The Customer Is Not Always Right

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Laws protecting employees against discrimination in the workplace prohibit an employer from making employment decisions based on prejudices and stereotypes about an employee's sex, race, religion or other protected characteristics. These restrictions of the anti-discrimination laws may on occasion conflict with an employer's business objective of catering to customer preference. An example of such a conflict would be where a healthcare provider is faced with a patient's demand to be cared for by White employees only. Nevertheless, customer preference is rarely a defense in an employment discrimination lawsuit.

The seminal case illustrating the tension between customer preferences and anti-discrimination legislation is Diaz v. Pan Am. World Airways, Inc. 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971). Pan Am previously had a policy of restricting its hiring for flight attendants to females and refused to hire male candidates for the position. When a class of males alleged that Pan Am engaged in discrimination for refusing to hire them on the basis of sex, Pan Am asserted a "customer preference" defense; that is, that its customers overwhelmingly preferred to be served by female stewardesses and would refuse to fly Pan Am if they were not attended by women. Pan Am claimed that female stewardesses were considered superior in "non-mechanical" aspects of the job, such as "providing reassurance to anxious passengers, giving courteous personalized service and, in general, making flights as pleasurable as possible within the limitations imposed by aircraft operations." Id. at 387. Nevertheless, the Fifth Circuit held that Pan Am's practice of hiring only female flight attendants unlawfully discriminated against men, despite the fact that Pan Am's customers may have preferred women. Id. at 389. The court found that having male flight attendants would not jeopardize the ability of the airline to provide safe transportation, and that the non-mechanical aspects of the job were not reasonably necessary to the normal operation of the airline. Id. at 388.

Employers engaging in discriminatory decision-making driven by real or perceived customer preference often attempt to take shelter in the bona fide occupational qualification ("BFOQ") defense. Section 703(e)(1) of Title VII of the Civil Rights Act of 1964 creates a statutory defense in discrimination cases where an employer can show that a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise" requires the services of a person of a particular religion, sex or national origin. 42 U.S.C. § 2000e-2(e)(1) (2000). Although the defense is available for gender, religion, and national origin-based hiring, it is not available in race discrimination cases. Id. However, the Supreme Court of the United States has stated that the BFOQ defense "provides only the narrowest of exceptions to the general rule requiring equality of employment opportunities," and made clear that the burden is on the employer to affirmatively demonstrate that the discriminatory criteria is "reasonably necessary" to the job in question. See Dothard v. Rawlinson, 433 U.S. 321, 333 (1977).

Guidelines promulgated by the Equal Employment Opportunity Commission ("EEOC") have been crucial in the federal courts' understanding of the BFOQ defense ("Guidelines"). These Guidelines state that, except where necessary for the purposes of authenticity or genuineness, "the refusal to hire an individual

because of the preferences of co-workers, the employer, clients or *customers*" does not warrant the application of the BFOQ exception. 29 C.F.R. § 1604.2(a)(1)(iii), (2) (emphasis added). The EEOC Guidelines make it clear that customer preference does not support a BFOQ and therefore is not a valid defense to discrimination under Title VII.

Diaz and later cases were decided in light of these EEOC Guidelines and support the proposition that employers cannot justify otherwise unlawful discrimination on the basis that their customers prefer not to deal with members of a protected class. Federal case law has shown that generally only a narrow set of contexts exists in which customer preference may be lawfully considered: privacy, safety, and authenticity. While employers may, at times, lawfully engage in otherwise discriminatory practices as a result of these three concerns, almost any other reason will be rejected. For example, in an age discrimination context, a research scientist presented evidence that his age was a factor in his employer's decision to fire him. Silver v. N. Shore Univ. Hosp., 490 F. Supp. 2d 354, 357 (S.D.N.Y. 2007). Although the employer argued that they fired the plaintiff because they were unable to obtain funding to support the plaintiff's research, the plaintiff submitted a recording of a conversation with his supervisor where the supervisor noted that both he and the plaintiff were in their late fifties and then stated, "[p]eople are not going to lay out money for people like us anymore." Id. at 365. The district court held that the employer could not discriminate against the plaintiff on the basis of their customers' preferences, in this case, the preferences of outside funding sources. Id. Similarly, in Ames v. Cartier, Inc., 193 F. Supp. 2d 762 (S.D.N.Y. 2002), the plaintiff alleged that he was discriminated against on the basis of sex due to the jewelry store's policy that white male customers were to be served only by white female sales associates. Id. at 768-769. The district court held that "while pandering to customers' discriminatory preferences could very well help effectuate a sale, employers nevertheless may not discriminate on the basis of their customers' preferences." Id. at 769.

Given Supreme Court precedent, EEOC Guidelines and relevant case law, it is clear that customer preference is rarely a complete defense to discrimination. If customer preference was an unqualified defense to employment discrimination claims, employers would be allowed to pander to the societal prejudices and stereotypes that necessitated anti-discrimination legislation in the first place.

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