# APPEARANCE BASED HIRING: THE 'BONA FIDE OCCUPATIONAL QUALIFICATION' CARVEOUT, EXPLORING HOOTERS OF AMERICA AND *AIR INDIA V. NARGESH MEERZA*

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ABSTRACT

*Title VII of the Civil Rights Act of 1964 permits hiring discrimination on the grounds of religion, sex and natural origin as a bona fide occupational qualification (BFOQ), if the same is integral to the business of the establishment. For years, the American franchise Hooters has been subjected to various lawsuits for its discriminatory hiring practices. This Article examines whether a restaurant which markets itself as a family-friendly joint can insist that its female servers must don makeup and wear sexually alluring costumes and further, justify its discriminatory hiring practices as a "business necessity" under the BFOQ carveout. This Article explores the arguments raised by such employers and also provides a comparative constitutional analysis with the discriminatory hiring practices in the airline industry, addressed by the Indian Supreme Court in the landmark case of* Air India v. Nargesh Meerza. *This Article argues that sex is not a permissible BFOQ for servers in the hospitality industry as the service provided by a "Hooters Girl" does not form the core of the Hooters business and that across jurisdictions, customer preferences cannot be used to justify discriminatory employment policies when sex of the employee is merely tangential to the business.*



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## INTRODUCTION

> *"Being a Hooters Girl is an honour bestowed upon only the most entertaining, goal oriented, glamourous and charismatic women"* —from the Hooters website.[1]

Appearance discrimination with respect to the workplace may be defined as the preference for a more attractive candidate, regardless of whether or not such appearance actually forms part of the job description, a problem which is sometimes referred to as "lookism."[2] Over the past few decades, the American food chain Hooters has gained fame for advertising its female servers in a sexually alluring way to entice customers. Hooters has also been the subject of various lawsuits which allege that the restaurant engages in gender-biased hiring—by reserving the position of servers for only females.[3] Based on several statutory provisions, discriminatory hiring is illegal.[4]

Surprisingly, Hooters has been oddly forthcoming about and proud of being a 'breastaurant,'[5] judging by the highly problematic marketing and advertising strategy it employs. Breastaurants signal the advent of a new breed of restaurants where servers dress provocatively[6] to sexually lure customers.[7] Such establishments make the feminized labor of the service industry visible in a way that now reads as distasteful.[8] These restaurants endorse traditional gender roles by catering to a male, predominantly middle-aged clientele[9] and employing exclusively female waitstaff.[10] The main question this Article seeks to address is whether an employer has the right to restrict certain positions solely to women and moreover, dictate the appearance and grooming standards for such employees.

This Article discusses the exception to Title VII of the Civil Rights Act of 1964, which permits hiring discrimination on the grounds of religion, natural origin and sex: bona fide occupational qualifications (BFOQ) that are integral to the

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1. *Careers*, HOOTERS, https://perma.cc/3CY4-NYME (last visited Dec. 14, 2022).

2. *Lookism*, MERRIAM WEBSTER, https://perma.cc/GJR2-R6TL (last visited Dec. 14, 2022).

3. *See* Paul A. Driscoll, *Hooters Settles Gender Discrimination Lawsuit, Gets to Keep Waitresses,* AP NEWS (Sept. 30, 1997), https://perma.cc/YX7P-972H.

4. Michael Aamodt, *Really, I Come Here for The Food: Sex as a BFOQ for Restaurant Servers,* 54 TIP 3 (2017), https://perma.cc/V4WJ-MTN9 (discussing cases that have raised the bona fide occupational qualification as a defense including lawsuits filed against Hooters).

5. A breastaurant is a sexually objectifying restaurant environment, which promotes, intensifies and sanctions the treatment of women as objects of sexual desire. *See* Candace Braun Davison, *11 'Breastaurants' That Make Hooters Seem PG*, DELISH (Jul. 29, 2016), https://perma.cc/J2ZM-87SH.

6. *Id.*

7. *'Breastaurants' with a 'View' Booming in Struggling US Dining Industry*, INDIAN EXPRESS (July 27, 2012), https://perma.cc/TYT5-6H9P.

8. Sascha Cohen, *The Rise and Fall of the American Breastaurant*, DAILY BEAST (Sept. 17, 2018), https://perma.cc/X9LZ-Y9FY.

9. Wil Fulton, *The Strange, Resilient Story of the 'Breastaurant,'* THRILLIST (Mar. 2, 2016), https://perma.cc/D2Y7-D9Y5.

10. Dawn Szymanski & Chandra Feltman, *What's the psychological toll of being a Hooters waitress?*, CONVERSATION (Aug. 31, 2015), https://perma.cc/7E2S-T2KP.

functioning of a business.[11] While the BFOQ carveout discusses different categories of protected classes, the focus of this Article is limited to sex-based discriminatory hiring practices. It also probes whether the business concept propagated by Hooters through provocative uniforms, gestures, and remarks encourages and fosters a ground for sexual harassment, and it questions whether it exposes young children to the objectification of women.[12] As long as Hooters continues to market itself as a family-friendly restaurant and hosts a children's menu, it has no credibility to claim that female servers donning make-up and sexually alluring costumes are a business necessity or an integral part of its business.[13] Further, this Article explores whether statutory provisions such as the BFOQ carveout, which are used as a silver bullet by employers to shield themselves from their appearance based discriminatory hiring practices, should be narrowly construed to limit their applicability to businesses which mainly sell looks and not other products or services.

In this regard, the Article briefly outlines the legislative history of Title VII and a judicial interpretation of the BFOQ defense to gender specific employment decisions. It then turns to an analysis of the Supreme Court of India's landmark verdict in *Air India v. Nargesh Meerza*. *Nargesh Meerza* is widely considered to be a monumental judgment in Indian jurisprudence as the Supreme Court dealt with the issue of sex-based discrimination in employment related matters for the first time.[14] The focus of this Article's analysis is the judgment's take on (1) sex discrimination in the airline industry and (2) the role of customer preferences as defense for sex discrimination. This analysis shall be juxtaposed with United States (U.S.) jurisprudence on the tenability of 'customer preferences' as a defense for sex discrimination.

In this regard, the Article provides a comparative analysis of hiring discrimination prevalent under two jurisdictions, namely, India and the U.S., and discusses whether customer preferences can be used to hold that sex is a permissible basis for hiring in certain establishments.

## I. THE HOOTERS CONTROVERSY: DOES BFOQ APPLY?

### A. TITLE VII AND THE BFOQ CARVEOUT

Title VII acts as a "stringent barrier to discriminatory acts by prohibiting acts of gender discrimination, which historically has been an obstacle for women

11. *See generally* Stephanie Scott, *When Is It Legal for an Employer to Discriminate in Their Hiring Practices Based on a Bona Fide Occupation Qualification*, U. CIN. L. REV. (2016), https://perma.cc/NG4K-23PG.

12. *See generally* Lauren B. Moffitt & Dawn M. Szymanski, *Experiencing Sexually Objectifying Environments: A Qualitative Study*, 38 COUNSELING PSYCH. 6 (2010), https://perma.cc/G8WT-SR4T.

13. *See* Irin Carmon, *The Battle Against Hooters: What About The Children?*, JEZEBEL (Dec. 17, 2010), https://perma.cc/J87G-38T6.

14. Air India v. Nargesh Meerza, 1981 AIR 1829 (1981) (India).

attempting to access equal opportunities in the workplace."[15] In this regard, Title VII states that an employer may not "fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or natural origin."[16]

Title VII was originally a protective measure for those individuals who had suffered discrimination regarding their race, religion, and national origin.[17] It was only later, based upon numerous deliberations, that the scope of Title VII was broadened to include gender protection as well.[18] In fact, at the time of inclusion, critics "argued that the inclusion of such gender-based protections mandated further meetings, hearings, and findings and ought to be addressed in a separate legislation, because gender was so fundamentally different from other protected categories like race and national origin."[19]

While Title VII now generally prohibits discrimination in employment, it contains an exception which allows discriminatory hiring practices in certain circumstances.[20] According to Title VII, companies may hire discriminately for certain positions on the basis of "religion, sex or natural origin in those instances where religion, sex or natural origin is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or enterprise."[21]

In matters concerning Title VII, once a plaintiff is successful in proving a case of employment discrimination, the burden of proof automatically shifts to the employer who must justify their hiring policies by proving that a legitimate, nondiscriminatory reason for such policy does indeed exist.[22] There is no violation of

15. Benjamin O. Hoerner, *The Role-Modeling BFOQ: Court Confusion and Educational Promise*, 16 U. PA. J. BUS. L. 1211, 1214 (2014), https://perma.cc/WF8Z-Z4A9.

16. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1).

17. *See infra* note 18.

18. Inclusion of sex as a protected class was an addition made in the House of Representatives, when Congressman Howard Smith, an opponent of civil rights, included sex as grounds for illegal gender discrimination, in a legislative attempt to defeat the passage of a broader strategy. The amendment was initially introduced as a joke or tactic to defeat or weaken civil rights legislation. *Civil Rights Act of 1964*, VA. ENCYCLOPEDIA, https://perma.cc/L6KB-ZPC5 (last visited Dec. 14, 2022); *Women's Rights and the Civil Rights Act of 1964*, NAT'L ARCHIVES, https://perma.cc/5DBZ-VMJV (last visited Dec. 14, 2022); Cynthia Deitch, *Gender, Race, And Class Politics and the Inclusion of Women in Title VII of the 1964 Civil Rights Act*, 7 GENDER & SOC'Y PT. 2, 183, 183 (1993), https://perma.cc/8ZDL-8VHQ.

19. Hoerner, *supra* note 15, at 1214.

20. Durwood Ruegger, *Patient/Customer Privacy Rights Clash with Equal Employment Opportunities*, 9 J. HEALTH & HUM. RES. ADM. 4, 448, 448 (1987), https://perma.cc/SDG7-3XA4.

21. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(e).

22. McDonnell Douglas Corp. v. Green, 411 US 792, 802–04 (1973) (concerning a suit filed under Title VII for racial discrimination in employment matters, wherein the complainant had the burden to establish that (1) he belonged to a racial minority; (2) he applied for and was sufficiently qualified and able to perform the job in question; (3) though qualified, he was still rejected; and (4) thereafter, the employer continued to seek applicants with the complainant's qualifications to fill the position).

Title VII if the employer is able to show that such hiring practices are based on a BFOQ.[23]

BFOQ is an affirmative defense to discrimination and is typically employed in instances wherein an employer has been accused of employment discrimination.[24] While the BFOQ carveout is used by employers to defend discriminatory hiring practices pertaining to religion, sex, or natural origin, the focus of this Article will be centered around examining and analyzing sex-based discriminatory policies.[25]

Due to a number of factors,[26] first and foremost that gender was included rather rapidly as a protected class under Title VII and was, therefore, not subjected to a prolonged debate or deliberation, the scope and applicability of the BFOQ exemption to sex discrimination was not explored as thoroughly as its applicability to the other classes in the statute.[27]

However, the provision still has certain points of clarity—the BFOQ exception is limited to certain instances where such discrimination is "reasonably necessary" to the "normal operation" of the "particular business"—the use of such terms effectively prevents the use of general subjective standards and advocates an objective, verifiable requirement.[28] Moreover, the fact that such criteria is "occupational" implies that it is paramount for the criteria to be connected to job-related skills and aptitudes.

### B. UNDERSTANDING APPEARANCE BASED DISCRIMINATION

To ordinary bystanders, appearance based discrimination may seem like a rational response to customer preferences.[29] However, discriminatory hiring on the grounds of appearance greatly affects job prospects and advancement opportunities; a survey of interviewers revealed that appearance remains the single most important factor for consideration in employee selection for a wide variety

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23. Chambers v. Omaha Girls Club, Inc., 834 F2d 697, 703 (8th Cir. 1987) (holding the club's challenged business practices did not violate Title VII, because it was a justified business necessity when a black, unmarried woman, who was employed by the Omaha Girls Club to act as a role model to young girls and help them attain their goals, was fired upon notifying the club of her pregnancy).

24. *Bona Fide Occupational Qualification (BFOQ)*, CORNELL L. SCH. LEGAL INFO. INST., https://perma.cc/JDQ2-539K (last visited Dec. 16, 2022).

25. It is interesting to note that the BFOQ exception is solely limited to religion, sex, and natural origin. Race and color are not included within this exception. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(e).

26. Michael Evan Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implications for the Issue of Comparable Worth*, 19 DUQ. L. REV. 3, 453, 467 (1981), https://perma.cc/E4RG-3T6A.

27. *See* Rachel L. Cantor, *Consumer Preferences for Sex and Title VII: Employing Market Definition Analysis for Evaluating BFOQ Defenses*, 1999 U. CHI. LEGAL F. 1, 493, 496–97 (1999), https://perma.cc/P6CV-FZKX.

28. *See* Jane W. May, *The Bona Fide Occupational Qualification Exception–Clarifying the Meaning of "Occupational Qualification,"* 38 VAND. L. REV. 5, 1345, 1349–51 (1985), https://perma.cc/T4DH-4PHP.

29. Deborah L. Rhode, *Hooters Hires Based on Looks. So Do Many Companies. And There's No Law Against It.,* NEW REPUBLIC (Aug. 31, 2014), https://perma.cc/J92G-FLDH.

of jobs.[30] This assessment holds true even in situations where the performance of a job has no link whatsoever to the appearance or attractiveness of a potential candidate.[31]As long as there is no impediment to job performance, the way a person looks or dresses should have no bearing on whether they are deemed to be suitable for a job.

The use of appearance as a factor for consideration while making employment decisions is not justified, rational, or beneficial to society as a whole, unless a bona fide qualification or reasonable business purpose exists.[32] Beauty and sexuality are essentially artificial constructs, which vary from person to person. Moreover, they are inherently subjective. It is imperative to protect qualified applicants from arbitrary discrimination and instead, promote their hiring and retention on the grounds of relevant work experience, skill set, and qualifications.

At the same time, to promote an economically fruitful and sustainable work environment, it is critical to balance the concerns of both the employer and the employee.[33] A dominant purpose of antidiscrimination statutes is to protect employees from discriminatory behavior based on "stereotyped impressions."[34] However, such laws were also enacted to bring about a change in societal perceptions, so that the need for such statutory provisions ultimately becomes both obsolete and unnecessary.[35] The language of Title VII should make it evident that the only businesses which can hide behind the BFOQ carveout are ones where gender or appearance are essential to the business function.

Gender discrimination in human resources practices is closely linked to gender-segregated departments and networks in organizations resulting in overarching gender inequalities;[36] it all depends on whether the human resources department of the organization encourages such problematic policies.[37] Each organization strategizes to achieve its objectives, which include being profitable and maintaining and expanding its consumer base.[38] Such strategy can influence

30. *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 8, 2035, 2040 (1987).

31. *Id.*

32. Elizabeth M. Adamitis, *Appearance Matters: A Proposal to Prohibit Appearance Discrimination in Employment*, 75 WASH. L. REV. 195, 195 (2000).

33. *See generally* Ann C. McGinley, *Babes and Beefcake: Exclusive Hiring Arrangements and Sexy Dress Codes*, 14 DUKE J. GENDER L. & POL'Y 257, 275 (2007) (a work environment where the concerns of both the employee and employer are accounted for is more conducive to productivity as opposed to one where only unilateral views prevail).

34. Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 10, 13 (2000).

35. *Id.* at 41.

36. Caitlin S. Stamarski & Leanne S. Son Hing, *Gender Inequalities in the Workplace: The Effects of Organizational Structures, Processes, Practices, and Decision Makers' Sexism*, FRONTIERS IN PSYCH. (Sept. 16, 2015), https://perma.cc/R8RH-3873.

37. *Id.*

38. *Id.*

the level of inequality within an organization.[39] For example, the Hooters marketing strategy is to attract heterosexual men, which has led to discrimination in human resources policies and decisions regarding recruitment of wait staff.[40]

This Article considers what would qualify as an appropriate BFOQ. For example, would an exotic dancer or a person working at a strip club, whose sole function is to display and use their bodies in a sexually alluring manner for entertainment purposes, qualify?[41] On the other hand, would female servers at restaurants such as Hooters or similar establishments like Twin Peaks, whose primary purpose is to service customers, be excluded? Contemplating these considerations also begs the question, then, does a business have the right to choose its own character—can Hooters restrict their server positions solely to females? Moreover, can Hooters insist that their female employees conform to certain appearance and grooming standards, based on customer preferences and further, make hiring decisions based upon such preferences? These are considerations which this Article seeks to discuss in the next segment.

### C. HOOTERS AND THE BFOQ CARVEOUT

The American food chain Hooters was founded in 1983,[42] and it inspired a number of imitators including the Tilted Kilt Pub and Eatery in 2003[43] and Twin Peaks in 2005.[44] The success of a breastaurant in a highly competitive environment greatly depends on consistent and low-cost delivery of the eroticized brand by female servers who have no specific skill set.[45] Hooters curated its corporate image through the use of its female servers as sexual ornaments, by promoting events like wet t-shirt competitions and marketing swimsuit calendars.[46] Female waitstaff are also required to "look" a certain way prior to coming into contact with a customer, including their hair styling, makeup, and attire.[47]

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39. Frederique Austin & Fabrizio Butera, *Institutional Determinants of Social Inequality*, FRONTIERS IN PSYCH. (Jan. 8, 2016), https://perma.cc/T69C-CJ45.

40. K.A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CAL. L. REV. 1, 147–213 (2004).

41. Mila Gumin, *Ugly on the Inside: An Argument for a Narrow Interpretation of Employer Defenses to Appearance Discrimination,* 96 MINN. L. REV. 1769, 1791 (2012).

42. *The Official Saga: Hooters History*, ORIGINAL HOOTERS, https://perma.cc/KZ3L-7VJH (last visited Dec. 14, 2022).

43. Cory Doctorow, *"Breastaurants" are Hooters 2.0*, BOING BOING (June 8, 2011), https://perma.cc/VUU5-V2GR; Muriel Stevens, *New York-New York Leads Irish Parade,* L.V. SUN (Mar. 14, 2003), https://perma.cc/36UJ-HE65.

44. TWIN PEAKS, https://perma.cc/EPD8-4BTS (last visited Dec. 14, 2022); *Breastaurant Boom: Hooters-Style Eateries Experience a Mini-Boom*, FOX NEWS (Nov. 30, 2015), https://perma.cc/E37G-UEZ9.

45. Dianne Avery, *The Female Breast as Brand: The Aesthetic Labor of Breastaurant Servers*, *in* INVISIBLE LABOR*:* HIDDEN WORK IN THE CONTEMPORARY WORLD 171–92 (Marion G. Crain, Winifred R. Poster, & Miriam A. Cherry ed. Univ. of Cal. Press 2016).

46. Michael Brizek, *It's More Than Just the Perceived Exploitation of Women. Contemporary Issues Facing Hooters Restaurant*, 3 J. CASE RSCH. IN BUS. & ECON., 1, 3–4 (2011), https://perma.cc/CXX6-Y5TL.

47. Key excerpts from the Hooters Employee Handbook mandate that "hair is to be styled at all times. Makeup is to be worn to best accentuate your features. Hooters Girls are to be camera-ready at all times." *So You Wanna be a Hooters' Girl?*, SMOKING GUN, https://perma.cc/B99K-3VTU (last visited Dec. 14, 2022).

While the BFOQ defense may be used by employers for recruitment on the grounds of national origin, religion, and sex, the scope of this Article analyzes the BFOQ carveout used by Hooters to exclusively employ female servers and promote a theme of female sexuality.

The attractiveness of an employee is often used as a strategic move and effective selling point to 'brand' the organization with a certain look.[48] Hooters has used this to build its image and branding for decades. The bulk of work performed by any server or waiter in the food service industry comprises of tasks such as seating people, taking meal orders, clearing plates, and bringing checks.[49] The performance and completion of such tasks is not dependent upon the gender of the server. Unlike an actor or dancer, whose core job function is performance, the primary job function of a waiter or server is to provide service. In contrast, the Supreme Court has highlighted that the application of the BFOQ carveout is limited to "occupational" skills and aptitudes.[50]

This Article probes the question then, does the image of the Hooters Girl constitute an "occupational qualification reasonably necessary to the normal operation of a particular business" as provided for under Title VII of the Civil Rights Act 1964 carveout that Hooters has been using for decades to protect itself against lawsuits and claims regarding its branding, marketing, and advertising. Moreover, can Hooters or any other breastaurant use the defense that employee attractiveness is a necessary quality, essential to the business of the establishment? This continues to be a major outstanding question in the study and survey of appearance based discrimination.

For decades, many breastaurants have attempted to tap into today's "lookist" culture[51] by ensuring that their servers and waiters present a saleable image, as part of their attempts to survive in a highly competitive industry.[52] This means hiring decisions are often made on the grounds of personal attractiveness or adherence to dress codes and grooming standards.

As part of their uniform, "Hooters girls" are required to wear tight t-shirts which bear the Hooters logo (consisting of two large owl eyes, bearing a striking resemblance to areolas and nipples) and tiny shorts.[53] These uniforms continue to

48. Frank J. Cavico, Stephen C. Muffler, & Bahaudin G. Mujtaba, *Appearance Discrimination, "Lookism" and "Lookphobia" in the Workplace*, 28 J. APPLIED BUS. RSCH. 791, 792 (2012).

49. *What Are the Duties of Waiting Staff?*, CHRON (May 14, 2021), https://perma.cc/KK7J-PT7U.

50. Int'l Union v. Johnson Controls, 499 U.S. 187, 201 (1991); Dothard v. Rawlinson, 433 U.S. 321, 333 (1977); W. Air Lines v. Criswell, 472 U.S. 400, 402 (1985).

51. Allison T. Steinle, *Appearances and Grooming Standards as Sex Discrimination in the Workplace*, 56(1) CATH. U. L. REV. 261, 266 (2006), https://perma.cc/RV9W-PVGS (citing Stephanie Armour, *Your Appearance, Good or Bad, Can Affect Size of Your Paycheck*, USA TODAY, July 20, 2005, at 1B); Michael Starr & Adam J. Heft, *Lookism: New Forms of Discrimination*, HOGAN LOVELLS (2006), https://perma.cc/7JXA-PYPF.

52. Stacey S. Baron, *(Un)Lawfully Beautiful: The Legal (De)Construction of Beauty*, 46 B.C. L. REV. 359, 365 (2005).

53. Sarah L. Ream, *When Service with a Smile Invites More than Satisfied Customers: Third-Party Sexual Harassment and the Implications of Charges Against Safeway*, 11 HASTINGS WOMEN'S L.J. 107, 114 (2000).

be the draw for the largely male clientele of which the restaurant boasts.[54] Effectively, it is reflective of the fact that female employees are constantly, and increasingly, being objectified at work, through the imposition of uniforms, dress, and grooming codes.[55] Moreover, female employees are often required to don uniforms and adhere to dress codes when the same standards are not expected from their male counterparts performing the same jobs.[56] In *Carroll v. Talman Federal Savings & Loan Association*,[57] the United States Court of Appeals for the Seventh Circuit held that employee-imposed dress codes which demanded that female employees wear a uniform as a condition of employment,[58] while the same condition permitted male employees in the same position to wear only "appropriate business attire," amounted to gender discrimination under section 703(a)(1) of Title VII.[59] The case also initiated debate and discourse about whether or not dress code regulations were the type of employment practices which Congress intended to prohibit under Title VII.[60]

While Hooters and its problematic hiring policy is the focus of this Article, it is not alone in the way it has made its employees feel. In the year 2000, Harrah's Casinos started its "Personal Best" program to upgrade its image.[61] The terms of the policy mandated all beverage servers adhere to a certain dress-code, requiring them to wear high heels, makeup, and style their hair.[62] A veteran bartender named Darlene Jespersen complained that the cosmetics made her feel "sick, degraded, exposed and violated" and was fired for her refusal to adhere to the program.[63] As a result, she filed a suit against Harrah's on the grounds of sex- based discrimination.[64] In her deposition, Jespersen relayed that she felt as though she was "being pushed into having to be revealed or forced to be feminine to do her job, to stay employed, when it has nothing to do with the making of a drink" and that she felt like she had to "become dolled up" and was being treated as "a sexual object."[65] Harrah's was successful in defending its employment practices; the United States District Court for the District of Nevada granted summary judgement

54. *Id.*

55. Tove Danovich, *How Restaurants Get Away With Looks-Based Discrimination*, JEZEBEL (Aug. 24, 2016), https://perma.cc/QAM2-2RQ6 (the requirement to wear multiple uniforms as part of a server's journey in the restaurant industry includes 'bikini top Mondays,' sexy Santa dresses during the holidays, low-cut shirts, and crop tops).

56. *See generally* Susan Hillary Loeb, *Disparate Dress Codes as Sex Discrimination in Violation of Title VII*, 56 CHI.-KENT L. REV 1249, 1262 (1980).

57. Carroll v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028 (7th Cir. 1979).

58. *Id.* at 1033 (as a condition of her employment, it was mandatory for the plaintiff Mary Carroll to wear a "career ensemble" every day apart from "glamour days").

59. *Id.* (Talman tried to defend its dress code policy by raising the argument that "women cannot be expected to exercise good judgement in choosing business apparel, whereas men can").

60. *Id.*

61. Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1077–78 (9th Cir. 2004).

62. *Id.* at 1077.

63. *Id.* at 1077–78.

64. *Id.*

65. Steinle, *supra* note 51.

for Harrah's[66] and the Ninth Circuit affirmed.[67] Jespersen was not objecting to "neutral, professional standards" or "uniforms identifying an employee with his or her employer" but rather the specific application of a "demeaning stereotype."[68] Additionally, Jespersen received excellent performance ratings and was popular with customers even when she did not wear any makeup.[69]

However, the verdict in Harrah's is a one-off. In most cases, employers either compromise or decide to settle out of court (as seen in the numerous Hooters lawsuits) when their appearance based hiring policies are challenged.[70]

In most cases, courts have held that using sex stereotyping in the workplace is a violation of the fundamental principles enshrined in Title VII.[71] Also, practically speaking, given the image-conscious society we live in at present, should workplaces begin introducing appearance based policies, it would only instigate greater and more noxious forms of sex stereotyping. In the opinion of the authors, many individuals already suffer from body image issues which contribute to a lack of confidence, hence it is even more imperative to ensure that workplaces refrain from appearance based hiring at all costs.

### D. WHEN IS SEX-BASED BFOQ PERMISSIBLE?

Case law regarding the BFOQ exception to Title VII has shown that hiring discrimination based on sex may be permitted when it impacts the safety or privacy of a business.[72] Such sex-based employment discrimination has been seen in numerous cases, such as *Healey v. Southwood Psychiatric Hospital*.[73] In *Healey,* the BFOQ exception was considered permissible on the grounds that hospitals may hire nurses based on gender, as respecting the privacy of patients is "essential" to the business of running a hospital.[74] Similarly, in *Jennings v. New York State Office of Mental Health,* at least one security hospital treatment assistant

66. *See* Jespersen v. Harrah's Operating Co., 280 F. Supp. 2d 1189, 1196 (D. Nev. 2002).

67. *See* Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1106 (9th Cir. 2006) (en banc).

68. Steinle, *supra* note 51, at 284.

69. *Jespersen*, 392 F.3d at 1077 (noting how Jespersen was rated by supervisors as "highly effective" and praised for making a good impression on guests).

70. For instance, in 1997 Hooters entered into a settlement agreement with some prospective male employees who had filed a lawsuit on the ground of gender discrimination. *See* Paul A. Driscoll, *Hooters Settles Gender Discrimination Lawsuit, Gets to Keep Waitresses*, ASSOCIATED PRESS, Sept. 30, 1997, https://perma.cc/5ZJE-Y67J. In March 2010, Hooters again entered into a settlement agreement with its employees who sued it for its discriminatory practices. *See Settlement Reached in Lawsuit Against Hooters*, KCRA3 NEWS (Dec. 7, 2011, 8:23 AM), https://perma.cc/36BK-TCMH.

71. *See generally* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Bostock v. Clayton Cty. 140 S. Ct. 1731 (2020) (offering protection against discrimination for gay and transgender individuals).

72. Everson v. Mich. Dep't of Corr., 391 F.3d 737, 762 (6th Cir. 2004) (holding that female gender is a BFOQ for guards in female prisoner housing units because it would decrease the likelihood of sexual abuse and other security issues); Fesel v. Masonic Home, 447 F. Supp. 1346, 1352 (D. Del. 1978), *aff'd*, 591 F.2d 1334 (3d Cir. 1979) (recognizing the privacy interests of residents in a retirement home who would prefer a nurse aide of the same sex).

73. Healey v. Southwood Psychiatric Hospital, 78 F.3d 128, 133–34 (3d Cir. 1996).

74. *Id.* at 133 (noting that "privacy concerns justify [the hospital's] discriminatory staffing policy" because of the hospital staff's role in the hygiene, menstrual, and sexuality concerns of the patients).

assigned to each psychiatric hospital was required to be the same gender as the ward's patients and such hiring was considered permissible as a BFOQ.[75] These cases have applied the BFOQ in an appropriate manner, because it is reasonable to expect that privacy would be the essence of, or an integral part of, the business of a hospital. It is generally observed that individuals belonging to certain communities and religious groups (especially in developing countries) are more comfortable being examined by a medical professional belonging to the same gender; this often stems from a lack of awareness, conditioning, socio-economic status, or exposure.[76]

However, courts are generally not amenable to finding that sex is an appropriate BFOQ when the promotion of sex appeal is tangential to the sex-neutral essence of a business.[77] Courts have drawn a distinction between businesses that hire women to sell sex and those which use sex appeal to sell another product.[78] In most cases, courts tend to look unfavorably upon the latter group of businesses when they argue that the essence of their business would be undermined if they did not follow discriminatory employment practices.[79]

In this regard, sex BFOQ cases may be grouped into three categories. First is those which involve jobs for which the physical traits of a particular gender are essential for performance of certain tasks. In the case of *Dothard v. Rawlinson*, the Supreme Court noted that the BFOQ defense "provides only the narrowest of exceptions to the general rule requiring equality of employment opportunities."[80] This case was the first instance where the Supreme Court encountered a substantive opportunity to read the BFOQ exception as a narrow exception to Title VII's rather sweeping stance against discrimination. The case revolved around Dothard, a woman who sued a state penitentiary in Alabama after she had applied for the position of a contact correctional counselor and was denied employment.[81] The penitentiary defended its hiring practice on several counts, one of which was that being male was a BFOQ for positions involving contact.[82] The Court construed the BFOQ exemption to accept the penitentiary's argument

75. Jennings v. N.Y. State Off. Mental Health, 977 F.2d 731, 732 (2d Cir. 1992).

76. *See, e.g.*, Adinarayana Makam, Channamallikarjuna Swamy Mallappa Saroja, & Gareth Edwards, *Do Women Seeking Care From Obstetrician-Gynaecologists Prefer to See a Female or a Male Doctor?*, ARCHIVES GYNECOLOGY & OBSTETRICS 281, 443–47 (Mar. 2010), https://perma.cc/LX9Z-D5W9.

77. McGinley, *supra* note 33, at 257–58, 266–67 ("Las Vegas casinos exclusively hire women to serve cocktails on the casino floor, dressing them in tight-fitting, sexy, uncomfortable costumes and high heels . . . while courts are generally more lenient in finding BFOQs when the employer asserts consumer privacy as a justification, courts judge an employer's BFOQ defense more harshly when the employer hires women or men exclusively to use sex appeal to sell unrelated goods and services.").

78. *Id.* at 266–67.

79. Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CAL. L. REV. 147, 152, 160 (2004) (emphasizing that the process of determining the "essence" of a business is "both facially unclear and radically undertheorized by the courts").

80. Dothard v. Rawlinson, 433 U.S. 321, 333 (1977).

81. *Id.* at 323.

82. *Id.* at 332.

that male gender was a BFOQ for contact positions in the penitentiary.[83] The Court emphasized the violent environment of the Alabama prison and stated that the presence of women in such an environment would undermine "the essence of a correctional counselor's responsibility" which was to maintain prison security.[84] However, this category does not permit employers to make assumptions about female strength and capabilities, and most courts have readily dismissed arguments made by employers who claim that only men may be hired for positions involving physical labor or heavy lifting.[85] Such arguments are premised on traditional sex stereotypes, and often make misplaced and ill-informed assumptions about female physical capabilities.[86]

The second BFOQ category is where the job involves some form of sexual entertainment as the primary good for sale. In the case of *St. Cross v. Playboy Club* the court perceived the role played by "Playboy Bunnies" as an appropriate BFOQ, as it was similar to the role of an actor or performer.[87] Courts have held that sex is a valid BFOQ for such jobs.[88] There are recognizable differences in what gender-differentiated appearance or grooming standards set out to achieve, depending on whether a business is purely for sexual titillation, "plus-sex" or strictly goods and services oriented. Pursuant to the primary purpose doctrine, the BFOQ exception permits specificity when job tasks are primarily related to sex.

The third category encompasses instances where employers seek to sell a non-sexual good or service alongside the promotion of sexual arousal; a situation which courts have consistently deemed do not merit the BFOQ defense—as seen in numerous Hooters lawsuits, which will be discussed at greater length in the next segment of this Article.[89]

However, courts have rarely found gender discrimination to be acceptable.[90] As stated above, the burden of convincing the court that such discrimination is

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83. *Id*. at 334–37.

84. *Id*. at 335–36.

85. Hoerner, *supra* note 15.

86. *See generally* Jurinko v. Edwin L. Wiegand Co., 477 F.2d 1038 (3d Cir. 1973) *vacated*, 414 U.S. 970 (1973); *see also* Gunther v. Iowa State Men's Reformatory, 462 F. Supp. 952 (N.D. Iowa 1979) *aff'd*, 612 F.2d 1079 (8th Cir. 1980) (explaining that a refusal to hire a woman on the basis of stereotyped characterizations is prohibited by the equal employment provision); Mitchell v. Mid-Continent Spring Co., 583 F.2d 275, 280–81 (6th Cir. 1978), *modified on denial of reh'g*, 587 F.2d 841 (6th Cir. 1978) (finding that the employer's "bona fide lifting requirement cannot be implemented by the blanket exclusion of all females"); Rosenfeld v. S. Pac. Co., 444 F.2d 1219, 1224 (9th Cir. 1971) (finding that the "company attempts to raise a commonly accepted characterization of women as the 'weaker sex' to the level of a BFOQ"); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 718 (7th Cir. 1969) (holding that the legitimate requirement of lifting thirty five pounds be open to men and women).

87. Yuracko, *supra* note 79, at 152, 155 (emphasizing that the process of determining the "essence" of a business is "both facially unclear and radically undertheorized by the courts").

88. Guardian Cap. v. N.Y. State Div. of Hum. Rts., 360 N.Y.S. 2d 937, 939 (1974).

89. Matthew A. Peterson, *Maintaining the Narrow Scope of the Bona Fide Occupational Qualification: Rejecting Gender Discrimination in Bartender Hiring*, N.Y.U PROCEEDINGS, https://perma.cc/C674-L8XR (last visited Dec. 14, 2022).

90. Teamsters Local Union No. 117 v. Wash. Dep't of Corr., 789 F.3d 979, 987 (9th Cir. 2015) ("In light of [the] demanding legal standards, BFOQs are few and far between.").

necessary to maintain the "essence of the business" rests with the employer.[91] Courts have interpreted the BFOQ exception to mean that it must be "reasonably necessary to the normal operation of the particular business" in order to gauge that the essence of the business would be undermined if the BFOQ criteria was not accepted.[92] However, these courts have not clearly established how courts should proceed in determining what constitutes the "essence" of a business.[93]

In many ways, the *St. Cross* case established the threshold to determine whether sex is an acceptable BFOQ in hiring decisions. The 1971 ruling compared the waitressing jobs of "Playboy Bunnies" to a "part in a theatrical production," stating that the primary task was to provide sex appeal as opposed to simply serving cocktails, thereby holding that single-sex hiring was reasonably necessary to carry out normal operations at the Playboy clubs.[94]

Unless sexuality is the primary purpose of the business and reasonably necessary to its daily operations, employers are barred from using the BFOQ exception.[95] In *Guardian Capital v. New York State Division of Human Rights*,[96] the court ruled that an employer's efforts to transform a hotel restaurant into a cabaret-themed nightclub by hiring exclusively female servers and requiring them to wear "alluring costumes" did not warrant a BFOQ defense. This case was distinguished from the ruling in the *St. Cross* case because the court warned that the employer could not engage in discriminatory hiring practices simply to offer customers sexual titillation alongside food.[97]

### E. CUSTOMER SATISFACTION AS A BFOQ DEFENSE: COMPARATIVE ANALYSIS

Customer satisfaction can never be considered sufficient to justify use of the BFOQ defense.[98] In a statement to *Business Insider*, Hooters did indeed admit that while gender-based hiring is not permitted, it does use the BFOQ carveout to hire women servers.[99]

This Section of the Article examines whether customer preference and satisfaction may be taken into account by an employer to use BFOQ as a defense to its

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91. Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253–54 (1981); Stephen F. Befort, *BFOQ Revisited: Johnson Controls Halts the Expansion of the Defense to Intentional Sex Discrimination*, 52 OHIO ST. L.J. 5, 8 (1991), https://perma.cc/9MDF-PDYJ.

92. S*ee* Dothard v. Rawlinson, 433 U.S. 321, 336 (1977) (interpreting 42 U.S.C. § 2000e-2(e)).

93. Yuracko, *supra* note 79, at 152 (emphasizing that the process of determining the "essence" of a business is "both facially unclear and radically undertheorized by the courts").

94. Guardian Cap. v. N.Y. State Div. of Hum. Rts., 360 N.Y.S. 2d 937, 940 (1974) (quoting St. Cross v. Playboy Club of N.Y., Case No. CSF 22618–70, Appeal No. 773 (N.Y. State Div. of Hum. Rts. Dec. 17, 1971)).

95. U.S. EQUAL EMP. OPPORTUNITY COMM'N, CM-625 BONA FIDE OCCUPATIONAL QUALIFICATIONS (Sept. 18, 2022 7:43 AM), https://perma.cc/WXU2-SB67.

96. *Guardian Cap*., 360 N.Y.S. 2d at 938.

97. *Id*. at 939.

98. Michael L. Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 TX. L. REV. 1025, 1055–56 (1977).

99. Jacob Shamsian, *The strange loophole that let's Hooters hire only female servers*, BUSINESS INSIDER (Sept. 13, 2015, 10:00 AM), https://perma.cc/TG77-8HC5.

discriminatory hiring practices by examining three landmark cases in greater detail.

*Diaz v. Pan American World Airways* is one of the most famous and illustrious cases in regard to customer preferences as part of a BFOQ defense.[100] This remains one of the most historic cases and earliest decisions to use Title VII to invalidate an airline's policy of hiring only women as flight attendants.[101] In April 1967, Celio Diaz applied for the position of flight cabin attendant with Pan American World Airways (Pan Am) and was rejected due to Pan Am's hiring policy, which had been in operation since 1965 and restricted the position to women alone.[102] Agitated by this rejection, Diaz filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging that Pan Am had unlawfully discriminated against him on the grounds of sex, violating Title VII of the Civil Rights Act.[103] An investigation by the EEOC determined that the airlines's hiring policy was unlawfully discriminatory and in violation of the Civil Rights Act.[104] Diaz then filed a class action suit on behalf of himself and others in the United States District Court for the Southern District of Florida, under section 706(f) of the Civil Rights Act, seeking injunctive relief and damages, both of which were denied.[105] The district court held that the airline's policy of hiring only women for the position of flight cabin attendant was permissible as a BFOQ under section 703(e) of the Civil Rights Act,[106] thereby rejecting Diaz's stance that the qualification criteria for the position of flight cabin attendant should solely be based upon an individual's ability to perform purely routine mechanical tasks such as "the storage of coats and preparation and service of meals and beverages."[107] Rather, the district court accepted Pan Am's contention that being a woman constituted a BFOQ for the position of a flight attendant,[108] basing its argument on alleged passenger preferences for female flight attendants and their ability to better tend to the psychological needs of passengers.[109] Both of these

100. *See generally* Diaz v. Pan Am. World Airways, Inc., 311 F. Supp. 559 (S.D. Fla. 1970).

101. Toni Scott Reed, *Flight Attendant Furies: Is Title VII Really the Solution to Hiring Policy Problems,* 58 J. AIR L. & COM. 267, 276 (1992), https://perma.cc/KN8R-BKPL.

102. Joseph M. Piepul, *Labour Law – Civil Rights Act of 1964 – Sex Discrimination and the Bona Fide Occupational Qualification – Diaz v. Pan American World Airways, Inc.*, 12 B.C. L. REV. 747, 747 (1971).

103. *Id.*

104. *Diaz*, 311 F. Supp. at 560.

105. *Id.*

106. Section 703(e) of the Act states that 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 or enterprise." 42 U.S.C. § 2000e-2(e).

107. *Diaz*, 311 F. Supp. at 563.

108. *Id.* (arguing that the role of a flight attendant required the performance of special nonmechanical functions 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.").

109. Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 387 (5th Cir. 1971). Pan Am provided expert testimony from a psychiatrist, which led the trial court to hold that "an airplane cabin represents a

arguments were rejected on appeal to the Fifth Circuit.[110] The Fifth Circuit stressed that "it is reasonable to assume, from a reading of the statute itself, that one of Congress' main goals was to provide equal access to the job market for both men and women."[111] It further went on to state that "the primary function of an airline is to transport passengers safely from one point to another," that the employment of male stewards would not "so seriously affect the operation of an airline as to jeopardize or even minimize its ability to provide safe transportation from one place to another" and that the aspects of the job in which females generally out-perform males are not "reasonably necessary to the normal operation" of Pan Am's business.[112] The verdict in *Diaz* was paramount because it created a distinction between business necessity and business convenience.[113] The court articulated the "essence test" wherein a BFOQ is established only when "the essence of the business operation would be undermined" if employees who did not bear the relevant employment qualifications were hired.[114] Thus, based on the reasoning in *Diaz,* moving forward courts should find that the essence of a restaurant business does not include promotion of female sexuality.

Cases similar to *Diaz* have looked at whether marketing campaigns based on sex appeal qualify as a BFOQ; this question has been explored and then vehemently rejected.[115] In *Wilson v. Southwest Airlines,* the court considered whether female sex appeal constituted a BFOQ for the role of a flight attendant and ticket agent with Southwest Airlines,[116] also infamously referred to as the "love airline" due to their marketing campaign.[117] In 1971, Southwest hired a Dallas-based advertising agency to develop a winning marketing strategy, attempting to garner a "catchy" image to distinguish itself from its competitors; the agency determined that a large part of Southwest's clientele consisted of male businessmen.[118] It also analyzed that Southwest's competitors, the other air carriers serving the same market, tended to project an image of conservatism.[119] Taking these factors into account, the agency suggested that Southwest Airlines project itself as an airline promoting "feminine youth and vitality,"[120] through advertisements proclaiming, "at last there is somebody else up there who loves you" and "we're spreading love all over Texas."[121] In keeping with this image, Southwest's personnel,

unique environment in which an air carrier is required to take account of the special psychological needs of its passengers. These psychological needs are better attended to by females." *Id.*

110. *Id.*

111. *Id.* at 386.

112. *Id.*

113. The Fifth Circuit held that the personality and psychological attributes of females were only "tangential" to the business enterprise rather than "essential." *Id.* 388–89.

114. *Id.* at 388.

115. Wilson v. Southwest Airlines Co., 517 F. Supp. 292, 304 (N.D. Tex. 1981).

116. *Id.* at 293.

117. *Id.* at 294.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

dressed in high boots and hot pants, and were featured in numerous magazines and billboards.[122] The airline itself encouraged its personnel to provide a fun, entertaining, and engaging environment for its male passengers during flights.[123]

Southwest Airlines boasted that its sales were largely due to their attractive flight attendants, who were the "largest single component" of its success, and that a survey on customer preferences conducted by the airlines revealed that "courteous and attentive hostesses" ranked fifth in terms of importance, behind timely departures and helpful ground personnel.[124] Although both *Southwest* and *Diaz* followed a female-only flight attendant policy, the former attempted to distinguish itself from the latter by stressing that its policy went to the essence of its corporate persona as the "love airline" and was necessary to accomplish its business targets.[125] These arguments were strongly rejected. In *Diaz*, the Fifth Circuit rejected Pan Am's argument that its hiring policy was required to satisfy customer preferences, stating that such concerns were simply tangential to the airlines main function—transporting passengers from one point to the other.[126] The court in *Southwest* elaborated upon three points which are crucial to illustrate the restrictive scope of the BFOQ defense.[127] First, that discrimination on the grounds of sex cannot be directed or justified by customer preferences, because this would end up perpetuating the very prejudices which Title VII was enacted to overcome.[128] Second, the removal of such sex-based hiring discrimination may impose a financial burden, but that still does not give rise to a BFOQ defense.[129] Third, the requirement of "business essence" was narrowly interpreted wherein the court held that "love is the manner of job performance, not the job performed," thereby stating that the airline's main job was to transport its passengers,[130] and that sex or sex appeal was not the dominant service provided.[131] Further, the court in *Southwest* also created a demarcation regarding sex appeal and recognized that the BFOQ exception is met where "vicarious sex entertainment is the primary service provided" and not just a marketing scheme to enhance profits.[132] Similarly, Hooters claims that the service provided by a Hooters Girl and the experience she provides forms the core of its business, thereby equating

122. *Id.*

123. Deborah Weinstein, *What Law Firms and Legal Recruiters May Not Do to Create a Diverse Workplace*, 66 PHILA. BAR ASS'N: LAWYER ARTICLES 2 (2003), https://perma.cc/EPF5-4V7L.

124. Toni Scott Reed, *Flight Attendant Furies: Is Title VII Really the Solution to Hiring Policy Problems,* 58 J. AIR L. & COM. 1, 267, 272 (1992).

125. KIMBERLY A. YURACKO, GENDER NONCONFORMITY AND THE LAW 69 (Yale Univ. Press, 2016).

126. Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

127. *Wilson*, 517 F. Supp. at 301–04.

128. *Id.* at 301.

129. *Id.* at 304; Michael J. Frank, *Justifiable Discrimination in the News and Entertainment Industries: Does Title VII Need a Race or Color BFOQ?*, 35 U. S.F. L. REV. 473, 484 (2001).

130. *Wilson*, 517 F. Supp. at 302.

131. Jacqueline H. Lower, *The Pregnant Employee's Appearance as a BFOQ Under the Pregnancy Discrimination Act*, 14 LOY. U. CHI. L. J. 195, 217 (1982), https://perma.cc/VC86-BSJT.

132. *Wilson*, 517 F. Supp. at 302.

their servers to entertainers and establishing that the purpose with which customers tend to visit the restaurant is first and foremost, for the assumed sexual experience and second, for the food.[133]

In another landmark decision, the Ninth Circuit was confronted with the question of whether sex can be a BFOQ in *Fernandez v. Wynn Oil*, wherein an international marketing agency had extensive dealings with Latin American clients who objected to the vice-president of the international operations division because she was female.[134] Testimony from the South American clients was further reviewed to adduce that they would indeed refuse to work with a female vice-president, which led the district court to hold that hiring Fernandez would "destroy the essence" of Wynn's business or "create serious safety and efficacy problems."[135] Thus, the court concluded that such hiring discrimination on the grounds of sex does indeed constitute a BFOQ.[136] However, the Ninth Circuit overturned the decision, stating that the district court had erred in its factual findings and legal conclusions.[137] It held that customer preferences based on stereotypes cannot justify a sexually discriminatory practice[138] because promoting a woman into the marketing role would not destroy the essence of a marketing business.[139] Furthermore, the Ninth Circuit also placed an emphasis on the EEOC regulation, noting that customer preferences generally cannot inform the "essence" of a business; rather they can only support BFOQ proprietary in cases of maintaining authenticity.[140]

These cases have identified that the BFOQ defense is extremely narrow and was not framed with the intention "to provide an end-run around Title VII for employers."[141] In this line of cases, where the employer has argued that customer preference justifies its sex-based hiring policy, courts have looked at the "essence" of the business and construed the same somewhat narrowly, to determine whether or not the argument has merit.[142]

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133. *Important Points For Employers Bona Fide Occupational Qualification BFOQ Defense and Sex Discrimination in the Workplace*, WATSON & ASSOCIATES LLC, https://perma.cc/5B8N-3PZY (last visited Dec. 14, 2022); Mary E. Becker, *Discrimination Helps Companies Trade on Women's Sexuality*, 82 ABA J. 40, 41 (1996), https://perma.cc/J2B5-9ZMJ.

134. Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1274 (9th Cir. 1981).

135. *Id*. at 1276.

136. *Id*. at 1274.

137. *Id*. at 1276.

138. *Id*. at 1277; Janice R. Bellace, *The International Dimension of Title VII*, 24 CORNELL INT'L L.J. 1, 13 (1991).

139. Leslie S. Gielow, *Sex Discrimination in Newscasting,* 84 MICH. L. REV. 443, 463–64 (1985).

140. *Fernandez v. Wynn Oil Co*., 653 F.2d at 1277.

141. JOSEPH A. SEINER, EMPLOYMENT DISCRIMINATION (PROCEDURE, PRINCIPLES, AND PRACTICE) 371 (2nd ed.).

142. In *Fernandez v. Wynn Oil Co*., the court determined that the essence of the position was to do business with South Americans, which could be accomplished by both sexes. In *Diaz v. Pan American World Airways*, the court determined that the essence of the business was safe travel, and held that flight attendants of both sexes could accomplish that task. *Fernandez*, 653 F.2d at 1276; Diaz v. Pan American World Airways, 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

### F. HOOTERS LAWSUITS

In 1993, a group of men sought employment at Hooters and were denied, causing them to pursue a gender discrimination suit against the restaurant chain, alleging that Hooters had violated Title VII by refusing to hire men for "front of the house" positions such as serving, bartending, and hosting.[143] In granting the group's motion for class certification, the district court identified the validity of the defendant's BFOQ defense as one of the main issues to be considered in a future trial.[144] However, the validity of Hooters's use of the BFOQ defense has never been thoroughly explored by either judge or jury because most cases have resulted in a settlement.[145]

Again, in 1997, men wanted to be Hooters servers and were refused the job.[146] Hooters settled the litigation for $3.75 million and then opened certain support staff positions for men such as bartenders and hosts.[147] However, Hooters continued to employ only women as servers, using the BFOQ rule to their advantage.[148] In 2009, Hooters was sued for its gender-biased hiring practices and settled once again.[149] Nikolai Grushevski then filed a class action lawsuit against Hooters, alleging that its Corpus Christi franchise refused to hire men as food servers.[150] He did so on behalf of "all males across the country who applied for the position of a waiter at a Hooters restaurant and were denied."[151] To date, Hooters's fundamental claim remains that men cannot be servers because the experience provided by being served by the Hooters Girl is the core of the Hooters franchise.[152] The food chain stated that "while we offer world famous wings and burgers, the essence of our business is the Hooters Girl and the experience she provides to our customers."[153] In 2015, the Hooters website stated the following: "We're proud of who we are. Yes, we have a pretty face. And sex appeal is part of our thing."[154]

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143. Latuga v. Hooters, Inc., 93 C 7709, 1996 U.S. Dist. LEXIS 4169, *1 (N.D. Ill. 1996).

144. *Id.*

145. Cantor, *supra* note 27.

146. *Hooters Settles Suit By Men Denied Jobs*, N.Y. TIMES (Oct. 1, 1997), https://perma.cc/S7JW-3NBC.

147. *Is it Legal for Hooters to Only Hire Female Waitresses?*, BONONI LAW GROUP, LLP (May 3, 2018), https://perma.cc/85H7-B292.

148. Matthew A. Peterson, *Maintaining the Narrow Scope of the Bona Fide Occupational Qualification: Rejecting Gender Discrimination in Bartender Hiring*, N.Y.U. PROCEEDINGS (Feb. 2, 2021), https://perma.cc/XQ2K-4GJB.

149. *Id.*

150. *Texas Man Settles Discrimination Lawsuit Against Hooters for Not Hiring Male Waiters*, FOX NEWS (Jan. 14, 2015, 12:58 AM), https://perma.cc/FAF4-4Q5P.

151. *Id.*

152. Shamsian, *supra* note 99.

153. *Id.*

154. *Id.*

The Hooters Employee Handbook emphasizes the essence of the restaurant's concept, stating that "this is show business, just like the modeling industry,"[155] effectively equating its servers to entertainers. Even assuming that sex appeal was necessary for Hooters to operate as a restaurant, the BFOQ defense doesn't hold up; Hooters's food and beverage could be served by individuals of either sex who fit certain appearance based specifications without using a gender-based discriminatory policy. The essence of its business operations would not be undermined without that policy, and as such, the BFOQ defense used by Hooters, time and again, is not applicable.

When the BFOQ exception is used by employers, businesses, and establishments to defend their hiring policies and practices, courts delve into the facts of the case and check whether the "essence of the business" test is met or not.[156] Practically speaking, courts only uphold sex-based BFOQ defenses when sex is essential to a business's continued participation in a certain market, meaning, when sex is the determining factor for such market.[157] Ultimately, it comes down to whether the employer can adequately prove that the sex of the employee defines the market in which the employer competes.[158]

A case qualifies as a BFOQ case when a defendant argues that only the members of a particular sex can perform the job instead of arguing that it only hires men or women for a particular position. In June 2016, Rafael Ortiz filed a lawsuit against a Twin Peaks in Davie, Florida for being denied a job as a restaurant server, because he was male.[159] The server positions are referred to as "Twin Peak Girls," a slogan which was proudly boasted by the restaurant on its website, which stated: "Be a Twin Peaks Girl! The Twin Peaks Girls are the hosts of the party bringing the Twin Peaks experience to life while serving high quality eats and drinks. They have a 'girl next door' personality, offering a playful and energetic hospitality to our guests."[160]

Ultimately the case was settled before trial.[161] When faced with such lawsuits, restaurants such as Hooters and Twin Peaks have never denied that they have a hiring policy which is preferential towards women; rather, they argue that the women-only requirement is a part of the restaurant theme in which such servers donn makeup and wear uniforms.[162]

Hooters continues to promote itself as a family restaurant.[163] Despite the various allegations and lawsuits against the restaurant for sexualizing the role of the

155. *So You Wanna Be a "Hooters" Girl?*, SMOKING GUN, https://perma.cc/GM5D-FLQM (last visited Dec. 15, 2022).

156. Jillian B. Berman, *Defining the "Essence of the Business": An Analysis of Title VII's Privacy BFOQ after Johnson Controls*, 67 U. CHI. L. REV. 749, 753 (2000).

157. Cantor, *supra* note 27.

158. *Id.*

159. Ortiz v. Twin Rest. Mgmt., No. 0:16-CV-61526, Complaint, (S.D. Fla. June 29, 2016).

160. Aamodt, *supra* note 4.

161. *Id.*

162. *Id.*

163. *Why Hooters*, HOOTERS, https://perma.cc/JKU4-ACC6 (last visited Dec. 15, 2022).

female servers, Hooters has sustained its image as a family friendly franchise. For example, the franchise continues to advertise its "kids menu."[164] The image of the business with the Hooters Girl selling itself as a "family friendly" restaurant reinforces the outdated norms of women's role both in family structures and in the workplace.[165]

Congress enacted Title VII in order to create a statutory foundation for the principles of non-discrimination.[166] However, the liberal interpretation of the BFOQ carveout provided for in Title VII acts contrary to such motivation, causing concern that a wide interpretation of this carveout may lead to it undermining the main purpose behind the general ban on hiring discrimination.[167]

## II. HOOTERS AND SEXUAL HARASSMENT LAWSUITS

The problematic human resources policies endorsed and propagated by Hooters have created an environment that has led to allegations of sexual harassment. Several female servers have brought sexual harassment claims against the customers who visit the American franchise.[168] This raises the question of whether Hooters creates a "sexually charged atmosphere"[169] and condones acts of sexual harassment.[170]

Sexual harassment at the workplace consists of repeated and unwanted advances, either verbal or non-verbal, including propositions, gestures, innuendos, or inappropriate touches, by a customer or a worker, which impedes a woman's ability to work or employment prospects.[171] The crux of these lawsuits is that Hooters created and sustained a sexually subordinating working environment,

164. The children's menu is available on the website when ordering online. *Kids Menu*, HOOTERS, https://perma.cc/N3GL-TE5F (last visited Dec. 13, 2022).

165. Becker, *supra* note 133, at 41.

166. Weeks v. S. Bell Tel. & Tel. , 408 F.2d 228, 236 (5th Cir. 1969).

167. *E.g.* Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 387 (5th Cir. 1971) ("[I]t would be totally anomalous to [construe this provision] in a manner that would, in effect, permit the exception to swallow the rule.").

168. Amy Kuebelbeck, *Sexual Ornamentation or Invitation to Harassment at Hooters Bar?: Lawsuits: A lawyer for several former waitresses calls it a 'corporate culture of misogyny.' But the chain's attorneys and officials say they are only marketing 'sex appeal,'* L.A. TIMES (Aug. 8, 1993, 12:00 AM), https://perma.cc/BRK3-ZZLU.

169. Sarah L. Sanville, *Employment Law – Employer Liability for Third-Party Sexual Harassment: Does Costilla Take the Hoot out of Hooters?*, 25 WM. MITCHELL L. REV. 1, 351, 366, (Dec. 1999), https://perma.cc/3P2H-H443.

170. Kelly C. Timmons, *Hooters: Should There Be an Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims*, 48(4) VAND. L. REV. 1107, 1127 (May 1995), https://perma.cc/LW2F-2E9U.

171. Merrick T. Rossein, *Sex Discrimination and the Sexually Charged Work Environment*, 9 N.Y. U. REV. L. & SOC. CHANGE 271, 272 (1979), https://perma.cc/ZD2P-E88L.

which facilitated sexual harassment.[172] In *Felepe v. Bloomington Hooters*, the plaintiffs alleged that certain customers requested sexual favors and harassed waitresses by refusing to pay the bill.[173] However, as is the case with many Hooters lawsuits, the parties in this case also subsequently opted for an out-of-court settlement.[174]

Moreover, the name of the chain itself serves as an open invitation for both customers and workers to comment on women's breasts.[175] Working environments that tend to foster situations of sexual harassment are problematic for two reasons: first, such environments act as a breeding ground for men with a proclivity towards acts of harassment, and second, victims are reluctant to come forward, believing that their complaint may not be taken seriously, and may instead result in negative personal consequences.[176] This may result in further incidents of harassment, eventually causing a drop in job performance or even forcing a woman to leave the problematic profession.[177]

Certain lawsuits have also alleged that the Hooters requirement of a sexually provocative uniform caused servers to be subjected to unwelcome advances by customers who have called out comments, such as "I want to order your hooters" and have made further degrading remarks about women's breasts and buttocks, in addition to staring and making passes at these servers.[178] Moreover, the nature of the workplace was such that the bodies of female servers were primarily being broadcasted for the sexual entertainment of men.[179]

The female work staff of Hooters have often shared anecdotes about their experience.[180] In an interview with the Daily Beast, Sascha Cohen spoke about her part time job as a Hooters girl at the Santa Monica location, while also attending

172. *Former Hooters Waitress Sues for Sexual Harassment*, FEMINIST MAJORITY FOUND. BLOG (Jan. 22, 1997), https://perma.cc/K9NQ-6JH2 (customers would frequently hoot and jeer at the servers, which was encouraged by the management).

173. Timmons, *supra* note 170, at 1108 (citing Felepe v. Bloomington Hooters, No. 93-11134, Complaint at 11 (D. Minn. 1993)).

174. *See* Sanville, *supra* note 169, at 366.

175. Denise Smith Amos, *Lawsuit Challenges Hooters*, TAMPA BAY TIMES, https://perma.cc/JB8R-KBUH (last updated Oct. 9, 2005).

176. Frederique Autin & Fabrizio Butera, *Institutional Determinants of Social Inequality*, FRONTIERS 111 (Jan. 8, 2016).

177. *Id*.

178. Lisa L. Walker, *Tipping Capital and the Guise of Gratuity: Women Servers' Perspectives of Sexualized Interactions in the Sports Bar and Grill Industry*, JEWLSCHOLAR @ MTSU, https://perma.cc/696L-RDFD (last visited Dec. 15, 2022).

179. Victor Fiorillo, *Hooters Waitress Says She Was Sexually Assaulted at Work*, PHILADELPHIA (Sept. 14, 2017), https://perma.cc/2LCU-KXZ2.

180. Chelsea Ritschel, *What it's really like to be a Hooters Girl: 'Men think they can treat you a certain way'*, INDEPENDENT (Oct. 25, 2021), https://perma.cc/Z22D-F5HL (when one female Hooters server was asked if she would recommend a job at the food chain, she responded, "If you're okay with all the controlling rules and sexual harassment from customers, then yes.").

college.[181] She was grateful that the job gave her a chance to monetize her youth and beauty, the main "marketable assets" she possessed before obtaining either a college degree or any meaningful work experience, and it did so in a way that was both legal and far safer than many sections of the actual sex industry.[182] However, she admitted that she "had to perform the emotional labor of pretending to find [these] men fascinating, while deflecting their bolder advances because Hooters is, after all, a family restaurant."[183]

The issue of sexual harassment lawsuits due to an unfavorable working environment has been the subject of debate and controversy in a number of other cases as well. In the landmark judgment of *EEOC v. Sage Realty*,[184] Margaret Hasselman, a lobby attendant, was required to wear a sexually provocative outfit which exposed her thighs and buttocks as part of her uniform.[185] Sage Realty's requirement to wear the "short, revealing and sexually provocative uniform" subjected her to "repeated harassment" in the form of sexual propositions, lewd comments, and gestures.[186] The court ruled that the sexually alluring uniform was the primary contributing factor that subjected Hasselman to unwelcome comments and innuendos—harassment which was both severe and pervasive enough to create a debilitating and abusive work environment.[187] Moreover, the court held that the problematic dress code was clearly not a BFOQ for lobby guards; rather, the uniform hindered the security and safety functions which a guard is required to primarily execute.[188]

Courts have also been very consistent in holding that dress codes or uniforms which place employees at risk for sexual harassment create actionable claims and may violate the provisions of Title VII.[189] In *Marentette v. Michigan Host*, the court held that there is a "difference between reasonable employment decisions based on factors such as grooming and dress, and unreasonable ones."[190] Moreover, the court believed that some form of dress code could violate and, thus, fall within the provisions of Title VII.[191] Moreover, cases such as *EEOC v. Newtown Inn*[192] and *Priest v. Rotary*[193] have further strengthened the contention

181. Cohen, *supra* note 8.
182. *Id.*
183. *Id.*
184. *See generally* EEOC v. Sage Realty Corp., 507 F. Supp. 599 (S.D.N.Y. 1981).
185. *Id.* at 604.
186. *Id.* at 605.
187. *Id.* at 599.
188. *Id.* at 611.
189. Rossein, *supra* note 171, at 272.
190. Marentette v. Mich. Host, 506 F. Supp. 909, 911 (E.D. Mich. 1980).
191. *Id.* at 912.
192. EEOC v. Newtown Inn Ass'n, 647 F. Supp. 957, 958–60 (E.D. Va. 1986) (wherein female waitresses were required to dress provocatively to participate in sexually-oriented themes such as "Bikini Night" and "Whips and Chains Night" and raised a claim under Title VII).
193. Priest v. Rotary, 634 F. Supp. 571, 574, 581 (N.D. Cal. 1986) (wherein a cocktail waitress successfully sued for discrimination under Title VII, upon termination from her job for refusing to wear "something low-cut and slinky").

that a sexually alluring dress code imposed as a condition of employment and subjecting female employees to acts of harassment violates the spirit of Title VII.

## III. *AIR INDIA V. NARGESH MEERZA*

A landmark verdict in Indian jurisprudence, *Air India v. Nargesh Meerza* was the first among many to probe the issue of sex-based discrimination in employment matters.[194] In the case, female flight attendants were subjected to service conditions different from their male counterparts, despite sharing the same job profile.[195] These conditions were mainly rooted in perceived gender roles.

The Supreme Court of India was faced with questions regarding the constitutionality of a set of regulations governing the services of Air Hostesses employed by Air India and the Indian Airline Corporation (IAC).[196] Both of these corporations had their own set of regulations.[197] The regulations in question were (1) regulations 46 and 47 of the Air India Employees Service Regulations,[198] and (2) regulation 12 of the Indian Airlines Service Regulation; collectively referred to as "Regulations."[199]

As per the Regulations, the Air Hostesses of both corporations were required to retire: (a) upon attaining the age of thirty-five years; (b) upon marriage if such event took place within four years from the date of joining service; or (c) upon first pregnancy.[200] The age of retirement of the Air Hostesses under regulation 47 could be extended up to ten years by granting yearly extensions, at the discretion of the Managing Director.[201] However, in cases of Air Hostesses employed by IAC, the extension could last for only five years, effectively raising the age of retirement to forty years. This extension was not a matter of right but

194. Air India v. Nargesh Meerza, 1981 AIR 1829 (1981) (India).

195. *Id.* ¶ 4.

196. *Id.* ¶ 81.

197. *Id.* ¶ 1 (The services of the Air Hostesses employed by Air India were governed by the Air India Employees Service Regulations whereas the services of the Air Hostesses employed by the IAC were governed by Indian Airlines Service Regulation).

198. *Id.* ¶ 5 (The relevant excerpts from the Regulations are: "46. Retiring Age: Subject to the provisions of sub-regulation (ii) hereof an employee shall retire from the service of [IAC] upon attaining the age of fifty-eight years, except in the following cases when he/she shall retire earlier: (c) An Air Hostess, upon attaining the age of thirty-five years or on marriage if it takes place within four years of service or on first pregnancy, whichever occurs earlier. 47. Extension of Service. Notwithstanding anything contained in Regulation 46, the services of any employee, may, at the option of the Managing Director but on the employee being found medically fit, be extended by one year at a time beyond the age of retirement for an aggregate period not exceeding two years, except in the case of Air Hostesses and Receptionists where the period will be ten years and five years respectively.").

199. *Id.* ¶ 13 ("Flying Crew shall be retained in the service of [IAC] only for so long as they remain medically fit for flying duties. Further, an Air hostess shall retire from the service of IAC on her attaining the age of thirty years or when she gets married whichever is earlier. An unmarried Air Hostess may, however, in the interest of IAC be retained in the service of [Indian Airline Corporation] up to the age of thirty-five years with the approval of the General Manager.").

200. *Id.* ¶ 15.

201. *Id.*

was contingent on the absolute discretion of the Managing Director, with no appeal mechanism in place under the Regulations.[202]

On the other hand, the service conditions of the male employees assuming the posts of Air Pursers (APs) and Flight Stewards (FSs) remained starkly different despite the inherent similarity in the nature of services rendered by them and the Air Hostesses.[203] The mode of recruitment, avenues for promotion, and conditions of service were different for these two groups, despite the common nature of job function. First, the age of retirement for the APs was set at fifty-eight years, and they were not subject to retirement contingencies, unlike the Air Hostesses.[204] In fact, the two classes, FSs and Air Hostesses, were deemed to have separate seniority, and their promotions took place according to their respective level of seniority.[205] Second, Air Hostesses had a minimum service period of three years, whereas the FSs had a minimum service period of five years.[206] Third, the Air Hostesses were eligible for discounted (retiral concessional) passage after completing four years of service whereas for FSs, it was seven years of service.[207] However, an Air Hostess received retirement benefits on completion of fifteen years of service whereas for FSs, the period of maturity for retiral benefits was thirty years of service.[208] The reasoning behind this specific distinction was that these retiral benefits were intended to be compensatory in nature as the Air Hostesses were required to retire at an early age of thirty-five, extendable up to forty, whereas FSs retired at a later age of fifty-eight years.[209] Other than this condition, Air India failed to adduce any cogent reason to justify the differences in service conditions between the classes, especially when it was undisputed that the nature of job was exactly the same.

Although the factual issues are different from the Hooters cases, the two organizations are both dominated by inherent sex discrimination in their hiring policies. While Hooters did not hire men for the position of waiters at all, Air India's policies made a stark differentiation in the work conditions of the male and female employees despite the similarity in their respective job profiles and justified this distinction *inter alia* on the basis of customer preferences. Similarly, in *Diaz* the airline policy allowed for the hiring of only females as flight attendants, whereas, in *Nargesh Meerza* both male and female employees were hired for the role of flight attendants. However, the sex discrimination persisted in the service conditions of these two classes much to the disadvantage of the female flight attendants.

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202. *Id.* ¶ 16.

203. *Id.* (APs were employed by Air India for their international operations whereas FSs were employees of IAC for their domestic operations).

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* ¶ 127.

208. *Id.*

209. *Id.*

The challenge to the Regulations hinged on the violation of Articles 14, 15, and 16 of the Constitution of India.[210] It particularly focused on the violation of the guarantee of equality under Article 14 of the Constitution, where the Air Hostesses claimed that they were being treated differently than the male pursers, the violation of the right against discrimination under Article 15(1), and the infringement of the right to equality of opportunity in matters of public employment guaranteed under Article 16 of the Indian constitution.[211]

Article 14 of the Indian Constitution safeguards "equality before law" as well as the "equal protection of the laws."[212] "Equality before law" is a negative concept which prohibits discrimination.[213] "Equal protection of the laws" is an affirmative concept that requires the State to provide special treatment to persons in different situations in order to establish equality amongst all.[214] The essence of Article 14 is that equals would be treated equally, whereas unequal would have to be treated unequally in order to further the objective of equality for all.[215]

To determine whether individuals are equal, Indian courts use the reasonable classification test.[216] Equality is ensured for all those belonging to the same class whereas the different classes have to be treated differently according to the specific requirements of their class.[217] This classification must be founded on an intelligible difference which distinguishes one class from the other and the difference must have a rational nexus to the object sought to be achieved by such classification.[218]

To sustain an Article 14 challenge, a party must establish that the two categories of employees belonged to the same "class" and that, despite being equals, were treated dissimilarly. In their Article 14 challenge, the Air Hostesses argued that they were similarly situated with the male pursers as they form a part of the same cabin crew and perform identical or similar duties.[219] They further contended that even if the Air Hostesses were a separate category or class, there was an *inter se* discrimination between the Air Hostesses posted in the United Kingdom and those serving on the other Air India flights, as the age of retirement post extension differed between the two.[220]

Air India, on the other hand, submitted that Air Hostesses and APs formed two separate classes altogether and hence could not be deemed to be "equals" within the meaning of Article 14.[221] They relied on the difference in the mode of

210. *Id.*
211. *See generally id.*
212. INDIA CONST. art. 14. ("Equality before law - The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.").
213. M. Nagaraj v. India, 8 SCC 212 (2006) (India).
214. Ashok Kumar Thakur v. India, 5 SCC 403 (1995) (India).
215. W. Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75 (1952) (India).
216. *Id.*
217. *Id.*
218. *Id.* ¶ 58.
219. *Id.* ¶ 19.
220. *Id.* ¶ 64.
221. *Id.*

recruitment, their qualifications, their promotional avenues, and the circumstances under which they retire.[222] They also argued that a lower retirement age for females was due to the strenuous job profile of an Air Hostess, which might not be well suited for women of an older age.[223]

The Air Hostesses also alleged that they had been subjected to hostile sex-based discrimination, and that the termination of their services due to pregnancy or marriage within the first four years of service was manifestly unreasonable and arbitrary, violative of Article 14.[224] They also argued the rationale behind having only younger women as Air Hostesses was speculative and inconsistent with the concept of emancipation of women.[225] Additionally, they highlighted that the Air Hostesses had been completely deprived of promotional opportunities available to the male members of the cabin crew.[226]

IAC responded to these arguments with a volley of counter contentions. It argued against the violation of Article 15(2) of the Constitution, maintaining that the recruitment of the Air Hostesses was swayed by other considerations and not just sex alone.[227]

The defense advanced by IAC regarding the marriage and pregnancy contingencies is steeped in the societal perception of the effects of marriage, rooted in the idea that pregnancy and marriage impede the focus and performance of a woman in service. IAC argued that the limitations based on pregnancy and marriage were reasonable restrictions, and if they were to be removed, then IAC would be inundated with heavy expenditures to make arrangements for substitutes for the Air Hostesses on maternity leave.[228] It also insisted that the Court should take into consideration that a large number of Air Hostesses voluntarily drop out of service even before the age of retirement fixed under the Regulations.[229] This line of argument is completely irrelevant and legally unsound as the number of Air Hostesses seeking an early retirement does not justify the dissimilar treatment between the two classes essentially performing the same function.

The Supreme Court of India assessed the Article 14 issues based on classification, namely, whether the Air Hostesses and the APs formed the same class or two distinct classes.[230] The Court held that "Article 14 forbids hostile discrimination but not reasonable classification. Thus, where persons belonging to a particular class in view of their special attributes, qualities, mode of recruitment and the like, are differently treated in public interest to advance and boost members

222. *Id.* ¶ 6.
223. *Id.*
224. *Id.* ¶ 18.
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.* ¶ 22.
230. *Id.* ¶ 27.

belonging to backward classes, such a classification would not amount to discrimination."[231] It relied on *Kathi Raning Rawat v. Saurashtra*[232] and *General Manager, Southern Railway v. Rangachari*[233] to highlight that unequal treatment between two different classes is not contrary to the ethos of the Constitution.[234] The Court cited the following paragraph of Judge Fazal Ali from the *Saurashtra* judgment to outline permissible discrimination:

> I think that a distinction should be drawn between "discrimination without reason" and "discrimination with reason." The whole doctrine of classification is based on this distinction and on the well-known fact that the circumstances which govern one set of persons or objects may not necessarily be the same as those governing another set of persons or objects, so that the question of unequal treatment does not really arise as between persons governed by different conditions and different sets of circumstances.[235]

It further relied on the verdict in *All India Station Master's & Assistant Station Master's Association v. Gen. Manager, Cent. Railways* to address the need for classification of employees into different classes and the concomitant differential treatment of the various classes holding that, "[e]ach such class can be reasonably considered to be a separate and in many matters, independent entity with its own rules of recruitment, pay and prospects and other conditions of service which may vary considerably between one class and another."[236]

The Court however, failed to scrutinize the basis for separately classifying male and female employees. The Court's excessive focus on differential treatment of different classes diverted any seminal discussion on how these classes were to be categorized, and, especially considering the unique facts of the case, it failed to take a look at the inherent sex-based discrimination that existed at the recruitment level. Although the *Nargesh Meerza* case superficially dealt with differences in service conditions, it was inherently rooted in hiring level sex-based discrimination between the classes. The Court referred to the following paragraph from *Rangachari* without fully elucidating how this dictum fit into the factual matrix of the current dispute.

> For each such class there are separate rules fixing the number of personnel of each class, posts to which the men in that class will be appointed, questions of seniority, pay of different posts, the manner in

231. *Id.* ¶ 19.
232. Kathi Raning Rawat v. Saurashtra, 1952 AIR 123 (1952) (India).
233. Gen. Manager, S. Ry. v. Rangachari, 1962 AIR 36 (1961) (India).
234. *Kathi Raning Rawat*, 1952 AIR 123; *Rangachari*, 1962 AIR 36.
235. *Kathi Raning Rawat*, 1952 AIR 123.
236. All India Station Masters' & Assistant Station Masters' Ass'n v. Gen. Manager, Cent. Rys., 1960 AIR 384 (1959) (India).

> which promotion will be effected from the lower grades of pay to the higher grades, e.g., whether on the result of periodical examination or by seniority, or by selection or on some other basis and other cognate matters. Each such class can be reasonably considered to be a separate and in many matters independent entity with its own rules of recruitment, pay and prospects and other conditions of service which may vary considerably between one class and another.[237]

The *Rangachari* case dealt with an affirmative action program for the promotion of lower class individuals. The Court in this case had upheld the reservation of certain promotions for individuals of particular classes as a consequence of affirmative action to maintain adequate representation of lower classes even at higher levels of service.[238] In fact, none of the cases that the Court relied on discussed discrimination on grounds of sex.[239] *Nargesh Meerza* is different because it dealt with a class who was being prejudiced due to their perceived gender role. These gender considerations were wholly irrelevant to the performance of their jobs. The Court's broad analysis was limited to the justification of discrimination between different classes, but it completely neglected to discuss the parameters under which the classification in itself may not be justified. In other words, it failed to look into the intelligible difference behind this need for classification between men and women.

The Court further noted that Article 16(1) is only violated if there is a breach of equality between members of the same class of employees, and Article 14 did not contemplate equality between members of separate or independent classes.[240] In its assessment of whether the APs and Air Hostesses form two separate classes, the Court favored the arguments by IAC on the mode of recruitment, qualifications, and promotional avenues.[241] Although the Court acknowledged that the nature of duties between the two classes was similar, it found that this alone would not render them one class of service.[242] It relied on the case of *Punjab v. Joginder Singh* to find that hiring qualifications for a post and the method of recruitment are important parameters to determine a distinction between two classes.[243] However, the judgment in *Joginder Singh* dealt with equality of pay scales of junior teachers without any consideration of sex.[244] The Court failed to justify the application of *Joginder Singh*'s rationale to the facts of *Nargesh Meerza*.

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237. Air India v. Nargesh Meerza, 1981 AIR 1829 (1981) (India) (quoting All India Station Masters' & Assistant Station Masters' Ass'n v. Gen. Manager, Cent. Rys., 1960 AIR 384 (1959) (India)).

238. Gen. Manager, S. Ry. v. Rangachari, 1962 AIR 36, 19 (1961) (India).

239. *Air India*, 1981 AIR 1829.

240. *Id.* (citing Gujarat v. Shri Ambica Mills Ltd., 1974 AIR 1300 (1974) (India); Ramesh Prasad Singh v. Bihar, 1978 AIR 327 (1978) (India); W.U.P. Elec. Power & Supply Co. v. Uttar Pradesh, 1970 AIR 21 (1969) (India)).

241. *Id.*

242. *Id.*

243. *Id.* (citing Punjab v. Joginder Singh, 1963 AIR 913 (1962) (India)).

244. *See* Punjab v. Joginder Singh, 1963 AIR 913, 4 (1962) (India).

Additionally, it noted the difference in the number of posts per category, differences in the starting salaries between the two categories, and the perks of the employment in assessing whether the APs and Air Hostesses were two separate classes.[245] The Court declared the Air Hostesses and APs two distinct classes subject to different rules and regulations.[246] Consequently, it held that the peculiar conditions governing the Air Hostesses alone could not amount to discrimination so as to violate Article 14 of the Constitution, as they form a separate category altogether.[247] Interestingly, the Court failed to note that the differences in service conditions themselves stem from the perceived societal role of women. There is no requirement for distinction between males and females as the role of a flight attendant does not have to be a gender specific job. A flight attendant is responsible for ensuring the safety, security, and comfort of airline passengers. The job profile generally requires one to possess good communication skills, the ability to deal with passengers, maintain composure, etc.[248] The skills and efficiency required for the performance of the expected roles has little to do with one's gender. This is precisely what the Fifth Circuit in *Diaz* had stressed upon noting that "the primary function of an airline is to transport passengers safely from one point to another."[249] Thus, making a distinction between male and female employees for the discharge of such functions does not assist in the normal operation of an airline business.

Discussing the genderless nature of flight attendant duties also highlights the fallacy in the Supreme Court of India's reasoning on classification. The Court made it abundantly clear that the job function of both the classes was the same, but it failed to address why a sex-based compartmentalization is justified at the hiring level for rendering services of the same nature. The very nature of this classification between Air Hostesses and APs rests on sex alone, at best guided by stereotypical considerations which in itself are discriminatory classifications. The facts of the case demanded a thorough scrutiny of stereotypical notions that guide the hiring level classification—which is starkly missing from the judgement.

The Court, however, discussed another closely related aspect in the second limb of argument—even if there is no discrimination *inter se* between Air Hostesses, the conditions impugned are so unreasonable and manifestly arbitrary that they are violative of Article 14.[250] IAC advanced the argument that the class of Air Hostesses is a sex-based recruitment, and any discrimination made in their service conditions had not been made on the ground of sex alone but due to numerous other considerations.[251] The Air Hostesses countered with the contention that "the

245. *Air India*, 1981 AIR 1829, 57.
246. *Id.*
247. *Id.*
248. *Cabin Crew: Safety Comes First*, BH TRAINING (Aug. 24, 2015), https://perma.cc/8ZCQ-VV7W.
249. Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).
250. *Air India*, 1981 AIR 1829.
251. *Id.*

real discrimination is . . . on the basis of sex which is sought to be smoke-screened by giving a halo of circumstances other than sex" alluding to the fact that IAC reliance on "other considerations" was merely a red herring to derail focus from the underlying sex discrimination.[252] This invites special attention because although the Court sided with IAC, years later the Supreme Court in *Navtej Johar v. India* chastised this very proposition, noting that sex discrimination cannot be churned out in isolation and is usually inextricably linked to different social and economic realities of the time.[253] The judgment has brought to the forefront the idea that gender is a complex issue, which involves consideration of multifarious factors that might not always be compartmentalized discretely.

The Court then ventured into assessing the challenge to the "arbitrariness" of the Regulations.[254] The Court had three conditions to review: first, the age of retirement which was pegged at thirty-five years; second, termination upon marriage within four years of service; and third, termination upon first pregnancy.[255] The Court found no infirmity with the second condition.[256] The Court reasoned that most Air Hostesses start their careers between the ages of nineteen and twenty-six and the number of Air Hostesses who decide to marry immediately after entering the service is considerably low.[257] It found that the regulation permitting an Air Hostess to marry at the age of twenty-three if she has joined the service at the age of nineteen was a salutary provision.[258] The Court grounded its assessment on the entry age of nineteen and viewed the restriction on marriage as a positive deterrent for a woman to marry before the age of twenty-three.[259] In the opinion of the Court, it "improves the health of the employee, promotes the then existing family planning programme, and also increases the chances of a successful marriage as the woman in this age bracket is likely to become fully mature."[260] The Court concurred with IAC that if the bar on marriage within four years of service was removed, then IAC would have to incur a significant expenditure in making substitute arrangements.[261]

With respect to the third condition, the Court sided with the Air Hostesses, deeming the provision to be the "most unreasonable and arbitrary."[262] IAC had argued that pregnancy gives rise to medical complications which hamper the performance of an Air Hostess and debilitates her physique, thereby rendering it difficult for her to discharge her duties even post-pregnancy.[263]

252. *Id.*
253. *See generally* Navtej Singh Johar v. India, 2018 AIR 4321 (2018) (India).
254. *Air India*, 1981 AIR 1829, ¶ 81.
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.*

The Court outrightly rejected these arguments, citing the lack of any legal or medical authority for this "bald proposition" on the effects of pregnancy on discharge of an employee's duties.[264] It reasoned that the regulation did not prohibit marriage after four years, and it is not reasonable to impose a restriction on a natural consequence of marriage.[265] Citing the Maternity Benefit Act (1961) and the Maharashtra Maternity Act (1965), the Court emphasized that an Air Hostess is entitled to certain benefits, including maternity leave.[266]

Interestingly, the Court inadvertently reinforced another stereotype by placing the thrust of its reasoning on the notion that pregnancy is a natural outcome of marriage. The analysis could have avoided linking pregnancy with marriage. It essentially alludes to the understanding that if IAC deemed marriage after four years of service to be permissible, it might as well be welcoming towards pregnant employees who are married. A possible ramification of this reasoning is that if IAC had not allowed a marriage exemption at all, unmarried pregnant women would stand no chance at being employed with IAC.

The Court relied on a series of Indian judgments pronouncing that arbitrary or unreasonable action cannot be upheld and violates the guarantee of equality enshrined in Article 14.[267] The Court ultimately struck down the last portion of regulation 46(i)(c) for being in violation of Article 14.[268] As a suggestion, the Court advised the corporations to provide maternity leave for a period of fourteen to sixteen months if the corporations felt that pregnancy, for its entire duration, would hinder the discharge of some Air Hostesses' duties.[269]

The Court then moved its scrutiny to the first condition, which provided that Air Hostesses were required to retire by the age of thirty-five, extendable at the option of the Managing Director to the age of forty-five, subject to other conditions being satisfied.[270] The question of determining an Air Hostess's retirement age is generally decided by the relevant authorities after considering factors such as nature of the work, current conditions, practice in other institutions, etc.[271]

Against this backdrop, the Court, relying on *Imperial Chemical Industries (India) v. Workmen*, concluded that, "where the authority concerned takes into account factors or circumstances which are inherently irrational or illogical or tainted, the decision fixing the age of retirement is open to serious scrutiny."[272] The Court analyzed the reasons submitted by IAC for affixing thirty-five years as the age of retirement. IAC advanced three reasons: (1) given the arduous and

264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.* ("The impugned provisions appear to us to be a clear case of official arbitrariness. As the impugned part of the regulation is severable from the rest of the regulation, it is not necessary for us to strike down the entire Regulation.").
269. *Id.*
270. *Id.*
271. *Id.*
272. *Id.*

strenuous job requirement of the Air Hostesses, an early age of retirement is in the best interest of their efficiency and health; (2) practice demonstrates that quite a sizeable number of Air Hostesses retire even before the age of thirty-five*;* and (3) Air Hostesses are recruited to provide attractive and pleasing service to passengers in a highly competitive field and consequently stress is laid on their appearance, youth, glamour, and charm.[273]

The Court discarded the first and second arguments for want of logic, especially considering the advanced medical technology of the contemporary times where it is no longer tenable that a woman loses her efficiency at the ages of thirty-five, forty, and forty-five.[274] The Court's assessment of the third argument is of far greater relevance to this Article's discussion. IAC tried to justify the retirement age on the basis of customer preferences, highlighting the need for an Air Hostess to be "charming" and "glamorous."[275] The Court expressed its unequivocal displeasure with this argument. It considered this argument to be based on "pure speculation and an artificial understanding of the qualities of the fair sex" and an "insult to the institution of sacred womanhood."[276] The Court's disapproval is reflected in the following paragraph from the judgment:

> It is idle to contend that young women with pleasing manners should be employed so as to act as show pieces in order to cater to the varied tastes of the passengers when in fact older women with greater experience and goodwill can look after the comforts of the passengers much better than a young woman can. Even if IAC had been swayed or governed by these considerations, it must immediately banish or efface the same from its approach. More particularly such observations coming from a prestigious Corporation like Air India appear to be in bad taste and is proof positive of denigration of the role of women and a demonstration of male chauvinism and verily involves nay discloses an element of unfavourable bias against the fair sex which is palpably unreasonable and smacks of pure official arbitrariness.[277]

The Court's opinion on customer preferences was limited to discrimination between the different age groups of women within the same sex, as opposed to the gendered perception of women discussed in *Southwest*. *Southwest*'s reasoning addressed sex-based discrimination and clarified that customer preferences cannot outweigh equality between sexes.[278] This is the reasoning the Court in *Nargesh Meerza* should have adopted. However, the Court decidedly refrained from following U.S. jurisprudence on this front, arguing that "due process of

273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.*
277. *Id.*
278. Wilson v. Southwest Airlines Co., 517 F.Supp. 292, 304 (N.D. Tex. 1981).

law" is not conducive to the Indian constitutional framework.[279] The Court's approach is not entirely reflective of its time, as Indian jurisprudence was evolving and had already effectively started utilizing the doctrine of due process years before the delivery of the verdict in *Nargesh Meerza*.[280]

The Court emphasized local influences, social conditions, and legal or political pressures as deciding factors for fixing a retirement age.[281] The Court also pointed out that there can be no cut and dry formula for determining the age of retirement, which is linked to various circumstances and factors.[282] As identified by the Court, the spirit of the regulation is that an Air Hostess, if medically fit, is likely to continue up to the age of forty-five by yearly extensions given by the Managing Director.[283] The Court, however, noted that the real intention of the makers of the Regulations have not been carried out because the Managing Director was given absolute discretion to extend or not to extend the period of employment in the case of Air Hostesses older than thirty-five.[284] In the words of the judgment, "the words 'at the option' are wide enough to allow the Managing Director to exercise his discretion in favour of one Air Hostess and not in favour of the other which may result in discrimination."[285]

The Court highlighted three primary defects in the impugned provision: first, the regulation lacks any guidelines, rules, or principles which may govern the exercise of discretion by the Managing Director; second, there is no requirement for furnishing adequate reasoning for refusing to extend the period of employment; and third, there is no appellate mechanism to appeal the order passed by the Managing Director.[286]

The Court opined that the impugned provision excessively delegates power, as the entire fate of an Air Hostess's extension depends upon the whims and fancies of the Managing Director without any guiding principle to shape his discretion.[287] The Court struck down regulation 47 to the extent that it gave solely the Managing Director the option to extend the services of an Air Hostess.[288] The

279. *Air India*, 1981 AIR 1829.

280. *See generally* Maneka Gandhi v. India, 1978 AIR 597 (1978) (India). *See also*, Manoj Mate, *The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases*, 28 BERKELEY J. INT'L L. 216, 217 (2010).

281. *Air India*, 1981 AIR 1829.

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* The Court relied on *Lala Hari Chand Sard v. Mizo Dist. Council*, reaffirming the idea that a regulation lacking in any principles or standard for the exercise of the executive power is a bad regulation and is violative of Article 14. *Id.* The Court also relied on *Anwar Ali Sarkar* to expound the doctrine of a provision suffering from the vice of excessive delegation of power. *Id.* It referred to the judgement of *Mysore v. S.R. Jayaram*, where the Court found rules that provided no statutory principle or guidelines to determine the suitability of a particular candidate for recruitment to be suffering from the vice of excessive delegation of power. *Id.*

287. *Id.*

288. *Id.*

effect of striking down this provision was that an Air Hostess, unless the provision is suitably amended to bring it in conformity with the provisions of Article 14, would retire at the age of forty-five and the Managing Director would be bound to grant yearly extensions as a matter of course, for a period of ten years if the Air Hostess is found to be medically fit. Thus, effectively extending the period of an Air Hostess's services to her fifty-fifth birthday. The Court categorically refused to entertain the argument on customer preferences, and instead it primarily based its verdict on the arbitrariness of the provision.

In its discussion on the violation of Articles 15(1) and 16(2)—noting that these provisions prescribe discrimination on the ground of sex alone—the Court relied on *Yusuf Abdul Aziz v. Bombay*[289] and *Miss C.B. Muthamma v. India*[290] (*C.B. Muthamma*) to highlight that sex is a permissible classification when coupled with other considerations.[291]

The Court in particular made a bland reference to the following paragraph from the *C.B. Muthamma* case without drawing any parallel to the current dispute:

> We do not mean to universalise or dogmatise that men and women are equal in all occupations and all situations and do not exclude the need to pragmatize where the requirements of particular employment, the sensitivities of sex or the peculiarities of societal sectors or the handicaps of either sex may compel selectivity. But save where the differentiation is demonstrable, the rule of equality must govern.[292]

The Court failed to adduce any deliberation into what these other considerations were. The aridity of the analysis on this point evinces the Court's reluctance to address the very reasons forming the basis of the original classification.

The analysis then moved to regulation 12 of the IAC Regulations. In the case of the Air Hostesses employed by Air India, the Court adopted a similar approach to the issues raised by Air Hostesses employed by IAC and Air India.[293] Similar to its analysis of Air India employees, the Court declared Air Hostesses to be a separate class from male flight stewards employed by IAC, thereby ruling out any discrimination on the grounds of sex under Article 14 and re-emphasizing that where classes of service are different, inequality of promotional avenues is legally permissible.[294]

Regulation 12 provided that "[a]n Air Hostess shall retire from the service of IAC on her attaining the age of thirty-five years or when she gets married, whichever is earlier. The General Manager may, however, retain in service an

289. *See generally* Yusuf Abdul Aziz v. Bombay, 1954 AIR 1954, 321 (1954) (India).
290. *See generally* Miss C.B. Muthamma v. India, 1979 AIR 1868 (1979) (India).
291. *Air India*, 1981 AIR 1829.
292. *Id.*
293. *Id.*
294. *Id.* (relying on Mysore v. M.N. Krishna Murthy, 1973 AIR 1146 (1973) (India)).

unmarried Air Hostess up to the age of forty years."[295] The Court found two serious constitutional infirmities in the rule which were also present in Air India's regulation 46.[296] The clauses regarding retirement and pregnancy were held to be unconstitutional for the reasons given in the case of Air India Air Hostesses: that regulation 46 delegates unguided and uncontrolled power, and the power conferred on the General Manager to retain an Air Hostess up to the age of forty was also struck down as invalid for lack of any guidelines or principles.[297] The Court found the cases of Air India and IAC Air Hostesses to be identical, thus an extension up to the age forty-five in the case of one and forty in the case of other, would amount to discrimination *inter se* in the same class of Air Hostesses and was also subsequently struck down on that ground.[298]

Overall, the Court extended the retirement age to forty-five and did away with the provision on pregnancy.[299] It did not interfere with the bar on marriage during one's first four years of employment. The judgement did not hold the discriminatory employment conditions and promotional avenues for the Air Hostesses and APs to be discriminatory on the basis of sex under Article 15, reasoning that they were covered by the reasonable classification principle under Article 14. The grounds that the Court based the decision on did not truly encompass the spirit of the Constitution. It circuitously rejected the core constitutional claim of sex-based discrimination for a superficial interpretation of class distinction without scrutinizing the sex discrimination that existed at the hiring level.

Years after the *Nargesh Meerza* case, the male Flight Pursers and female Air Hostesses were merged into a single cadre in 1997, with identical uniform service conditions in place for new employees.[300] The conditions stipulated in the *Nargesh Meerza* judgement were later challenged before the Bombay High Court, which took into consideration the merger of the cadres and held that a lower retirement age for Air Hostesses would indeed be discriminatory on the basis of sex under Article 16 and would not amount to reasonable classification under Article 14.[301] In addition, the judgment prescribed certain guidelines for IAC to follow.[302] This decision reached the Supreme Court on appeal which was severely critical of the stance taken by the High Court. The Supreme Court noted that the lower court's decision was a departure from precedent and overruled the decision.[303] However, even though the judgement heavily relied on the *Nargesh Meerza* case, there was a step forward when it held that the Air Hostesses had to retire only

295. *Id.*
296. *Id.*
297. *Id.*
298. *Id.*
299. *Id.*
300. Rajendra Grover v. India Air Ltd., (2008) ILR 1. Del 508, 514–15 (India).
301. Yeshashwinee Merch. v. Air India Ltd. (2002) 4 LLJ 701 (Bom.), 711 (India).
302. *Id.*
303. Air India Cabin Crew Ass'n v. Yeshaswinee Merch., (2003) 6 SCC 277, 283–84 (India).

from Flying Duties (as part of Cabin Crew) at the age of fifty but could continue their services through ground duties.[304]

The discussion of classifying male and female Air India employees and their different retirement ages, which were rooted heavily in the idea of gender roles and sexual stereotypes, was revisited and consequently over-ruled in the Supreme Court of India's decision in *Navtej Singh Johar v. India*.[305] The *Navtej Singh* judgement and the *Nargesh Meerza* case both discuss discrimination on the basis of sex under Article (15)(1) of the Indian Constitution. While the *Nargesh Meerza* case endorsed the idea that discrimination based not on "sex" alone did not amount to a violation of Article 15(1), the *Navtej Singh* judgment held that such a narrow view of Article 15 strips the prohibition on discrimination of its essential content.[306] It noted that sex discrimination is intrinsically intersectional, meaning it cannot operate in isolation of other identities, especially from the socio-political and economic context.[307] The judgment found the classification endorsed by the *Nargesh Meerza* case between male and female employees to be discriminatory and in violation of Article 14 and Article 15 of the Constitution of India.[308]

## CONCLUSION

The inception of Title VII's prohibition against employment discrimination on the grounds of sex has definitely enabled women to make progress in their efforts to shatter the glass ceiling and achieve parity with their male counterparts.[309] The Civil Rights Act has acknowledged the highly prevalent social norms surrounding sex discrimination, while also accounting for the legitimacy of employer's interests as limited justification for using sex-conscious hiring practices.[310]

It is paramount that legislative bodies recognize a business necessity exception to the BFOQ rule. In terms of appearance based discrimination, a narrow interpretation of such statutory provisions should limit the BFOQ carveout to professions wherein a person's physical appearance constitutes the sole or primary qualification for fulfilling business purposes. Creating this type of distinction will help preserve the impact of antidiscrimination statutes, without destabilizing the integrity of establishments where employees' appearance is an integral business feature.

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304. *Id.* at 283.

305. Navtej Singh Johar v. India, (2018) 10 SCC 1, 25 (India).

306. Air India v. Nargesh Meerza, (1981) 4 SCC 335, 337 (India); Navtej Singh Johar, (2018) 10 SCC at 24.

307. Navtej Singh Johar, (2018) 10 SCC at 219.

308. *Id.* at 218.

309. *See* M. Neil Browne & Andrea Giampetro-Meyer, *Many Paths to Justice: The Glass Ceiling, the Looking Glass, and Strategies for Getting to the Other Side*, 21 HOFSTRA LAB. & EMP. L.J. 61, 63–64 (2003) (defining the metaphorical "glass ceiling" as a hidden barrier to women's advancement up the corporate ladder, created by unwitting male perceptions that their failure to promote women is justifiable).

310. Mayer G. Freed & Daniel D. Polsby, *Privacy, Efficiency and the Equality of Men and Women: A Revisionist Way of Sex Discrimination in Employment*, 6 AM. BAR FOUND. RSCH. J. 583, 602 (1981).

Moreover, a business necessity defense ought to be limited in application to only cases where a different appearance would interfere in the actual execution of the job. A legitimate concern may be a regulation which prohibits healthcare workers from donning facial hair, as it may interfere with their surgical masks and the execution of their duties. With respect to the *Nargesh Meerza* judgment, this Article has explored the Indian Supreme Court's take on gender discrimination in the airline industry. Although the Court was reluctant to strike down the hiring level classification between the female Air Hostesses and male stewards, it did categorically lay down that "customer preferences" or "perceived gender role [s]" alone cannot be a justifiable ground for discriminating between employees sharing the same job profile.

Similarly, even while interpreting the BFOQ defense rather narrowly, courts have established that such gender-based hiring practices are appropriate when keeping in mind the employer's third party clients' privacy concerns, physical safety, or rehabilitative interests, which may be jeopardized by a non-discriminatory hiring practice—but at no stage has "customer preference" been regarded as a reason to permit sex discriminatory hiring practices.[311]

It is critical to ensure that courts do not rule that the way a person looks or dresses is a business necessity unless not having that appearance actually makes it physically impossible for one to perform the task for which they were hired or their appearance would impact either their own safety or the safety of others. Because appearance based discrimination often results from individual biases and pre-conceived notions, it is imperative that courts strive for greater objectivity and place heavy reliance on the credible testimony of neutral third parties. Antidiscrimination statutes were instituted to facilitate a pragmatic shift in society and empower the masses to think in a fair manner.[312] Permitting an establishment like Hooters to evade penalty and repercussions by alleging that attractive and sexually enticing servers are a business necessity, integral to the functioning of its non looks-based business, results in the perpetuation of attitudes which are solely focused on appearance and end up preventing fair and equal employment opportunities. In the end, only the judicial system has the ability to efficiently and equitably put teeth into constitutional mechanisms like Title VII and the Indian Constitution.

Over the last fifty years, Title VII has been relatively successful in providing legal protection for women in hiring, firing, and promotion, as well as in preventing the perpetuation of sex stereotypes. Nonetheless, one point continues to hinder gender equality in the workplace, which continues to successfully evade Title VII protections: the retail entertainment industry concept that sex sells.

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311. Hoerner, *supra* note 15.

312. Katharine Christopherson, Audrey Yiadom, Juliet Johnson, Francisca Fernando, Hanan Yazid, & Clara Thiemann, *Tackling Legal Impediments to Women's Economic Empowerment* 8, 25 (Int'l Monetary Fund Working Paper No. 22/37, 2022).