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By **Louis Pechman**

Balancing Customer Preference With Employee Rights

LAWS prohibiting employment discrimination seek to change societal prejudices and stereotypes regarding sex, race, religion and other protected categories. On occasion, these laudable goals may conflict with the business objective of satisfying the preferences of customers.

A patron may prefer a French waiter in a French restaurant, an attendant of the same sex in a hospital, or a young female waitress at Hooters.¹ Recent cases demonstrate, however, that a customer's discriminatory preference is rarely a defense to an employment discrimination lawsuit.

The landmark case that highlighted the tension between discrimination and customer preference was *Diaz v.*



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Pan Am. World Airways Inc.,² in which the Fifth Circuit held that Pan Am's practice of hiring only female flight attendants was unlawful discrimination against males, despite the fact that Pan Am's customers preferred women. *Diaz* and its progeny focus on the provision in Title VII permitting discrimination on the basis

of religion, sex or national origin where it "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business" — or the BFOQ.³

The Supreme Court has noted that the BFOQ is an extremely narrow exception to the general prohibition of discrimination on the basis of sex, and that the burden is on the employer to affirmatively demonstrate that the discriminatory criteria is sufficiently related to the job in question.⁴

Regulations of the Equal Employment Opportunity Commission (EEOC) specify that application of the BFOQ exception is unwarranted in cases where the refusal to hire is

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based on "the preferences of coworkers, the employer, clients, or customers."⁵

In view of the limits of the BFOQ defense, courts seldom sanction customer preference as a defense to discrimination.⁶ On the other hand, when the sexual privacy rights of patients are implicated,⁷ courts have generally taken a more favorable view of the BFOQ exception.

The narrowness of the BFOQ exception was recently reaffirmed in *EEOC v. HI 40 Corp., Inc.*,⁸ in which the EEOC sued Physicians Weight Loss Centers due to its refusal to hire men as weight loss counselors. The counselors were responsible for enrolling customers and providing one-on-one counseling to them, discussing issues related to weight loss.

Many counselors had experienced the battle with weight themselves and were presented as role models to the customers. One part of the job entailed measuring skin folds on the customer's neck, shoulders, bust, ribs, waist, hips, thigh, knee, calf and ankle using calipers to determine their percentage of body fat.

Although the court acknowledged that female customers may object to having their measurements taken by a man or to discussing the emotional and physiological issues related to weight loss with a man, it declined to hold that being female was a BFOQ for employment with the Centers. The court recognized that the customers had a privacy interest with respect to the taking of measurements, but found the intrusion in this case to be minimal. It noted that customers had the option of taking their own measurements, or foregoing the measurement altogether.

The court found no privacy interest in connection with the counseling function. Instead, it focused on the complete elimination of an employment opportunity for male applicants.

The court rejected the Centers' assertion that customer preference renders being female a BFOQ, stating that "preferences by customers have little, if any, legitimate role in making determinations of the legitimacy of discrimination under Title VII."⁹ The court found that the evidence presented by the Centers demonstrating customer preference for female counselors was neither scientifically tested nor sound.

The court determined that the Centers' refusal to hire male counselors was discriminatory under Title VII and was not justified by the BFOQ exception.

Protections against religious discrimination may create particularly vexing issues in relation to customer preference since employers have an affirmative duty to accommodate the religious beliefs of employees.¹⁰

In *Banks v. Service America Corp.*,¹¹ food service workers who served meals at the cafeteria of a General Motors automobile manufacturing plant greeted customers by saying "God bless you," "Praise the Lord," and other similar phrases.

The employees were devout Christians who believed that the Holy Spirit moved them to bless all of their customers, but Service America received complaints from approximately 20 to 25 customers who felt that such greetings were inappropriate. As a result, Service America specifically instructed the employees to cease this practice or risk termination. The employees refused to comply and were fired.

In *Banks*, the district court explained that Title VII requires an employer to demonstrate that it has reasonably accommodated an employee's religious needs or that it cannot do so without undue hardship. The court further stated that a mere disruption of routine is insufficient to demonstrate undue hardship; the hardship must be tangible and present.

Although Service America claimed that it would be impossible to keep the employees away from customers because it would leave them short-handed or require them to hire other employees to fill in the gap, the court concluded that this was a de minimis burden.

Service America presented no evidence that it lost any business due to the plaintiffs' practices. Juxtaposed against the fact that over two thousand meals per day were served and only 1 percent of customers even registered a complaint, the court opined that there was no need to remove the employees from the public area and that there was insufficient proof that Service America would suffer in any material way from the continued activities of plaintiffs.

The court concluded that it was for a jury to decide whether Service America, without undue hardship to its business operations, could reasonably accommodate the religious practices of the employees.

Customer's Touch

Another emerging area of potential liability for employers in regard to their customers is in the context of sexual harassment. This issue arose in *Folkerson v. Circus Circus Enterprises Inc.*,¹² when a professional mime sued her employer, the Circus Circus Casino, claiming that she was fired in retaliation for rejecting sexual harassment by a casino patron.

While performing as a life-size children's wind-up toy, the employee was touched in the shoulder area by a casino patron. The customer disregarded the repeated warnings of a woman working at a nearby rental counter not to touch the employee. In response, the mime hit the patron in the mouth. The casino subsequently fired her, claiming she did not have adequate provocation to strike the patron.

Under the particular circumstances of the case, the Ninth Circuit found that the casino had taken reasonable steps to ensure the employee's safety

and that the mime's termination was therefore not in retaliation for her rejection of the purported harassment.

The court explained, however, that "an employer may be held liable for sexual harassment on the part of a private individual, such as the casino patron, where the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct." In this regard, the Ninth Circuit's reasoning comports with both EEOC regulations¹³ and other federal court decisions.¹⁴

The Americans with Disabilities Act (ADA) also presents interesting issues with respect to customer preference. In passing the ADA, Congress acknowledged that individuals with disabilities are discriminated against "based on characteristics that are beyond [their] control and resulting from stereotypic assumptions not truly indicative of [their] individual ability"¹⁵

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One court has noted that "[a]n employer's concern about a client's reaction to an employee's handicap can be a powerful means of perpetuating stereotypes and holding back qualified workers."¹⁶

The protections granted by the ADA are not restricted to those employees actually suffering from a disability. Individuals who are "regarded as" disabled are also entitled to the Act's full protection.¹⁷ The "regarded as" language has particular relevance in the area of customer preference because an individual may have an impairment that is substantially limiting only by virtue of the attitudes of others toward the condition.

The EEOC gives the example of an experienced assistant manager of a convenience store with a prominent facial scar who was passed over for promotion to store manager. Believing customers would not want to look at this person, the owner promoted a less experienced part-time clerk. According to the EEOC, the employer discriminated against the assistant manager on the basis of disability, because she was perceived and treated as a person with a substantial limitation.¹⁸

Employers Beware

Where there are conflicts between the demands of customers and the rights of employees, a measured approach must be taken by employers. While it is good business to subscribe to the maxim, "the customer is always right," under the employment laws, the employer may nonetheless be liable.

(1) A challenge to Hooters' policy of hiring only women as waitresses, bartenders and hostesses is pending. *Latuga v. Hooters Inc.*, 1994 U.S. Dist. LEXIS 4008 (ND Ill. 1994).

(2) 442 F.2d 385 (5th Cir. 1971), cert. denied, 404 U.S. 950 (1971).

(3) 42 USCA 8 2000e-2(e).

(4) *Dothard v. Rawlinson*, 433 U.S. 321, 329-334 (1977). See also *UAW v. Johnson Controls Inc.*, 499 U.S. 187, 201 (1991) (finding that policy of

excluding women with child-bearing capacity from lead-exposed jobs was not a BFOQ because employee's sex or pregnancy does not actually interfere with her ability to perform); *Western Air Lines Inc. v. Criswell*, 472 U.S. 400, 412 (1985) (noting that BFOQ exception contained in the Age Discrimination in Employment Act of 1967 was also intended as an extremely narrow exception).

(5) 29 CFR 81604.2(a)(1)(iii).

(6) See *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981) (preference of Latin American clients for male corporate officers); *Vigars v. Valley Christian Ctr.*, 805 F.Supp. 802 (ND Cal. 1992) (preference of parents against unwed pregnant teachers).

(7) See *Local 567 v. Michigan*, 635 F. Supp. 1010 (ED Mich. 1986); *Backus v. Baptist Medical Center*, 510 F.Supp. 1191 (ED Ark. 1981).

(8) 953 F. Supp. 301, 305 (WD Mo. 1996).

(9) HI 40, 953 F.Supp. at 305.

(10) 42 USC 2000e(j). See also *TWA v. Harrison*, 432 U.S. 63, 74 (1977) ("[T]he employer's statutory obligation to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship, is clear . . .").

(11) 952 F.Supp. 703 (D Kan. 1996).

(12) 107 F.3d 754 (9th Cir. 1997).

(13) 29 CFR 81604.11(e).

(14) See e.g. *Menchaca v. Rose Records Inc.*, 67 FEP 1334 (ND Ill. 1995) (holding an employer liable for the sexual harassment of an employee by a regular customer when employer was on notice of inappropriate conduct).

(15) 42 USC 812101(2)(a)(7).

(16) *Meisser v. Houe*, 1994 LEXIS 1763, at n.10 (ND Ill. 1994).

(17) 42 USC 812102(2)(c).

(18) Equal Employment Opportunity Commission, A Technical Assistance Manual of the Employment Provisions (Title I) of the Americans with Disabilities Act at II-10 (Jan. 1992).