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Bona Fide Occupational Qualification

Discrimination against people based on their race, religion, gender, national origin, age or other protected status is generally prohibited under the laws of the U.S. However, in some rare circumstances, the very nature of the job requires you to choose candidates based on what are otherwise protected characteristics.

For example, imagine you are a church looking to hire a new clergy member. Obviously, a Lutheran church wants to hire someone who is Lutheran and it wouldn't make sense for them to hire a Catholic. Similarly, the Catholic Church understandably wants to hire Catholics, not Lutherans. Normally, this qualifies as discrimination because job candidates are expressly being hired or not based on their religious beliefs.

While normally we want to prohibit hiring or firing based on religious affiliation, in this narrow circumstance it makes sense to allow employers to effectively discriminate against otherwise qualified individuals. The law allows for these sorts of employment considerations through what is known as a bona fide occupational qualification (BFOQ) exception.

The Bona Fide Occupational Qualification Exception

In order to use the BFOQ exception, an employer must prove that no member of the group you are discriminating against could perform the job. Using the religious example above, a Lutheran church would argue that only a Lutheran could effectively practice and preach the tenants of their religion and a Catholic would be unable to perform the job due to his or her beliefs.

Courts are very careful to only allow very narrow exceptions to the general prohibition of discrimination against a protected status, and in the case of race there is no exception in case law. The most common exceptions are generally crafted for religion and gender. As an employer, you have to be exceptionally careful, because what may make perfect business sense to you won't be successful in court.

For example suppose you were a retail store that sold the latest fashions to a hip and trendy demographic. Although you may justifiably believe that a pretty young girl would be the best candidate for a sales person, if you turned down an older candidate who was otherwise qualified because they were simply "too old", you may find yourself facing a lawsuit. From a court's perspective, there is nothing about the duties of a salesperson that an older candidate couldn't do that a younger, prettier candidate could.

Bona Fide Occupational Qualification Examples

One of the best ways to understand BFOQ exceptions is to look at examples where courts have allowed what would otherwise be discrimination:

- For airline pilots, mandatory retirement age requirements were allowed because safety was the primary concern and airlines could show that older pilots were significantly less safe once they reached a certain age.
- Male clothing designers could legally advertise for male models only, where female models wouldn't be able to model men's clothing as intended.
- Churches can legally hire only members of their church and reject clergy from other religions.
- An airline was allowed to hire only pilots of a certain religious background because one of the countries that the airline flew over prohibited, under punishment of death, the presence of people outside of this religion.

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