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Customer Preference and the Bona Fide Occupational Qualification Defense Under Title VII of the Civil Rights Act of 1964: The Customer is Not Always Right

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Research Guides

Customer Preference and the Bona Fide Occupational Qualification Defense Under Title VII of the Civil Rights Act of 1964: The Customer is Not Always Right

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Introduction

Background

Although Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of religion, sex, or national origin in employment, employers who face lawsuits under Title VII may partially or fully escape liability by raising the bona fide occupational qualification defense (BFOQ). Section 703(e) of the statute provides the exemption that allows discrimination in the instances where sex is a BFOQ reasonably necessary to the normal operation of the particular business for which the exception is claimed. In ***Dothard v. Rawlinson***, 433 U.S. 321 (1977), the Supreme Court found that the BFOQ is "an extremely narrow exception to the general prohibition of discrimination on the basis of sex" in upholding a rule requiring prison guards in close contact with inmates to be the same gender as those inmates. *Id*. at 334. Later, the Court in ***International Union, UAW v. Johnson Controls, Inc***., 499 U.S. 187 (1991) reasserted the rigors of BFOQ in rejecting the defendant's argument that fears for the safety of fertile women and their fetuses justified exclusion of such women from working in its battery department. There, the Court found that the employer's concerns regarding the safety and health of women and their fetuses, while based on apparently good intentions, were not directly related to job performance.

Generally, courts do not find customer preference alone to be a BFOQ to an employment discrimination claim under Title VII. However, federal case law has shown that a narrow set of circumstances exist in which customer preference may be considered. The most common of these is where an employer attempts to establish a BFOQ defense based on privacy interests. A second potential situation where customer preference may be taken into account involves authenticity interests (e.g. a Chinese restaurant discriminating on the basis of national origin where striving for "authenticity" is the essence of the employer's business). However, case law addressing the latter situation has been scant.

Scope

This web research guide presents a general overview and legal issues relating to customer preference as a factor in federal courts' consideration of the bona fide occupational qualification defense (BFOQ) for employers who face lawsuits involving alleged discrimination based on religion, sex, or national origin under Title VII of the Civil Rights Act of 1964 (Note: BFOQ does not apply to discrimination based on race). By compiling legal materials related to this subject into a single resource, the author hopes students, employers, and legal professionals with little or no familiarity with the subject matter will find this guide a useful starting point to their research.

About the Author

Keith Hayasaka, in the Spring of 2007, is a second year law student at the Georgia State University College of Law in Atlanta. He is a graduate of Vanderbilt University and spent several years in Southern California working in feature film development, production, and distribution before entering law school. At GSU Law, he is a member of the Moot Court Board and Mock Trial Team, a Justice on the Honor Court, and has served as a graduate research assistant in the law library. He intends to pursue a career in civil litigation.

Disclaimer

Bibliographies on this Web site were prepared for educational purposes by law students as part of Nancy P. Johnson's Advanced Legal Research course. The Law Library does not guarantee the accuracy, completeness, or usefulness of any information provided. Thorough legal research requires a researcher to update

materials from date of publication; please note the semester and year the bibliography was prepared.

The annotations provided here are for educational purposes only and not intended to constitute legal advice. The author does not warrant or assume any legal liability or responsibility for the accuracy, completeness, or usefulness of any information, apparatus, product, or process disclosed herein. This research guide is not comprehensive and should be viewed as a starting point. Legal materials are updated often and cases may be overturned or questioned. Therefore a user of this guide should always check any case or statute to ensure that it is still good law. Further, secondary sources, such as journals and treatises, receive new annotations and updates on a regular basis.

Finally, if you have questions regarding your research, feel free to talk to one of your reference librarians. Their advice could save you considerable time and effort.

Currentness

This research guide was prepared for Professor Nancy Johnson's advanced legal research class and was last updated on April 10, 2007.

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Primary Sources

Federal Statute: Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e)

1. Section 701 of the Civil Rights Act of 1964 provides in part:

42 U.S.C. § 2000e. Definitions

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

2. Section 703(a) of Title VII provides:

42 U.S.C. § 2000e-2(a). Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer--
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

3. Section 703(e) of Title VII provides:

42 U.S.C.A. § 2000e-2(a). Unlawful employment practices

(e) Notwithstanding any other provision of this subchapter,

(1) it shall not be an unlawful employment practice for an employer to hire and employ employees [...] on the basis of religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

Federal Cases

1. The General Rule: Customer Preference Alone Not a BFOQ

Olsen v. Marriott Intern., Inc., 75 F.Supp.2d 1052 (D.Ariz. 1999) In considering the defendant hotel's defense of its refusal to consider the

application of a male massage therapist, the court found no BFOQ where the hotel's hiring policies of massage therapists were based on actual and predictable customer requests and preferences for female massage therapists, not on the inability of men to fulfill core job functions or that such core job functions intrude upon privacy interests. ***E.E.O.C. v. Hi 40 Corp., Inc.***, 953 F.Supp. 301 (W.D.Mo. 1996) In finding that the defendant weight loss centers' policy of refusing to hire male counselors violated Title VII, the court determined that being female was not a bona fide occupational qualification for being employed as a counselor at the defendant employer's weight loss centers. While the centers' mostly female customers preferred female counselors, who took physical measurements of the customers and discussed personal subjects with them, there was no showing that ability to take measurements and counsel customers on weight loss were talents uniquely possessed by women or that employing male counselors would pose a more than minimal impact on the customers' privacy interests.***Jatczak v. Ochburg***, 540 F.Supp. 698 (D.C.Mich. 1982) The court found that a "male only" hiring policy for child care worker positions was not a BFOQ based on clients' needs and preferences because the ability to transmit knowledge of work skills and appropriate work behavior is not a function of the gender of the counselor. "[T]he required manual skills, as well as desirable characteristics of concentration, punctuality, appropriate dress, self discipline, and cooperation can be conveyed and modeled by a qualified female worker as well as a male to clients of either sex." Id. at 704.

Wilson v. Southwest Airlines Co., 517 F.Supp. 292 (D.C. Tex. 1981) In rejecting the defendant airline's argument that customer preference for female flight attendants justified its refusal to hire males, the court held that being a female was not a bona fide occupational qualification required to successfully perform the jobs of flight attendant and ticket agent, even where the marketing campaign of the defendant airline focused on feminine spirit, fun, and sex appeal to distinguish it from its competitors.

Fernandez v. Wynn Oil Co., 653 F.2d 1273 (9th Cir. 1981) In holding that customer preference cannot justify gender discrimination, the court rejected the defendant employer's argument that its decision to promote the plaintiff to director of international operations was justified on the basis that Latin American clients would negatively react to a woman in such a high position. ***Diaz v. Pan Am World Airways, Inc***. 442 F.2d 385 (C.A.5 1971) In this case, the court held that customer preference may be taken into account only when it is based on the company's inability to perform the primary function or service it offers. Here, the court found that the primary function of an airline is to transport passengers from one point to another while the "pleasant environment, enhanced by the obvious cosmetic effect that female stewardesses provide as well as […] their apparent ability to perform the non-mechanical functions of the job in a more effective manner than most men […] are tangential to the essence of the business involved."

2. Customer Preference Giving Rise to Privacy Interests: A Narrow Exception to the Rule

Tharp v. Iowa Dept. of Corrections, 68 F.3d 223 (C.A.8 Iowa 1995) A prison policy of allowing only female residential advisors to staff women's unit of mixed-gender minimum security prison was not found to violate prohibitions in Title VII. The policy was instituted to further legitimate penological and privacy interests in having women conduct urinalysis and body searches of other women, and male employees did not suffer termination, demotion, or reduction in pay, but were merely occasionally denied shift assignment of their choice.***Norwood v. Dale Maintenance System, Inc.***, 590 F.Supp. 141 (D.C.Ill. 1984) The court held that sex was bona fide occupational qualification for washroom attendant positions in a 82-story commercial building where the factual basis for a sex-based policy existed in privacy interests of tenants and guests and where no reasonable alternative was available; the closing of washrooms while servicing is being performed or having attendants leave when individual wants to use the washroom would compromise privacy rights of tenants and guests, result in loss of productive work time for, increase costs for janitorial service, increase problems in security, and decrease desirability of the building as rental property.

E.E.O.C. v. Mercy Health Center, Not Reported in F.Supp., 1982 WL 3108 (W.D.Okl. Feb. 02, 1982) The court determined that patient preference for female nurses in the labor and delivery area of the defendant hospital gave rise to a bona fide occupational qualification where employment of male nurses would cause medically undesired tension for patients, as evidenced by objections voiced by doctors, results of a written survey, and consideration of the intimate duties performed by staff nurses in this area.***Fesel v. Masonic Home Inc.***, 447 F. Supp. 1346 (D. Del. 1978) In a sex discrimination in employment action brought by a male nurse's aide against a defendant residential retirement home, the home met its burden of establishing BFOQ defense based on privacy interests of its guests, in view of evidence that 22 of the retirement home's 30 guests were female, that female guests objected to having their personal needs attended to by male nurse's aide, that administrators of home had factual basis for believing that such objections existed when plaintiff applied for employment, and that operation of home and the size of staff precluded hiring of male nurse's aide in such manner that there would always be at least one female on duty to attend to personal care needs of female guests objecting to male care.

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Secondary Sources

Law Review and Journal Articles

Law review and journal articles provide background information on specific legal topics, often ones that are "hot" or have been recently affected by court decision(s). These articles may be available in hardbound editions or viewed on Westlaw and Lexis. If using the Georgia State University's law library, many law review and journal articles may also be accessed using HeinOnline (which is limited to use in the Georgia State University's Law Library). Further, Infotrac is an index of law review articles searchable by date or subject.

Ernest F. Lidge III, *Law Firm Employment Discrimination in Case Assignments at the Client's Insistence: A Bona Fide Occupational Qualification?*, 38 CTLR 159 (2005) An article examining the intersection of employment discrimination laws with rules of legal ethics in the context of law firm assignments.

Emily Gold Waldman, *The Case of the Male OB-GYN: A Proposal for Expansion of the Privacy BFOQ in the Healthcare Context*, 6 UPAJLEL 357 (2004) An article exploring the question of whether an OB-GYN practice can make explicitly gender-based decisions about which physicians to hire and fire based on customer preference and other business considerations in light of increased numbers of practicing female OB-GYNs.

Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CALR 147 (2004) An article focusing on the two types of distinctions courts make in their decisions where sex constitutes a BFOQ justifying sex discrimination: privacy-based and sexual-titillation based justifications.

Rachel L. Cantor, *Consumer Preferences for Sex and Title VII: Employing Market Definition Analysis for Evaluating BFOQ Defenses*, 1999 UCHILF 493 (1999) A comment discussing Title VII, the different tests courts use to evaluate BFOQ defenses, and arguing that all gender-specific employment decisions, both found to

be valid or invalid under the BFOQ exception, are "somehow based on consumer preferences."

Toni Scott Reed, *Flight Attendant Furies: Is Title VII Really the Solution to Hiring Policy Problems?*, 58 JALC 267 (1992) A comment covering the historical development of airlines' use of flight attendants, Title VII's impact to airlines, current analysis used by courts in sex discrimination cases, and the potential future success of challenges.

Elsa M. Shartsis, *Privacy as a Rationale for the Sex-Based BFOQ*, 1985 DETCLR 865 (1985) A comment discussing the perceived right to privacy and the employment milieux in which it has been invoked. Also evaluates Title VII decisional law and suggests standards and considerations "heretofore ignored" by the courts.

Debra A. Stegura, *The Biases of Customers in a Host Country as a Bona Fide Occupational Qualification: Fernandez v. Wynn Oil Co.*, 57 SCALR 335 (1984) This note analyzes the Fernandez judicial opinion and argument that the court's statement that preferences of customers in a foreign country for male business representatives do not have constitute a BFOQ under Title VII does not have the strength of a holding.

Hornbooks and Nutshells

Hornbooks and Nutshells are single volume books devoted to a single, broad legal subject (e.g. Torts or Contracts) and are helpful in acquainting the reasearcher with the "black letter law". The following materials on Employment Discrimination include discussion on BFOQs and can be found in the Georgia State University Law Library's collection. Availability of these materials in the libary can be checked by using GIL, the library's online catalog.

Harold Lewis and Elizabeth Norman, Employment Discrimination Law & Practice (West, 2nd ed. 2004)(ISBN: 0314150129)(Library call number: KF3464.L487 2004 - check reserves desk) A hornbook surveying the claims, defenses, procedures and remedies relating to the federal law of employment discrimination.

Mack A. Player, Law in a Nutshell: Federal Law of Employment Discrimination in a Nutshell (West, 5th ed. 2004)(ISBN: 0314150021)(Library call number: KF3464.Z9 P55 2004 - check reserves desk) A nutshell providing a survey of common law, statutes, remedies, and procedures pertaining to employment discrimination.

Thomas R. Haggard, Understanding Employment Discrimination (Lexis, 2001)(ISBN: 0820543209)(Library call number - KF3464 .H34 2001) A supplement providing the statutory framework and caselaw necessary to understand the field of employment discrimination. Part of the "Understanding" series of supplements.

American Law Reports (ALR)

American Law Reports (ALR) are also a good starting point for research. These annotations often have citations to a number of cases and statutes, as well as other ALR articles, journals, books and treatises. ALR is available on Westlaw and Lexis, as well as in hardbound editions in the Georgia State University's Law Library. The following annotations discuss customer preference as it pertains to BFOQ.

Melissa K. Stull, *Permissible Sex Discrimination in Employment Based on Bona Fide Occupational Qualifications (BFOQ) under § 703(e)(1) of Title VII of Civil Rights Act of 1964 (42 U.S.C.A. § 2000e-2(e)(1))*, 110 A.L.R. Fed. 28 (1992) An annotation collecting and analyzing the federal cases in which the courts have determined under what circumstances sex discrimination in employment may be justified on the basis of the BFOQ.

Effect of Customer's Interest or Preference on Establishing Bona Fide Occupational Qualification Under Title VII of Civil Rights Act of 1964 (42 U.S.C.A. § 2000e-2(e)), 63 A.L.R. Fed. 402 (1983) This annotation collects and analyzes cases in which federal courts and the EEOC have considered whether interests or preferences of customers form a valid basis for establishing sex as a BFOQ under Title VII.

Looseleaf Services

These are multi-binder sets that contain statutory text, regulations, judicial and/or administrative opinions and annotations. They are updated frequently, so the information found in these binders will be valuable to the researcher. The following looseleaf services pertain to Employment Discrimination Law.

Walter B. Connolly, A Practical Guide to Equal Employment Opportunity, (Law Journal Seminars Press, Rev. ed. 1979) A two-volume set analyzing discrimination based on protected traits under Title VII and EEO considerations.

Arthur Larson & Lex K. Larson, Employment Discrimination, (Matthew Bender, 2nd ed 1994) A looseleaf compiling statutes, regulations, administrative materials, as well as practice forms related to employment discrimination law.

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Online Resources

Search Engines

Search engines such as Google, Yahoo!, Lycos, Alltheweb, Altavista, and Ask.com provide a free and easy means of starting your research project.

Legal Websites

1. Sites Requiring Paid Subscription and/or Fee

a. Lexis and

b. Westlaw are probably the most well-known and utilized legal research sources on the Internet. However, using these sites either require a paid subscription or a fee (usually charged per each search) and can become quite costly.

In Westlaw, topics may be searched under "Key Numbers". The following might be useful in researching employment discrimination issues:

78 CIVIL RIGHTS
I. RIGHTS PROTECTED AND DISCRIMINATION PROHIBITED IN GENERAL, k1001-k1100
II. EMPLOYMENT PRACTICES, k1101-k1300
III. FEDERAL REMEDIES IN GENERAL, k1301-k1500
IV. REMEDIES UNDER FEDERAL EMPLOYMENT DISCRIMINATION STATUTES, k1501-k1700
V. STATE AND LOCAL REMEDIES, k1701-k1800
VI. OFFENSES AND PENALTIES, k1801-k1809

c. VersusLaw is a lower cost alternative to Lexis and Westlaw. Two different price plans are available; the "premium plan" offers standard caselaw searching, including federal district court opinions back to 1950.

d. Loislaw is another lower cost alternative that offers access to primary law, public records, and treatises.

2. Free Access and Searches

a. Casemaker features a combination of state and federal legal materials as to put the "information your members need to conduct legal research right at their fingertips." (per quote on website)

b. FindLaw's free service allows you to choose a legal issue, including employee rights, and will help locate an attorney in that particular area.

c. Lexis-One was created with small firms in mind; offers free case searching through the past five years. A somewhat limited but lower cost alternative to Lexis-Nexis.

d. GPO-Access is provided by the U.S. government's printing office and disseminates official information from all three branches of the Federal Government. Legislative resources include congressional bills, public & private laws, and the United States Code.

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Organizations and Attorney Directories

Bar Association and Agencies

ABA Labor & Employment Section - this site provides breaking news in the field of labor & employment law, a calendar of events, and a continuing legal education (CLE) schedule

Atlanta Bar Labor & Employment Section – a website listing upcoming events and CLEs for attorneys practicing in the field of employment law

Equal Employment Opportunity Commission – the official website of the EEOC, the federal agency that oversees compliance with Title VII

Georgia Bar Labor & Employment Section - provides membership information and roster, as well as section news

Attorney Directories

FindLaw – a free site that provides search for employment attorneys who handle employment discrimination claims

Georgia Bar Directory – a current listing of attorneys who practice law in the State of Georgia

Martindale-Hubbell - allows the user to locate employment attorneys who handle employment discrimination cases as well as search specific geographic areas for attorneys or firms that practice employment law

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