

rationale for the rule was that many of the hospital's adolescent clients had been victims of sexual abuse and might be willing to speak only with counselors of a specific sex. The court agreed that scheduling shifts based on sex was facially discriminatory but held that the sex requirement was a BFOQ due to its close relationship to the therapeutic mission of the hospital. Privacy-based BFOQs have also been recognized in cases involving delivery nurses,¹¹ custodians,¹² and correctional officers assigned to certain female residential facilities.¹³

A number of BFOQ cases involve the staffing of correctional facilities. *Breiner v. Nevada Department of Corrections* provides a good example of the complexities of applying antidiscrimination law to this setting.

Breiner v. Nevada Department of Corrections 610 F.3d 1202 (9th Cir. 2010)

OPINION BY CIRCUIT JUDGE BERZON:

The Nevada Department of Corrections (NDOC) hires only female correctional lieutenants at a women's prison. The district court granted summary judgment upholding NDOC's discriminatory employment policy, concluding that the policy imposed only a "de minimis" restriction on male prison employees' promotional opportunities and, alternatively, that the policy falls within Title VII's exception permitting sex discrimination in jobs for which sex is a bona fide occupational qualification. We reverse as to both holdings.

In September 2003, NDOC's Inspector General learned that a female inmate at the Southern Nevada Women's Correctional Facility (SNWCF) had been impregnated by a male guard. At the time, SNWCF was operated by a private company, Corrections Corporation of America (CCA). * * * In the course of the investigation, the Inspector General . . . discovered that SNWCF had become "an uninhibited sexual environment." He noted "frequent instances of inappropriate staff/inmate interaction," "flirtatious activities between staff and inmates," and "widespread knowledge" of "long-term inmate/inmate sexual relationships." In exchange for sex, prison staff "routinely introduce[d] . . . contraband into the institution, including alcohol, narcotics, cosmetics, [and] jewelry." * * *

In the wake of the Inspector General's report, which ignited "very high profile" media coverage, CCA

announced that it was terminating its contract to operate SNWCF. NDOC resumed control of the facility and, according to Crawford, faced intense political pressure to "mitigate the number of newspaper articles" and to "assure the State of Nevada that we would not be embarrassed like this again." To achieve this goal, Crawford decided to restaff the facility so that seventy percent of the front line staff at SNWCF would be women. Crawford also decided to hire only women in SNWCF's three correctional lieutenant positions. The correctional lieutenants are shift supervisors and are the senior employees on duty seventy-five percent of the time. Correctional lieutenants report to wardens or deputy wardens and are responsible for supervising the prison's day-to-day operations, including directing the work of subordinate staff, inspecting the facility and reporting infractions, and monitoring inmates' activities and movement through the facility. There is one correctional lieutenant assigned to SNWCF per shift. Although the correctional lieutenant posting specified that "only female applicants will be accepted for these positions," several males applied for the positions, which were eventually filled by three women.

The . . . plaintiffs, all male Nevada correctional officers, * * * filed suit alleging that the state's decision to limit the correctional lieutenant positions to women violated Title VII's prohibition on sex discrimination in employment.

¹¹*EEOC v. Mercy Health Center*, 1982 U.S. Dist. LEXIS 12256 (W.D. Ok.).

¹²*Norwood v. Dale Maintenance Systems*, 590 F. Supp. 1410 (N.D. Ill. 1984).

¹³*Everson v. Michigan Department of Corrections*, 391 F.3d 737, 756–759 (6th Cir. 2004) (in addition to security and public safety rationales).

A. THE “DE MINIMIS” THEORY

NDOC asserts that the three SNWCF positions were the only correctional lieutenant promotions in the NDOC system as a whole restricted to women applicants and that twenty-nine out of thirty-seven correctional lieutenant positions filled over a four year period went to men. Relying on these statistics, NDOC maintains that the concededly discriminatory policy of excluding men from the SNWCF correctional lieutenant positions had only a “de minimis” impact on the plaintiffs and so did not violate Title VII with regard to them. This conclusion reflects a fundamental misunderstanding of the basic precepts of Title VII and is not supported by our case law.

It is beyond dispute that the denial of a single promotion opportunity such as the one here at issue is actionable under Title VII. * * * Further, Title VII is offended when an individual suffers discrimination with respect to a particular adverse employment decision, even if others of the same protected group are not similarly disadvantaged. “A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination.” * * * Title VII protects the ability to pursue one’s own career goals without being discriminated against on the basis of race or sex, even if others of the same race or sex were not subject to disadvantage.

In holding otherwise, the district court relied on *Robino v. Iranon*. Robino concerned prison officials’ decision to assign only female guards to six “posts” in a women’s prison—those from which the guard could observe inmates in the shower—to “accommodate the privacy interests of the female inmates and reduce the risk of sexual conduct between [guards] and inmates.” The plaintiffs in Robino were current male guards complaining that female guards—individuals holding the same position—were to a limited degree given different job assignments within the same job category. * * * Thus, the restriction in Robino was “de minimis” not, as the district court thought, because a small proportion of positions were affected, but because “male [guards had] not suffered any tangible job detriment beyond a reduced ability to select their preferred watches.”

Robino’s premise, then, was necessarily that a minor impact on job assignments was too minimal to be actionable. This very limited concept has no application to NDOC’s policy. An employer’s “fail[ure] or refus[al] to hire” on the basis of sex is, without limitation, actionable under Title VII. NDOC’s refusal to

hire men in the correctional lieutenant positions therefore violates Title VII unless NDOC can demonstrate that gender is a BFOQ for the positions. NDOC cannot meet that burden, as we now explain.

B. GENDER AS A BONA FIDE OCCUPATIONAL QUALIFICATION

* * * [T]he BFOQ is an “extremely narrow exception to the general prohibition of discrimination on the basis of sex” that may be invoked “only when the essence of the business operation would be undermined” by hiring individuals of both sexes. To justify discrimination under the BFOQ exception, an employer must prove by a preponderance of the evidence: 1) that the job qualification justifying the discrimination is reasonably necessary to the essence of its business; and 2) that [sex] is a legitimate proxy for the qualification because (a) it has a substantial basis for believing that all or nearly all [men] lack the qualification, or . . . (b) it is impossible or highly impractical . . . to insure by individual testing that its employees will have the necessary qualifications for the job.

NDOC has not explicitly articulated the “job qualification” for correctional lieutenants for which it claims sex is a legitimate proxy. * * * Glen Whorton, the director of NDOC from 2005 to 2007, declared that “the employment of male correctional lieutenants at SNWCF would create a real risk . . . if female inmates were sexually assaulted, abused by male correctional lieutenants and/or male . . . subordinates and such abuse was kept silent by the male correctional lieutenants . . . because they were protecting themselves and/or their . . . subordinates (‘code of silence’).” * * * Female correctional lieutenants, according to Whorton, “are more inclined to monitor and discipline the wrongful conduct of correctional subordinates and to take steps of prevention with respect to female inmates as their very nature, womanhood, is more conducive to dealing with the complexities and differences of female inmates.” * * * Crawford [the current director of the NDOC] also testified that she wanted correctional lieutenants who “understand[] management of women. I think that women do have an innate ability to manage women. * * * I just believe [women] are more patient. They’re probably more maternal. . . . they have an instinct and an innate ability to discern what is real and what isn’t. . . . the female officers were able to better discern, you know, what’s really happening here.”

[I]t appears that NDOC administrators sought to “reduce the number of male correctional employees being compromised by female inmates,” and that they

believed the gender restriction on shift supervisors would accomplish this because (1) male correctional lieutenants are likely to condone sexual abuse by their male subordinates; (2) male correctional lieutenants are themselves likely to sexually abuse female inmates; and (3) female correctional lieutenants possess an “instinct” that renders them less susceptible to manipulation by inmates and therefore better equipped to fill the correctional lieutenant role.

The first theory fails because NDOC has not shown that “all or nearly all” men would tolerate sexual abuse by male guards, or that it is “impossible or highly impractical” to assess applicants individually for this qualification. As to the second theory, there is no “basis in fact” for believing that individuals in the correctional lieutenant role are particularly likely to sexually abuse inmates. The third theory—and, to a significant degree, the first two—relies on the kind of unproven and invidious stereotype that Congress sought to eliminate from employment decisions when it enacted Title VII.

We begin our analysis by surveying the decisions applying the BFOQ exception in the prison context. *Dothard*, the only Supreme Court case on the subject, concerned a “peculiarly inhospitable” maximum security prison for men where conditions were so atrocious as to be “constitutionally intolerable,” and “a substantial portion of the inmate population [was] composed of sex offenders mixed at random with other prisoners.” In the context of this extreme environment, the Supreme Court upheld a regulation prohibiting women from working in “positions requiring continual close physical proximity to inmates,” finding “[m]ore [] at stake . . . than an individual woman’s decision to weigh and accept the risks” of working in “a prison system where violence is the order of the day.” * * * “The likelihood that inmates would assault a woman because she was a woman would pose a real threat to . . . the basic control of the penitentiary.”

* * * Appellate courts, including this court, have followed *Dothard* in requiring prison administrators to identify a concrete, logical basis for concluding that gender restrictions are “reasonably necessary.” In *Everson v. Michigan Department of Corrections*, the Sixth Circuit upheld a gender restriction imposed by the Michigan Department of Corrections (MDOC) to eradicate “rampant sexual abuse of female prisoners.” MDOC had “pledged . . . to minimize access to secluded areas and one-on-one contact between male staff and female inmates” pursuant to settlement of two lawsuits, one brought by the United States Department of Justice, alleging that the failure to protect female

inmates from ongoing sexual abuse violated their constitutional rights. To effectuate the settlement agreements, MDOC employed only female guards in the housing units of women’s prisons. MDOC data showed that most allegations of sexual abuse, and all of the sustained allegations, involved male employees, and that sexual abuse occurred most frequently in the housing units. This data, the court held, “established that the exclusion of male [guards] will decrease the likelihood of sexual abuse.”

In *Henry v. Milwaukee County*, a juvenile detention center decided to staff each housing “pod” with at least one guard of the same sex as the juveniles housed on that pod, to achieve a “direct role model/mentoring form of supervision.” During the day, one of the two guards on each male “pod” could be female, but the sole night shift slot on each pod had to be staffed by a man. The Seventh Circuit accepted the administrator’s “professional judgment” that same-gender mentoring was “necessary to achieve the [facility’s] mission of rehabilitation.” Yet, the court found no factual support for the administrator’s conclusion that the program’s effectiveness required same-sex staff at all times, including on the night shift, when the juvenile inmates were sleeping.

In *Robino*, we held that even had the gender-based restriction on assignments been actionable under Title VII, it fell within the BFOQ exception. The prison, based on “a study conducted by a specially appointed task force in compliance with an EEOC settlement agreement,” designated as female only those posts that “require[d] the [guard] on duty to observe the inmates in the showers and toilet areas . . . or provide[d] unsupervised access to the inmates.” Because “a person’s interest in not being viewed unclothed by members of the opposite sex survives incarceration,” we held that protecting inmate privacy and preventing sexual misconduct warranted the restriction.

These cases illustrate that, even in the unique context of prison employment, administrators seeking to justify a BFOQ must show “a high correlation between sex and ability to perform job functions.” * * * Applying this “high correlation” requirement, NDOC’s first rationale for restricting the supervisory correctional lieutenant positions to women cannot suffice. Crawford’s testimony suggests that because the supervisors employed by CCA were male and had failed to prevent sexual abuse, NDOC was entitled to conclude that men as a class were incapable of adequately supervising front line staff in female prisons. . . . CCA’s acknowledged leadership failure falls far short of providing “a factual

basis for believing that all or substantially all [men] would be unable to safely and effectively perform the duties of the job,” or that it would be “impossible or highly impracticable to determine job fitness”—here, the ability to enforce workplace rules prohibiting sexual misconduct—“on an individualized basis.” * * *

NDOC’s second rationale fares no better. There is no evidence indicating that any correctional lieutenant at SNWCF had sexual relationships with an inmate. * * * In fact, the one substantiated case of sexual abuse Crawford mentioned was the front line guard who impregnated an inmate, yet NDOC continues to employ men in thirty percent of these positions. When asked why the complete prohibition on the hiring of men was limited to correctional lieutenants, Crawford stated, “We did not want to go globally on this. We wanted to be specifically, what can we do to bring this thing under control . . . ? And it was the recommendation that we just look at . . . not the line level, but the supervisor level.” This explanation falls short of the “reasoned decision-making process, based on available information and experience,” that can support a BFOQ.

Even if there were a factual basis to believe that any correctional lieutenant sexually abused any inmate, there is no basis to presume that sexual abuse, by correctional lieutenants or by guards with their supervisors’ tacit permission, would continue after the state resumed control over the prison. CCA’s lax oversight provided male correctional lieutenants “the opportunity not to take action against male correctional subordinates that sexually abused female inmates.” That opportunity cannot be presumed to exist after the wholesale change of SNWCF’s leadership, designed precisely to cure wholesale management defects going well beyond the sexual abuse issue.

To hold otherwise would be to absolve NDOC from their fundamental responsibility to supervise their staff, from wardens to front-line guards. In Dothard, the inmates’ violent behavior, which prison administrators could not directly control, rendered the gender restriction reasonably necessary. Neither Dothard nor any of the cases on which NDOC relies support finding a BFOQ based on the bald assertion that it would be “impossible . . . to ensure that any given male correctional lieutenant will take action to prevent and stop sexual misconduct.” Where, as here, the problem is employee behavior, prison administrators have multiple resources, including background checks, prompt investigation of suspected

misconduct, and severe discipline for infractions, to ensure compliance with institutional rules. NDOC has not demonstrated that these alternative approaches—including the Inspector General’s suggestion of enhanced training for both supervisors and front-line guards—are not viable.

Disturbingly, in suggesting that all men are inherently apt to sexually abuse, or condone sexual abuse of, female inmates, NDOC relies on entirely specious gender stereotypes that have no place in a workplace governed by Title VII. NDOC’s third theory, that women are “maternal,” “patient,” and understand other women, fails for the same reason. To credit NDOC’s unsupported generalization that women “have an instinct and an innate ability to discern . . . what’s real and what isn’t” and so are immune to manipulation by female inmates would violate “the Congressional purpose to eliminate subjective assumptions and traditional stereotyped conceptions regarding the . . . ability of women to do particular work.” * * * A BFOQ can be established only by “objective, verifiable requirements [that] concern job-related skills and aptitudes.” Though the professional judgment of prison administrators is entitled to deference, “[t]he refusal to hire a [man] because of [his] sex based on assumptions of the comparative employment characteristics of [men] in general” will not support a BFOQ. * * *

Restricting employment opportunity on the basis of gender can be justified by the need to counter uncontrollably violent inmate behavior, as in Dothard. But this case concerns the behavior of employees, not inmates. Precluding men from serving in supervisory positions in women’s prisons is not a substitute for effective leadership and enforcement of workplace rules. * * *

CASE QUESTIONS

1. What were the legal issues in this case? What did the court decide?
2. Why did the court reject the NDOC’s “de minimis” argument?
3. What criteria for establishing a BFOQ are discussed in this case?
4. Why was the NDOC’s BFOQ defense not successful? How is this case different from other corrections cases in which the BFOQ defense was established?
5. Do you agree with the court’s decision? Why or why not?

Except when clear authenticity, public safety, or privacy interests are at stake, employers should not impose protected class requirements for employment based on the demands or needs of customers or coworkers. Overall, the best advice regarding BFOQs is that even when suitability for a job is associated with protected class characteristics, employers should seek more individualized means of assessing suitability rather than rely on protected class as a convenient proxy. For example, if being knowledgeable about contemporary music is a requirement of a job, the employer should directly assess that knowledge rather than limit hiring to young people on the assumption that older people are not conversant on the subject. Finally, because some state antidiscrimination laws require that BFOQs be certified by the state fair employment practice agency before being put into use, *employers might be required to convince state fair employment practice agencies that BFOQs are warranted before putting them into effect.*

Sex-plus cases

A less obvious form of facially discriminatory policy or practice occurs when neutral criteria are applied to some protected class groups but not others. In an important Supreme Court case, the employer refused to employ women with children under age 5.¹⁴ The company did not concern itself with the ages of the children of male employees. Even though the majority of the company's employees were women and the policy excluded only some women, it was deemed facially discriminatory because it was applied to and limited the employment opportunities of women only. Likewise, a female truck driver was allowed to go to trial on her claim that the trucking company required her to obtain an independent medical evaluation of a gynecological condition, while not requiring the same for males with serious health conditions.¹⁵ Although circumstances may call for sex-specific requirements or policies, the general rule is that *employers must not establish requirements that apply to some protected class groups but not others.* These cases are labeled **sex-plus** because they most often involve differential requirements based on sex, but the issue is really "protected class-plus." Thus, an employer's policy of requiring that candidates for a promotional position who were over 40 years of age submit to EKG exams, while younger candidates were not usually required to do so, was facially discriminatory. A BFOQ could not be established because of the fairly minimal public safety dimensions of the job and because it was possible to require EKG testing on a more individualized basis than age.¹⁶

Weight and appearance

Getting ahead in the workplace is like entering a beauty contest. Well, not exactly, but research has shown that physical appearance has a pervasive effect on employment outcomes. People judged better looking are more likely to get hired, to be promoted, and even to be paid more.¹⁷ One aspect of appearance that can affect treatment in the workplace is weight. Research suggests that discrimination on the basis of weight is common and that such bias is particularly detrimental to women. Males are apparently given more slack and have to put on considerably more weight than women before experiencing similar mistreatment.¹⁸ A heavier-than-average woman described her experience when she

¹⁴*Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

¹⁵*Taylor v. Giant of Maryland*, 33 A.3d 445 (Md. App. 2011).

¹⁶*Epter v. New York City Transit Authority*, 127 F. Supp. 2d 384 (E.D.N.Y. 2001).

¹⁷Daniel S. Hamermesh and Jeff E. Biddle. "Beauty and the Labor Market." *American Economic Review* 84 (December 1994), 1174–94.

¹⁸R. M. Puhl, T. Andreyeva, and K. D. Brownell. "Perceptions of Weight Discrimination: Prevalence and Comparison to Race and Gender Discrimination in America." *International Journal of Obesity* 32.6 (2008), 992–1000.