

STATE OF RHODE ISLAND  
COMMISSION FOR HUMAN RIGHTS

Decision on the Request of the University of Rhode Island for a  
Bona Fide Occupational Qualification  
for One Position of Storekeeper

**INTRODUCTION**

On March 25, 2014, the Rhode Island Commission for Human Rights (hereafter the Commission) received a request from the University of Rhode Island (hereafter URI) that the Commission certify a gender-specific bona fide occupational qualification (hereafter BFOQ) for one position of storekeeper at the Keaney-Mackal equipment and locker room in the Athletic Complex at URI. Specifically, URI requested a BFOQ that would allow it to advertise for, and hire, a female for one of the positions of storekeeper at the Athletic Complex.

A notice of a public hearing, which described the opportunity to submit written or oral comments, was posted on the Secretary of State's website, at the State House Library and at the Commission. Notice was given to people and organizations who had requested prior notice of public hearings. A public hearing was held on July 30, 2014. Commissioners Camille Vella-Wilkinson, Iraida Williams, Rochelle Bates Lee and T. Kevin Olasanoye, Esq. were present at the hearing. Representatives of URI and several individuals presented their views with respect to the BFOQ request at the hearing.

**FINDINGS OF FACT**

1. URI is a university. The equipment and locker rooms in the Athletic Complex are used by nine women's varsity teams and the members of the visiting teams who are competing against the URI teams. The swimming pool in the Athletic Complex is open to the public at various times when it is not being used by the URI teams, and the swimming pool locker rooms are used by members of the public of all ages from children to senior citizens.
2. The responsibilities of storekeepers at the Athletic Complex include the management of team uniforms for games and practices, as well as locker room set-ups. The storekeeper has the responsibility for issuing, distributing, fitting, tailoring, cleaning, laundering and repairing uniforms for the URI student athletes. When fitting the uniforms or assisting athletes with uniforms, the storekeeper may have occasion to touch various parts of the athletes' bodies.
3. The storekeepers come into the locker rooms while athletes are there in order to provide towels and uniforms and to assist with issues that arise with putting on or repairing uniforms. The issues with uniforms and lack of towels can arise at any time

so that it is not possible to schedule when the storekeepers will be needed in the locker rooms.

4. The Athletic Complex has separate locker rooms for the men's and women's teams. Individuals utilize the locker room to change clothes, so there are generally individuals in various stages of undress in the locker rooms. On the second floor of Tootell Gymnasium, one of the women's team locker rooms is not walled off from women's toilets and showers. There is access to shower rooms from all of the locker rooms – some of the shower rooms have doors separating them from the locker rooms and some do not.
5. The patrons of the locker rooms at the Athletic Complex have a legitimate privacy interest in not being viewed by a member of the opposite sex while they use the locker rooms and showers.
6. At the hearing, Michael McDonald and Ted Romanosky, representatives of Local 528, Council 94 AFSCME, the union which represents storekeepers at URI, stated that the union had no objection to the granting of a BFOQ for one position of storekeeper.
7. In 1991, the Commission issued a BFOQ to URI for two positions of storekeeper, one for a man and one for a woman, effective for five years from June 12, 1991.
8. The most recent storekeeper position held by a woman has been vacant for approximately two years. Students have been performing the storekeeper functions while that position has been vacant. The other storekeeper positions are held by men.

### **CONCLUSIONS OF LAW**

URI proved by a preponderance of the evidence that a BFOQ based on the female sex should be certified for one position of storekeeper in the Athletic Complex.

### **DISCUSSION**

In the instant case, URI requests that the Commission certify that being female is a BFOQ for one position of storekeeper in the Athletic Complex. The Fair Employment Practices Act, Title 28, Chapter 25 of the General Laws of Rhode Island (hereafter FEPA), provides that:

It shall be an unlawful employment practice:

(1) For any employer:

(i) To refuse to hire any applicant for employment because of his or her ... sex ....

R.I.G.L. § 28-5-7(1)(i).

The FEPA further provides that:

It shall be an unlawful employment practice:

...  
(4) *Except where based on a bona fide occupational qualification certified by the commission ...*, for any employer ... to:

...  
(v) Establish, announce, or follow a policy of denying or limiting, through a quota system or otherwise, employment ... of any group because of the ... sex ... of that group.

R.I.G.L. § 28-5-7(4)(v). (Emphasis added.)

Federal cases and regulations interpreting Title VII of the Civil Rights Act of 1964 are utilized as a guideline in interpreting the FEPA. Center for Behavioral Health, Rhode Island, Inc. v. Barros, 710 A.2d 680, 685 (R.I. 1998). Under § 703(e)(1) of Title VII, an employer may hire an employee on the basis of his or her sex “in those certain instances where ... sex ... is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise”. 42 U.S.C. § 2000e-2(e)(1).

As the United States Supreme Court declared over thirty-five years ago, “the bfoq exception was in fact meant to be an *extremely narrow* exception to the general prohibition of discrimination on the basis of sex.” Dothard v. Rawlinson, 433 U.S. 321, 334 (1977) [emphasis added]. The Court has emphasized “the restrictive scope of the BFOQ defense”. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Johnson Controls, Inc., 499 U.S. 187, 201 (1991). The burden of proof in BFOQ cases rests with the employer seeking the exception. Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5<sup>th</sup> Cir. 1969). “Courts have described this burden as a heavy one, ... and have held the BFOQ exception to be justified only in rare, appropriate circumstances.” Torres v. Wisconsin Dept. of Health and Social Services, 639 F. Supp. 271, 278 (E.D. Wis. 1986), *aff’d* 838 F.2d 944 (7<sup>th</sup> Cir. 1988), *reh’g en banc, rev’d on other grounds*, 859 F.2d 1523 (7<sup>th</sup> Cir. 1988), *cert. denied*, 489 U.S. 1017 (1989) [citations omitted].

To prove that a BFOQ is justified based on privacy interests, the following standards must be met:

An employer asserting a privacy based BFOQ defense must satisfy a three part test: the employer must establish that 1) there is a factual basis for believing that hiring any members of one sex would undermine the essence of its business, 2) the asserted privacy interest is entitled to protection under the law, and 3) no reasonable alternatives exist to protect the privacy interests other than the gender based hiring policy.

EEOC v. Sedita d/b/a Women's Workout World, 816 F. Supp. 1291, 1295 (D. Ill. 1993) [citations omitted].

Courts have recognized the legitimacy of privacy interests when people are in a state of undress or their bodies must be touched in ways different from the usual everyday contact. In Everson v. Michigan Department of Corrections, 391 F.3d 737 (6<sup>th</sup> Cir. 2004), *cert. denied* 546 U.S. 825 (2005), the Court of Appeals held that the employer proved the necessity of a BFOQ for sex for certain positions of correctional officers based, in part, on considerations of the privacy of the inmates. Correctional officers in the housing units would see the prisoners in a state of undress. *See also* Hernandez v. University of St. Thomas, 793 F. Supp. 214 (D. Minn. 1992). In Hernandez, the privacy interest was in the private use of communal bathrooms without the presence of an opposite-sex janitor. *See also* Wilson v. Chertoff, 699 F. Supp. 2d 364 (D. Mass. 2010) (the Transportation Security Administration has a legitimate need for a BFOQ for sufficient female employees to perform pat downs on female passengers and therefore it could require female employees to be trained first).

The Commission has certified BFOQs in recognition of privacy rights in the past. *See, e.g.*, Decision on the Re-Filed Request of Rhode Island College for a Bona Fide Occupational Qualification for Two Positions of Housekeeper (August 29, 2008) (the Commission certified a BFOQ for two positions of Housekeeper in the college recreation center, one for a man and one for a woman, upon showing that the patrons had a privacy interest in not being viewed by a member of the opposite sex while in the locker rooms and that no less restrictive alternatives existed which would allow appropriate cleaning and inspection of the facilities); Decision on the Request Of The University of Rhode Island For A Bona Fide Occupational Qualification for Positions of Janitor In the Athletic Complex (October 5, 1993) (the Commission certified female sex as a BFOQ for a specified number of available janitorial positions upon URI's showing that female users had a privacy interest in using shower/toilet facilities and that no less restrictive alternatives to the BFOQ existed); Decision on the Request of Bradley Hospital for a Bona Fide Occupational Qualification in the Position of Milieu Therapist on the Night Shift of Its Adolescent and Children's Units (September 12, 2001) (the Commission certified sex as a BFOQ for a limited number of positions when the night shift staffing did not contain sufficient numbers of both sexes to protect the privacy needs of the children and adolescent patients whose care at times necessitated potential body searches and viewing a patient while the patient was bathing/showering or performing bodily functions; no reasonable alternatives were available to address the privacy concerns). The Commission also previously certified a BFOQ for two positions of Storekeeper at URI. Decision on the Request of the University of Rhode Island for a Bona Fide Occupational Qualification for Two Positions of Storekeeper in the Athletics Department (June 12, 1991)<sup>1</sup>.

In the instant case, URI has demonstrated that the female athletes and patrons of the athletic complex have a genuine privacy interest which is entitled to protection. While dressing and undressing, using the showers and using the toilet facilities, people have a legitimate privacy interest in not being viewed by the opposite sex. *See* Everson, Sedita, Hernandez and the Commission decisions on the requests for BFOQs discussed above. The fitting of uniforms

---

<sup>1</sup> The certification for that BFOQ expired in 1996.

and assistance with putting on some of the uniform components also involve touching parts of the body that are not touched in everyday contact. *See Wilson*. The privacy interests in question have been established.

The question that remains is whether there are reasonable alternatives to a BFOQ that would protect the legitimate privacy interests of the female athletes and patrons. In *Everson*, the Court stated that: "this court imposes on employers asserting a BFOQ defense the burden of establishing that no reasonable alternatives exist to discrimination on the basis of sex". [Cite omitted]. 391 F.3d at 749. The Court, after careful examination of possible alternatives, upheld the employer's determination that there were no reasonable alternatives to a BFOQ for the positions in question. *See also Hernandez*, which concerned a university which required that custodians in certain of its dormitories be the same sex as the residents. The Court had earlier denied summary judgment to the employer and in this case it denied summary judgment to the custodian plaintiff. The Court stated that in order to "establish that sex is a BFOQ because of privacy considerations, a defendant must show a factual basis for believing that an intrusion on legitimate privacy interests is an essential part of the employee's job and that any alternative to a sex-based policy would undermine the central mission of the enterprise". 793 F. Supp. at 217. The Court held that the University did not need to demonstrate that it actually lost dormitory residents to establish the need for a BFOQ. However, the University did need to demonstrate that the alternatives to a sex-based policy were unreasonable, that at "some point, a high degree of added cost, decreased cleanliness, or intrusion on privacy could undermine the central mission of the enterprise". 793 F. Supp. at 218. Since factual issues needed to be determined, the Court denied the motion for summary judgment. While the Commission has granted BFOQs to protect privacy rights (see above), it has also denied a BFOQ when it found that the privacy concerns were not sufficient justification or that reasonable alternatives existed to address the concerns raised. *See Decision on the Request of Tri-Hab, Inc. for a Bona Fide Occupational Qualification for the Positions of Counselor and Manager at King House for Women* (June 20, 2001) (the Commission refused to certify female sex as a BFOQ for Counselors and/or Managers in a residential substance abuse treatment center for women absent evidence showing the infeasibility of less onerous administrative alternatives). *See also Decision On the Request Of Butler Hospital for A Bona Fide Occupational Qualification For A Balance of Sexes In The Position Of Mental Health Worker* (March 31, 1992) (Commission denied Butler Hospital's BFOQ request based on insufficient evidence in support of a BFOQ). The question of whether an employer has demonstrated that there are no reasonable alternatives to a BFOQ is fact specific.

URI introduced the floor plan of the locker rooms and facilities. The floor plan demonstrates the immediate proximity of the locker rooms to the shower and bathroom facilities in some instances. In addition, the duties of the storekeeper cause the storekeeper to be in the locker room where people are in a state of undress. Further, the need for spontaneous response to uniform difficulties and lack of towels means that scheduling would not meet the needs for a female employee to be present on short notice. It is evident that there is no reasonable alternative to a BFOQ that would preserve the privacy interests of the athletes and patrons and allow the accomplishment of the basic functions of the job of storekeeper. An employer has a heavy burden to prove the need for a BFOQ, but the employer need not go to absurd lengths

to prove that a BFOQ is necessary to protect the privacy interests of its students and patrons. *See, e.g. Brooks v. ACF Industries, Inc.*, 537 F. Supp. 1122 (W.Va. 1982) (The employer proved that the male sex was a BFOQ for janitorial positions at its plant because, due to seniority rules and the predominance of males in the workforce, the female plaintiff would have been required to clean male locker rooms, showers and bathrooms which were in almost constant use; the male workers had legitimate privacy interests and there were no reasonable alternatives that would protect their privacy if the plaintiff were assigned those janitorial duties). URI has demonstrated that there are no reasonable alternatives to a BFOQ to protect the privacy interests of its students and patrons and therefore the Commission grants URI's request for a BFOQ.

**ORDER**

A BFOQ for the female gender is hereby certified for one position of storekeeper in the Athletic Complex. This certification shall be effective for ten years from the date of this Order unless amended or revoked by the Commission or a court of competent jurisdiction before that time. During the effective period, the certification is binding on the Commission in any subsequent sex discrimination in hiring or transfer charges<sup>2</sup> against URI with respect to this position unless URI omitted or misstated material facts in its presentation to the Commission. URI must state in advertisements or postings for the storekeeper position for which a BFOQ has been certified that: "A Bona Fide Occupational Qualification has been certified by the Rhode Island Commission for Human Rights". This BFOQ certification is not binding with respect to other government agencies which have jurisdiction over employment matters.

Entered this [29<sup>th</sup>] day of [August] , 2014.

\_\_\_\_\_/S/\_\_\_\_\_

Camille Vella-Wilkinson  
Commissioner

\_\_\_\_\_/S/\_\_\_\_\_

Iraida Williams  
Commissioner

---

<sup>2</sup> The certification is binding on the Commission, during the relevant time period, for subsequent sex discrimination charges with respect to hiring or transfer relating to gender for the one position of storekeeper for which a BFOQ was granted, not to sex discrimination charges with respect to hiring or transfer that allege sexual harassment or pregnancy discrimination.

\_\_\_\_\_/S/\_\_\_\_\_

Rochelle Bates Lee  
Commissioner

\_\_\_\_\_/S/\_\_\_\_\_

T. Kevin Olanoye, Esq.  
Commissioner