



## The *Bona Fide* Occupational Qualification (BFOQ) Defense in Employment Discrimination: A Narrow and Limited Justification Exception

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### Abstract

*U.S. civil rights laws prohibit discrimination in employment based on the protected categories or characteristics, such as race, color, religion, sex, and national origin. However, the BFOQ doctrine allows an employer to discriminate on the basis of religion, sex, or national origin in certain instances where these dimensions of diversity are a bona fide occupational qualification, meaning that any of these traits are reasonably necessary to the normal operation of doing business.*

*The reality is that most managers are concerned and thus wary of using this doctrine due to its sensitive and complex nature and the fact that it is discrimination. Yet, the BFOQ doctrine can be used successfully in those rare employment circumstances where a discriminatory exclusion is reasonably related to the normal and legitimate operations of the business. This article explains the nature of this doctrine and demonstrates when the BFOQ defense can be used with rational justifications for sustainability of the operation. The authors explain the proper and limited use of the BFOQ doctrine in order to avoid legal liability; and we recommend diversity awareness for the creation of an inclusive and fair workplace.*

**Key words:** *Civil Rights Act, discrimination, stereotypes, BFOQ, bona fide occupational qualification, inclusive workplace, diversity.*

### Introduction

Discrimination against people is not favored legally or ethically in the United States (Muffler, Cavico, and Mujtaba, 2010) or other places around the globe because it is not aligned with the modern worker's perception of justice (Huang, Ryan, and Mujtaba, 2015). Accordingly, there are many Civil Rights laws that prohibit discrimination, particularly in employment, based on race, color, religion, gender/sex, national origin, age, disability, or other protected categories. However, embodied in these laws is an exception whereby discrimination based on otherwise protected characteristics may be legal because the very nature of the job requires such characteristics. The main "theme" of the article, as manifested by the title, is that managers and employers must take heed because the BFOQ defense is a narrow and limited one indeed.

The purpose of this article is to explicate this exceptional doctrine, called the *bona fide* occupational qualification (BFOQ) defense. The article will first provide a general overview of key U.S. Civil Rights laws. Then the BFOQ doctrine is illustrated and explicated in four key categories: gender/sex, religion, national origin, and age. The authors examine the pertinent statutes, administrative rules, case law, and legal commentary. The authors next address the at times confusing relationship between the BFOQ doctrine and the concept of appearance discrimination. Based on the foregoing legal analysis the authors will then discuss the implications of the BFOQ doctrine for managers and employers. Moreover, we discuss the important role that diversity awareness and training can provide to create an inclusive workplace and to ensure legal compliance as well as to achieve an ethical and fair workplace. Based on the aforementioned legal and diversity analysis, we provide suitable recommendations to prevent legal liability. The article concludes with a brief summary for managers, trainers and entrepreneurs.

### **Legal Overview**

Title VII of the Civil Rights Act of 1964 prohibits discrimination in the terms and conditions of employment based on the protected categories or characteristics of race, color, religion, sex, and national origin (Civil Rights Act, 1964; Muffler, Cavico, and Mujtaba, 2010; Cavico and Mujtaba, 2014). The BFOQ doctrine in Title VII of the Civil Rights Act states that it is unlawful for an employer to discriminate or classify employees or applicants except “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” (*United States Code*, Title 42, Section 2000e, 2015). The protected characteristics are subject to the BFOQ defense are religion, gender/sex, and national origin. Consequently, it must be emphasized, that race and color cannot be BFOQs (*Syrenthia Dysart v. Palms of Pasadena Hospital*, 2015, p. 19; *Morton v. United Parcel Serv.*, 2001; EEOC, Compliance Manual, Section 15, 2015; Cavico and Mujtaba, 2014; Bryant 1998). Bryant (1998, p. 213) explains that “Congress did not include a BFOQ for race in Title VII, presumably because it believed that there were no situations where the race of the employee would be relevant to job performance.”

To establish an initial case of employment discrimination the aggrieved party must show that he or she is a member of the protected class and that he or she was treated differently because of his or her sex, national origin, religion, or age (by virtue of the Age Discrimination in Employment Act). In such a case the employer has the burden of demonstrating a non-discriminatory reason for the adverse employment action or the employer interpose a BFOQ as a defense (Cavico and Mujtaba, 2014; Martin, 2012-2013; Muffler, Cavico, and Mujtaba, 2010). For discrimination pursuant to the permissible BFOQ criteria the U.S. Supreme Court has stated that the BFOQ must relate to the “essence” or “central mission” of the employer’s business (*Western Airlines, Inc.*, 1985, p. 413). The Ninth Circuit Court of Appeals further explained that the employer must show that it “had reasonable cause to believe that all (class members) would be unable to perform the job safely and efficiently or that it was impossible or highly impractical to consider the qualifications of each” (United States Court of Appeal for the Ninth Circuit, Model Jury Instructions, 2015).

The Age Discrimination and Employment Act of 1967 (ADEA)(EEOC, Facts About Age Discrimination, 2015; Alexander, Havercome and Mujtaba, 2015; Mujtaba and Cavico, 2010) prohibits employment discrimination against people over 40 years of age regarding any term and condition of employment, including hiring, firing, promotions, job assignments, among other

aspects of employment. To so discriminate is unlawful as for an employer to retaliate against a person for opposing discriminatory employment practices based on age or for filing an age discrimination charge or testifying or participating in any way in any investigation, proceeding, or litigation pursuant to the ADEA)(EEOC, Facts About Age Discrimination, 2015; Mujtaba and Cavico, 2010). The ADEA applies to employers with 20 or more employees, including state and local governments, as well as employment agencies, labor organizations, and the federal government)(EEOC, Facts About Age Discrimination, 2015). Specifically regarding the BFOQ exception the ADEA states that an employer can take otherwise discriminatory actions “where age is a bona fide occupational qualification reasonably necessary to the normal operations of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance...would cause the employer...to violate the laws of the country in which such workplace is located” (*United States Code*, Title 29, Section 623, 2015).

### **Legal Analysis of the BFOQ Defense**

The initial and most important point about the BFOQ doctrine is “the BFOQ defense is written narrowly and is to be read narrowly” (*Jacquetta Hawkins v. Summit County, Ohio*, 2012, p. 16). The burden of proof and persuasion, moreover, is on the employer to establish that a particular position justifies a BFOQ and concomitant discrimination in employment (*Jacquetta Hawkins v. Summit County, Ohio*, 2012, p. 16; Nguyen, 1998, p. 228; Stegura, 1984, p. 343). Furthermore, from a procedural perspective the courts have described the BFOQ as an “affirmative defense,” which means that “the failure to plead an affirmative defense therefore results in a waiver of that defense” (*Joseph Ferrara v. City of Yonkers*, 2015, p. 819). Finally, the courts note that the BFOF doctrine is not a “blanket” rule but rather a defense that requires a case-by-case analysis (*William Reese v. Michigan Department of Corrections*, 2009, p. 13; May, 1985, p. 1364).

This legal analysis will focus mainly on private sector employment cases, as there are at times different rules for public sector employers. For example, if the employer is a prison the BFOQ doctrine is superseded by a two factor test, to wit: discrimination based on gender is legal if 1) the prison policy of requiring female- or male-only supervision of inmates is reasonable under the circumstances; and 2) such a discriminatory policy imposes only a “minimal restriction” on the adversely affected employee (*Tipler v. Douglas County, Nebraska*, 2007). The rationale is that “the reasoned decisions of prison officials are entitled to deference and the goals of security, safety, privacy, and rehabilitation can justify gender-based assignments” (*Jacquetta Hawkins v. Summit County, Ohio*, 2012, p. 16). Actually, the leading BFOQ prison case is an older Supreme Court case, *Dothard v. Rawlinson* (1977), where the court upheld a BFOQ prohibiting women from certain inmate-contact positions in male maximum security prisons in Alabama due to the “rampant violence” in the prison system (pp. 336-37). The *Dothard* case is also important for the Supreme Court’s pronouncement that the BFOQ exception is “meant to be a narrowly construed exception to the general prohibition of discrimination on the basis of sex” (*Dothard v. Rawlinson*, 1977, p. 334). The Court of Appeals case of *Teamsters Local Union No. 117 v. Washington Department of Corrections* (2015) is also instructive as the court upheld female-only guard positions at a women’s prison for three reasons offered by the state prison system – improving security, protecting inmate privacy, and preventing sexual assaults – with the court explaining that: “We have little difficulty holding that the state’s reasons for adopting the BFOQ designation...are each reasonably necessary to the essence of operating Washington’s women’s prisons” (p. 991). However, the court also emphasized: “Although limited gender

discrimination may be permissible in the prison employment context, prison administrators do not get a free pass. The Department must have an objective ‘basis in fact’ for ‘its belief that gender discrimination is reasonably necessary – not merely reasonable or convenient – to the normal operations of its business.’ This means prison administrators ‘seeking to justify a BFOQ must show a high correlation between sex and ability to perform job functions.’ Speculation about gender roles is insufficient – the evidence must demonstrate that prison administrators had a ‘concrete, logical basis for concluding that gender restrictions are reasonably necessary’ and that alternatives to sex discrimination have been ‘reasonably considered and refuted’” (*Teamsters Local Union No. 117 v. Washington Department of Corrections*, 2015, pp. 987-88).

## A. Sex

The U.S. Supreme Court, in the aforementioned *Dothard* case, applied the following test for gender to be a BFOQ; that is, the employer’s evidence must establish that: 1) the essence or central mission of its business would be undermined by hiring members of both sexes; and 2) there is no factual basis for believing that all or substantially all persons of one gender could not perform the job duties safely and efficiently (*Dothard v. Rawlinson*, 1977, p. 333). The Supreme Court, also in the context of sex discrimination, provided some further explanation to the BFOQ defense in the case of *Int’l Union, United Auto., Aerospace and Agri. Implement Workers of Am. v. Johnson Controls, Inc.* (1991, p. 201), to wit: “The statute thus limits the situations in which discrimination is permissible in ‘certain instances’ where sex discrimination is ‘reasonably necessary’ to the ‘normal operations’ of the ‘particular’ business. Each one of these terms – certain, normal, particular – prevents the use of general subjective standards and favors an objective, verifiable requirement. But the most telling term is ‘occupational’; this indicates that these objective, verifiable requirements must concern job-related skills and attitudes.” A precursor to the aforementioned Supreme Court cases was the U.S. Court of Appeals case in *Diaz v. Pan Am. World Airways, Inc.* (1971), where the airline attempted to sustain its BFOQ of hiring only females as flight attendants. The Court of Appeals rejected the defense, saying that the airline could not substantiate its contention that a female flight attendant would provide better customer service and comfort than a male or that a man serving as a flight attendant would decrease business or diminish the flying experience of the customer (*Diaz v. Pan Am. World Airways, Inc.*, 1971). Similarly, in the aforementioned *Int’l Union, United Auto., Aerospace and Agri. Implement Workers of Am.* (1991, pp. 206-07), the employer did not prevail in sustaining its purported BFOQ because there was “no factual basis for believing that all or substantially all women would be able to perform safely and efficiently the duties of the job involved.” To compare, in the federal district court case of *Wendy Wilson v. Michael Chertoff* (2010) the court upheld a BFOQ based on safety and privacy for the hiring of only female TSA agents to do pat-down searches of female passengers. Yet, to compare further, the federal district court in the case of *Rhonda Becknell v. Board of Education of Owsley County, Kentucky* (2008) rejected a BFOQ for the hiring of only males for assistant principals in the high school system because part of an assistant principal’s duties is the discipline of students, including physical discipline by “paddling.” The court reasoned that nonetheless that hiring of only males “relates to the essence, or the central mission of the employer’s business” and that being a male is not “reasonably necessary to the normal operation of the High School” (*Rhonda Becknell v. Board of Education of Owsley County, Kentucky*, 2008, pp. 21-22). Recall that BFOQ determinations are made on a case-by-case basis.

The BFOQ health-care cases, at times called the “therapeutic” exception” (*Healy v. Southwood Psychiatric Hospital*, 1996, pp. 169-70; Martin, 2012-2013; Wilhelm, 2007; Lidge,

2005, pp. 169-170), are very interesting and informative indeed. Although the BFOQ is narrowly construed by the courts and the EEOC, the agency has indicated that when a psychiatrist, psychologist, or clinician recommends that a patient be cared for or treated by a health care worker of a particular gender, for example, a female staff member taking care of a patient who has negative reactions to males, that discriminatory selection could rise to the level of a BFOQ. The test for the EEOC would be whether the “medical evidence establishes that assignment of male staff would hinder patient treatment and the essence of the employer’s business is to provide effective patient care (EEOC, Informal Discussion Letter, 2005, p.). The EEOC explains its rationale, to wit:

Although the BFOQ exemption is very narrow, EEOC and the courts have recognized that the psychological needs of an employer’s clients or customers can make sex a BFOQ....For sex to constitute a BFOQ under such circumstances, the fulfillment of the psychological needs of the clients or customers must fall within the essence of the employer’s business and be necessary to the normal operation of the employer’s business. For example, in one case, the EEOC determined that a social agency did not violate Title VII when it assigned same-sex counselor-teachers to assist individuals with intellectual disabilities in achieving independent living (EEOC, Informal Discussion Letter, 2005, p. 1).

An older but still valid case law authority is the federal district court decision of *Fesel v. Masonic Home of Delaware, Inc.* (1978) where the court upheld precluding a male nurse’s aide from working in a retirement home where 22 of the 30 guests were female. The court based its decision sustaining the BFOQ on the testimony of several residents and an expert witness who persuaded the court that many of the female residents would not consent to be taken care of by a male (*Fesel v. Masonic Home of Delaware, Inc.*, 1978, p. 1353). Accordingly, the court concluded that the employer had a factual belief that the hiring of male nurse’s aides would undermine the essence of its business (*Fesel v. Masonic Home of Delaware, Inc.*, 1978, p. 1353). Another case illustration is the Third Circuit Court of Appeals case of *Healy v. Southwood Psychiatric Hospital* (1996), where the court upheld a BFOQ assigning only females as childcare specialists positions for female children because women were better role models for girls and because it would be easier for a child who had been sexually abused to discuss her problems with a female healthcare worker (pp. 132-33). The court explained that the “therapeutic mission” of the employer necessitated the gender-based assignments and thus the BFOQ (*Healy v. Southwood Psychiatric Hospital* (1996, p.133).

Staffing and scheduling factors, moreover, may impact the patient preference criterion and thus determine whether a BFOQ is present. To compare, in one state case the Ohio Supreme Court ruled that although male patients preferred male nurse’s aides due to privacy concerns, the “ease with which work assignments could be rescheduled to avoid privacy problems” negated the BFOQ for the male gender for the position, particularly due to the size of the health care facility (Case Notes: Discrimination, 1992, p. 153). However, in a Mississippi federal district court case, the hospital did prove that gender was a legitimate occupational qualification for hospital orderlies when it came to layoffs of female orderlies due to the preference of older male patient for male orderlies. The court explained its rationale, to wit:

The hospital had retained for male orderlies with less seniority, but the orderlies were often called upon to perform urethral catheterization of male patients. There was a

preponderance of female nurses available to catheterize female patients, as compared to only one two or three male nurses available for male patients....Defense witnesses testified that many older male patients would reject female personnel if women were called upon to perform the procedure. Furthermore, because of the paucity of male personnel, no scheduling alternatives were available to protect both the patients' privacy interests and plaintiff's job....The defendant had satisfactorily established that using gender as a criterion for selecting orderlies was reasonably necessary for the normal operation of the hospital, and its gender preference was not deemed a pretext for unlawful discrimination (Case Notes, Discrimination, 1987, p. 207).

Another example of a valid gender BFOQ is the Seventh Circuit Court of Appeals case of *Torres v. Wisconsin Department of Health and Social Services* (1988), where the court upheld a gender BFOQ due to the need for the rehabilitation of sexually abused female patients, which required the hiring of all-female staff and guards. Similarly, if there are privacy issues involved, particularly in health care settings, the courts may find the BFOQ based on "customer preference." One illustration is the federal district court case of *Backus v. Baptist Medical Center* (1981), where the court upheld the hospital's BFOQ to preclude an otherwise qualified male nurse from working in the obstetrics and gynecology department. The court agreed with the hospital's rationales for the BFOQ, to wit: to ensure privacy for female patients, to maintain their personal dignity, to avoid offending female patients who might go elsewhere for medical services, to avoid hiring additional nurses so as to reduce the liability for sexual misconduct, and overall to avoid higher operational costs *Backus v. Baptist Medical Center* (1981, pp. 1192-1196). It is also important to point out that in the *Backus v. Baptist Medical Center* (1981, p. 1196) case, the hospital presented several witnesses, including doctors, nurses, and a former patient, to substantiate the aforementioned BFOQ rationales. Brueckner (2014, pp. 187-88) supplies additional examples of nurses in maternity wards, nurses in retirement homes, as well as bathroom attendants, where "gender based hiring may qualify as a valid BFOQ" to protect the privacy interests of third parties and where there is no reasonable alternative. In such a case, the "courts have reasoned that the customer's or patient's privacy rights outweigh the employment rights established by Title VII" (Brueckner, 2014, p. 188). Moreover, regarding nurses, Wilhelm (2007, p. 79) explains that "the courts were persuaded that the female sex is very sensitive to bodily exposure and must be shielded from the sight of unselected individuals of the opposite sex. It was determined that male patients are not so sensitive, eliminating the need for a 'male-only' BFOQ in the hospital setting." Similarly, Martin (2012-2013, pp. 521-22), in examining the health care BFOQ case law, points out an interesting fact, to wit: "In practice, employees in fields such as health care are likely to find that the system affects males more negatively, in part because there is no counterpoint to obstetrics and gynecology from which to exclude female employees." Wilhelm (2007, p. 91) concurs: "In the nursing profession, the argument for the BFOQ is that women's bodily privacy should trump the male nurses' rights to employment in the OB-GYN department." The value of privacy and individual beliefs and "customer" preferences for privacy and modesty, therefore, may form the basis of a BFOQ, especially in the health care field. There is a big difference between a mere customer's recognition for privacy and a female patient, especially a pregnant one, whose care will involve exposure of her body and intimate bodily contact. The law clearly recognizes this distinction.

It should be noted that customer preference or satisfaction outside of the health care field generally is not sufficient to sustain the BFOQ defense since typically they are based on stereotypes and biases (*Diaz v. Pan Am. World Airways, Inc.*, 1970; *Wilson v. Southwest Airlines*

Co., 1981; Martin, 2012-2013). “Client preferences” for a “preferred characteristic” is usually insufficient for a BFOQ (Stegura, 1984, pp. 345-46). Stegura (1984, p. 347) advances the rationale for the preceding rule: “Often the real preference is the employer’s, loosely based upon its assumptions that customers will not deal with the prospective employee because she is a woman.” To illustrate, in *Fernandez v. Wynn Oil Company* (1981), the Ninth Circuit Court of Appeals held that the preference of overseas South American customers as sales representatives did not qualify as a BFOQ because to do so would allow impermissible “stereotypes to pervade the legal system” and would “allow the employer to cater to a hostile female culture” (pp. 1276-77). Similarly, customer preference for females as flight attendants does not make being a female a BFOQ since the primary business of an airline is to fly passengers and not to provide sex notwithstanding the airline’s sex-oriented marketing and branding campaign (*Wilson v. Southwest Airlines Co.*, 1981; Martin, 2012-2013). However, when sex or sex appeal is the essence of the service or the “primary function” of the service or the “dominant service” itself then customer preference can be taken into account (*Wilson v. Southwest Airlines Co.*, 1981, p. 301). For example, in one federal district court case, the court said that “sex appeal” may be a BFOQ for the position of an exotic dancer at an adult entertainment club (*Amanda Berry v. The Great American Dream, Inc.*, 2015, pp. 8-9). Accordingly, Martin (2012-2013, p. 521) points out that the “courts consistently have allowed businesses to engage in sex discrimination when the only product offered is sexual titillation.” The saga of Hooters Restaurant and its litigation with the EEOC and in the courts illustrates the preceding points as well as the defensive use of the BFOQ doctrine. The EEOC has long claimed that Hooters was engaging in unlawful discrimination by refusing to hire men as servers, that is, according to Hooters, as “Hooters Girls.” The restaurant interposed the BFOQ defense saying it was reasonably necessary for that type of business (where the female servers are more important than the food) that the Hooters Girls be, in fact, girls. After a great deal of legal activity as well as an inspired advertising campaign by the company featuring “Hooters Guys,” the goal of which was to mock the EEOC and to make the agency look ridiculous. Ultimately, the EEOC settled with Hooters Restaurant, allowing the Hooters Girls to still be girls and to continue to function as servers, but eliciting a promise from the company to hire more men in gender-neutral, ancillary positions, such as bartenders and bar-backs. Thus, from a practical vantage point at least Hooters was victorious (Cavico, Muffler, and Mujtaba, 2013).

## **B. Religion**

An established general rule is that religious organizations can discriminate on the basis of religion. As such, a religious organization can require that a person be of that denomination to be hired. A Catholic Church is not going to be required to have a Jewish “priest.” However, if the employment position is not materially going to be affected by the religion of the applicant, for example, a church maintenance person, then a BFOQ religious requirement would be much more difficult to sustain since religion (or lack thereof) should have no appreciable effect on the ability of the person to do the job. Furthermore, a religious school could require that its administration and faculty be of the same religious denomination. An international BFOQ religious example is the case of *Kern v. Dynallectron Corporation* (1984) where the court held that being of the Muslim faith or conversion to Islam was a BFOQ to hire a pilot flying helicopters to Mecca since non-Muslims flying into Mecca would be, if apprehended, subject to the punishment of death by beheading.

## **C. National Origin**

Surprisingly, in the research for this article the authors have learned that there is a lack of statutory explication, legislative history, case law, and even legal commentary as to the existence, meaning, and illustration of the BFOQ doctrine in the context of the national origin criterion. This paucity is even more surprising due to the current heightened emphasis on diversity and cultural sensitivity and competence. Nonetheless, there is some legislative history and one important case. The leading case is the Second Circuit Court of Appeals decision in *Avigliano v. Sumitomo Shojii America, Inc.* (1981) where the court allowed a BFOQ for the American subsidiary of a Japanese company to hire only Japanese nationals where their employment was necessary to the successful operation of the business. The case in addition to being the leading national origin BFOQ decision is also significant for the four factor test that the court used to determine if being of Japanese ancestry was a national origin BFOQ; 1) familiarity with the Japanese language and culture; 2) knowledge of Japanese products, services markets, customs, and business practices; 3) familiarity with the personnel and the operations of the principal parent company in Japan; and 4) the acceptability to the personnel with whom the company does business (*Avigliano v. Sumitomo Shojii America, Inc.* (1981, p.559). Tran (1998, pp. 247-48) points out that the Supreme Court did not expressly rule on the Second Circuit's four factor BFOQ test, but the Court "did acknowledge that certain positions in a Japanese company may require a 'great familiarity' with Japanese language, culture, customs, and business practices."

As to the legislative history behind Title VII, Brueckner (2014, p. 177) and Tran (1998, p. 242) provide the following permissible BFOQ national origin examples from the Congressional debate: a French restaurant hiring a French cook; and a Polish person to work in a Polish organization. However, Tran (1998, pp. 243-44) relates another example – this one from the EEOC – of an impermissible national origin BFOQ, to wit: a French language school that only wants to hire French nationals as teachers; as in such a case the "essence" of the employer's business is language instruction, which competent people of any national origin could provide without harming the employer's business, and not providing French role models. Lidge (2005, p. 167) notes that "similarly, courts may recognize a BFOQ defense to a national origin discrimination claim when a restaurant maintains an authentic ethnic atmosphere. For example, a Chinese restaurant may require that its chef be ethnically Chinese." Lidge (2005, p. 169) explains the rationale for such a BFOQ: "When a Chinese restaurant desires to limit its staff to ethnic Chinese employees in order to maintain an authentic Chinese atmosphere, it is not because a non-Chinese person would be unable to cook Chinese food. Instead the employer has made a business judgment that its customers would prefer an authentic Chinese atmosphere."

The Walt Disney Company has been successful in utilizing the BFOQ doctrine to ward off threatened national origin discrimination lawsuits. Disney hires workers to match its cultural-based areas so as to provide visitors with an authentic as possible cultural experience. Disney calls these employees "cultural representatives" (Garcia, 2011). For example, Disney hires only people from African countries to staff customer-contact positions at the African-themed area and African village of Harambe (Associated Press, 1998). A Disney representative explained the rationale: "We can put millions of dollars into building the village of Harambe, but it doesn't come alive without people who know what it's like to live in an African village....It's like the French pavilion at EPCOT. You can teach someone from Kissimmee to speak French, but they don't have the French experience. This is one of the things that gives the real big wows to our guests" (Associated Press, 1998). Moreover, Disney encourages its "cultural representatives," whom it also calls "local experts," to interact with their guests and to tell them about their homes (Garcia, 2011, p. 2D). To justify the BFOQ, Disney points to a guest satisfaction survey where

35% of the guests state specifically that the interactions with the cultural representatives were a highlight of their visit (Garcia, 2011). Recall, though, that since race or color can never be a BFOQ but national origin can, one may see a white South African at Harambe, but not a black African-American. When Disney says Africa, it means Africa! Disney's strong "African" rationale is at times called the "authenticity" or "genuineness" defense for the BFOQ (Lidge, 2005, p. 165; Stegura, 1984, p. 346). Moreover, it is a defense accepted by the EEOC (Lidge, 2005, p. 169).

#### **D. Age**

If the employer's objective in having an age restriction is to achieve public safety, the EEOC will require that the employer demonstrate that the challenged age restriction does in fact effectuate that public policy goal, and that no reasonable alternative exists that would better or equally advance the goal with less discriminatory effect (Mujtaba and Cavico, 2010). An established example of an age BFOQ concerns mandatory retirement ages for airline pilots. As such, applicants for airline pilot can be rejected if they are a certain age (60 years as per the Federal Aviation Administration in the case of pilots and first officers), and current employees can be compelled to retire when they reach that age due to safety concerns (Bruecker, 2014). According to one court, the BFOQ for pilots is established as a "matter of law" because "there was no question that today Congress and the FAA continued to rely on an age-based rule for retirement of pilots" (*Equal Employment Opportunity Commission v. Exxon Mobil Corporation*, 2012, Overview). Other examples of public safety-premised age BFOQs would be police, other law enforcement, firefighters, and bus drivers, where certain physical requirements are a necessity for efficient job performance (*Carmelo Correa-Ruiz v. Hon. Sila Maria Calderon-Serra*, 2005; Mujtaba and Cavico, 2010); Schiff, 1993). As such, Bruecker (2014, p. 183) explains that to use age as a BFOQ the employer must "establish that some members of the discriminated-against class possess a trait precluding safe and efficient job performance that cannot be ascertained by means other than knowledge of membership in the class." In the case of pilots, Bruecker, 2014, p. 183) further explains that the mandatory retirement age has been upheld because "the Court recognized that a pilot's good health is critical to the safety of the passengers and that there is no better way to ensure the health of pilots than by the use of age as a proxy for good health." The safety rationale has also sustained a maximum age limit for bus drivers (*Usery v. Tamiami Trail Tours, Inc.*, 1976). Aside from the preceding precedents the courts will examine a purported age BFOQ to determine if the older worker can do the job safely and efficiently (May, 1985, p. 1364). The federal district court case of *Oscar Camacho v. Puerto Rico Ports Authority* (2003) is instructive as to the critical need for an employer to justify factually any asserted BFOQ. In the case, the Puerto Rico Port Authority (PRPA) attempted to sustain an age BFOQ of a mandatory retirement age of 70 for harbor pilots on the grounds of safety and security. However, the court refused to sustain the BFOQ: "because PRPA has not presented any evidence to show the factual basis it has to believe that at age 70, harbor pilots are no longer qualified to perform the duties of their job. In fact, the record is devoid of any proof tending to establish a link between the age qualification and the safety and security concerns claimed by PRPA....It has been held that 'the question of whether mandatory retirement age is a BFOQ is a fact-intensive inquiry'" (*Oscar Camacho v. Puerto Rico Ports Authority*, 2003, pp. 26-27).

#### **E. Summary**

The preceding legal analysis indicates, as emphasized by the title to this article, that the BFOQ is a narrow and limited defense to employment discrimination based on the protected categories of

sex, religions, national origin, and age. The courts are very hesitant to interpret the doctrine broadly, perhaps due to a fear that too big an “exception” will swallow the general rule prohibiting discrimination in employment. Nevertheless, the BFOQ doctrine can be used as a successful defense to employment discrimination, but clearly only rarely. In the next section of the article the authors discuss further the implications of the BFOQ doctrine and offer some suggestions and recommendations to employers and managers in order to successfully use the defense and thus to avoid legal liability pursuant to Title VII of the Civil Rights Act.

### **Legal Implications**

If an employer is accused of discrimination in hiring or other employment practices the employer may be able to interpose a BFOQ defense pursuant to Title VII to avoid legal liability. However, the laws and legal commentary examined in the preceding parts to this article clearly indicate that the BFOQ doctrine is a very narrow and limited one indeed, as it should be in the authors’ opinion, since it essentially is legal discrimination. Brueckner (2014, p. 178) explains that the narrow construction of the doctrine by the courts exists because the “courts are concerned that an excessively broad interpretation of the exception will render the statute meaningless.” The narrow and limited nature of the BFOQ doctrine is further underscored by the EEOC in its explication of the BFOQ doctrine regarding age in relationship to job notices and advertisements. The EEOC indicates that “a job notice or advertisement may specify an age limit only in the *rare circumstances* where age is shown to be a ‘bona fide occupational qualification’ (BFOQ) reasonably necessary for the normal operations of the business” (EEOC, Facts About Age Discrimination, 2015, p. 1) (emphasis added). To justify the BFOQ managers and employers should take heed of the aforementioned Supreme Court’s emphasis on the words “reasonably necessary,” “normal operation,” and “particular” business. To rely on a gender BFOQ the employer would have to demonstrate that it had reasonable cause to believe that all or substantially all women, or men, as the case may be, would be unable to perform the job efficiently and safely. Accordingly, the essence of the BFOQ defense is that it must be demonstrably, reasonably, and verifiably related to the normal business needs of a particular business. That is, the employer must clearly show that the essence of its business operations would be substantially harmed if the business was forced to eliminate its discriminatory policy. Providing an adequate factual basis for the employer’s belief that all or substantially all of the applicants without the necessary job qualification would be unable to perform is critical. As such, the BFOQ doctrine is premised on objective facts, rationality, and logic, and not prejudice, fear, ignorance, bias, stereotype, or even employee or customer preference.

### **Diversity Awareness for Creating an Inclusive Workplace**

In order to achieve a workplace free from fear, ignorance, bias, and stereotype, the authors emphasize the importance of diversity education, training, as well as the diversity audit for organizations that want to have competitive and sustainable operations (Mujtaba, Cavico, Senathip, and U-tantada, 2016; Alexander, Havercome and Mujtaba, 2015; Allahand and Mujtaba, 2015). Modern managers have a responsibility of creating an inclusive society and workplace for everyone by regularly auditing their firms on various diversity dimensions. Managers must create a workplace that accommodates people of all backgrounds and abilities, so long as they can perform the job (Allahand and Mujtaba, 2015). Today, there are many organizations that do an excellent job of diversifying their workforce in order to create an inclusive work environment for all (Muffler, Cavico, and Mujtaba, 2010). Modern managers and competitive firms need to measure and regularly audit themselves in the achievement of their

diversity goals. Once relevant data are collected through diversity audits, then proper assessment, training and development opportunities can be implemented to create an inclusive work environment for everyone.

We recommend that firms attempt to work toward the creation of a pluralistic and inclusive work culture. *Pluralistic culture* is created when cultural differences are acknowledged and preserved. In an *inclusive culture*, work groups can be heterogeneous and together they create a distinctive competitive advantage through their unique cultural knowledge (Mujtaba, 2010). When the workers of a team, department, or company are diverse and thus come from different cultural, religious, generational, and ethnic backgrounds they more readily will demonstrate an openness toward using divergent thoughts in order to achieve synergy based on their distinct yet complementary views; and as such they are likely to have an inclusive and productive organizational culture as well as a legal and ethical one. An inclusive work culture displays the excellent ability of hiring diverse employees as well as attaining a balanced distribution of diverse staff in all departments. Furthermore, such an environment encourages success based upon individual effort and team performance and not premised on the mere “personal” preferences of managers, coworkers, clients, and/or customers, which preferences could be rooted in impermissible biases and stereotypes. According, it is recommended that each department manager should conduct an organizational diversity audit on an annual basis and set developmental goals for the coming year in order create and/or maintain an inclusive work culture for all employees represented in the modern and diverse workforce.

## **Recommendations**

Based on the foregoing legal examination and diversity analysis, the authors offer the following recommendations to managers and employers:

- Make sure to have objective, rational, verifiable, and particular-to-the- business reasons to justify any BFOQ.
- Focus on the necessity of using the BFOQ doctrine for the success of the business as opposed to mere preference and/or convenience.
- Show that the discriminatory means of an employment policy is sufficiently related to a legitimate business end.
- Demonstrate that all or substantially all of applicants and current employees do not possess the requisite characteristics for business success.
- Demonstrate that all or substantially all applicants and current employees cannot do the job safely and efficiently.
- Emphasize the rationales of safety, privacy, authenticity, and genuineness.
- Demonstrate that business operations would be undermined if the business could not utilize the BFOQ.
- Demonstrate that regarding assigning job responsibilities in a selective (that is, discriminatory) manner that it is not feasible to do so due to the nature of the business so as to satisfy privacy values and equal employment opportunities.
- Prove the need for the BFOQ by appropriate tests, expert witnesses, and scientifically accepted research and data.
- Do not base a BFOQ on any unproven assumptions, biases, and stereotypes about the ability of a person to perform a job.
- Do not base a BFOQ on the stereotypical notion that certain work is too strenuous or arduous for women and older workers.

- Do not exclude a person from a job based on gender-related, stereotypical assumptions about the roles of men and women.
- Utilize the privacy component of customer preference to justify a gender BFOQ, especially in a health care setting.
- Underscore the therapeutic nature of the position to justify a gender BFOQ in a health care setting.
- Utilize the expansive aforementioned Second Circuit four-factor test to justify a BFOQ based on national origin.
- For all BFOQs the employer must demonstrate that there is no reasonable alternative to discriminating based on the permissible protected categories.
- Work toward the creation of an inclusive workplace where all current and potential employees are welcomed and respected as unique human beings.

The authors trust that the preceding recommendations help to underscore the narrow and limited nature of the BFOQ defense and also to assist employers and managers in utilizing the doctrine in the rare cases where it is absolutely necessary to discriminate in employment based on gender, religion, national origin, or age. The authors also hope that the diversity recommendations offered herein will help employers and managers achieve a not only legal but also ethical workplace.

### **Conclusion**

As emphasized in the title to this article and throughout this work, the BFOQ defense is a narrow and limited one indeed. The courts and EEOC clearly disfavor it as well they should as it is legal discrimination. Accordingly, employers and managers must be wary of the doctrine. Yet there is a little flexibility for the application of the doctrine, as indicated by the examination of the case law and legal commentary herein. The BFOQ doctrine may be successful in those rare employment circumstances where the BFOQ (that is, the discriminatory exclusion) is reasonably related to the normal operations and legitimate business goals of a particular business. Nonetheless, employers must tread very carefully and be sure that they can sufficiently demonstrate the essential need for the BFOQ for the operations of the employer's business. Employers engaging in diversity education and training as well as conducting a diversity audit will help ensure that the BFOQ is used properly, and sparingly, but also that the workplace is an ethical as well as legal one. The authors trust that their explication of the law and legal commentary herein as well as their diversity analysis and their concomitant recommendations will be helpful to employers and managers to properly use the BFOQ and thus to avoid legal liability and also most importantly to achieve a fair and just workplace.

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