Gender as Bona Fide Occupational Qualification

Douglas Massengill

This article discusses the category of "sex" as a bona fide occupational qualification and focuses on two general situations where employers have attempted to justify gender exclusion on the basis of a BFOQ: customer preference and customer/client privacy.

The legislative history of Title VII of the 1964 Civil Rights Act indicates that the inclusion of "sex" as one of the protective categories was almost an afterthought. Some believe that it was introduced in an "eleventh-hour" attempt to defeat passage of the legislation. Needless to say, the inclusion of sex or gender (the term "gender" is more typically used currently) has had an important impact in the area of unlawful employment discrimination.

In an attempt to temper the effect on employment practices a provision was placed within the language of Title VII, known as the Bona Fide Occupational Qualification (BFOQ) clause. This provision states:

> Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business.[1]

As might be expected, this provision left much to interpretation regarding when "religion, sex, or national origin" was "reasonably necessary to the normal operation of [a] particular business." This article will concentrate on the category of "sex" as a bona fide occupational qualification. Additionally, the focus will be on two general situations where employers have attempted to justify gender exclusion on the basis of a BFOQ: customer preference and customer/client privacy.

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CUSTOMER PREFERENCE

One of the earliest cases involving customer preference was *Diaz v. Pan American Airways, Inc*.[2] In this case, the Fifth Circuit reversed a district court ruling that the airline could exclude men from consideration as flight attendants. The lower court had ruled that Pan American's policy of only hiring female flight attendants was the result of a "pragmatic" process based on the airline's experience and designed to provide better performance for its passengers. The airline had shown to the court's satisfaction that female attendants were "superior" at providing assurance to nervous passengers and making flights as pleasurable as possible. The court also indicated that evidence showed that passengers preferred female attendants. Finally, it concluded that although some men could have performed equally, the process for identifying them was too "burdensome," and would have reduced the average level of performance:

> The admission of men to the hiring process, in the present state of the art of employment selection, would have increased the number of unsatisfactory employees hired, and reduced the average levels of performance of Pan Am's complement of flight attendants.[3]

The Fifth Circuit disagreed. It stated that the test was one of business necessity, not business convenience.

> Discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively.[4]

The court indicated there was no evidence that male attendants would jeopardize the safety of passengers. It said that the ability to perform non-mechanical aspects of the job could be considered in making selections, but the employer could not exclude all males because these aspects were not reasonably necessary to the operation of the airline. The court stated:

> What we hold is that because the non-mechanical aspects of the job of flight cabin attendant are not "reasonably necessary to the normal operation" of Pan Am's business, Pan Am cannot exclude all males simply because most males may not perform adequately.[5]

Furthermore, Pan Am could not use the excuse that the exclusion of all males was the best way to select desired personnel. It would have to be shown that it was not only impractical to find men with necessary abilities, but also that abilities are necessary, not tangential. Finally, the court commented on "customer preference" as a basis for a BFOQ:

> While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome.[6]

All in all, the Fifth Circuit established that while secondary requirements of a job may be used partially as a basis for selection, they cannot be used to deny employment to an entire class of individuals. This is true even if one gender is much more likely to possess the qualities necessary for the performance of those requirements. In addition, the court established a much cited precedence that customer preference cannot be used as a BFOQ.

In *Wilson v. Southwest Airlines Co.*,[7] a related, but more complex set of issues was considered. Southwest had policy of hiring only women for ticket agents and flight attendants. The airline used "sex appeal" to attract male passengers, and sex appeal was prominent in its promotional campaigns. It considered itself the "Love Airline." It claimed that two surveys showed that its attractive flight attendants were the single most important element of it success. However, one survey showed that "courteous and attentive hostesses" ranked fifth behind such things as "on time departures" and "departure frequency." The district court conceded that "love image" had enhanced the company's ability to attract passengers and that femininity and sex appeal were related to successful job performance.

> To the extent the airline has successfully feminized its image and made attractive females an integral part of its public face, it also follows that femininity and sex appeal are qualities related to successful job performance by Southwest's flight attendants and ticket agents.[8]

However, the court went on to say, the strength of the relationship had not been established. Southwest had contended that women were needed to attract male customers and preserve Southwest's unique corporate personality. The court said that it had been established:

> that to recognize a BFOQ for jobs requiring multiple abilities, some sex-linked and some sex-neutral, the sex-linked aspects of the job must predominate. [For example,] in jobs where sex or vicarious sexual recreation is the primary service provided, e.g. a social escort or topless dancer, the job automatically calls for one sex exclusively; the employee's sex and the service provided are inseparable. Thus, being female has been deemed a BFOQ for the position of a Playboy Bunny, female sexuality being reasonably necessary to perform the dominant purpose of the job which is forthrightly to titillate and entice male customers.[9]

The court stipulated that when multiple characteristics are essential to the job, sex-linked characteristics must dominate for sex to become BFOQ. It stated that "mechanical" non-sex-linked duties predominated the job of ticket agents and flight attendants, even though these activities may be performed "with love." Love is the manner of job performance, not the job performed.[10]

The court discounted the argument that females-only policy was necessary to the success of the marketing campaign. It ruled that marketing had created an expectation of female employees and the need to meet this expectation did not support a BFOQ. It reiterated that customer preference was not a valid consideration. The ability to compete was not relevant.

The court also rejected that the company's primary function was to earn a profit, rather than transport passengers, and therefore its image of "sex appeal" was a business necessity. The court did agree that every business has the goal of earning money, but,

> [f]or purposes of BFOQ analysis, however, the business "essence" inquiry focuses on the particular service provided and the job tasks and functions involved, not the business goal. If an employer could justify employment discrimination merely on the grounds that it is necessary to make a profit, Title VII would be nullified in short order.[11]

Finally, the court ruled that there was not adequate proof that the preferences of the airline's male customers were so strong that they would cease traveling on the airline if it were to employ male flight attendants and ticket agents. The company had claimed that the success of its marketing campaign would be diminished because customers would be disappointed when seeing male employees after seeing only female employees in their advertisements. The court ruled that while this might meet the "test of business convenience," it did not meet the "test of business necessity." It further noted that:

> It is also relevant that Southwest's female image was adopted at its discretion, to promote a business unrelated to sex. . . . Southwest exploited, indeed nurtured, the very customer preference for females it now cites to justify discriminating against males.[12]

As noted, the issues in this case were more complex than in *Diaz*. Here the company had intentionally created a preference/expectation for gender specific employees. The court, however, ruled that customer preference still did not reach the status of business necessity required for sex to be considered a BFOQ.

In *Fernandez v. Wynn Oil Co.*,[13] the district court recognized gender as BFOQ for position of Director of International Marketing. This was based on the company's contention that all clients in South American countries

would refuse to conduct business with a woman. The court considered this to create the "business necessity" justification for a BFOQ, stating:

> The only occasion where customer preference will rise to the dignity of a bona fide occupational qualification is where no customer will do business with a member of one sex either because it would destroy the essence of the business or would create serious safety and efficacy problems.[14]

It drew a distinction, however, between mere preference of customers and an absolute refusal to conduct business with members of a given gender, stating:

> Whatever view Americans may hold regarding business and social customs in South America and Southeast Asia, it was not merely for the convenience of itself or its customers that Wynn Oil refused to consider a woman for that position. To have hired Ms. Fernandez—regardless of her qualifications—would have totally subverted any business Wynn hoped to accomplish in those areas of the world.[15]

The Ninth Circuit reversed the lower court. It indicated that there was not credible evidence indicating a refusal of customers to conduct business with a woman. Specifically, the court said:

> Nor does the record provide any basis for the district court's findings that hiring Fernandez would "destroy the essence" of Wynn's business or "create serious safety and efficacy problems." There is, in short, no factual basis for linking sex with job performance.[16]

The court went on to state that even if there were such evidence that customers would refuse to conduct business with a woman, this would not rise to the level of business necessity required to establish a BFOQ. In thus ruling, it relied on EEOC regulations which state:

> The only customer preference allowed as a BFOQ exception is one necessary for the purpose of genuineness or authenticity (e.g., a performer).[17]

Finally, the court rejected the argument that a separate rule applies in international contexts.

Wynn is different from the two airline cases in that there was a contention that the very nature of the circumstances surrounding job performance precluded the acceptance of a woman in the position. Even though the lower court accepted these circumstances as creating a BFOQ, the Court of Appeals first ruled there was no factual basis for

this belief. Secondly, even the total refusal of customers to do business with a member of one gender was not sufficient to create a BFOQ.

CUSTOMER OR CLIENT PRIVACY[18]

The issue of customer/client privacy and gender as a BFOQ has occurred most often in institutions providing patient care. In *Fesel v. Masonic Home*,[19] a male was applicant turned down for job as nurse's aide at nursing home. In evaluating the claim that gender was a BFOQ the court looked at two criteria:

> When an employer defends a sex discrimination action by raising the privacy interests of its customers as the basis for a BFOQ defense, [1] that employer must prove not only that it had a factual basis for believing that the hiring of any members of one sex would directly undermine the essence of the job involved or the employer's business, but also [2] that it could not assign job responsibilities selectively in such a way that there would be minimal clash between the privacy interests of the customers and the nondiscrimination principle of Title VII.[20]

The employer had affidavits from several individuals stating that they would remove parents if a male aide was hired. The court accepted the idea that reluctance to be cared for by a male was based on upbringing and sexual stereotypes, but went beyond "customer preference." It ruled that the personal care aspects of the job created a valid privacy interest and that due to the size of the nursing home, it was not feasible to selectively assign responsibilities. Consequently, the court ruled that the home had successfully established a BFOQ on the basis of privacy interest of the guests, stating:

> While these attitudes may be characterized as "customer preference," this is, nevertheless, not the kind of case governed by the regulatory provision that customer preference alone cannot justify a job qualification based upon sex. Here personal privacy interests are implicated which are protected by law and which have to be recognized by the employer in running its business.[21]

In *Backus v. Baptist Medical Center*,[22] the plaintiff was denied a transfer to the OB-GYN ward on the basis of gender. The court ruled that due to nature of the ward, an employee's competence was secondary to the obvious "bodily intrusions" that would result from allowing male nurses. The court opined:

> Due to the intimate touching required in labor and delivery, services of all male nurses are inappropriate. Male nurses are not

> inadequate due to some trait equated with their sex; rather, it is their very sex itself which makes all male nurses unacceptable.[23]

The court stated that it does not matter that a nurse is a health care professional because he would be an unselected intruder on the patient's right to privacy. It differentiated between a delivery room situation and instances where a female may by choice select a male doctor.

In *EEOC v. Mercy Health Center*,[24] a very similar situation was at issue. A male nurse sought employment in the labor and delivery area of the hospital. The court observed:

> The privacy right has been recognized in a variety of situations, including disrobing, sleeping, or performing bodily functions in the presence of the opposite sex.[25]

The court then stated:

> Courts have recognized that "[c]ustomer preference may. . . give rise to a [bona fide occupational qualification] for one sex where the preference is based upon a desire for sexual privacy (emphasis in original)."[26]

It ruled that due to the sensitive and intimate nature of the duties, the presence of a male nurse could create medically undesired tension. It further noted the fact that a large number of high risk births occurred, and therefore, it was especially important that the experience be without stress.

In *Local 567, American Federation of State, etc. v. Michigan*,[27] the state mental health institutions maintained a practice of same-sex personal care for its patients. The defendants asserted that it did so in order to protect the privacy rights of its patients. The court agreed that protection of privacy was justifiable:

> It is obvious that the law recognizes the privacy rights of these patients or residents and that the defendants had the right to protect these rights, possibly even more so in the case of mental health patients who are far more reliant on the protection of the defendants than patients in hospitals.[28]

The plaintiffs claimed that even though there might be privacy rights implicated by the type of care given to patients, the intrusion would occur regardless of gender. The court disagreed, stating that this was an unrealistic view of human mores and contrary to law. It stated that most people would find it a greater invasion of privacy to have naked body viewed and have personal care performed by a member of opposite sex. Finally, the plaintiff claimed that mental patients are analogous to

children and a familial model of care should be used in providing care.[29] The court did not rule on this, indicating that there was not enough evidence to take a position. The last issue addressed was raised by the court itself; whether there was a reasonable alternative to the sex-based job classifications. The court stated:

> Defendants have the burden of showing that the essence of their operation would be undermined by failing to have these sex-based classifications and they must present a factual basis for this belief. Next, they must show that no reasonable alternatives exist to these sex-based classifications.[30]

In *Jennings v. New York State Office of Mental Health*,[31] a mental hospital had adopted a policy that stated that each ward would have to have both a male and female Security Hospital Treatment Assistant (SHTA) during each shift. As a result of this policy a female employee was transferred to another ward. She objected to this policy and claimed that gender did not qualify as a BFOQ. The court adopted the following standard:

> 1) the OMH has a factual basis for believing that it is necessary to staff at least one SHTA of the same gender on each ward in order to protect the privacy interests of the patients; 2) that the patients' privacy interest is entitled to protection under the law; and 3) that no reasonable alternatives exist to protect those interests other than the gender based hiring policy.[32]

The court concluded that certain duties of a SHTA (*e.g.*, bathing patients and assisting them in the bathroom) affected the privacy of the patient and that a person of the opposite gender would be unable to adequately perform some of these duties and successfully respect those rights. Then it ruled that privacy was entitled to protection.

> Thus, their right to privacy may not be abrogated by virtue of their confinement in a state-run facility unlike a prison inmate who has forfeited some rights in repayment to society. The patients at OMH are just that, patients. They are vulnerable and mentally ill. Basic decency demands that their privacy be respected to whatever degree feasible.[33]

Finally, it concluded that having one member of each sex was the minimum necessary to ensure privacy rights. The court stated that it made no difference that there were male doctors on female wards and female nurses on male wards because they were trained professionals.

The cases previously discussed deal with physical privacy of patients. The following two cases deal with "emotional" privacy issues. In *Healey v. Southwood Psychiatric Hosp.*,[34] a female counselor brought suit

because she had been transferred to night shift when a need developed for a child care specialist to attend to the needs of female children and adolescents on that shift. The court ruled that an employer must have a basis for asserting gender as a BFOQ. However, it stated, this determination could be based on "common sense" and the opinions of experts. The court concluded that the "essence" of Southwood's business is to treat emotionally disturbed and sexually abused adolescents and children, and that Southwood had presented expert testimony that staffing both males and females on all shifts was necessary to provide therapeutic care. The court stated:

> "Role modeling," including parental role modeling, is an important element of the staff's job, and a male is better able to serve as a male role model than a female and vice versa. A balanced staff is also necessary because children who have been sexually abused will disclose their problems more easily to a member of a certain sex, depending on their sex and the sex of the abuser. If members of both sexes are not on a shift, Southwood's inability to provide basic therapeutic care would hinder the "normal operation" of its "particular business." Therefore, it is reasonably necessary to the normal operation of Southwood to have at least one member of each sex available to the patients at all times.[35]

In *Sowers v. Elgin Mental Health Ctr.*,[36] the plaintiff brought suit after being transferred to a unit that housed female patients because of the need for a female counselor on that unit. Formerly, the chief psychiatrist in an all-female unit at EMHC had expressed her opinion that a female caseworker was needed to address the needs of the six female patients in the unit. Some of these patients had been sexually assaulted or abused, and she felt that a female caseworker could deal more effectively with these issues than a male caseworker." The court agreed:

> The work described in this case, which involved helping female mental health patients deal with past instances of sexual abuse and assault, implicates such a privacy interest. Though these privacy concerns may not be so overriding as to justify the exclusion of all males from this line of work, the Court finds them sufficiently important to permit the consideration of gender as a criteria in deciding to transfer [the plaintiff].[37]

The preceding cases have shown that courts have been willing to affirmatively apply a BFOQ exception where the privacy of patients in hospitals is the issue. Even though the preferences of those patients cannot be separated from their right to privacy, it is apparent that courts have decided that these preferences are rooted in the prevailing norms of our society and as such deserve protection.

PRIVACY IN NON-PATIENT CARE SITUATIONS

Gender as a BFOQ based on privacy rights has been examined in areas other than patient care. One area is whether washroom attendants need to be of the same gender as those who use the washrooms. In *Norwood v. Dale Maintenance Sys*,[38] the court decided that there was a factual basis for believing that opposite-sex cleaning while restrooms were in use created a legitimate privacy issue even though there was no evidence that the practice would cause tenants to vacate the building.

> The court concludes that the intrusion on personal privacy which would occur if opposite sex attendants were allowed access into the washrooms while in use is sufficiently substantial so as to constitute a factual basis for defendant's sex-based policy.[39]

It then considered whether there were reasonable alternatives such as the washrooms being closed while servicing was being performed; or the attendant being instructed to leave the washroom if someone wished to use it. Given the nature of the building, the court decided that these alternatives were not feasible. Therefore gender could be considered a BFOQ.

In *Hernandez v. University of St. Thomas*,[40] the university claimed a BFOQ for custodians in female dormitories. The court recognized a privacy issue and considered whether accommodations could be made so that males could perform the job. It indicated there was reason to believe that inefficiencies caused by opposite-gender cleaning of bathrooms would preclude accommodations and therefore denied summary judgment for plaintiff.

A second area where the issue of privacy has been addressed is employment in health clubs or as massage therapists. In these situations there is considerably more opportunity to exercise choice on the part of the customers than there is in a hospital setting or even in the use of washrooms. In *United States EEOC v. Sedita*,[41] Women's Workout World claimed that gender was BFOQ for manager, assistant manager, and instructor at their women-only exercise clubs. It presented petitions from over 10,000 members indicating that they would leave if the club hired men. Because employees could view clients nude and sometime had to touch them in intimate places to take measurements, the court ruled that a privacy interest was involved. Even though the EEOC argued that the "essence" of the business was providing exercise classes, the court indicated that the evidence produced could give reasonable inference that the business could be broadly construed as providing personal and individual service to female clients. It then examined the factual basis for a BFOQ and said that there was a reasonable inference that customers would leave if men were hired. Finally, the court considered whether accommodations could protect privacy interests while

still accepting men. The employer had argued that women would refuse service by men and also there would be substantial costs involved to protect privacy. The court refused to award summary judgment on the basis that the issues stated above needed to be resolved at trial.

In *EEOC v. Hi 40 Corp.*,[42] Physicians Weight Loss Centers claimed that gender was a BFOQ and refused to hire male counselors. The company based this on privacy concerns for their mostly female clients. The counselors took measurements, including bust and thigh, and often talked about "intimate" subjects. The court ruled that while privacy was at issue, there were minimal infringements on privacy.

> Additionally, even when female counselors are taking the measurements, if they are to be taken in an area or in a way that makes the customer uncomfortable, the female counselors either allow the customer to take her own measurements or simply forego the measurement. The taking of measurements by male counselors under these circumstances constitutes only minimal intrusion on any privacy interests of customers.[43]

An important conclusion was that privacy did not extend to the counseling function.

> The real privacy interests of the customers only extend to the intrusions created by the physical measurements which the counselors take. The Court does not accept the proposition that Physicians Weight Loss customers have a privacy interest that extends to the counseling function.[44]

The court concluded that the essence of the business was helping people lose weight and there was no showing that women could take measurements and counsel on best approach to lose weight better than men. It emphasized that customer preference could be given little consideration in establishing a BFOQ.

In *Olsen v. Marriott Int'l, Inc.*,[45] the company claimed a BFOQ based on the need to allow customers to choose the gender of their massage therapist. Otherwise, the company contended, there would be an invasion of privacy. An expert witness argued there was a need to choose the gender of the therapist because otherwise those who had suffered sexual abuse would suffer adverse consequences. The witness stated that touch by someone of the same gender as past abuser could trigger a "kinesthetic memory of abuse." The court discounted this "theory" as a justification for preferring same-gender therapists because those individuals would not have the necessary memory in advance to request the gender of the therapist. Also, there was no evidence that gender would play a part in "touch" triggering such memories. In addition, those individuals would likely be a small percentage of customers seeking massage.

The company then raised the privacy issue because of physical contact during massage. The court ruled that a privacy issue was not applicable because rather than ensuring that all massages were by same-sex therapists, Marriott was, in fact, recognizing the preferences of customers to choose whether or not they wished this privacy.

> The Marriott does not argue that each client should be provided with a massage therapist of the same sex as the client due to the intrusion upon clients' privacy interests. Rather, it argues that each client should be allowed to choose the sex of their massage therapist due to the intrusion upon clients' privacy interests.[46]

The court stated that this choice lessens the argument that privacy issues require therapists to be of same sex as customers.

> The customer preference rationale also diminishes the argument that privacy concerns require the use of therapists who are the same sex as their clients—if clients are allowed to choose, it is unnecessary that the client and massage therapist be of the same sex.[47]

In addition, the court indicated there was no evidence that privacy concerns were the reason that customers chose female therapists, familiarity based on past experience may have been the reason.

> Life experiences upon which customer preferences are based even could include past experience with the female therapists employed by the Marriott in a far greater percentage, i.e., the discriminatory practice of hiring mostly female message therapists could be shaping customers' future expectations.[48]

The court pointed out that the Marriott had not made an effort to educate customers on acceptability of male therapists.

Finally, the court differentiated between privacy concerns in this particular situation and those in other situations such as patient care and in penal institutions. In this type of situation the customer has a greater degree of control over the activities of the therapist than a patient or prisoner has over that of a caregiver or guard.

> Prison procedures, not inmate choice, govern when guards may view unclothed inmates. Patients at a psychiatric hospital and elderly residents of a nursing home do not necessarily have a choice about whether to be bathed and, if so, when and under what circumstances. Employees using workplace bathrooms have some control over where and when to do so; however, their choices regarding both place and time are limited. In sharp contrast, the massage client chooses to expose, area by area, portions of his or her body other than genitalia in order to obtain the massage. Moreover, in addition

> to the rules forbidding genital touching, a client may limit the extent of contact even further by instructing the therapist not to massage certain areas.[49]

CONCLUSION

In general, courts have been reluctant to assign BFOQ status for gender. In no uncertain terms they have stated that customer preference (unless motivated by privacy issues) was not a legitimate factor in excluding one or the other gender. Even when recognizing privacy issues, the courts have required first, a factual basis for privacy concerns be established and second, there be no reasonable alternative to excluding all of one gender from consideration for employment.

NOTES

1. 42 U.S.C. § 2000e-2(e).

2. 442 F.2d 385 (5th Cir. 1971).

3. 311 F. Supp. 559, 568 (D. Fla. 1970).

4. 442 F.2d 385, 388 (5th Cir. 1971).

5. *Id.*

6. *Id. at 389.*

7. 517 F. Supp. 292 (D. Tex. 1981).

8. *Id.* at 296.

9. *Id.* at 301.

10. *Id.* at 302.

11. *Id.*

12. *Id.* at 303.

13. 1979 U.S. District LEXIS 10704 (D. Cal. 1979).

14. *Id.*

15. *Id.*

16. 653 F.2d 1273, 1276 (9th Cir. 1981).

17. *Id.* at 1277.

18. This article will not attempt to analyze the issue of privacy rights versus Title VII protections within the context of the unique environment of penal institutions.

19. 447 F. Supp. 1346 (D. Del. 1978).

20. *Id.* at 1351.

21. *Id.* at 1352.

22. 510 F. Supp. 1191 (D. Ark. 1981).

23. *Id.* at 1195.

24. 1982 U.S. Dist. LEXIS 12256 (D. Okla. 1982).

25. *Id.*

26. *Id.*

27. 635 F. Supp. 1010 (D. Mich. 1996).

28. *Id.* at 1013.

29. In families the care of small children is typically done by both parents irrespective of the gender of the child.

30. *Id.* at 1014.

31. 786 F. Supp. 376 (D.N.Y. 1992).

32. *Id.* at 380–381.

33. *Id.* at 384.

34. 78 F.3d. 128 (3d Cir. 1996).

35. *Id.* at 133.

36. 1997 U.S. Dist. LEXIS 16010 (D. Ill. 1997).

37. *Id.*

38. 590 F. Supp. 1410 (D. Ill. 1984).

39. *Id.* at 1417.

40. 793 F. Supp. 214 (D. Minn. 1992).

41. 816 F. Supp. 1291 (D. Ill. 1993).

42. 953 F. Supp. 301 (D. Mo. 1996).

43. *Id.* at 304.

44. *Id.*

45. 75 F. Supp. 2d 1052 (D. Ariz. 1999).

46. *Id.* at 1063.

47. *Id.* at 1065.

48. *Id.* at 1067.

49. *Id.* at 1069–1070.