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MEMORANDUM

TO: Robert Corbisier, Executive Director

FROM: Alexander Roider, Special Projects Attorney

DATE: April 4, 2025

RE: Sex as a bona fide occupational qualification for an educational employer

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You asked me to address the question in a legal memorandum of whether an institutional employer, such as an educational entity, violates AS 18.80.220 by requiring employees in a single-sex dormitory to be of a particular sex. An employer would probably not violate AS 18.80.220 if they exclusively hired one sex for a role in which the sex of the applicant is a bona fide occupational qualification (BFOQ).[1] This is a longstanding defense, with robust guidelines in the jurisprudence.[2]

I. AS 18.80

The understanding that some roles may necessitate legal sex discrimination has existed in the Commission's statute since it's congruence in 1965 with Title VII of the Civil Rights Act of 1964.[3] The language reads, in relevant portion:

> [I]t is unlawful for an employer to refuse employment to a person, or to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment because of the person's… sex… *when the reasonable demands of the position do not require distinction on the basis of… sex…*[4]

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[1] *See id.*

[2] *E.g.*, Int'l Union v. Johnson Controls, 499 U.S. 187, 201 (1991) (herein after *United Auto Workers v. Johnson Controls*); Dothard v. Rawlinson, 433 U.S. 321, 334 (1977); Robino v. Iranon, 145 F.3d 1109, 1111 (9th Cir. 1998); Olsen v. Marriott Int'l, 75 F.Supp.2d 1052, 1060–1068 (D. Ariz. 1999); Hernandez v. Univ. of St. Thomas, 793 F.Supp. 214, 216 (D. Minn. 1992).

[3] *See* ALASKA STAT. § 18.80.220(a)(1) (2025). *See also* STATE OF ALASKA J. OF H. SUPP., H. B. No. 139 at 2 (1965).

[4] ALASKA STAT. § 18.80.220(a)(1) (2025) (emphasis added).

This language sets up a condition for discrimination to be unlawful only when the position's reasonable demands do not require discrimination.[5] A respondent may defend against allegations of unlawful discrimination by asserting that sex discrimination is a job necessity.[6] This assertion is supported by the language's legislative intent. The 1965 restructuring of AS 18.80 was done in large part to ensure that Alaska's anti-discrimination laws were in line with the Civil Rights Act of 1964.[7] An almost identical exemption to what is featured in AS 18.80.220 is prominent in the Civil Rights Act.[8] Furthermore, Alaska courts consistently use Title VII precedent to interpret the language of AS 18.80.[9] This AS 18.80 exception is the state equivalent to Title VII's bona fide occupational qualification defense.[10]

II. Title VII & the Bona Fide Occupational Qualification of Sex Defense

Title VII, the federal legislation used by the Alaska courts to interpret AS 18.80, has a carve-out allowing deliberate discrimination when one's sex is a "bona fide occupational qualification."[11] Section 703(e) of Title VII reads, in relevant portion:

> It shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual… on the basis of his… 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.[12]

This language establishes a legal defense to allegations of disparate treatment in employment.[13] Under Section 703(e), if an employer can illustrate that an employee's sex is a bona fide occupational qualification, then the employer does not violate Title VII.[14]

While there was some early debate over what qualified as a BFOQ, the United States Supreme Court repeatedly ruled that it is a narrow exemption from the greater goals of Title VII.[15] An employer must establish both that there exists a direct relationship between sex and the ability to do the job, and that the sex-segregated job qualification goes to the "essence" or "central mission of the employer's business."[16] Only if both of these prongs are proven may an employer defend against an allegation of unlawful discrimination with a BFOQ.[17]

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[5] *See id.*
[6] *See id.*
[7] *See* STATE OF ALASKA J. OF H. SUPP., H. B. No. 139 at 2 (1965).
[8] *Compare* ALASKA STAT. § 18.80.220(a)(1) (2025), *with* Civil Rights Act of 1964 § 703(e), 42 U.S.C. §2000.
[9] *See* Loomis Elec. Prot. v. Schaefer, 549 P.2d 1341, 1342 (Alaska 1976).
[10] *Compare id.*, *with* ALASKA STAT. § 18.80.220(a)(1) (2025); Civil Rights Act of 1964 § 703(e), 42 U.S.C. §2000.
[11] *See* Civil Rights Act of 1964 § 703(e), 42 U.S.C. §2000.
[12] *Id.*
[13] *See id. See also Johnson Controls*, 499 U.S. at 201.
[14] *See* Civil Rights Act of 1964 § 703(e), 42 U.S.C. §2000.
[15] *See Johnson Controls*, 499 U.S. at 203–204; *Olsen*, 75 F.Supp.2d at 1060–63. *But see* 110 Cong. Rec. 13,170 (1964) (statement of Sen. Robert Byrd).
[16] *See Johnson Controls*, 499 U.S. at 203–204; *Olsen*, 75 F.Supp.2d at 1060–63.
[17] *See id.*

A. *Direct Relationship Between Sex & the Ability to Perform*

The first prong an employer must establish to assert a BFOQ defense concerns the relationship between sex and the requirements of the job.[18] In *United Auto Workers v. Johnson Controls*, the Court, focusing on the "occupational qualification" portion of the BFOQ, explained this prong as requiring evidence of "a high correlation between sex and ability to perform job functions…."[19] Courts consistently reject BFOQ defenses that are based merely on a correlation between sex and a job requirement.[20] Instead, an employer must prove that "all or substantially all" members of a given sex would be incapable of performing the job duties.[21] This prong is certainly stringent, but not impossible to pass.[22] What the Court is trying to establish is that the role includes functions that effectively necessitate employees of a certain sex.[23] Prison guards,[24] orderlies,[25] school staff,[26] and nurses[27] often meet this standard. However, this alone is insufficient to prove a BFOQ defense.[28] An employer must also prove that the qualification goes to the "essence" of an employer's vocation.[29]

B. *Qualification Goes to Essence of Employment Operation*

The second prong to successfully assert a BFOQ defense requires an employer to prove that the qualification at issue goes to the "essence" or "central mission of the employer's business."[30] This prong ensures that there is no less discriminatory accommodation available for the job in question.[31] A BFOQ defense cannot be asserted if the relevant qualification is only tangential to the business's goals.[32] Nor can it be asserted if the qualification goes to the essence of an overly generic, broad, or subjective business goal, such as profit or aesthetic.[33] The qualification that demands sex discrimination must be entwined with the central mission of the

[18] *See id.*

[19] 499 U.S. at 202. *See also Dothard*, 433 U.S. at 331.

[20] *See, e.g.*, *Johnson Tool*, 499 U.S. at 204 (rejecting a policy of preventing female employees from working at a battery factory that was linked to pregnancy complications); Fernandez v. Wynn Oil, 653 F.2d 1273, 1276 (9th Cir. 1981) (rejecting a policy of hiring only men to conduct business in South American countries due to machismo attitudes); Rosenfeld v. S. Pac., 444 F.2d 1219, 1227 (9th Cir. 1971) (rejecting a policy of excluding women from jobs that required long hours); Weeks v. S. Bell Tel. & Tel., 408 F.2d 228, 235 (5th Cir. 1969) (rejecting a policy of excluding women from roles that require the ability to lift thirty pounds).

[21] *Dothard*, 433 U.S. at 333.

[22] *See, e.g.*, *Dothard*, 433 U.S. at 333; *Robino*, 145 F.3d at 1111; *Hernandez*, 793 F.Supp. at 218; Jennings v. N.Y. State Off. of Mental Health, 786 F.Supp. 376, 380 (S.D.N.Y. 1992); Fesel v. Masonic Home of Del., 447 F.Supp. 1346, 1354 (D. Del. 1978).

[23] *See Dothard*, 433 U.S. at 333.

[24] *See Robino*, 145 F.3d at 1111.

[25] *See Jennings*, 786 F.Supp. at 380.

[26] *See Hernandez*, 793 F.Supp. at 218.

[27] *See Fesel*, 447 F.Supp. at 1354.

[28] *See Johnson Controls*, 499 U.S. at 203–204.

[29] *See id.*

[30] *Id.*

[31] *See id.*

[32] *See id. See also* Diaz v. Pan Am. World Airways, 442 F.2d 385, 389–389 (5th Cir. 1971).

[33] *E.g.*, *Olsen*, 75 F.Supp.2d at 1067 (rejecting argument that female sex was a BFOQ for masseuse roles, due to male masseuses being unprofitable in the past); E.E.O.C. v. Mike Fink Corp., 1998 WL 34078445 (M.D. Tenn. July 17, 1998) (rejecting that male sex was a BFOQ for servers at "Cock of the Walk" restaurants which featured an "old riverboat" aesthetic).

employer.[34] Thus, this prong limits the BFOQ defense to those industries whose central purpose may necessitate sex discrimination.[35] Almost always, these industries assert three aspects of their "essence" that requires a BFOQ exception: privacy,[36] safety,[37] or customer preference.[38]

i. Privacy

Perhaps the single-most frequently upheld "essence" of a job that justifies a BFOQ is the privacy interest of clientele.[39] When a business requires an employee to frequently observe undressed clients or touch clients in potentially intimate areas, there often exists a BFOQ for that employee's sex to match the clientele.[40] This arises often with prison guards who conduct pat-downs or strip searches, and nurses who may have to bathe or toilet patients.[41] Roles where these tasks are at the "essence" of the employment are almost always granted BFOQs, because, as the Ninth Circuit puts it, "[w]e cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity."[42] It was this concern that found a BFOQ existed for janitors cleaning single-sex dormitories with communal bathrooms.[43]

In addition to physical privacy, courts also found jobs with private conversations at their essence as justifying a BFOQ.[44] These can include therapists that discuss sensitive topics, sex education instructors that wish to encourage intimate conversations, or mentors that need to appear open to potentially embarrassing questions.[45] Almost always, these roles involve interacting with youth or another vulnerable population.[46] Importantly, it is not that clientele may be more comfortable communicating with like sexes that justifies this mission before the courts.[47] Rather, it is the privacy concerns of the clientele who may feel just as strong a desire to shield themselves from members of another sex during a conversation about puberty or sexual abuse as they would if they were disrobing.[48]

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[34] *See Johnson Controls*, 499 U.S. at 203–204.
[35] *Accord id.*
[36] *E.g.*, Loc. 567 Am. Fed'n of State, Cnty., & Mun. Emps. v. Michigan, 635 F.Supp. 1010, 1013 (E.D. Mich. 1986); *Fesel*, 447 F.Supp. at 1354; *Jennings*, 786 F.Supp. at 387; Chambers v. Omaha Girls Club, 629 F.Supp. 925, 947 (D. Neb. 1986).
[37] *E.g.*, *Dothard*, 433 U.S. at 336–337; Torres v. Wisconsin Dept. of Health & Soc. Servs., 859 F.2d 1523, 1530 (7th Cir. 1988).
[38] *E.g.*, St. Cross v. Playboy Club, Appeal No. 773, Case No. CFS 22618–70 (N.Y. Hum. Rts. Appeal Bd. 1971).
[39] *See, e.g.*, *Loc. 567*, 635 F.Supp. at 1013; *Fesel*, 447 F.Supp. at 1354; *Jennings*, 786 F.Supp. at 387; Chambers v. Omaha Girls Club, 629 F.Supp. 925, 947 (D. Neb. 1986).
[40] *Id.*
[41] *See Loc. 567*, 635 F.Supp. at 1013; *Jennings*, 786 F.Supp. at 380; *Fesel*, 447 F.Supp. at 1354.
[42] *Loc. 567*, 635 F.Supp. at 1013 (citing York v. Story, 324 F.2d 450, 455 (9th Cir. 1963)).
[43] *See Hernandez*, 793 F.Supp. at 218.
[44] *E.g.*, *Jennings*, 786 F.Supp. at 382–383; *Omaha Girls Club*, 629 F.Supp. at 925; Healey v. Southwood Psychiatric Hosp., 78 F.3d 128, 134 (3rd Cir. 1996).
[45] *Id.*
[46] *See id.*
[47] *Compare id.*, *with Olsen*, 75 F.Supp.2d at 1067.
[48] *Compare Healey*, 78 F.3d at 134, *with Loc. 567*, 635 F.Supp. at 1013.

ii. Safety

Roles where one's sex may make an environment unsafe may require a BFOQ, however it will depend on whose safety is potentially threatened by the sex discrimination.[49] Courts invariably rejected BFOQ defenses when the justification for the discrimination involves the essence of the role imperiling the safety of the rejected sex themselves.[50] Historically, this involved employers unlawfully screening women from roles in high crime areas, roles that require late hours, or roles that require strenuous labor.[51] As Justice Stewart puts it, "[i]n the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself."[52] However, if the safety of others may be jeopardized by the inclusion of a given sex, a BFOQ defense may be established.[53] Most case law on the subject comes from women's prisons excluding male prison guards to prevent rampant sexual assault, or men's prisons excluding female prison guards to prevent agitating a sex offender population.[54] It is important to remember that a BFOQ must also have a direct relationship between sex and the ability to perform.[55] As such, for BFOQs where safety concerns arise from the essence of the role, the safety concerns must come from the sex of the employees themselves.[56] As illustrated in *Dothard v. Rawlinson*, it is insufficient for women to often be less physically strong than men—the safety of others must "be directly reduced by [the applicant's] womanhood."[57]

iii. Customer Preference

As a general rule, customer preference is insufficient justification to establish a BFOQ.[58] If a clientele has a strong preference for female waitresses or male bartenders, the interest in greater profits is too general to be considered entwined with the "central mission of the employer."[59] As such, courts routinely reject this argument.[60] However, there is one narrow exception to this rule: "jobs where sex or vicarious sex is the primary service provided."[61] If a role is at its essence about sexual titillation, an employer may assert sex as a BFOQ.[62] This justification has traditionally been limited to topless dancers or Playboy models.[63]

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[49] *Compare Johnson Controls*, 499 U.S. at 206, *with Dothard*, 433 U.S. at 336–337.
[50] *E.g.*, Crane v. Vision Quest Nat'l, 2000 WL 1230465 (E.D. Penn. Aug. 23, 2000); *Johnson Controls*, 499 U.S. at 206; *Weeks*, 408 F.2d at 235.
[51] *See id.*
[52] *Dothard*, 433 U.S. at 335.
[53] *E.g.*, *Dothard*, 433 U.S. at 336–337; Torres v. Wisconsin Dept. of Health & Soc. Servs., 859 F.2d 1523, 1530 (7th Cir. 1988).
[54] *See Dothard*, 433 U.S. at 335–337.
[55] *See Johnson Controls*, 499 U.S. at 203–204; *Olsen*, 75 F.Supp.2d at 1060–63.
[56] *See Dothard*, 433 U.S. at 335.
[57] *Id.*
[58] *E.g.*, *Olsen*, 75 F.Supp.2d at 1065; *Diaz*, 442 F.2d at 389–389; *Mike Fink Corp.,* 1998 WL 34078445.
[59] *Compare id.*, *with Johnson Controls*, 499 U.S. at 203–204.
[60] *See Olsen*, 75 F.Supp.2d at 1065; *Diaz*, 442 F.2d at 389–389; *Mike Fink Corp.,* 1998 WL 34078445.
[61] Wilson v. Southwest Airlines, 517 F.Supp. 292, 301 (N.D. Tex. 1981).
[62] *See id.*; St. Cross v. Playboy Club, Appeal No. 773, Case No. CFS 22618–70 (N.Y. Hum. Rts. Appeal Bd. 1971).
[63] *E.g.*, *St. Cross*, Case No. CFS 22618–70. *But cf. Wilson*, 517 F.Supp. at 303–304.

III. Conclusion

There is little reason to believe that any portion of AS 18.80.220 jeopardizes single-sex schools' ability to only hire prefects of a given sex. The language of AS 18.80.220 includes a BFOQ defense, in the style of its inspiration, Title VII of the Civil Rights Act.[64] As the abundant jurisprudence makes clear, so long as there is a direct relationship between one's sex and their ability to perform needed job functions, and that the required qualifications go to the core of the business's mission, employers may lawfully discriminate on the basis of sex for these niche roles.[65]

[64] *Compare* ALASKA STAT. § 18.80.220(a)(1) (2025), *with* Civil Rights Act of 1964 § 703(e), 42 U.S.C. §2000. *See also* STATE OF ALASKA J. OF H. SUPP., H. B. No. 139 at 2 (1965).
[65] *See Johnson Controls*, 499 U.S. at 203–204; *Olsen*, 75 F.Supp.2d at 1060–63.