some retail clothing salespeople are required to wear the clothes they sell,⁸² and salespeople at specialty cosmetics counters in department stores or boutiques must wear those cosmetics; both positions require those who hold them to “appear” a certain way as a condition of employment. At the same time, many entertainment industry jobs are not appearance-oriented: writers, directors, producers, crew members, agents, talent bookers and schedulers, and entertainment lawyers do not practice appearance-oriented professions.

Perhaps the ultimate appearance-oriented industry is modeling, in both print and runway varieties. What designers and photographers seek is a particular “look,” which may change from season to season or employer to employer. Currently, for example, runway models are almost always very thin, very tall women. The notion of an appearance-oriented position allows us to distinguish between the height and thinness associated with the runway model, which are her very stock in trade, and those features as found in the basketball player or rower. (The ballet dancer is an interesting in-between case.)

Although not all appearance-oriented positions employ it, the heart of appearance-oriented industries and positions is the ideal of the heterosexually beautiful woman (of leisure), an ideal to which women

⁸² *Pevsner v. Commissioner of Internal Revenue*, 628 F.2d 467 (5th Cir. 1980) (female sales manager of Yves St. Laurent Rive Gauche Boutique in Dallas who was required to wear YSL clothing while working, was not permitted to deduct cost of purchase and maintenance of the YSL clothing so long as it was “adaptable to general use as ordinary streetwear”).

in all walks of life and professions are expected to strive, or at least aspire. One of the ways the longtime exclusion of women from almost all professions continues to make itself felt is in the extent to which many jobs are treated as appearance-oriented simply because women hold them. The extent to which appearance-oriented professions more heavily burden women, or alternatively, the policy of dividing the same job into an appearance-oriented position for women and a non-appearance-oriented position for men, raises the question of sex discrimination under Title VII.⁸³ While almost everyone would concede that actors and actresses inhabit appearance-oriented positions, the *range* of appearances available to male actors is vast compared to what is available to women: "babe, district attorney, and 'Driving Miss Daisy.'"⁸⁴

On-screen personalities may be thought to occupy appearance-oriented positions even when they are not "acting" but are, for example, delivering the news. However, male anchors can get older, fatter, grayer and/or balder without it endangering their jobs; as Christine Craft learned, female newscasters cannot.⁸⁵ One of the matters at issue in that litigation, and in a great deal of sex discrimination litigation, is the question of *whether* the job classification in question is an appearance-oriented position or not. If it is, some measure of appearance-oriented discrimination is unavoidable and permitted; if not, passing a woman over for partnership until she learns to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" is unlawful.⁸⁶

Assuredly, a role on a night-time soap opera is "appearance-oriented," perhaps more so even than most television roles. Spelling productions have a long history of featuring stunning women whose

⁸³ *Gerdom v. Continental Airlines, Inc.*, 692 F.2d 602 (9th Cir. 1982) (policy of weight restrictions on female "flight hostesses" but not on male "directors of passenger service" held "discriminatory on its face").

⁸⁴ Goldie Hawn's character, an aging starlet, describes her own options this way in *The First Wives' Club* (Paramount, 1996).

⁸⁵ *Craft v. Metromedia, Inc.*, 766 F.2d 1205 (8th Cir. 1985), *cert. denied*, 475 U.S. 1058 (1986).

⁸⁶ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

“look” becomes the beauty ideal of the era (think of “Charlie’s Angels” and “Dynasty”), and “Melrose Place” is no exception. The physical beauty of the performers (these days, both male and female) is a crucial part of the fantasy appeal of the characters and the lives they lead and without question a cornerstone of the show’s success. It thus seems fair to say SEG is entitled to the widest possible latitude in hiring and firing on the basis of appearance which the law allows. The question is how to harmonize the existence of such jobs and industries with the non-discrimination mandates of Title VII as amended by the PDA.

B. Pregnancy as Inability to Work in an Appearance-Oriented Position

Johnson Controls could not be clearer in instructing employers that they may only discriminate against a pregnant woman if pregnancy “prevents her from performing the duties of her job.”⁸⁷ In most employment settings, this is a very demanding standard which offers pregnant women a great deal of protection. Note, for example, that pregnancy must actually “prevent” her from performing the job, not just make it more difficult or less efficient. But in appearance-oriented positions, this standard may seem far easier to meet. After all, what the job explicitly requires is the maintenance of a particular appearance (among other things). Almost all acting contracts, Tylo’s included, contain a provision permitting termination of the contract if the performer undergoes “a material change of appearance.” Such provisions are used to prevent performers who have been selected on the basis of particular physical features from cutting or dying their hair, having plastic surgery, gaining or losing a great deal of weight, and to protect producers from having to retain or pay off the actor whose chiseled profile is flattened in a bar fight or car accident (though Montgomery Clift came out O.K), or the lithe nymph who metamorphoses overnight into a voluptuous matron.

SEG in terminating Tylo understood itself to be taking advantage of this provision. As her termination letter read, “your pregnancy

⁸⁷ 499 U.S. 187 (1991).

will result in a material change in your appearance. Your material change does not conform with the character you have been engaged to portray. This character is by necessity not pregnant.”⁸⁸ In the language of *Johnson Controls*, Tylo’s pregnancy prevents her from performing the “duties” of this acting job, portraying “a seemingly happily married woman who starts having affairs,” because “she would be going to bed with the first guy when she’s about seven months pregnant.”⁸⁹

The possibility of Tylo playing the role if SEG were willing to “shoot around” her pregnant belly seems never to have been seriously considered by SEG. While some actresses may be in a position to make such demands, there is an obvious difference between Hunter Tylo and Madonna, Roseanne, Phylicia Rashad, Shelley Long, Rhea Perlman, and even Gabrielle Carteris. All of these women, except Tylo, are well-established stars, even superstars, whose value to the shows on which they appear is beyond question. While it would be reasonable—and make good business sense—to accommodate an established star of the show, some think it is not reasonable to make the same accommodation for someone who has not yet appeared on the program. Such a person can easily be replaced. This argument has some popular support. When Allred appeared on “Politically Incorrect,” author and fellow guest Elizabeth Wurtzel suggested that greater accommodation might be made for Heather Locklear, who has been on the show since its second season and is widely credited with its “breakout” success.⁹⁰ Sure enough, less than a year later, with pregnancy rumors swirling around Locklear, *TV Guide* reported Aaron Spelling blithely promising, “We’ll just shoot around it.”⁹¹

Similarly, columnist Loraine O’Connell says,

Producers of *The X-Files* did shoot around the pregnancy of Gillian Anderson, who plays agent Dana Scully. But Scully is one of the two main characters, for crying out loud. Why should the *Melrose Place* producers

⁸⁸ Warrick, *supra* note 10.

⁸⁹ *Id.*

⁹⁰ *Politically Incorrect* (Comedy Central cable television broadcast, May 30, 1996).

⁹¹ Mark Schwed, *Hollywood Grapevine*, TV GUIDE (April 19-25, 1997) at 12.

go out of their way when the character Tylo was to play hasn't even appeared in the show yet?⁹²

Why, indeed.

C. *Pregnancy as Inauthenticity in an Appearance-Oriented Position*

A consideration very closely related to “ability to work”—so close it may actually amount to nothing more than a different way of saying the same thing—is the claim that “authenticity” requires that an actress on “Melrose Place” not be pregnant. As Tylo’s termination letter read, “The character you have been engaged to portray . . . is by necessity not pregnant.”⁹³ The EEOC’s guidelines about sex-based BFOQs specify that, “Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification.”⁹⁴

Thus the desire for authenticity in the role of night-time soap opera seductress may straightforwardly permit SEG to do what it did. In fact, the EEOC itself, which has historically adopted a somewhat more aggressive anti-sex discrimination posture than the courts, gave as its own example of an employment context in which sex would be an acceptable BFOQ “actor or actress.”⁹⁵ It seems a small step from the gender-based authenticity which justifies auditioning only men for male roles and only women for female roles to the sort of authenticity which justifies the exclusion of pregnant women from some of those female roles.

Popular reaction to the case suggests widespread intuitions in accord with this idea, and a coordinate view of the suit itself as an absurd excrescence of feminism. One commentator remarked that the suit had “all the earmarks of feminist ideology taken to an extreme,” and was “another example of ideology overwhelming common

⁹² Loraine O’Connell, *When Feminist Ideology is Taken to the Extreme*, ORLANDO SENTINEL, June 7, 1996, at E1.

⁹³ Warrick, *supra* note 10.

⁹⁴ 29 C.F.R. § 1601.1(a)(1)(ii); also cited as 29 C.F.R. § 1604.1(2).

⁹⁵ *Id.*

sense.”⁹⁶ Ed Fishbein of the *Sacramento Bee* sarcastically described the suit as a “new chapter” in “[t]he ongoing struggle for the right of the nation’s soap opera actresses to continue playing seductresses after becoming pregnant,” which, “[a]t first glance, . . . would not appear to be a landmark moment in the struggle for human justice.”⁹⁷ If a pregnant woman is not believable in the role, would not present an “authentic” or “genuine” appearance, the logic of sex-based BFOQs would seem to permit her termination.

V. THE PDA AND THE PREGNANT TELEVISION ACTRESS

A. *Ability to Work and Reasonable Accommodation by the Employer*

The PDA states that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work”⁹⁸ The only reasons contemplated in the Senate Report for not permitting a pregnant woman to work are “medical reasons.”⁹⁹ Both the House and Senate Reports refer to the pregnant woman’s “ability to work” in a way which makes plain that what is meant is that performing the job while pregnant is not dangerous to her, the unborn child, or third parties (because of her incapacity).¹⁰⁰ SEG and its defenders take for granted that a pregnant woman cannot play a sexy non-pregnant character on television. Otherwise SEG’s reasoning that because the character is “by necessity not pregnant,” the actress must also be not pregnant, would be a *non sequitur*, as ordinarily, actors and the characters they play are not expected to have all their traits in common. Is SEG’s reasoning sound? Or might a pregnant woman be “able to work” at the job of portraying a sexy non-pregnant woman?

⁹⁶ O’Connell, *supra* note 92.

⁹⁷ Ed Fishbein, *Soap Star Claims Dirty Treatment*, SACRAMENTO BEE, May 19, 1996 at A2.

⁹⁸ Revised section 701, 42 U.S.C. § 2000e(k).

⁹⁹ California Fed. Sav. and Loan Ass’n, 479 U.S. 272, 298 (1987) (White, J., dissenting) (citing S. Rep. No. 95-331, at 4 (1977)).

¹⁰⁰ *Id.*

Certainly there is no suggestion that working as a television actress while pregnant endangers anyone's safety. While there are things a pregnant woman cannot do, or more accurately, views of her body which cannot be presented compatibly with a non-pregnant character, there is a great deal she *can* do, and we should not be swept up in SEG's disingenuous assumption. The fact of the matter is that pregnant actresses play non-pregnant characters on television all the time, just as non-pregnant actresses play pregnant characters (one on "Melrose Place" this past season—Courtney Thorne-Smith as "Alison Parker"). How burdensome would it have been for the SEG producers to accommodate Tylo's pregnancy rather than terminating her contract, either by "shooting around" her belly, writing the pregnancy into her character, shooting scenes out of order,¹⁰¹ or, an option no commentator or party to the suit has yet mentioned, using a so-called "body double"?¹⁰²

Tylo maintains that the accommodations necessary for such a portrayal are relatively minor. "When a woman is pregnant, she might have to be camouflaged in the stomach for a matter of two months. Really and truly, those are the two months at the end when she would be getting near to her maternity leave anyway."¹⁰³ Actress Marilu Henner, who is not involved in Tylo's suit in any way, echoes her sentiments. Henner worked through two pregnancies in eighteen months, on the CBS series "Evening Shade," her talk show "Marilu," and a made-for-cable movie. "I've been not pregnant, playing pregnant. I've been playing not pregnant, but pregnant. And

¹⁰¹ This is the approach "Melrose Place" is taking to accommodate Heather Locklear's pregnancy. Raymond Edel, *Television News and Notes*, THE RECORD, June 26, 1997 at 46.

¹⁰² This Comment does not explore this fourth option in depth, as no one involved in the case on either side has mentioned it. Nevertheless, this is frequently done in the movies when the starring actress refuses to do nude scenes, when producers feel some part of her anatomy is not satisfactory, or when the character has to perform physical acts the person acting the role cannot perform. Examples include piano playing and dancing. Among the best known of these performers is Marine Jahan, who performed the dancing scenes for actress Jennifer Beals in *Flashdance* (Paramount, 1983). A body double seems to be a good way of handling the few scenes in which a late-term pregnancy could not plausibly be concealed.

¹⁰³ *Showbiz Today*, *supra*, note 6.

I've been playing pregnant when I was pregnant. And I can tell you, it all comes down to costuming and camera angles."¹⁰⁴

The history of prime-time television's adjustments to pregnancy among leading ladies would seem to bear this out, at least in part. For example, when Phylicia Rashad of "The Cosby Show" became pregnant when her character was not, the producers camouflaged her condition. Alternatively, the real-life pregnancy of comedienne Roseanne was written into the show,¹⁰⁵ as was that of Rhea Perlman, whose fertile character Carla Tortelli on "Cheers" had yet another child.¹⁰⁶ On the same show, Shelley Long's pregnancy was concealed by shooting her behind the bar and on one episode, ingeniously beneath the floorboards.¹⁰⁷ More recently, when pregnancy was not compatible with the character of the angel played by Roma Downey on CBS' "Touched by an Angel," executive producer and head writer Martha Williamson saw to it that the pregnant actress continued to work without her pregnancy showing up on camera.¹⁰⁸ Jane Seymour carried twins to term playing virginal "Dr. Quinn, Medicine Woman."¹⁰⁹ On the science fiction show "The X-Files," the pregnancy of lead actress Gillian Anderson was usually concealed by above-the-waist shots and loose blazers, but used to great dramatic effect in an "alien abduction" episode which featured a striking shot of her very pregnant belly. And on Aaron Spelling's very own "Beverly Hills 90210," the pregnancy of actress Gabrielle Carteris became the unplanned almost-aborted pregnancy of the character Carteris portrayed, unmarried college freshman Andrea Zuckerman. The producers also intend to integrate the pregnancy of Jennie Garth into upcoming plots involving her character, Kelly Taylor. As Suchil herself noted, "[O]ur decision not to use Ms. Tylo for the upcoming season had nothing to do with the company's using

¹⁰⁴ Warrick, *supra* note 10.

¹⁰⁵ *Day and Date* (WCBS television broadcast, May 14, 1996).

¹⁰⁶ *Showbiz Today*, *supra* note 6.

¹⁰⁷ Warrick, *supra* note 10.

¹⁰⁸ *Id.*

¹⁰⁹ *Day and Date* (WCBS television broadcast, May 14, 1996).

or retaining pregnant women on the show. Last season, we had a pregnant character.”¹¹⁰

Movie actresses, on the other hand, more often take temporary retirement upon becoming pregnant. Although Demi Moore flaunted her pregnant body on the cover of *Vanity Fair* magazine in August, 1991, she did not try to make “Striptease” while pregnant. Michelle Pfeiffer nabbed the role of the Catwoman in “Batman Returns” after the first choice, Annette Bening, bowed out after becoming pregnant.¹¹¹ “Pregnancy forced Robin Wright to give up the role of Maid Marian in ‘Robin Hood.’ But in an odd twist of fate, she was selected to replace the pregnant Annette Bening nine months later as the lead in the 1992 Irish drama ‘The Playboys.’”¹¹² Nevertheless, the first few months of pregnancy, at least, can successfully be concealed on celluloid, as Madonna demonstrated last year by making “Evita” through her fourth month of her pregnancy with daughter Lourdes Maria Ciccone Leon, born in mid-October.¹¹³ And in an event that augurs well for any actress who might happen to be pregnant when cast, Frances McDormand was awarded the 1996 Best Actress Oscar for her portrayal of Police Chief Marge Gunderson in “Fargo” (which happened to be directed by her husband), a role she portrayed while in an advanced state of pregnancy.

When SEG attorney Sally Suchil said it “obviously . . . wouldn’t work” to have Tylo “going to bed with the first guy when she’s about seven months pregnant,” she seemed in part to be suggesting “technical” difficulties.¹¹⁴ The examples I have just given should demonstrate that a pregnancy is hardly “incompatible” in any strong sense with a role on a night-time television show, whether the pregnant belly is “written in,” “shot around,” replaced with a non-pregnant belly double, or avoided by shooting particular scenes before the pregnancy begins to show. The realities of show business make

¹¹⁰ *Id.*

¹¹¹ *Showbiz Today*, *supra* note 6.

¹¹² Warrick, *supra* note 10. It is probably safe to assume that the father of her child, Sean Penn, did not give up any movie roles as an expectant father.

¹¹³ Madonna, *Madonna’s Private Diaries*, VANITY FAIR, Nov., 1996, at 174 (diary covers until May 29, 1996).

¹¹⁴ Warrick, *supra* note 10.

the claim that pregnancy “prevented” Tylo from being able to perform the job an implausible exaggeration at best. Admittedly, the producers would have to go to some additional inconvenience and expense. But the law does not require that a pregnant woman’s ability to work be identical to that of non-pregnant actresses in order for her to be protected from discrimination. Her ability need only be “similar,” and it was.

But perhaps it is unreasonable to expect such technical acrobatics on behalf of a performer who is yet to actually appear on the show. An established “star” in any business is in a better bargaining position than a newcomer, because an established performer has proven his or her worth to the enterprise. The gap between unknown quantity and bankable star is especially wide in television, where the “chemistry” among an ensemble cast is mysterious but all-important. Some actors who successfully lead one cast flop in their next venture (Mary Tyler Moore); sometimes a cast of unknowns hits it big. Once success arrives, the salary an actor can command per episode may go up ten times (*e.g.*, the television show, “Friends”). The nobody who shared a dressing room may begin the next season in her own luxury trailer. How can Tylo, who had just signed her “Melrose Place” contract, expect to be able to call up the executive producer and make demands about her character or special camera work?

Appealing as this argument may seem, the logic is dangerous when the accommodation in question has to do with pregnancy. First, it makes a woman’s choice to continue working in her chosen profession while bearing children a privilege, available only to an elite few whose unique value to their employers cannot be questioned. It creates subtle coercive pressure on women to terminate otherwise wanted pregnancies, by encouraging them to believe that after all, they can always have their children “once they make it” (as stars, law partners, etc.). It analogizes the decision to bear a child to other “whims” which might be catered to in a star, but can be safely ignored in a nobody. Furthermore, by this reasoning, pregnancy will always be a justification for denying someone a promotion, for why should employers go out of their way to accommodate a position to the needs of someone who has not yet occupied it (be it partner, manager, or tenured professor)? Finally, such an approach cannot

help but have a disparate adverse impact on expectant mothers compared with expectant fathers.

Business convenience (and prejudice), in the forms of reluctance to invest further resources in an actress new to the show and/or to accommodate a pregnancy, dictated SEG's decision. The ease of shooting around Tylo's pregnancy, writing her pregnancy in, or using a body double, make clear that Tylo's (or any actress') non-pregnancy does not go to the "essence" of the business operation, and should not stand in the way of reinstatement and non-discrimination remedies.

B. *Authenticity Reexamined*

As noted above, one of the strongest arguments against requiring SEG to retain Tylo through her pregnancy relies on her "inauthenticity" at portraying a "Melrose Place"-style seductress while pregnant herself. The fact that viewers may not be aware of an actress' pregnancy should considerably blunt these authenticity concerns. While a visibly pregnant woman might not authentically convey the image of the character sought by producers, to the extent her pregnancy can be concealed (shot around, replaced by a body double, etc.), no issue arises. It is thus not the authenticity of her appearance, but the ease and convenience of the producers, which is facilitated by the no-pregnancy rule, and the latter, unlike the former, is not a legitimate basis for discrimination. Nevertheless, it is worth exploring how and why a visibly pregnant woman would "obviously" be inauthentic or ungentrified in the role of adulterous siren on a night-time soap. For the sake of argument, let us assume that pregnancy-concealing film techniques are *not* employed.

One approach might be called "soft-core porn authenticity." As Suchil says, "This is a show where our characters parade around in various states of undress."¹¹⁵ In other words, Tylo essentially was hired not just to deliver lines and create a character, but to uncover parts of her anatomy which the producers had the right to assume would have a sexy—that is, non-pregnant—shape. Bill Maher of "Politically Incorrect" suggested something similar when he noted to

¹¹⁵ *Id.*

guest Allred “that one reason Melrose Place is so popular is its good-looking cast members and their choice body parts. The camera’s mission, he said, is to seek out those parts, not shoot around them.”¹¹⁶ The assumption is that pregnant body parts are not “choice” the way non-pregnant ones are. “The material change in her appearance” caused by pregnancy thus goes to the very essence of the job, which is strictly analogized to occupations like stripper or pornographic actress. In the sex industry, non-pregnancy is the mainstream taste, while pregnancy is a “fetish.” “Melrose Place,” like *Playboy*, *Penthouse*, and the ordinary strip club, caters to mainstream tastes.

Such an argument plainly goes too far. If last season and again this season there was a pregnant character, it is apparently not regarded as necessary that every (female) character parade around half-naked on every episode every week.¹¹⁷ Last season’s (fake) pregnancy of photographer “Jo Reynolds” (Daphne Zuniga) was carried to term. Maher’s humorous remark, though he may have meant it tongue-in-cheek, obscures the point that “Melrose Place” is not, after all, hard-core pornography, mainstream or otherwise. It is prime-time American television: glamorous melodrama, at most mildly titillating. There is nothing approaching full frontal nudity of men or women or explicit sexual acts. The form of entertainment the program provides is not really sexual in nature. Men occasionally appear topless, women do so only from behind. The women do wear very short skirts, skimpy tops, and fitted pants and dresses. Hunter Tylo was a shapely, slender woman pre-pregnancy; pregnancy filled her out, of course, but it also made her more buxom. The greater the artistic distance between “Melrose Place” and material intended to do nothing but produce sexual arousal almost reflexively in the viewer—and presumably SEG would maintain that there is some—the less it should matter that a visibly pregnant woman does not excite the prurient interests of many (even most) viewers.

¹¹⁶ O’Connell, *supra* note 92.

¹¹⁷ Perhaps coincidentally, the only character who has appeared this season in a string bikini is the one Tylo would have played. Even more ironic is that the character Tylo would have played announced in “Melrose Place’s” season finale that she was pregnant.

This leads into to the second and more fundamental version of the argument, “pregnant women lack authentic sex appeal,” or more simply, “pregnancy is not sexy.” On this argument, it is not discrimination against pregnant women to exclude them from a sexy, skin-revealing role, any more than it would be “discrimination” to refuse to cast a hirsute ectomorph to play bald and burly “Mr. Clean.” The pregnant woman’s physiognomy is simply incompatible with sexiness. Right?

Articulating the view that a pregnant woman “obviously” cannot play a sexy part is one female commentator, who writes, “Spelling’s attorney contends that the role Tylo was hired for ‘is simply incompatible with her pregnancy.’ Well, of course. How appealing would viewers find it to watch a woman heavy with child romping in the hay?”¹¹⁸ The picture is meant to produce aesthetic and even moral distaste. Which “viewers” does this writer have in mind? The answer comes in the next sentence: “The average guy may find his wife gorgeous when she’s pregnant. And plenty of women feel they’re never more beautiful than when they’re pregnant. But when viewers show up for steamy TV or movie romance, they’re not expecting to see someone whose water may break.”¹¹⁹ Not only does this writer assume that the typical viewer is “the average guy” (also, apparently, a straight married father) or his fecund wife, despite demographics to the contrary,¹²⁰ but she seems to imply either that

¹¹⁸ O’Connell, *supra* note 92.

¹¹⁹ *Id.*

¹²⁰ “Melrose Place” typically wins its time slot in all measured demographic groups. For example, in December, 1996, “Fox’s “Melrose Place” swept the 8 p.m. hour Monday in all key adult demos, including adult men and women 18-49, adult men and women 18-34 and adult men and women 25-54.” Lisa de Moraes, *Get Fresh to Finish 1-2 in Ratings Race*, HOLLYWOOD RPT., Dec. 11, 1996. The special appeal of the show to advertisers rests on its attracting young women. “‘Melrose Place’ never cracked Nielsen’s top 30, but it succeeded in attracting a large following among women 18 to 34, the group most coveted by TV advertisers.” Paul Farhi, *TV Networks Under Fire For Racy, Ratings-Driven “Family Hour,”* WASH. POST, June 5, 1996 at A1. See also Mark Robichaux, *Lifetime Aims Shows At Young Women*, STAR TRIB., July 10, 1996 at 7E. In March of 1996, the show was watched by 12.9% of women in that group. Brian Lowry, *Changing Channels*, DAILY VARIETY, Mar. 27, 1996. The demographics of the show have also prompted SEG to develop an associated World Wide Website for the program. Lisa Picarille, *Melrose Place: a Tangled Web Indeed*, COMPUTERWORLD, Dec. 23, 1996-Jan. 2, 1997.

Tylo proposed working up to her delivery day, or that “viewers” know so little about pregnancy that they fear anyone who is visibly pregnant is about to deliver.

What is never considered is the possibility that for some viewers, the pregnant body (of a gorgeous actress, recall) might itself be beautiful. Worse still is the suggestion, however faint, that there is something deviant about anyone, man or woman, who finds a pregnant woman sexy. The very *idea* of being turned on, even unwittingly, by a pregnant woman, makes some people very uncomfortable,¹²¹ and television “reassures” them by reinscribing assumptions that pregnant women are invariably faithful to their husbands, or do not want to have sex, or that no one (except possibly the father of her child) would want to have sex with a pregnant woman.¹²² These assumptions may or may not be statistically accurate, but their apparent “obviousness” reveals how deeply embedded they are in this culture’s view of sexuality and pregnancy.

It is worth making a further general remark about “authenticity” in the soap opera context. SEG will no doubt attempt to argue that the unique features of night-time soap operas justify the widest discretion by producers in casting choices, so it seems only fair to indicate other features of soap operas to the contrary. Since many actresses appear on daytime soap operas for many years, even decades, those actresses who bear children do so in front of the camera’s eye. Devoted soap opera fans know when their favorite female star gets “kidnapped” she is really off having her baby or on her honeymoon, just as they know that when a male lead falls into a coma the actor is probably off making a miniseries or in rehab.

¹²¹ This Comment would argue that the reaction is akin to that associated with a straight man’s discovery that the “woman” to whom he is attracted is a man in drag, a wrong we might call “fraudulent arousal.” A woman bearing another man’s child, like another man, is not an “appropriate” object of a heterosexual man’s sexual attention, and rather than acknowledge his own polymorphous erotic nature, he will cry “foul” and claim to have been “tricked.”

¹²² This taboo has been broken at least once on primetime network television. During the 1987-88 season of “Moonlighting,” the very pregnant Maddie Hayes (Cybill Shepherd) met, fell in love with, and ultimately married a man she met on a train. However, the storyline was a not a success, and the marriage was annulled. ALEX MCNEIL, *TOTAL TELEVISION* 567-8 (3d ed. 1996).

Soap opera viewers, indeed, television viewers in general, are not noted for their demand for authenticity. For many years married couples were always depicted sleeping in twin beds, and no people of color appeared, neither of which “authentically” depicted American life. Today, racial and sexual integration on some programs exceeds that found in “real life.” Actors who can barely use TelePrompTers play world-renowned doctors, CEOs, high-powered advertising executives, and police detectives routinely. The prime-time sitcom “Friends” even made a joke on this subject last season, when it had the character of beautiful-but-stupid aspiring actor Joey Trebbiani land the role of a neurosurgeon on “Days of Our Lives.”

A single soap opera character may be played by several different actors over the course of a few years; children who are toddlers in one season reappear a few years later as rebellious teens. Amnesia is nearly epidemic, as are the mercurial reversals of fortune and inspired coincidences familiar from the world of fairy-tale and fantasy. Admittedly, night-time soaps are somewhat more demanding, but who can forget the “it was all a dream” season on “Dallas,” when a whole year’s worth of unpopular plot developments were wiped away with the stroke of a pen? While viewers cannot reasonably be expected to deny the evidence of their own eyes, and “believe” that a character played by a very pregnant woman simply is not pregnant, the sorts of accommodations necessary to conceal her pregnancy from their eyes are hardly likely to threaten the show’s credibility in a meaningful way, even among viewers “in the know.”

VI. ROADS NOT (YET) TAKEN

A. *Pregnancy/Weight/Appearance/Sex Discrimination*

The PDA requires courts to view pregnancy discrimination, applied to expectant mothers, all of whom are of course women, as sex discrimination. But in appearance-oriented industries, there is another way to understand pregnancy discrimination: as weight or appearance discrimination. Some motives which lead to pregnancy discrimination are related to beliefs about maternal and fetal health and safety, about women’s roles as mothers, or rest on outdated and

stereotyped assumptions about the effects of pregnancy on a woman's body and mind. But other attitudes leading to such discrimination have more to do with the pregnant woman's changing weight or appearance than anything else. It was the material change in her *appearance* to which Tylo's contract, and her termination letter, referred. It does seem safe to say that if Hunter Tylo could carry her pregnancy safely to term without gaining weight (or indeed, if she were a very heavy woman hired to play a very heavy character), that is, without materially changing her appearance, her pregnancy would not have resulted in her termination.¹²³

Some might argue that unless courts are to outlaw appearance-oriented industries across the board, employers in those industries can hardly be prohibited from discriminating on the basis of appearance. That is precisely the business they are in. Should modeling agencies be prevented from choosing whom to represent on the basis of his or her appearance?

The salient feature of Tylo's appearance likely to undergo alteration during pregnancy is her weight or size. While weight discrimination in general may not be prohibited by Title VII, it is possible to understand those instances of weight discrimination which are pregnancy discrimination as weight discrimination "because of sex," and thus prohibited by Title VII, or as weight discrimination "because of pregnancy," and thus prohibited by the PDA.

The best-developed jurisprudence in this area involves weight and pregnancy restrictions placed on stewardesses. The leading case concerning weight restrictions is *Gerdom v. Continental Airlines*.¹²⁴ This was not a pregnancy case; it concerned the permissibility of weight restrictions for stewardesses with no similar restrictions on male "directors of passenger service." Plaintiff Carole Gerdom had been a Continental stewardess for ten years. When terminated, she stood five feet, five and one-half inches tall, and weighed 146 1/2 lbs., thirteen pounds above the maximum allowable weight for that

¹²³ Spelling admitted as much in court papers which argued that Tylo would have been fired had her weight gain resulted from "eating too much candy, a thyroid condition [or] getting too little exercise." O'Neill, *supra* note 31.

¹²⁴ 692 F.2d 602 (9th Cir. 1982) (en banc).

height of 133 1/2 lbs.¹²⁵ The Ninth Circuit rejected the “adverse impact” portion of the claim, approaching the issue as a “sex-plus” qualification:

Some women have been excluded, but that exclusion has been on the basis of weight only. Prior to 1972, the weight requirements could not have restricted employment opportunities for women as a class because only women were hired for the position. [Citation omitted.] There is no evidence that the weight requirements have restricted employment opportunities as flight attendants for women as a class since 1972 [when Continental put a more general height-weight policy in place for both sexes].¹²⁶

However, the court looked more favorably upon the “disparate treatment” argument: stewardesses (all female) were subjected to a strict weight requirement, while directors of passenger service (all male) were not. If the positions differed only by sex and not by function, the policy would be discriminatory. The Ninth Circuit remanded the case to explore this question further. It is worth recalling that just twenty years ago, it seemed as obvious to some people that stewardesses “needed to be” sexy, young, unmarried females in order to do their jobs, as those requirements seem for prime-time soap opera actresses today.

Judge Schroeder, concurring in part and dissenting in part in *Gedom*, suggests the following rule: “I would hold that whenever an employer applies a rule only to employees in a sex-segregated job classification and not to other employees, a prima facie case of discrimination has been shown. This would be true under either disparate treatment or disproportionate impact analysis.”¹²⁷ The defense available to the employer under such a rule would be that

¹²⁵ 648 F.2d 1223, 1225 (9th Cir. 1981). Note that this weight requirement is considerably more permissive than that employed by United when they instituted the stewardess position in 1930. At that time, stewardesses were required to be under 5'4" and under 115 pounds. *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, Jt. App. 59-64 (7th Cir. 1971) (Courtright Affidavit, Joint Appendix).

¹²⁶ 648 F.2d at 1226.

¹²⁷ *Id.* at 1230.

meeting some requirement was “reasonably necessary to performance of the duties” of the single-sex job.¹²⁸

Thus, the notion of the “duties of the job” of TV seductress is revisited, but this time under the aspect of weight. Here one encounters a different set of hostile and prejudiced attitudes. The discussion of “choice body parts” above neglected one possible interpretation of the real concern: not that Tylo would be pregnant, but simply that she would be too *fat* to be sexy; that a pregnant woman’s legs, arms, face, butt—will be too fat to be a turn-on. Although this culture may have passed through the height of the “waif” craze in fashion modeling, at few times in history has the dominant beauty ideal diverged so far from the actual shape of most women, particularly of a pregnant one.

This approach allows one to decode some of the subtext in remarks about the case. It is not simply (or even centrally) that no man would have sex with a woman seven months’ pregnant with another man’s child; it is that no (normal) man would want to have sex with a woman that *fat*. It is not that women find pregnancy un-sexy; it is that no woman is entitled to think of herself as sexually appealing if she is that heavy.

Though it might seem to some like another form of feminist “extremism,” the relationship between weight discrimination, pregnancy discrimination, and the dominant female beauty ideal was subtly suggested on the TV news. The ultra-mainstream “Headline News” on CNN preceded its coverage of Hunter Tylo’s case with thirty seconds on Miss Universe’s allegations that pageant organizers demanded she lose 27 pounds in two weeks.¹²⁹ Cleveland’s WJW television, a Fox affiliate, presented the same stories, in the same order, on the same day.¹³⁰ Did someone sense a connection?

Federal law currently offers no protection against discrimination based on weight. Only Michigan state law does offer some protection, in the form of the Michigan Elliott-Larsen Civil Rights Act (“MELCRA”), which provides that:

¹²⁸ *Id.*

¹²⁹ *Headline News* (CNN cable television broadcast, Aug. 21, 1996).

¹³⁰ *Good Day at Midday* (WJW Fox television broadcast, Aug. 21, 1996).

An employer shall not do any of the following: (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.¹³¹

The other states offer no such protection.¹³²

In the case of first impression on the question of burden of proof for weight discrimination, the Michigan District Court had this to say:

The same statutory provision which covers weight discrimination claims also encompasses acts of discrimination on the basis of height and age. By analogy, this Court believes that the cases in those areas provide the appropriate authority for determining the burden of proof here. In *Matras v. Amoco Oil Co.*, 424 Mich. 675, 682 (1986), the Michigan Supreme Court, in holding that a plaintiff must show that age was a "determining factor" or "but-for" cause of the discharge, wrote: "Another formulation would be that age is a determining factor when the unlawful adverse action would not have occurred without age discrimination." *Id.* Therefore, in order to resolve this issue, the Court must determine whether reasonable minds could have concluded that Ross' discharge would not have occurred but for the Defendants' consideration of her weight. (footnotes omitted).¹³³

¹³¹ MICH. COMP. LAWS § 37.2202(1)(a) (West 1997). "The Michigan Civil Rights Commission has issued interpretive regulations indicating that Title VII should be used as a guide in the interpretation of [MELCRA], *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 617 (6th Cir. 1986) *cert. denied*, 481 U.S. 1041 (1987), *abrogated on other grounds*, *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993). However, in contrast to a plaintiff claiming violations of §§ 1981 and 1983, a plaintiff may prove a violation of MELCRA based on a claim of disparate impact or disparate treatment. *Singal v. General Motors Corp.*, 179 Mich. App. 497, 502-03, 447 N.W.2d 152, 155-56 (Mich. Ct. App. 1989).

¹³² *See, e.g.*, *Rogers v. Stratton Indus.*, 798 F.2d 913, 917 (6th Cir. 1986).

For example, if a person brought suit under the Tennessee employment discrimination statute for being discharged for being overweight, he would have failed to state a claim upon which relief can be granted, since a discharge for obesity is not actionable under Tennessee statutory or common law, but he also would have failed to bring himself within the jurisdiction of the Tennessee courts because the existing Tennessee civil rights statute does not make weight discrimination a subject that can be reviewed by the courts.

¹³³ *Ross v. Beaumont Hospital*, 687 F. Supp. 1115, 1122-25 (E.D. Mich. 1988).

Thought about in this way, it becomes clear that pregnancy discrimination as practiced in appearance-oriented industries is a species of weight discrimination. As noted above, if Tylo were able to carry her pregnancy safely to term without gaining weight, or changing her shape in any way, presumably SEG would not have terminated her contract. It is not the *idea* of a pregnant actress, but its visible consequences, to which they object. (In this way it differs from, for example, marriage prohibitions for stewardesses.) Tylo's termination would not have occurred "but for" defendants' consideration of her impending weight gain.

However, to the extent that this issue is making its way onto the civil rights agenda, it is in the form of protection for the so-called "morbidly obese" under the rubric of the Americans With Disabilities Act. Their advocates maintain that extreme obesity is a medical and/or genetic condition not under the control of the individual, not curable and thus "immutable" from the legal point of view, and appropriately protected like other immutable traits (*e.g.*, race, gender, physical handicap).

California appears to be taking this approach. The California Supreme Court in *Cassista v. Community Foods* held that "weight may qualify as a protected "handicap" or "disability" within the meaning of the FEHA [California Fair Employment and Housing Act, Gov. Code, § 12900 et seq.] if medical evidence demonstrates that it results from a physiological condition affecting one or more of the basic bodily systems and limits a major life activity."¹³⁴ The opinion reviews the state of the law elsewhere:

Of the courts that have considered [employment discrimination on the basis of weight], most [except Michigan] have concluded that an individual's weight does not by itself constitute a handicap or disability, but may in conjunction with other related disorders such as diabetes, high blood pressure, cardiovascular disease or osteoarthritis qualify as a handicap or disability under their respective states' antidiscrimination statutes.¹³⁵ For example, the Pennsylvania court held in *Philadelphia Electric Co. v. Commonwealth of Pennsylvania*¹³⁶ that morbid obesity alone, without

¹³⁴ 5 Cal. 4th 1050, 1052 (1993).

¹³⁵ *Id.* at 1061-62.

¹³⁶ 68 Pa. Commw. 212, 448 A.2d 701, 707 (1982).

other physical consequences, is not a handicap under the Pennsylvania antidiscrimination statute; state courts in Missouri and North Dakota have held similarly.¹³⁷ A federal district court in the state of Washington held that obesity was not a handicap under Washington law because it was not an "immutable" condition such as blindness or lameness.¹³⁸

By contrast, New York and New Jersey have employed broader interpretations of their respective state statutes. In *State Div. of Human Rights v. Xerox Corp.*, the New York court concluded that plaintiff's obesity qualified as a disability notwithstanding the fact that it was "unrelated to any glandular or organic deficiency," reasoning that "disability" under New York's Human Rights Law encompassed "merely diagnosable medical anomalies which impair bodily integrity" ¹³⁹ Applying similar reasoning, the New Jersey court in *Gimello v. Agency Rent-A-Car Systems*,¹⁴⁰ concluded that obesity qualified as a handicap under the New Jersey Law Against Discrimination.

Pregnancy discrimination in appearance-oriented industries stands at the intersection of sex discrimination and weight discrimination.¹⁴¹ Title VII and the PDA protect pregnant women from discrimination, but no similar law protects the overweight. Advocates for the obese (of both sexes) have had some success under the Americans With Disabilities Act and its state analogues, but it is still quite limited and

¹³⁷ *Mo. Comn. on Human Rights v. S.W. Bell Tele.*, 699 S.W.2d 75 (Mo. Ct. App. 1985); *Krein v. Marian Manor Nursing Home*, 415 N.W.2d 793, 796 (N.D. 1987).

¹³⁸ *Greene v. Union Pacific R. Co.*, 548 F. Supp. 3, 5 (W.D. Wash. 1981).

¹³⁹ 491 N.Y.S.2d 106, 108, 109 (1985).

¹⁴⁰ 594 A.2d 264 (N.J. Super. Ct. App. Div. 1991).

¹⁴¹ Cf. Kimberlé Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (Kimberlé Williams Crenshaw, et al., eds., 1995). Without pressing the analogy too hard, this Comment suggests that both men and women can be discriminated against on the basis of excess weight (like race), while only women suffer sex discrimination. The stricter scrutiny applied to race discrimination gives defendants incentives to construct their differential treatment as based on gender rather than race. By the same token, because weight (unlike race) discrimination is permissible, reconstructing pregnancy prohibitions as weight-gain prohibitions is a very attractive strategy for defendants. One important disanalogy is that prejudice associated with being overweight is vastly more damaging to women than to men, while race prejudice is an equal-opportunity evil. "Fat is a feminist issue" in a way that race is not (exclusively).

available mostly to the extremely or medically obese. It is thus a sensible strategy for those opposing pregnancy discrimination to operate within the sex discrimination paradigm, while defendant employers will seek to construct their behavior as weight (or more general appearance) discrimination, so as to escape liability.

But the special context of pregnancy discrimination in appearance-oriented positions calls for more "intersectionality." Where a woman may be terminated for a gain of ten to fifteen pounds, to say nothing of the twenty-five to thirty-five pounds regarded as healthy during pregnancy, the idea of pregnancy discrimination as a form of weight discrimination should not be overlooked. The acceptability of weight discrimination is hardly surprising in a culture as hypersensitive as ours is to (women's) weight and weight gain. Yet *Gerdom* and other airline cases have taught us that we should not ignore the sex-discriminatory aspects of weight discrimination against the merely plump woman rather than the obese. To the extent that deviation from a female ideal of slenderness is punished by job discrimination, at least when the deviation is due to pregnancy, the law can offer some protection.

B. *Pregnancy as Temporary Disability Revisited*

After *Cal Fed*, it is not entirely clear whether an employer may elect to treat pregnancy as a "temporary disability" on a par with others. Nevertheless, this is an interesting avenue for possible exploration on the question of sex discrimination. If an actor suffered a temporary disability which would have required partial concealment of some of his "choice parts" for a few months, would that seem to us legitimate grounds for his termination? By the same token, if Tylo had broken her leg or collarbone in March, instead of discovering she was pregnant, how would SEG have been expected to respond? Some of the same issues of established star vs. newcomer come into play here. One of the stars of the show, Andrew Shue, is a competitive soccer player, whose character, Billy, has suffered the occasional "skiing accident" which puts his leg in a cast for an episode or two when Shue is injured. It is unlikely that anyone has suggesting firing him because viewers cannot look at his legs for a few episodes. On

the other hand, one might choose to understand the roles played by television actors and actresses as requiring the maintenance of very specific features of appearance, and require performers of both sexes to be prepared to forfeit their jobs for deviating. (As in the flight attendant cases, however, one would want to scrutinize how exacting the standards were for men as opposed to women, and how strictly they were enforced.)

C. *Discrimination on the Basis of Refusal to Abort*

The coercive power employers might bring to bear on ambitious women to have abortions, rather than themselves accommodating an employee's pregnancy, has been mentioned above. Such concerns are not purely speculative, particularly in the appearance-oriented professions. Tylo herself says, "I have no doubt in my mind that this sort of thing [threatened loss of a job due to pregnancy] has forced other actresses to feel the pressure to not have a family and forfeit their pregnancy. A woman shouldn't have to choose between her family and her job."¹⁴² While Tylo's sensitivity to this issue might be attributed in part to her Christian beliefs,¹⁴³ other knowledgeable people say the same. "According to Nina Blanchard, high priestess of the high fashion modeling business, the choice between motherhood and cover girl can be excruciating. 'Yes, girls did come to me at times looking for advice on whether to have an abortion or quit working at a critical time in their careers.'¹⁴⁴ The tremendous pressure on workers in appearance-oriented industries to avoid pregnancy is also demonstrated by their requests to use gestational surrogates. "Dr. Richard Marrs, medical director of the Institute for Reproductive Research at the Hospital of the Good Samaritan, says he has turned down embryo-transfer requests of actresses who wanted to stay

¹⁴² Pam Lambert, et al., *Bringing Up Babies: As Clocks Tick and Instincts Prevail, Stars Single and Married are Heeding the Nesting Urge*, PEOPLE, July 8, 1996 at 76.

¹⁴³ Christy Slewinski, *Oh Baby: Pregnant Actress Sues Over "Melrose" Ouster*, DAILY NEWS (N.Y.) May 15, 1996 at 75.

¹⁴⁴ Warrick, *supra* note 10.

eligible for juicy roles.”¹⁴⁵ Whatever side of the abortion-rights issue one comes down upon, the right to choose pregnancy must not be subordinated to the right to choose abortion.

VI. CONCLUSION

The case of *Tylo v. SEG* presents the court with a novel question: the applicability of Title VII as amended by the PDA to appearance-oriented positions like actress on a night-time television soap opera. If the court determines that SEG (and other television producers like it) enjoys no special license to discriminate against pregnant women, but must instead, where possible, make reasonable accommodations to the change in appearance brought about by pregnancy, all women in show business will enjoy greater job security. The *Cal Fed* mandate that “women [have] the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life,”¹⁴⁶ will not stop at the soundstage door. Alternatively, the court may hold that within the narrow confines of permissible sex-based BFOQs is a special niche for non-pregnancy in appearance-oriented positions—in other words, business as usual in Hollywood. On-screen entertainment careers have always been a mixed blessing for women, offering nearly unparalleled opportunities for wealth and power while at the same time too often perpetuating degrading stereotypes. A ruling in Tylo’s favor would be a step in the right direction.

¹⁴⁵ Martin Kasindorf, *And Baby Makes Four: Johnson v. Calvert Illustrates Just About Everything that Can Go Wrong in Surrogate Births*, L.A. TIMES, Jan. 20, 1991 at 10 (Magazine).

¹⁴⁶ 479 U.S. 272 (1987).

