

Before the
STATE OF RHODE ISLAND
COMMISSION FOR HUMAN RIGHTS

Decision on the Re-Filed Request of Rhode Island College for a
Bona Fide Occupational Qualification
for Two Positions of Housekeeper

INTRODUCTION

On November 21, 2007, the Rhode Island Commission for Human Rights (hereafter the Commission) received a request from Rhode Island College (hereafter RIC) that it certify a gender-specific bona fide occupational qualification (hereafter BFOQ) for each of the two positions of housekeeper at RIC's Recreation Center. Specifically, RIC requested BFOQs that would allow it to advertise for, and hire, one man and one woman for two positions of housekeeper at the Recreation Center.

A notice of a public hearing was published in the *Providence Journal* on January 10, 2008. A public hearing was held on February 4, 2008. Commissioners Camille Vella-Wilkinson, Alberto Aponte Cardona and Nancy Kolman Ventrone were present at the hearing. Several individuals presented their views with respect to the BFOQ request at the hearing. The Commission also received a written submission with respect to the request.

On February 29, 2008, the Commission issued a Decision denying RIC's request for certification of BFOQs based on gender for two positions of housekeeper "at this time". Decision On the Request of Rhode Island College for a Bona Fide Occupational Qualification for Two Positions of Housekeeper (hereafter BFOQ Decision I), p. 7.

On March 31, 2008, the Commission received RIC's request to re-file its request for BFOQs and provide additional information. The Commission granted RIC's request and set a public hearing date of May 30, 2008. At the hearing on May 30, 2008, Commissioners Camille Vella-Wilkinson, Alberto Aponte Cardona and Nancy Kolman Ventrone were present. RIC submitted additional evidence and argument. Several individuals presented their views with respect to the re-filed BFOQ request at the hearing.

FINDINGS OF FACT¹

1. RIC is a college. It has a Recreational Center which is open to RIC students and employees. The former President of RIC, John Nazarian, directed that the facilities of

¹ These findings of fact are based on the evidence presented in both hearings. Given the additional evidence presented in the hearing on May 30, 2008, these findings of fact are different, in some instances, than the findings of fact made in the BFOQ Decision I.

the Recreation Center also be available to the community. It is utilized by, among others, older individuals and children. During the summer, it is used for programs serving children, including the Special Olympics.

2. The Recreation Center has separate locker rooms for men and women. Each locker room consists of a large open area. The toilet and shower facilities are within this same area. There are currently no walls, dividers or curtains that separate the dressing room area into discrete sections. Individuals utilize the locker room to change clothes and shower, so there are generally individuals in various stages of undress in the locker rooms.
3. The patrons of the Recreation Center have a legitimate privacy interest in not being viewed by a member of the opposite sex while they use the locker rooms.
4. The Recreation Center is used from 7:00 a.m. to 11:00 p.m. during the week. It is open for limited hours during the weekend, unless an outside group is utilizing it. There is a vacancy in the "day time" shift. The collective bargaining agreement that covers the housekeepers constrains RIC's ability to fill the positions by sex.
5. In its original BFOQ request letter, RIC maintained:

The way the Center is constructed we are not able to close off part of the men's or women's locker rooms for routine maintenance/cleaning during the course of our 16 hours of operation (7:00 a.m. – 11:00 p.m.) It is during these times that men and women use their respective showers, lockers and restrooms.

6. RIC asserted that temporary closures of the locker room to allow periodic cleaning and monitoring by an opposite sex housekeeper would be a burden on the patrons.
7. The duties of the housekeepers at the Recreation Center include cleaning the bathroom, shower and locker areas. Further, there are occasions when a housekeeper must respond to unexpected needs for immediate cleaning of the bathrooms and showers, such as when something has broken on the floor or when an unsanitary condition develops in the bathrooms. RIC housekeepers do not maintain records of time spent on various tasks in the Recreation Center. There is one full cleaning of each locker room per day which takes from forty (40) minutes to two hours. Housekeepers are directed to walk through the locker rooms and restrooms approximately every hour during the daytime shift. The time spent on additional cleaning varies; the housekeepers try to "dry up" the areas after each scheduled group utilizes the locker rooms during the daytime shift.
8. RIC representatives credibly testified as to the safety, health and liability concerns if a locker room at the Recreation Center were not cleaned on a regular basis.

9. The Rhode Island Affiliate of the American Civil Liberties Union (ACLU) submitted written testimony at the hearing on January 10, 2008, urging that the request for a BFOQ be denied. It is its position that RIC did not justify the need for a BFOQ in its initial request to the Commission, that RIC did not answer why the locker room could not be closed for maintenance, how the locker room's construction prohibits protection of the patrons' privacy interest and how much time it takes housekeepers to clean the facility. While acknowledging that "respect for privacy is certainly a legitimate interest in considering a BFOQ request on the basis of sex", the ACLU argues that a BFOQ should be granted only "in the most compelling circumstances and when absolutely necessary". At the hearing on May 30, 2008, a representative of the ACLU, Jennifer Azevedo, Esq., testified that RIC had not addressed the concerns of the Commission set forth in the BFOQ Decision I and that therefore RIC had not met its burden to justify a BFOQ.
10. At the hearing on January 10, 2008, Salvatore Lombardi, President of AFSCME Local 2884, spoke at the hearing and urged that the matter be resolved through collective bargaining. Robert Tetreault, Director of Human Resources at RIC, stated that he had spoken with union representatives and that they suggested that RIC seek a BFOQ. At the hearing on May 30, 2008, Mr. Lombardi stated that what RIC was attempting to do would be a violation of the collective bargaining agreement and that RIC had not negotiated with the union on this issue.
11. At the hearing on January 10, 2008, Michael Évora, Executive Director of the Commission, spoke on the necessity to obtain a BFOQ from the Commission if an employer wanted to fill a position by sex. He noted that RIC's arguments were based on assumptions about how those who used the Recreation Center felt. He stated that the inconvenience of closing the locker rooms during cleaning should be balanced against the impact of sex discrimination on the job applicant pool should a BFOQ be granted. At the hearing on May 30, 2008, he stated that while he was not speaking with respect to rights under the collective bargaining agreement, a union and employer could not make an agreement to violate the state Fair Employment Practices Act, that the Commission must approve a BFOQ.
12. At the hearing on May 30, 2008, Stephen Strycharz, Vice President of AFSCME Local 2884, testified in favor of upholding the BFOQ Decision I and denying RIC's re-filed request.

CONCLUSIONS OF LAW

RIC proved by a preponderance of the evidence that BFOQs based on gender should be certified for two positions of housekeeper at the Recreation Center.

DISCUSSION

In the instant case, RIC requests that the Commission certify that being female is a BFOQ for one position of housekeeper in the Recreational Center and that being male is a BFOQ for a second position of housekeeper in the Recreational Center. 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 ... 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).

As stated in the BFOQ Decision I, 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 discriminate on the basis of 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).

The Commission noted in the BFOQ Decision I that 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]. BFOQ Decision I, p. 5.

In the BFOQ Decision I, the Commission found that RIC had demonstrated that the patrons of the recreation facility have a genuine privacy interest which is entitled to protection. The question that remained was whether RIC genuinely considered alternatives to a sex-based policy and whether various alternatives were reasonable. With the new evidence, the Commission can conclude that there are no reasonable alternatives to a sex-based policy.

In the second hearing, RIC introduced the floor plan of the locker rooms and photographs of the facilities. It is now clear that there are only one set of locker rooms for each sex, there are no alternative locker rooms available. The crowded and close quarters of the locker room, the immediate proximity of the locker rooms to the shower and bathroom facilities and the interrelationship of the entrances and exits make it evident that temporary barriers or minor reconstruction would not solve the difficulty of preserving privacy.

In the second hearing, it was clarified that housekeepers check the locker rooms after each "group" for excess water to be mopped, soap and shampoo on the floors to be removed, etc. (Trans. 5/30/08, p. 11) and that they are directed to walk through the locker rooms and bathrooms to check them hourly. (Trans. 5/30/08, p. 13.)

In the first hearing, it was represented that seniority considerations in the collective bargaining agreement limited assignment options for a permanent position. (See Trans. 2/4/08, p. 12). Theoretically, RIC could continue to pay overtime to a female staff person from another shift to clean the women's facilities. This alternative does not resolve the issues. Not only is it an extra expense, it does not result in equal opportunities. Male workers would be denied the opportunity for this overtime, so it does not result in equal treatment on the basis of sex. RIC has represented that it is important to have the facilities open at all times as the facility is designed to fit the varied and flexible schedules of various community and college groups. (See Trans. 2/4/08, pp. 5-8.) Given the current shortage of women with sufficient seniority to win a bid to clean these facilities, the burden of closing a facility when there was an opposite sex housekeeper cleaning the facility would fall most heavily on the female patrons. A rigid adherence to equal treatment in assignments would likely result in unequal treatment in service.

Based on the layout of the locker rooms and the number of times that the locker room facilities must be checked and cleaned, it is evident that there is no reasonable alternative to a BFOQ that would preserve the privacy interests of the patrons. Even if the principal cleaning work could be done before or after the facility's hours of operation, there is still a critical need to do supplemental checking and cleanup. It is impractical and a burden on the essence of the operations to close down the facilities on a frequent and unpredictable basis to do that supplemental work. It is also unreasonable to utilize a floater or someone performing other functions to fulfill the supplemental work that occurs on such an erratic basis. 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 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). RIC has demonstrated that there are no reasonable alternatives to a BFOQ to protect the privacy interests of its patrons and therefore the Commission grants RIC's re-filed request for a BFOQ.

ORDER

A BFOQ is hereby certified for two positions of housekeeper in the Recreation Center, one position is certified for a man and one position is certified for a woman. This certification shall be effective for five (5) 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 against RIC² with respect to these two positions unless RIC omitted or misstated material facts in its presentation to the Commission. RIC must state in advertisements or postings for the housekeeper positions 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 [29th] day of [August] , 2008.

_____/S/_____

Alberto Aponte Cardona
Commissioner

_____/S/_____

Nancy Kolman Ventrone
Commissioner

Dissent from the Majority Decision
on the Re-Filed Request of Rhode Island College for a
Bona Fide Occupational Qualification for Two Positions of Housekeeper

I dissent from the majority opinion and find that RIC has not presented sufficient evidence for the Commission to grant a BFOQ.

² The certification is binding on the Commission, during the relevant time period, for subsequent sex discrimination charges in hiring or transfer relating to gender, not to sex discrimination charges in hiring or transfer that allege sexual harassment or pregnancy discrimination.

INTRODUCTION

I agree with the introduction within the majority opinion.

DISCUSSION

In the BFOQ Decision I, the Commission found that RIC had demonstrated that the patrons of the recreation facility had a genuine privacy interest which is entitled to protection. There is no dispute on this issue. However, the Commission found that RIC had not established that it genuinely considered alternatives to a sex-based policy and that various alternatives were not reasonable. The Commission stated that:

There is no evidence as to the cost of privacy screens or other structural methods to protect privacy. RIC did not convince the Commission that it fully evaluated various scheduling/time shifting/overtime/assignment options. While RIC reasonably asserts that it does not want to limit the hours of operation for only one sex to allow opposite sex housekeepers to perform needed cleaning, there is insufficient clarity as to the effect of closing on the operation of the facility.

BFOQ Decision I, pp. 6 – 7.

Other than testimony on its current scheduling practices, RIC provided no evidence whatsoever on these subjects in the second hearing. RIC presented evidence of a focus group in which the patrons indicated that they did not want an opposite sex housekeeper present with them in the locker room. Not only did RIC fail to give hard statistics on this focus group, it failed to introduce the exact questions asked. In addition, the question presented was one on which the Commission had already reached a conclusion – that the privacy interests of the patrons were legitimate. RIC's failure to address the Commission's actual concerns on structural, scheduling or closure alternatives verges on disrespect.

The ability to correctly assess the actual situation is hampered by the fact that the evidence presented by RIC in the second hearing was not consistent with the evidence presented by RIC in the first hearing. For example, in the first hearing there were references to two shifts, to cleaning occurring in the late afternoon and to the desperate situation that would result in the facility were not cleaned for a period of five or six hours. (Trans. 2/4/08, pp. 9, 10, 20, 31, 34.) In the second hearing we were told that cleaners are scheduled on only one shift (7:00 a.m. to 3:30 or 4:00 p.m.) and that there are no assigned cleaners for the seven-hour period from 4:00 p.m. through 11:00 p.m. (Trans. 5/30/08, pp. 9, 15.)

The ability to correctly assess the situation also is hampered by the lack of evidence on critical issues. The evidence, after two hearings, is still unclear as to how many times the facilities are cleaned on an average day, when they are cleaned and how long it takes for each cleaning. (There is testimony in the first hearing that a full cleaning can take forty minutes or can take one-and-one-half hours. (Trans. 2/4/08, pp. 11, 17, 35.) It appears, although it is not clear, that this cleaning time is based on the two housekeepers working separately. At the second

hearing, the evidence was that the major cleaning took two hours and took place at 7:00 a.m. (Trans. 5/30/08, p. 12.) It is unclear whether the times of shifts could be changed so that cleaning could take place before the facility opened or after the facility closed. The Commission cannot properly evaluate alternatives, as it is legally required to do, without this basic information.

I do not know, and RIC did not say, whether anyone assessed structural issues. Would it be possible to put a screen in the middle of the locker room and clean half the locker room and showers and then clean the other half of the locker room and the bathrooms, reducing the amount of time that facilities were out of use for the patrons? (There are bathrooms outside of the locker facilities.) Would the cleaning time be further reduced if both housekeepers cleaned both facilities? Could floaters address the occasional emergency clean-up situation? Without definitive and proven answers to these critical questions, I cannot conclude that the severe measure of granting a BFOQ is justified.

In the BFOQ Decision I, the Commission noted the standards for proving the need for a BFOQ. RIC clearly did not meet these standards. In light of this, I do not understand how the Commission can grant the BFOQ and I dissent from the majority decision.

_____/S/_____

Camille Vella-Wilkinson
Commissioner

_____[August 29, 2008]_____

Date