

## 7.4: BONA FIDE OCCUPATIONAL QUALIFICATION (BFOQ)

There are situations where employment discrimination is allowable under both federal and NYS law. An employer can discriminate if the employer establishes a lawful job-related reason for the discrimination. This is called a bona fide occupational qualification or BFOQ.

So how does BFOQ work? Here are some examples found by the courts as acceptable reasons to discriminate in hiring:

- Mandatory retirement age requirements were allowed for airline pilots 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 were allowed to legally advertise for male models only, since female models wouldn't be able to model men's clothing as intended.
- Churches were allowed to legally hire only members of their own church and faith and reject clergy from other religions.
- An airline was allowed to hire only pilots of a certain religious background. Why? Because one of the countries that the airline flew over prohibited, under punishment of death, the presence of people outside of a certain religion.

Title VII permits discrimination on the basis of "religion, sex, or national origin in those instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or enterprise." This exception has also been extended to discrimination based on age through the Age Discrimination in Employment Act (ADEA). This exception does not apply to discrimination based on race. NYS has also adopted the federal rule that race cannot be a justification for BFOQ discrimination.

So, what if a role in movie or play calls for a black male or female actress? Can a director discriminate in hiring an actor to play the role by excluding white actors? The answer is no. Title VII and the NYS's HRL make so exception for such situations. However, a director can choose an actor based on the actor's physical characteristics.

**DEFINITION OF A DISABILITY UNDER THE ADA:** The EEOC's ADA: Questions and Answers page on its website states the following regarding its interpretation of the ADA's definition of an individual with a disability.

Question. Who is a "qualified individual with a disability?"

Answer. A qualified individual with a disability is a person who meets legitimate skill, experience, education, or other requirements of an employment position that he or she holds or seeks, and who can perform the "essential functions" of the position with or without reasonable accommodation. Requiring the ability to perform "essential" functions assures that an individual will not be considered unqualified simply because of inability to perform marginal or incidental job functions. If the individual is qualified to perform essential job functions except for limitations caused by a disability, the employer must consider whether the individual could perform these functions with a reasonable accommodation. If a written job description has been prepared in advance of advertising or interviewing applicants for a job, this will be considered as evidence, although not necessarily conclusive evidence, of the essential functions of the job.

**REASONABLE ACCOMMODATION:** The law requires that an employer must make "reasonable accommodations" for those that are disabled. The EEOC's ADA: Questions and Answers page on its website states the following regarding what a reasonable accommodation and what actions is constitute such.

Question. What is "reasonable accommodation?"

Answer. Reasonable accommodation is a modification or an adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to participate in the application process or to perform essential job functions. Reasonable accommodation also includes adjustments to assure that a qualified individual with a disability has rights and privileges in employment equal to those of nondisabled employees.

Question. What kinds of actions are required to reasonably accommodate applicants and employees?

Answer. Examples of reasonable accommodation include making existing facilities used by employees readily accessible to and usable by an individual with a disability; restructuring a job; modifying work schedules; acquiring or modifying equipment; providing qualified readers or interpreters; or appropriately modifying examinations, training, or other programs. Reasonable accommodation also may include reassigning a current employee to a vacant position for which the individual is qualified, if the person becomes disabled and is unable to do the original job. However, there is no obligation to find a position for an applicant who is not qualified for the position sought. Employers are not required to lower quality

or quantity standards in order to make an accommodation, nor are they obligated to provide personal use items such as glasses or hearing aids.

The decision as to the appropriate accommodation must be based on the particular facts of each case. In selecting the particular type of reasonable accommodation to provide, the principal test is that of effectiveness, i.e., whether the accommodation will enable the person with a disability to do the job in question.

Of course, what is reasonable is a subjective question. Technology is rapidly changing what is possible and to some extent, what is reasonable. What may have seemed extraordinary 20 years ago is now very much the norm and expected. It is rare to find a public bathroom that does not have wheelchair assessable stalls. Building entry ramps and closer parking spaces are just part of our culture. The law has made much of this a requirement. With computers that work on voice commands and robotics everywhere, what was once impossible is now rapidly becoming reasonable.

The meaning of “reasonable accommodations” depends on the factual context. Take for example the situation of former professional golfer Casey Martin. Due to Casey Martin’s degenerative leg condition, he could not walk the course while participating in PGA tournaments and requested the use of a golf cart. The PGA denied his request claiming that walking was part of the game and that the use of a golf cart would give him an advantage over the other golfers. The case made its way to the United States Supreme Court, which applied the ADA to professional sports for the first time. (See *Martin v PGA*, 532 US 661 (2001)) The Court in a 7-2 decision found in favor of Casey Martin holding that the use of a golf cart is “a reasonable modification” that gives him the access to tournaments that the ADA law requires. The Court rejected the PGA’s argument that waiving the usual “walk-the-course” rule for Martin would represent “a fundamental change in the game.”

**HEALTH AND DISABILITY DISCRIMINATION AND BFOQ:** An employer may not discriminate against someone with a health problem or disability which does not interfere with a person’s ability to do a job in a reasonable manner. However, if an employer can prove there is a physical or mental requirement for a job that is a bona fide occupational qualification (BFOQ), they can discriminate. Consider the following two cases.

In *Schor v St. Francis Hospital*, 111 AD2d 852 (2d Dept. 1985) a Poughkeepsie NY hospital rejected an employment application for a nurse’s position where the duties required heavy lifting. The job applicant admitted that, because of a disability, she was unable to lift more than 15 pounds. The court ruled in favor of the hospital, holding that there was substantial evidence to support a DHR ruling of no “probable cause” to believe that the hospital acted in a legally impermissible manner.

In *Div. of Human Rights v. Xerox*, 65 N.Y.2d 213 (1985), the Xerox Corporation in Rochester, NY refused to hire a person whose disability was described as “active gross obesity.” The Court held that Xerox acted unlawfully, in violation of HRL Section 296(1) finding excessive weight to be a disability protected under the HRL. The Court stated “...the statute protects all persons with disabilities and not just those with hopeless conditions.” The Court went on to say that “We have found nothing in the statute or its legislative history indicating a legislative intent to permit employers to refuse to hire persons who are able to do the job simply because they have a possibly treatable condition of excessive weight.”

**MEDICAL AND MENTAL EXAMINATIONS:** A medical examination may be required of an employee or prospective employee, so long as the medical examination is job-related. Employers may require all employees to have annual job-related medical examinations, and/or may require medical examinations upon the happening of a job-related accident.

It is lawful for an employee to be terminated, if a medical report discloses that the employee is unable to perform his/her assigned tasks in a “substantial and reasonable manner,” and that the employee’s condition is “not temporary and is substantial.” The burden of proof is on an employee to prove that, although disabled, the employee can perform the duties required of the job in a reasonable manner.

Employers are also allowed to randomly test employees for drug use as long as the policy is in writing. If an employee tests positive for an illegal substance, the employer is within its legal rights to terminate the employee. Employees who refuse to take a drug test can also be fired.

**TERMINATION BASED ON DISABILITY:** The American with Disabilities Act (ADA) does not protect employees who miss work due to their disability, even if the disability occurs while on the job. The bottom line is that if an employee cannot do their job in a reasonable manner, they can be terminated.

**SUBSTANCE ABUSE AS A DISABILITY:** NYS’ HRL Section 296 protects rehabilitating and/or recovering alcoholics and drug abusers. However, it does not protect substance abusers who do not seek treatment for their substance abuse condition. Such is the situation in *Burka v NYC Transit Authority*, 680 F Supp 590 (1988, SD NY). A federal court held that a NYC Transit police officer

was properly dismissed from the force when he refused to acknowledge and accept treatment for alcoholism. The court held that it “was reasonable to conclude that the long-term effects of the police officer’s alcoholism would result in a diminished capacity to perform police functions and exercise judgment required of police officers.”

**PREGNANCY DISCRIMINATION:** The EEOC’s Pregnancy Discrimination page on its website states the following regarding pregnancy discrimination.

#### Pregnancy Discrimination

Pregnancy discrimination involves treating a woman (an applicant or employee) unfavorably because of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth.

#### Pregnancy Discrimination & Work Situations

The Pregnancy Discrimination Act (PDA) forbids discrimination based on pregnancy when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, such as leave and health insurance, and any other term or condition of employment.

#### Pregnancy, Maternity & Parental Leave

Under the PDA, an employer that allows temporarily disabled employees to take disability leave or leave without pay, must allow an employee who is temporarily disabled due to pregnancy to do the same.

An employer may not single out pregnancy-related conditions for special procedures to determine an employee’s ability to work. However, if an employer requires its employees to submit a doctor’s statement concerning their ability to work before granting leave or paying sick benefits, the employer may require employees affected by pregnancy-related conditions to submit such statements.

Further, under the Family and Medical Leave Act (FMLA) of 1993, a new parent (including foster and adoptive parents) may be eligible for 12 weeks of leave (unpaid or paid if the employee has earned or accrued it) that may be used for care of the new child. To be eligible, the employee must have worked for the employer for 12 months prior to taking the leave and the employer must have a specified number of employees.

(While the above mentioned EEOC’s page regarding pregnancy does not state this, FMLA also applies to the placement with the employee of a child for adoption or foster care, care for an immediate family member (spouse, child, or parent) with a serious health condition, or medical leave when the employee is unable to work because of a serious health condition.)

In 2006, a UPS driver Peggy Young became pregnant with her third child. Based on her doctor’s recommendation, she requested lighter-duty work. UPS refused the request and instead put her on unpaid leave. Young sued the company contending that the company discriminated against her because she was pregnant. She based her claim on the fact that UPS offered accommodations to non-pregnant employees with similar doctor recommendations, such as workers who were injured on the job.

Two lower courts disagreed. Both courts found that UPS was not required to offer the accommodation to someone because of their pregnancy and dismissed the case. The Supreme Court found differently, and in a 6-3 decision, the court reversed the lower court ruling and remanding the case back to the lower court. While it did not decide whether Young was discriminated against or not, it set forth the standard that courts should use in determining these types of cases.

The standard is that a plaintiff who makes a claim that she is being discriminated against because of her pregnancy has the initial burden of establishing a prima facie case of discrimination. If the plaintiff carries that burden, the employer has the opportunity to articulate some legitimate, non-discriminatory reason for the difference in treatment of a pregnant employee over a non-pregnant employee. If the employer articulates such a reason, the plaintiff then has an opportunity to prove by a preponderance of the evidence that the reason is not true and a pretext for discrimination.

It should be noted that even before UPS appeared before the U.S. Supreme Court, it had already changed its pregnancy accommodation policy and began treating pregnancy accommodations the same as other disability accommodations. It should also be noted that after the U.S. Supreme Court decision, Peggy Young and United Parcel Service settled this case.

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