Bona Fide Occupational Qualification (Bfoq) Essay, Research Paper

INTRODUCTION

Title VII states that an employee cannot be treated differently because of sex unless sex is a bona fide occupational qualification (BFOQ). When used as a defense, bona fide occupational qualification (BFOQ) allows an organization to hire and employ individuals on the basis of the qualifications reasonably necessary to the normal operation of that particular business or enterprise. This paper will discuss the necessary steps employers must take in order to justify using sex as a discriminator when hiring employees and review some known cases where BFOQ was used as a defense.

DEFINITIONS

Sex Discrimination is traditionally defined as systematically treating one sex differently from the other. However, discrimination can be further defined by breaking it down into two areas: disparate treatment and disparate impact.

Disparate treatment is more commonly known as outright discrimination. It is treating an individual differently than what is fair and just because of race, sex religious beliefs or any other differentiating factor.

Disparate impact is discrimination towards a group of employees who are members of the protected class. The protected class is that group of individuals who are protected from discrimination by a federal, state or local statute (Sovereign, p.352). Everyone is a member of at least one protected class, because gender is a protected class. In Title VII litigation, where the employee’s neutral practice causes the disparate impact, no showing of intent to discriminate is necessary for liability (Kovacic-Fleischer, p.858). In a Title VII case, once a plaintiff has made a prima facie disparate impact case, a defendant can defend by proving that the neutral practice is a “business necessity. If the defendant is able to establish the defense, the plaintiff still has the opportunity to prove that the defendant could achieve the business necessity in a less discriminatory manner.

The Bona Fide Occupational Qualification (BFOQ) is contained in Title VII of the Civil Rights Act of 1964. Under this title, employment in particular jobs may not be limited to individuals of a particular sex, religion, or national origin unless the employer can show that one of these factors is an actual and necessary qualification for performing the job. BFOQ is usually decided on a case-by-case basis. Race is never a BFOQ. When BFOQ is used as a defense, the employer admits sex discrimination but under the terms of the statute it is justified (Sovereign, p.91). The Supreme Court has determined that the BFOQ exception is intended as a narrow exception to the prohibition of sex-based discrimination (Hawke, p.58).

Title VII of the Civil Rights Act of 1964 states that it is unlawful for an employer to refuse to hire, discharge or discriminate against an individual because of race, color, religion, sex or national origin. Under Title VII sex discrimination is not unlawful if BFOQ can be proven as necessary for that position.

PROVING DISCRIMINATION

Employee Position

Employees alleging discrimination must attempt to prove a prima facie case. Prima facie means that before a person can go to court, it must be shown that a wrong has been committed by stating certain facts (Sovereign, p.38). The employee must show that he is a member of a protected class and has suffered an adverse employment action. An adverse employment action is anything the employer does which affects the employee’s job and is not positive. For example, if an applicant applies for an open position that he is qualified for, is rejected, and that position remains open and the employer continues to seek applicants, this could be discriminatory treatment. Adverse actions can range from firing, failure to hire, or failure to promote.

The employee then has to show that the employer’s reason for the adverse action was not legitimate. This is known as showing that the employer’s reason for not hiring was pretext. Once pretext is proven, then the court would presume that the adverse action was illegal. In some instances, this may not be enough. The employee may still have to provide evidence of discrimination.

Employer’s Position

When an employer is accused of discrimination, he must state that there was a legitimate reason for that adverse employment action. The employer may chose from many defenses. One defense may be BFOQ. In using BFOQ as a defense, the employer must show “reasonable necessity” for his actions. BFOQ’s are limited in scope and the burden of proof falls heavily on the employer.

Employers trying to establish a BFOQ based on the privacy rights of their customers, must first prove that the gender-based BFOQ is reasonably necessary to the normal operation of its business. The employer must also show he had a factual basis for believing that hiring members of that sex would undermine business operation. Also, the employer must show that the nature of their business allows no reasonable alternatives to their gender-based classifications that wouldn’t interfere with customer’s privacy rights.

A Job qualification can be gender-based only if an employer can prove that all or almost all members of the excluded gender cannot perform the job. If the employer has a job requirement that would eliminate a disproportionate number of one gender or the other, then under the disparate impact analysis, the employer could be ordered to discontinue the practice or accommodate the excluded gender.

If an employer fails to establish a BFOQ, the consequences can be costly. Traditional remedies available in a Title VII action include hiring or reinstating the plaintiff, providing back pay, and granting retroactive seniority (Hawke, p. 59).

CASES

United States v. Virginia

The United States challenged Virginia Military Institute’s (VMI) male- only admissions policy. Under title VII, an employer who intentionally discriminates on the basis of sex can defend on the ground that a gender qualification is “a bona fide occupational qualification reasonably necessary to the normal operation of that particular business”. Courts have held that BFOQ as a defense is narrow and that job qualification must relate to the “essence” of the business.

Although VMI is not an employer with respect to its students, the application of Title VII’s BFOQ defense and disparate impact analysis can still be used in this example. The VMI case involves governmental disparate treatment based on gender because the Commonwealth of Virginia intentionally treated women differently from men by excluding them from a military college. VMI openly admitted this disparate treatment in their all-male admissions policy. VMI argued accommodating women would destroy its adversative method. They attempted to use BFOQ as a defense arguing the necessity of not destroying a method that was essential to its institutional identity. The Court held that VMI had not met its burden of proving the defense, because some women could benefit from the program and the projected negative consequences were speculative and based on stereotypes (Kovacic-Fleischer, p 859).

The VMI case is one of disparate treatment and disparate impact discrimination. The Court’s decision not only required VMI to admit women, but also to make changes in barracks living and physical skill requirements to provide equal opportunity to women. VMI could have avoided these requirements by stating it their admissions policy, “all women willing to live without privacy in the military style barracks and able to perform feats of great upper body strength may apply” (Kovacic-Fleischer, p.859). If the Court had ordered VMI to admit women without changing any of its practices, those practices could have been labeled as neutral practices that have a disparate impact on women. This would cause disparate impact upon women, because few women would want to live without privacy among men and even fewer would have greater upper body strength than men would.

If women claimed that unchanged barracks practices and physical skill requirements had a disparate impact upon them, in the context of Title VII litigation, this would be sufficient to make the prima facie case. The women would then need to show that VMI instituted these practices with the intent to exclude women. VMI’s defense would be showing that these practices were necessary to its business.

The outcome of this case resulted in VMI making reasonable accommodations for women. The Supreme Court effectively required VMI, which intentionally discriminated against women to alter their housing arrangements and physical skill requirements to accommodate women.

Hooters Restaurant

Hooters came under fire after the EEOC made allegations that it had violated Title VII of the Civil Rights Act by discriminating against men. In 1992, seven men argued that Hooters discriminated against them when they refused to hire them as wait staff. Hooter’s chose to hire only female servers, bartenders and hosts. As a defense, Hooters claimed that they were providing “vicarious sexual recreation”. Hooters attempted to use female sexuality as a BFOQ, which would have worked if they were in the entertainment business. However, Hooter’s markets itself as a family restaurant. In this case, the courts looked at the essential nature of the business. Hooters, portrays itself to the public as a restaurant, not a sex business, therefore Hooter’s BFOQ did not hold up in court.

In the settling class action suit that challenged its right to hire only women in front-of-house positions, Hooters agreed to pay $2 million to the males who were denied the opportunity to serve as Hooter girls, $1.75 million in attorney’s fees and to create three gender neutral positions. Wait staff, will still be Hooters Girls, but they will now be assisted by “Hooter’s Persons” hired without regard to gender.

Male Nurses/Nurse Assistants

A manager may make hiring decisions based a number of criteria: education, experience, personality, even “gut feelings”. Nurse managers, responding to perceived patient privacy needs, sometimes hire applicants based on gender. The patient privacy issue concerns personal patient care, including bathing, dressing, or toileting assistance. As the frequency of this type of interaction occurs, a patient may claim that their privacy rights have been violated. This example will discuss whether employers can legally refuse to hire or assign male nurses to positions where the privacy rights of their patients are involved.

One of the earlier cases under Title VII was brought on by a private duty male nurse who alleged that the hospital engaged in sex discrimination by not allowing him to care for female patients. On two occasions this male nurse was assigned to provide private nursing care to female patients. Before he entered the prospective patient’s rooms, hospital staff informed him the he couldn’t work for the female patients because he was a male. Since he never tended the patient, he was never paid. The court found that the hospital had discriminated against him based on his sex by denying him access to the patients and not allowing the individual patient to determine whether to accept the male nurse’s services (Hawke, p.59).

In Fesel v. Masonic Home of Delaware (Hawke, p.59), an institution used the privacy rights of female patients in their defense. A residential retirement home with a predominately female clientele denied a male nurse employment. The district court required the employer to prove that it had a factual basis for believing a male nurse would undermine the essence of the employers business. The employer also had to show that he couldn’t assign the job responsibilities in such a way that there would be minimal clash between the privacy of the customers and the non-discrimination principle of Title VII (Hawke, p.59). Based on affidavits of female guests objecting to care by male nurses, the court established that the employer had successfully established a BFOQ defense based on the privacy interests of its clientele. The court distinguished the privacy rights of patients from mere customer preference (Hawke, p.59).

Not all cases involving patient care turn out the same. In 1991, the Ohio Supreme Court decided Little Forest Medical Center v. Ohio Civil Right Commission (Hawke, p.60). The medical center denied a male applicant a nursing assistant position because of his sex. The center served 256 elderly patients, the majority of who were female. The Ohio court determined that the employer didn’t establish BFOQ because they couldn’t prove that the policy protected its patient’s privacy rights, nor did the center demonstrate why it couldn’t assign male nurse assistants to male patients and non-objecting females.

Health care employers contemplating sex-based hiring should take proactive measures to support a BFOQ in the event of litigation. There are three tests that the courts apply in BFOQ defenses.

1. Can the employer provide statistical evidence derived from patient surveys/questionnaires or affidavits from patients attesting that they object to having an opposite sex employee care for their intimate needs? (Hawke, p. 5)

2. Do the opinions of health care experts, also recognized by the courts as providing a “factual basis,” agree with the defendant’s claim? (Hawke, p.5)

3. Could the health care employer have made any adjustments to accommodate the hiring or assignment of a male nurse or nursing assistant, while still protecting the interest of the female patient? (Hawke, p.5)

CONCLUSION

Title VII was designed to protect employees from sex discrimination in employment actions. Employers may prefer a certain gender for a specific job or position. He may or may not have a valid reason for this preference. Should he ever be challenged as to why he hired, fired or promoted unfairly, he must be prepared to defend his decision. BFOQ as a defense in sex discrimination cases will only prevail if the employer can show the discrimination is reasonably necessary to the operation of that business. An employer can avoid exposure to litigation by following guidelines for employers as outlined by the EEOC.

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