“Would you like Fries with that?” A Sexist, Politically Incorrect or Illegal Phrase?: BFOQs and Hooters
“The law must accept people as they are, and not make decisions as if such human foibles did not exist or were too undignified and frivolous to be given legal effect.”

-Arthur Larson

Introduction

The Civil Rights Act of 1964 outlawed major forms of discrimination against African Americans and women. Title VII of the Civil Rights Act of 1964 in part provides that:

It shall be unlawful to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.

Title VII also provides that employees may discriminate on the basis of sex, religion or national origin where one of those traits is a *bona fide qualification (BFOQ)* that is reasonably necessary to the business in question.

There has been a debate going around the restaurant chain of Hooters since the early 1990s. This debate focuses on the nature of

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Hooters business in regards to their waitresses (Hooters Girls) and bartenders. The business side of the argument is that Hooters is a restaurant that provides entertainment for their costumers in the form or waitresses dressed in sexually explicit costumes. The feminist side is that Hooters objectifies women and discriminates against men using the fuzzy legal defense of BFOQs. The point of this essay is not to argue either side of debate, but through legal reasoning decide: what is the extent to which sexuality is an appropriate asset of trade?

There have been two different kinds of illegal discrimination under Title VII that should be addressed. First is called disparate treatment. Disparate treatment sex discrimination is an obvious difference in the way that men and women are treated as employees or applicants. The second kind of sex discrimination is disparate impact, which includes facially neutral tests, standards, or rules that have the effect of making it more difficult for one sex to obtain employment or promotion, or work within the employment environment. All of the Hooters controversies that shall be mentioned in this essay will entail accusations of the former, disparate treatment. Disparate treatment can be broken into a sub-category of sex plus discrimination in which different standards of conduct are required of female employees than male employees.

The Equal Employment Opportunity Commission (EEOC) is a federal law enforcement agency that enforces laws against workplace discrimination. It was established as a mandate under Title VII of the Civil Rights Act of 1964. The EEOC has

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5 Ibid.
6 Francis J. Vaas, "Title VII: Legislative History," Boston College Law Review, 7, no. 3 (1966),
done investigations on Hooters that have caused much controversy, but has yet to take Hooters to court on the issue of sex discrimination. They have been referenced in many cases involving BFOQs and sex discrimination that are necessary to look at in order to form a legal argument surrounding sex discrimination at Hooters.

**Cases of BFOQs and Sex Discrimination**

Two important cases to look at when dealing with BFOQs are Dothard v. Rawlinson and UAW v. Johnson Controls. These cases are important because they are the only two BFOQ cases dealing with sex discrimination that have been decided on by the Supreme Court.  

In Dothard v. Rawlinson, Diane Rawlinson was denied employment as a prison guard at an Alabama maximum-security prison because she failed to meet the minimum weight requirement. The Alabama Board of Corrections made a gender-specific regulation in regards to maximum-security prisons in contact positions. She changed her claim to this regulation was a violation of Title VII and the 14th Amendment. Her case was eventually brought to the Supreme Court and they found that this regulation was a BFOQ. The court found that the primary obligation of a guard was to maintain security and control of the inmates by supervising their activities around the clock. The Court found that the safety of Ms. Rawlinson, as well as the safety of the inmates, was in danger in hiring a woman. She could be sexually and physically assaulted on the job, and would also have a hard time preventing assaults from happening to others. The Supreme

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7 Joseph Solberg, "Southwest Airlines, Playboy and Hooters: The BFOQ Connection," Westlaw Next (1996): 1-14,
Court also held in this case that when discussing BFOQs as a defense, there should be a narrow exception to discrimination based on sex. This is a belief held by the EEOC.

UAW v. Johnson Controls Inc. held that a company could not exclude a fertile female employee from certain jobs because of its concern for the health of the fetus women might conceive. This judgment by the Supreme Court showed that the BFOQ defense should be narrowly constructed. The Court found that this case differed from Dawthard v. Rawlinson in that there was not a safety issue regarding a third party because the unconceived fetuses of female employees do not count. They are not essential to the business of battery manufacturing. The Dothard and Johnson cases are important in dealing with the Hooters situation because they show the Supreme Court’s narrow approach when dealing with the BFOQ defense in sex discrimination.

In the following cases the courts deal with the primary function of a business and using the BFOQ defense in sex discrimination. In Diaz v. Pan American World Airways, Celio Diaz was not hired to work for Pan American World Airways as a flight attendant because the company only hired females for that position. He filed suit claiming that the company policy violated Title VII. The United States Court of Appeals for the Fifth Circuit ruled that it was not a BFOQ for the airline whose primary function is to transport passengers safely from one point to another. The court used the EEOC guideline against customer preference as a reason for a company’s inability to perform the primary

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function or service it offers.\textsuperscript{13} This ruling would be used in a case brought against Hooters in deciding whether Hooters Girls are part of Hooters’ business they would be destroyed without, or if they are simply waitresses in small clothing that costumers may prefer.

A restaurant case that is very similar to a case that would be brought against Hooters is Guardian Capital v. New York State Division of Human Rights. In this case, Guardian capital ran an inn that contained a restaurant named The Cabaret. A waiter at the Cabaret was fired because the employer was replacing all of the male waiters with females in an attempt to increase revenue. The waiter sued under illegal discrimination, and Guardian capital used the defense of discrimination due to a BFOQ. The court found that the belief that the change in company policy would increase revenue was not a good enough reason to allow employment discrimination.\textsuperscript{14}

Wilson v. Southwest Airlines Co. is probably the strongest case against a Hooter’s when discussing the importance of a certain sex to perform a job. In 1971, Southwest Airlines developed a marketing scheme in which they turned their corporate image into one of love and sex. Their company slogan was sexually explicit and they had a ticketing machine called a “quickie machine” to provide “instant gratification.” Their flight attendants dressed in high boots, hot pants, and were encouraged to flirt with male passengers.\textsuperscript{15} Southwest could not prove that the mechanical jobs of a flight attendant were done any better by a female than a male. They then tried to rely on the non-mechanical aspects of the job. The court did not argue that women may be able to

\textsuperscript{13} Joseph Solberg, "Southwest Airlines, Playboy and Hooters: The BFOQ Connection," \textit{Westlaw Next} (1996): 1-14,
\textsuperscript{14} 360 N.Y.S. 2d 937 (1974).
\textsuperscript{15} 517 F. Supp. 292 (N.D. Texas, Dallas Division 1981).
comfort passengers better than male flight attendants, but there is no evidence that having male flight attendants would jeopardize the airlines ability to provide safe transportation from one place to another.\textsuperscript{16} This is the same ruling that came from the Diaz case. The fact that customers prefer females cannot justify sex discrimination.\textsuperscript{17}

\textbf{“Hoo”story and Public Image of Hooters}

In the early 1980s, Hooters originated in Clearwater, Florida. It serves food such as hamburgers, chicken wings and sandwiches. It also provides customers with drinks including wine and beer. The restaurant was created to simulate a beach environment with the wooden décor to match. The servers of the restaurant are exclusively young women known as “Hooters Girls”. They are dressed in tight t-shirts decorated with huge owls eyes over their breasts. The servers are encouraged to give off the impression of a cheerleader. There are many decorations around the restaurant that are full of sexual connotations.\textsuperscript{18} Hooters has advertisements that show scantily dressed women alluring men with cute conversation. The scope of the business appears to be selling sex appeal with burgers and chicken wings, but they often market themselves as a family restaurant. It offers children highchairs, kids menus and booster seats. The inconsistency in allowing themselves and the customer to understand the essence of their business has gotten Hooters into some legal trouble.

\textbf{Hooters Cases concerning BFOQs}

\textsuperscript{16} Ibid.
\textsuperscript{17} 404 U.S. 950 (1971).
\textsuperscript{18} Kenneth L. Schneyer, "Hooting: Public and Popular Discourse About Sex Discrimination," \textit{Westlaw Next}: 1-65,
In 1993, Hooters received its first sexual discrimination case against the restaurant chain. Savino Latuga and David Gonzales sued Hooters for sex discrimination in violation of Title VII because they were not hired as servers. Hooters rebutted this case by alleging that sex was a BFOQ for the job of a Hooters Girl. \(^{19}\) This lawsuit was settled out of the court in 1997. \(^{20}\) The discussion of what would have happened had this case made it to trial should be discussed later in this essay.

**EEOC v Hooters:** The EEOC was conducting a private investigation on the hiring practices of Hooters. These investigations are not public knowledge, but Hooters did receive a conciliation offer to Hooters. \(^{21}\)

### Arguments For and Against Hooters

There have been no cases that have been brought to trial against Hooters in terms of disparate treatment, sex discrimination and how they hire their employees. The evidence shown previously in this essay shows that if there was an action brought up against Hooters, a strong case could be made against them by the EOCC or by a private party. Hooters has a relative advantage to the companies found guilty of sex discrimination above in that it has not been taken to court yet. It can choose to act and present itself in a way to avoid legal responsibility in terms of sex discrimination.

#### Argument for Hooters

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\(^{19}\) Ibid.

\(^{20}\) United States District Court, "Northern District of Illinois – CM/ECF LIVE, Ver 4.0.3 (Chicago) Civil Docket For Case

The discrimination on the basis of sex when gender is a bona fide occupational quality for the job has been accepted a number of times in the courts. Courts almost always accept the defense of BFOQs when privacy is an issue. This is shown when patients request a same-sex nurse to work with them, or when a high security prison does not let someone of the opposite sex work as a guard and perform strip searches on inmates. When a company is using the defense of a BFOQ for issues that are not related to privacy, they must prove that the sex discrimination works towards the essence of the business. This means that an employer must prove that gender is absolutely essential to the business' primary function and that members of the opposite gender could not successfully perform the duties that constitute the employer's essence of the business.\(^22\)

The main thing that Hooters can do to avoid legal consequences due to sex discrimination is to define their self and public image. When they achieve this they will be able to specify and therefore prove the essence of their business in court. The mission statement of Hooters Restaurant can be found on their website and is stated as follows:

“We are committed to providing an environment of employee growth and development so that we can provide every guest a unique, entertaining dining experience in a fun and casual atmosphere delivered by attractive, vivacious Hooters Girls while making positive contributions to the communities in which we live.”\(^23\)

This mission statement does not make Hooters sound any different than another neighborhood bar and grill. This is a problem because in order to avoid the legal obligations of ordinary restaurants and sex equality in hiring, they need to separate themselves from these places.


Hooters can begin to distinguish itself by proving that it does not fall under the same marketing practices of Southwest in Wilson v. Southwest Airlines. A court will be quick to through Hooters and Southwest together in that they are both evidence of corporate branding and sexual exploitation. Hooters can prove that it is different than Southwest by showing the wide array of restaurants that America offers. There are entertainment-based restaurants such as Chuck E. Cheese where eating at the restaurant is seen as an event more so than a meal. There is not a huge difference in the types of airlines that America offers. This left Southwest with no market to prove its case legitimate. Hooters can use this approach and show that eating at Hooters is an event where costumers come to observe sexy girls that happen to serve food and drinks, but are more so putting on a show. Yurako argues that Hooters is less dangerous to women than the sexualized version of Southwest Airlines. She elaborates on this by saying; “Hooters’ primary product is its sexualized environment, offering a soft-core porn sexual fantasy” while “Southwest’s dominant product was always air travel.” Companies such as Guardian Capital and Southwest Airlines changed their business structure to raise capital by objectifying women. Hooters, on the other hand, has always used the business structure of selling sex and burgers. While this may be politically incorrect, it is not illegal. Please refer to the quote at the beginning of this essay, and reflect that Hooters may be commercially exploiting sex, but it is in the essence of their business. It is not up to the court to decide the whether legal actions of corporations are perverse or not.

Hooters can also use Guardian Capital v. New York State Division of Rights to their advantage because there was an opinion from Justice Reynolds that did not agree with allowing the Playboy Club to exclusively hire females as Bunnies, and not allowing Cabaret to hire exclusively females as waitresses. He did not understand what duties the Bunnies had that the waitresses at the Cabaret did not. This opinion of the case shows that while some may argue against Hooters with the Wilson and Guardian cases, others may want to group Hooters with the Playboy Club. Hooters needs to distinguish itself as a business based on sex appeal and show that it deliberately seeks to titillate and entice its customers. 26

Authenticity is a defense that employers can take in trying to prove that sex discrimination is a BFOQ of their business. 27 Guidelines given by the EEOC determine that there are three BFOQ tests that an employer must pass in order to prove authenticity. These three tests are:

1) That all or substantially all members of the opposite gender are unable to perform in the role;
2) That the essence of the business would be undermined without the sex-based hiring decisions; and
3) That no reasonable alternative to the discriminatory hiring exists.28

Once Hooters proves that they are an establishment based on the sexual exploitation of the performing Hooters Girls, they will be able to prove their authenticity based on customer expectations.29 This is different from customer preference because the

28 Ibid.
contingency of loyalty a customer shows is based on their expectations being met.

Hooters can show that the essence of their business is reliant on the sex appeal of their waitresses by showing that their economic survival is dependent upon meeting customer expectations.

Finally, Hooters settled a case in 1994 after using the BFOQ exception as a defense for gender discriminatory hiring. The settlement permitted the company to continue excluding men from server positions, but mandated the creation of gender-neutral positions for bartenders and hosts.\(^{30}\) This settlement did not force Hooters to change the essence of their business, the debated Hooters Girls. This displays that even in the heat of a lawsuit the applicant displayed tacit consent to understanding the essence of Hooters business.

**Argument against Hooters**

Hooters is clearly a restaurant. The essence of this restaurant is to serve food and drinks. The service that the Hooters Girls provide can just as easily and efficiently be done by men. There is a legal rule set forth in the case Wilson v. Southwest Airlines. This rule is that the essence of business must be taken into account when deciding if sex discrimination based on the BFOQ of a job is permissible.\(^{31}\) To agree with Hooters in that the job of a waitress is a justified reason for sex discrimination based on the BFOQ of a job is to abandon the legal rule set forth in Wilson. Though many men do go to Hooters to gawk at the waitresses, customer preference should not be considered in determining the essence of a business. As the Southwest Case found, there is an option of


\(^{31}\) 404 U.S. 950 (1971).
using sex appeal in a nondiscriminating manner.\(^{32}\) This means that even if the Hooters believes that they need to dress women in scantily clad outfits, they are still able to when men are working there. A customer that has a male server still has the option of looking at one of the female workers to gain the experience of Hooters.

Schneyer notes, “Sex does not become a bon fide occupational qualification merely because an employer chose to exploit female sexuality as a marketing tool, or to better ensure profitability”.\(^{33}\) This is definitely true with the marketing case that Hooters displays to American. Sexy is Hooters image, and food is its essence. It should be noted that Hooters advertises to families when it sees fit. If Hooters was to really identify as a symbol for sex similar to a strip club, then age restriction would go up to 18 at every Hooters.

The cases that were taken to the Supreme Court as well as the restrictions on BFOQs by the EEOC display that there is supposed to be a narrowly constructed view on the ways that businesses can use the BFOQ defense. This is shown in both the Rawlinson and Johnson Controls cases. Kimberly A. Yurako explains that there is a much greater demand for the commodification and sale of female sexuality than male sexuality. She goes further to say that if courts were to permit employers to define jobs freely as requiring sexual titillation, the result would be a massive asymmetry of exclusion in the work world.\(^{34}\) This means that many men would not have jobs due to this sexual exploitation. Many women would make little money do to society’s legal push towards


low paying jobs such as waitressing. Employers would have the legal right to change all
customer contact jobs to having female sexuality in the job description. The female
population would find themselves exactly where they were before Title VII was
established. This last point is a legal one in so much that it obligates the court to draw a
line on the legal limits of sexual exploitation of women.

**Conclusion**

If Hooters were to be brought to court in the near future it is likely that it would
lose when trying to use the defense of BFOQs in sex discrimination. This is because the
court cases on sex discrimination hold a lot of precedent over the Hooters matter. Hooters
would be ruled as a company that’s main purpose is to serve food, and therefore should
hire male waiters as well to serve the food. Hooters is no longer one of the biggest food
chains in the country, nor do citizens want the government involved in private matters.
These are two reasons why a case against Hooters will probably not come up in the near
future. If Hooters does happen to find itself in trial, the courts will be able set precedent
for a long time as to the extent to which sexuality is an appropriate asset of trade.