

# RETAIL STORE IMAGE, *BONA FIDE* OCCUPATIONAL QUALIFICATIONS, AND JOB DISCRIMINATION: ESTABLISHING THE *ESSENCE OF THE BUSINESS* FOR RETAIL ORGANIZATIONS

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*The authors examine the relationships among the concepts of bona fide occupational qualifications, retail store image, and job discrimination. Retailers increasingly must grapple with employees' physical or demographic attributes as bona fide occupational qualifications for the purpose of creating a desired store image. Such practices may clash with Title VII of the Civil Rights Act of 1964, which prohibits discrimination in hiring, firing, promotion, or other workplace decisions. The question for retailers is: when is it defensible to discriminate on the basis of physical or demographic characteristics? The answer to that question involves determining the essence of the business. The authors examine legal cases involving hiring based on physical appearance or demographic attributes of employees and, using consumer preferences, propose economic and market research approaches for determining the essence of the business. Recommendations for retail organizations are offered.*

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## INTRODUCTION

Image creation is a major component of retail strategy. Consumers often use image to help evaluate and select retailers. Retail store image is the schematic memory (sometimes called knowledge structure) of a store as a result of many different stimuli. Schematic memory, or schema, refers to a complex web of associations among different stimuli. For example, knowledge structure of a target audience for McDonald's restaurants may be based on the association of the restaurants' fast service, friendly staff, low price, child-friendly atmosphere, limited menu, and clean facilities. Store image can be used to position a retailer vis-à-vis other stores in consumers' evoked sets.

Retail store image may be thought of as a combination or association of discrete elements. The web of tangible and intangible discrete elements in a store's image is linked together in

a molecule-like whole. The multiple-element, molecular nature of store image suggests that if an element, deliberately or inadvertently, is changed, such a change may completely alter *the essence* of a store's entity and hence its image. Using an analogy from chemistry, switching  $FE_3O_2$  to  $FE_2O_3$  creates a new substance.

Since the seminal work of Martineau (1958), the literature yields several conclusions about store image. Among these are:

1. There is general agreement about the definition of store image.
2. There is little disagreement concerning the potential major elements of store image:
  - Merchandise
  - Services
  - Clientele
  - Physical facilities
  - Convenience
  - Promotion
  - Store atmosphere
  - Institutional attributes
  - Post-purchase satisfaction
  - Store employees

3. The most frequently examined store image attributes are: merchandise quality and price, location convenience, general service, and employee/sales clerk image and service.
4. With the exception of legal articles or cases, no literature was found dealing with the relationship among store image, the physical and demographic attributes of employees/sales clerks, and the ability of the retail organization to legally discriminate based on those attributes.

### **JOB DISCRIMINATION, RETAIL STORE IMAGE, AND EMPLOYEE ATTRIBUTES**

Retailers have increasingly turned to physical and/or demographic attributes of employees as important, and sometimes dominant, elements in a retail store's image. To create a certain image, the retailer perceives a need to include these desired attributes in the definition of the organization's *bona fide* occupational qualifications (BFOQ). Using *bona fide* occupational qualifications in hiring means intentional discrimination on the basis of these personal attributes, a potential violation of Title VII of the Civil Rights Act of 1964 (hereafter Title VII), which prohibits discrimination in hiring, firing, promotion, or other workplace decisions. The question for retailers is how to navigate the dangerous waters of discrimination while establishing the store image needed to remain viable.

In the following sections, we first examine Title VII with the purpose of providing background for situations where discrimination, at least partially dependent on employee attributes, is used in hiring to achieve a store image. Next, we will consider the concept of *bona fide* occupational qualifications used to discriminate and its relationship to the *essence of the business*.

Generally, if these employee attributes (BFOQs) can be demonstrated to be related to the *essence of the business*, discrimination is acceptable and legal. Although normally court cases provide guidelines about when discrimination is legal, that has not been the case with retailers and *bona fide* occupational

qualifications. The problem is that retailer defendants have either lost or settled legal cases where employees' physical and demographic attributes were used to create or contribute significantly to a store image. The results of these cases, although interesting and insightful, provide few **strict** or completely **objective** guidelines for legal discrimination in hiring of retail employees. To provide more measurable and objective guidelines, we then propose economic analysis and market research similar to that used in mergers and acquisitions as a possible basis to determine if certain employees change the *essence of the business*. And last, based on the lessons learned from legal cases, economic analyses, and market research, we provide guidelines for retail organizations contemplating discrimination in hiring in order to make employee attributes dominant features in their store image.

### **Title VII of the Civil Rights Act**

One of the most important pieces of social legislation in the past fifty years in the U.S. is the Civil Rights Act of 1964. This act proscribes certain types of discrimination in a number of areas including public accommodation, public facilities, and public education. Title VII of the Act forbids discrimination in employment opportunity. Title VII is the primary federal statutory provision addressing discrimination in the workplace. The Act states it is an unlawful practice for an employer to discriminate against an individual on any term, condition, compensation, or privilege because of race, color, religion, sex, or national origin. The Act also establishes the five-member Equal Employment Opportunity Commission (EEOC) which is responsible for the judicial enforcement of civil rights laws.

In addition to the Civil Rights Act of 1964, a number of other federal laws prohibit job discrimination, and are under the purview of the EEOC. These acts include the Equal Pay Act, the Age Discrimination in Employment Act, the Rehabilitation Act, the Americans with Disabilities Act, and the Civil Rights Act of 1991. In total, this legislation extends protected group status to race, color, religion, sex,

national origin, age, disability, and differential pay due to sex. Generally, these laws apply to all public employers, state and local governments, educational institutions, labor unions, and employment agencies.

Under some circumstances, explicit discrimination against the defined protected groups is allowed. According to paragraph E of Section 703 of Title VII:

It shall not be an unlawful employment practice for an employer to hire and employ employees or for an employment agency to classify, or refer for employment any individual on the basis 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 (Title VII, emphasis added).

For example, a permissible defense against a claim of discrimination would be that such discrimination was necessary for reasons of national security. Likewise *bona fide* seniority systems, merit systems, and professionally developed tests provide legitimate defenses as long as they were not explicitly implemented to discriminate against protected group members.

### ***Bona Fide Occupational Qualifications***

A *bona fide* occupational qualification is "...any requirement, which when viewed on the surface seems biased, but actually is reasonably necessary for the performance of the job. For example, religion could be considered a *bona fide* occupational qualification when membership in a certain religion is reasonably necessary to the performance of a job" (Bluestreak Media, 2004). Other examples may include apparel models, or actors or actresses where excluding one sex or the other would be seen as a legitimate occupational qualification. In addition, a hospital could categorically exclude men from obstetrics-gynecological nursing positions or a club could hire only women to strip for a target audience (e.g., heterosexual men) if the employer could show that the discriminatory practice is "*reasonably*

*necessary*" to the "*normal operation*" of the "*particular*" business in question (42, U.S.C. 2000e). It is generally accepted that there are no BFOQs for race.

In order to use the BFOQ defense, the company/discriminator must pass what is known as the *essence of the business* test (Burstein, 1998). For a company to successfully pass the test, it must demonstrate that its hiring decisions, based on otherwise prohibited practices, are *essential* to the business.

The *essence of the business* test can be determined by answering three questions, all of which must be answered in the affirmative: (1) Is the basis for discrimination essential to the business? (2) Are all or reasonably all the members of the group allegedly being discriminated against unable to perform the requirements of the position without changing the product's or service's core characteristics and, as a result, its market? (3) Are there no other reasonable approaches that exist, except those that would cause the company to change markets or cause the company to fail? (Cantor 1999).

In order to answer the above three questions, the firm must be able to operationalize the concepts of the *essence of the business* and *relevant market*. The *essence of the business* can be determined by the strength of market-revealed consumer preferences. If failure to meet consumer preferences for a given employee attribute, such as sex or religion, would result in business failure, then sex or religion can be construed as integral to the *essence of the business*. For example, if consumers' preference for topless female dancers is sufficiently strong and failure to meet that preference results in a failure of the business, then topless female dancers are an integral part of the *essence of the business* and sex can be used as a BFOQ. On the other hand, if failure to meet consumers' preference may result only in decreased profits but not a failure of the business, that characteristic is not essential to the business and cannot be used as a BFOQ defense.

### CASES INVOLVING *BONA FIDE* OCCUPATIONAL QUALIFICATIONS

The difficult task facing a firm offering a bundle of attributes is to prove that a given employee attribute or a combination of attributes is the defining or integral characteristic of the business (*essence of the business*), and any change in those attributes will result in business failure. The following cases and arguments are examples where these issues were salient for discrimination in hiring by retailers.

#### Southwest Airlines

Southwest Airlines created a company called Love Air. The intended image of Love Air was “feminine spirit, fun, and sex appeal.” The company’s advertisements featured the slogan, “AT LAST THERE IS SOMEBODY UP THERE WHO LOVES YOU.” Love Air’s ads promised to deliver “tender loving care” to its target market, which was composed primarily of men (Burstein 1998). Furthermore, Love Air commercials promised clients attractive female attendants who wore hot-pants and served passengers “love bites” (toasted almonds) and “love potions” (cocktails). Even Southwest’s ticketing system featured a “quickie machine” that was to provide “instant gratification” (Cantor 1999).

After being sued for sex discrimination, Southwest Airlines argued that sex was a *bona fide* occupational qualification on the grounds that it was at the core of their marketing strategy. The court acknowledged the airline’s strategy as a practice necessary to attract customers who would make the airline economically viable. The judge in the case, however, concluded that Southwest’s marketing strategy did not transform the *essence* of Southwest’s business, which is the transportation of passengers from one location to another (McGowan 2003). Marketing strategies, therefore, in and of themselves, do not determine the *essence of the business*.

#### Hooters

Opening in 1983, Hooters has based its concept on the “Hooters Girl,” the all-American cheerleader, or the surfer girl next door. Hooters Girls, according to the company, are the face of Hooters stores and establish Hooters’ ambiance and fun and beach-like environment. Hooters Girls are women who can perform this function and maintain Hooters’ image. This image included wearing the Hooters uniform: “Hooters T-shirt, 1/2 shirt, or tank top (Hooter’s girls only), orange Dolfin’s shorts, white bra, suntan panty hose (non-design), clean white tennis shoes and socks, name-badge, pouch/belt, prom-like appearance (hair, makeup, and nails done neatly), positive attitude showing through, prettiest smile in the whole world!” (Burstein, 1998) In 1991, Hooters was contacted by the EEOC and notified that a complaint had been filed that the business was violating the Civil Rights Act. The plaintiff in the case claimed he was the victim of sex discrimination because he was not hired by Hooters despite significant experience as a waiter. This case was settled out of court in May of 1996. As part of the settlement, in which Hooters agreed to pay \$3.8 million to the plaintiff, Savino Latuga, the restaurants were allowed to continue hiring only women to wait tables. Other similar class-action suits filed by men in Chicago and Maryland were settled in similar fashion in November of 1997. In a press release, the company claims that the “settlement agreement acknowledged that ‘being female is reasonably necessary’ to the performance of the Hooters Girl’s job duties, forever preserving the integrity of the Hooters Girl Concept” (Burstein 1998).

#### Abercrombie and Fitch

Abercrombie and Fitch (A&F) is a specialty retailer of apparel for men and women with an active and youthful lifestyle. As part of its image, A&F crafted the “A&F Look,” primarily through its employees. A&F employees’ looks are carefully mandated by the company’s *Associate Handbook*. The handbook, for example, details the employees’ makeup for creating a *fresh, natural appearance* and types

of clothing and footwear which reflect body types, so that associates (sales representatives) look *attractive* and *classic*.

The A&F case is a complicated one because the company not only uses employees' appearance, but allegedly their race (the "A&F Look" typically includes attractive Caucasians), age, and country of origin (few Asians, Hispanics and Filipinos are hired as sales representatives) for building a desired store image. On June 16, 2003, a coalition of four organizations filed an employment discrimination class action lawsuit against A&F. The plaintiffs alleged that A&F discriminated against people of color, including Latinos, Asian Americans, and African Americans, in hiring, job assignment, and other terms and conditions of employment. The basis of the case, therefore, was race and country of origin, not appearance. A&F settled the case and agreed to pay \$50 million. The settlement approved on November 16, 2004, calls for payments of \$40 million to black, Hispanic, and Asian employees and job applicants and \$10 million for attorneys' fees and to monitor compliance. Because of the broad and rather vague nature of the "A&F Look," it was difficult for the company to use the BFOQ defense and establish a link to the *essence of the business*.

The critical question in the above and similar cases is to determine which *element*, or *combination of elements*, plays a *dominant* role in the company's product offering. This question can be answered by evaluating consumers' market-revealed preferences for a given element or a combination of elements, to determine the *essence of the business*. If, for example, it can be **demonstrated** that preference for employee attributes are strong enough, those attributes can be used as BFOQs (AFjustice 2004 and 2005).

### **Appearance as a *Bona Fide Occupational Qualification***

The cases considered above use dimensions of employee characteristics for creating store images. The conclusion reached was that an employer cannot discriminate against members of protected groups for the purpose of building

a desired store image unless it can be demonstrated that such attributes constitute *bona fide* occupational qualifications. The most perplexing and interesting BFOQ-related question, which was not resolved in the A&F case, is whether employees' **appearance** can be a BFOQ. Clearly, employers can enforce "grooming" codes for the purpose of store image as long as such codes are non-discriminatory in nature. Courts have recognized that appearance of a company's employees may contribute to the company's image and success in the market place. Therefore, a reasonable dress or grooming code is considered a proper management prerogative. (e.g., Fagan v. National Cash Register Co. 1973 and La Von Lanigan v. Bartlett & Co. Grain 1979). Title VII also does not bar "appearance" standards so long as they are non-discriminatory.

An interesting case in which appearance standards were raised is Craft v. Metromedia Inc., 1985. In this case, the plaintiff, Christine Craft, a co-anchor for a TV station in Kansas City, Missouri (KMBC-TV), was reassigned to a reporter position because of her appearance. The reassignment was based on the results of market research, specifically focus group studies and telephone polls, which were "overwhelmingly negative" toward the plaintiff. This case is important not only for the results of the case, but the use of a relatively unsophisticated market research method to make the decision. The court of appeals, in reviewing the district court opinion, stated:

Evidence showed a particular concern with appearance in television; the district court stated that reasonable appearance requirements were 'obviously critical' to KMBC's economic well-being; and even Craft admitted she recognized that television was a visual medium and that on-air personnel would need to wear appropriate clothes and makeup...while we believe the record shows an over emphasis by KMBC on appearance, we are not the proper forum in which to debate the relationship between news gathering and dissemination and considerations of appearance and

presentation—i.e., questions of substance versus image—in television journalism. (Craft v. Metromedia, Inc. 1985)

The Abercrombie & Fitch case also comes very close to the issue of employees' *looks* in building a store image. However, the lawsuit against A&F is grounded not on discrimination on the basis of looks or appearance. Rather, it alleges race and country of origin discrimination. The "Hooters' look" concept, as discussed earlier, relied heavily on the Hooters' requirement that wait staff wear cutoff shirts, tank tops, and orange jogging shorts. The *appearance* evidence was not addressed by the court because the case was settled. Hooters anecdotally may use appearance as a requirement for employment, and certainly clubs that employ exotic dancers or other types of performers use looks as a criterion, but no legal cases where found where appearance standards were central to arguments.

### Harrah's

The arguments in a case currently pending with the U. S. Court of Appeals for the Ninth Circuit, Jespersen v. Harrah's Operating Co., deal with issues of appearance standards, sex discrimination, and the *essence of the business*. Bartender Darlene Jespersen was fired by Harrah's after 20 years of service for refusing to comply with its new dress and appearance code which went to great lengths to prescribe dress and make-up standards for female bartenders. Jespersen's suit alleged that a rule requiring female servers to wear makeup violates federal law banning sex discrimination in the workplace because men were not subject to the same standard. Normally, differential grooming policies between men and women are deemed nondiscriminatory by the courts when the policy is based on societal norms and does not place a greater burden on one sex. Briefs in the case addressed the question of whether the interest of employers in promoting and protecting a business image trumps the right of employees to be free from what would otherwise be discrimination. (Jespersen v. Harrah's Operating Co. 2005)

Harrah's and the American Hotel & Lodging Association have been careful not to argue this is a BFOQ case, probably because it would be difficult to demonstrate that make-up on female bartenders is a significant part of the *essence of the business*. Instead the arguments are for the right of retailers to have different dress and grooming standards for men and women based on societal norms. The National Employment Lawyers Association is intent on making it an "*essence*" case. The Association's argument is that the essence of the business is "...courteous, professional, and competent provision of beverages," which does not necessitate "...that women alone wear prescribed make-up and present a contrived, ultra-feminine appearance at all times" (Dorrian 2005).

Clearly in the Harrah's grooming/appearance case it would be difficult to connect make-up on bartenders, male or female, with the *essence of the business*. The defendants, therefore, probably are wise to avoid the BFOQ defense, notwithstanding the importance of employees' appearance to the totality of the image retailers wish to present. In cases where the BFOQ argument is salient, the problem remains, of course, **how** employee attributes can be demonstrated to be an integral part of the *essence of the business*. In the following sections, we consider economic and market research approaches for determining the strength of consumers' market-revealed preferences and relate them to the *essence* argument.

### ECONOMIC AND MARKET APPROACHES FOR DEFINING THE ESSENCE OF THE BUSINESS

A method for defining the *essence of the business* is to focus on the bundle of attributes offered (goods, services, image, etc.) by a particular organization. The logic is that if two sellers offer the same bundle then the same price would be charged. If one seller has one difference in the bundle, then the price difference in the two sellers would reflect the value of that attribute. Price difference, then, would roughly reflect the consumer's willingness to pay more for the item under consideration. For example, if *Playboy*

magazine offered its readers a bundle of articles, reviews, provocative pictures, and cartoons for \$5.00 and another magazine offered similar features without provocative pictures for \$2.00, we may infer that the readers of *Playboy* magazine are paying \$3.00 for the provocative pictures. Since a substantial amount of *Playboy* magazine's revenue is generated from pictures, and the loss of that revenue will result in a business failure, provocative pictures are an integral part of the *essence* of *Playboy* magazine, at least in cultures where provocative pictures are protected and accepted.

In the case of Southwest's Love Air, the court acknowledged that the company used sex and sex appeal as a part of its product offering but concluded, without analyzing the airline's price structure, that sex is not the *essence of its business*. If Southwest, before the court's decision, charged more than similar airlines for its service, the price difference would reflect consumers' willingness to pay more for the sexy flight attendants and other Love Air accoutrements.

The pitfalls of the above reasoning to determine the *essence of the business* are obvious. Most sellers, including retailers, offer complex bundles of attributes. In almost all cases, therefore, identifying competitors that satisfy the *ceteris paribus* assumption is difficult, if not impossible. The price inquiry also does not take into account the price elasticity of demand for the product in question.

In the situation where employee physical and demographic attributes are argued to be salient and a basis for discrimination in hiring, another approach is needed. By examining the use of selected employee physical and demographic attributes by competitors in the relevant product market and determining if they are an integral part of the image of competitors, one could conclude the attributes are the, or a major part of the, *essence of the business*. The method outlined below takes into account the the cross-elasticity of demand among products.

The Supreme Court, in consideration of claims under various antitrust statutes, the United

States Department of Justice, and the Federal Trade Commission guidelines concerning horizontal acquisitions and mergers all use the notion of cross elasticity of demand for defining relevant product markets (Merger Guidelines 1992).

Cross elasticity of demand measures the extent to which various commodities are related to each other. The closer two commodities are substitutes, the greater is the size of the cross-elasticity coefficient. Cross elasticity of demand is used frequently by the government in the enforcement of antitrust laws for defining the boundaries of an industry. The analysis, then, focuses on the question of whether a firm has a monopoly power in the market. If the firm imposes a "small but significant and nontransitory" price increase, say five percent, and consumers respond by switching to another product, then that product is a substitute and should be entered into the hypothetical monopoly domain. Next, the same question will be asked: if the monopoly participants impose a "small but significant and nontransitory" price increase, will consumers switch to another product? If the answer is affirmative, that product will be included in the monopoly domain. This process will continue until consumers stop switching to a different product. When consumers stop switching to another product in response to a price increase, the boundaries of the market are defined. Once the boundaries of the relevant market are defined, an evaluation can be made as to whether an employee physical or demographic attribute(s), such as sex or religion, is a key element of all of the products in the market. If it is, then sex or religion is integral to the *essence of the business* and can be used as a BFOQ.

The obvious issues associated with this method have to do with measurement. Our argument is, however, that consumer researchers frequently handle this type of problem. For example, experimental research designs allow for manipulation of variables (the attributes of employees and other retailer controllable variables) in such a way that, at the very least, behavioral intentions for combinations of attributes can be determined. Moreover,

conjoint analysis has long served market researchers who need to understand the tradeoffs consumers are willing to make among attributes. A conjoint study produces consumer part worth utilities for product attributes to help marketers better understand consumer choice and tradeoffs consumers are willing to make. If topless females in a topless bar are the *essence of the business* then conjoint part worth utilities would reflect that. If a part worth were to be 1.0 for any attribute (the highest possible), that attribute could be said to be necessary or the *essence of the business*—the disjunctive consumer decision making is validated by conjoint analysis. In other words, in the topless bar case, if a part worth were 1.0, that would be evidence that topless females are the *essence of the business*. Conjoint analysis gives the retail decision maker not only a feel for tradeoffs the consumer is willing to make, but also tradeoffs the consumer is unwilling to make. Tradeoffs the consumer is unwilling to make can define the *essence of the business* for retailers and can be powerful evidence in BFOQ cases.

Financial forecasts based upon these methods can help establish, to the courts and others, the role some employee attributes play in the viability of the business and, therefore, the *essence of the business*. Marketers have faced similar issues when asked to justify price differences for products that are essentially the same, but offered to the market as different brands. The criterion long-used in such cases requires the organization, if called upon, to demonstrate that the market perceives the two brands as different products, therefore not injuring competition. If research can establish differences in perception in such cases, different prices are justified (Mayer, Mason and Orbeck 1970). Of course, these types of analyses can have external and other validity challenges, but they would at least allow retailers to use more than anecdotal evidence in defending employee attributes as integral to essence and viability.

#### RECOMMENDATIONS FOR RETAILERS IN BFOQ SITUATIONS

Retail strategists and tacticians should keep in mind that the ultimate goal of Title VII,

consumer preferences notwithstanding, is to create fairness for the purpose of maximizing social welfare. Discrimination in the workplace assuredly imposes a social cost for the targeted group and society as a whole. Circumstances exist, however, where allowing some discrimination-based social cost will result in an increase in social welfare. The courts have viewed this as the moral equivalent of the utilitarian “greater good” argument. In other words, BFOQ defenses for retailers are successful when it can be demonstrated that the social benefit of discrimination (preserving a going concern) outweighs its social costs (some discrimination based on the *essence of the business*). Retailers contemplating using employee characteristics for creating or significantly contributing to image should, particularly when the *essence of the business* is not clear, substantiate the activity with economic analysis and market research. A good starting point is to compare the firm’s price structure with its competitors for the purpose of determining if the firm’s prices are in any way reflections of consumers’ preferences for a given employee attribute. Retailers faced with discrimination allegations should also be in a position to show the court that cross elasticity of demand suggests that the employees’ attributes are *sine qua non* to the *essence of the business*. To accomplish this, long-used market research methods, such as experimental designs and especially conjoint analysis, which focus on and establish consumer tradeoffs, can be powerful and helpful tools for the retailer.

Retail store image is multi-dimensional. Clearly, in some cases, employee attributes play a role in image. The issues retail organizations must be willing and able to face are specificity, necessity, and demonstrability: 1) Can the retailer be specific about the employee attributes needed to perform the job? 2) Are employee attributes really a necessary condition for viability of the retail organization? And, if so, 3) can the retailer demonstrate that necessity with economic analysis and/or market research if challenged by employees who were discriminated against based on attributes that are normally protected?



Justifiable job discrimination is always a highly charged and difficult issue. The trend thus far in BFOQ-related legal challenges is for retailers to hope suits do not arise, to react only if they do, and to settle rather than risk a court-mandated standard. We hope that the discussion above will stimulate organizations to anticipate and prevent problems and challenges by being proactive through the use of widely-used and available economic analyses and market research methods.

### REFERENCES

- AFjustice (2004), "Discrimination Lawsuit Filed Against Abercrombie and Fitch Co." Retrieved November 2004 from [www.afjustice.com](http://www.afjustice.com).
- AFjustice (2005), "\$40 Million Paid to Class Members in December 2005 in Abercrombie & Fitch Discrimination Lawsuit Settlement," Retrieved February 2005 from [www.afjustice.com](http://www.afjustice.com).
- Age Discrimination in Employment Act (1967), Public Law, No. 90-202, 29 U.S.C. 621.
- Americans with Disabilities Act (1990), Public Law, No. 101-336, 42 U.S.C. 12101.
- Bluestreak Media (2004), *Bona Fide Occupational Qualification (BFOQ)*, Retrieved March 21, 2006, from <http://www.abc4.com/guides/employment/guide.aspx?guide=Discrimination>.
- Burstein, Joshua (1998), "Testing the strength of Title VII sexual harassment protection: Can it support a hostile work environment claim brought by a nude dancer?" *Review of Law and Social Change*, 24, no. 2: 271-314. Retrieved March 21 2006, from <http://web.lexis-nexis.com>.
- Cantor, Rachel L. (1999), "Consumer Preferences for Sex and Title VII: Employing Market Definition Analysis for Evaluating BFOQ Defenses," *The University of Chicago Legal Forum*, 1999: 493. Retrieved March 21 2006, from <http://web.lexis-nexis.com>.
- Civil Rights Act (1964), Public Law, No. 88-352, 42 U.S.C. 2000(e).
- Civil Rights Act (1991), Public Law, No. 102-166, 42 U.S.C. 1981.
- Craft v. Metromedia, Inc. (1985), (766 f. 2d 1205) C.A.8.
- Dorrian, P.F. (2005, July), "Bartender's Refusal to Wear Makeup Could Change Face of Discrimination Law," *Bulletin to Management*, 56(28). Retrieved August 26, 2005, from <http://www.bna.com/products/hr/btmn.htm>.
- Equal Pay Act (1963), Public Law No. 88-38, 29 U.S.C. 206(d).
- Fagan v. National Cash Register Co. (1973), 157 U.S. App. D.C. 15, 481 F. 2d 1115, 1124-25 (D.C. Cir. 1973).
- Jespersen v. Harrah's Operating Co. (2005), 9<sup>th</sup> Cir., No. 03-15045, oral argument 6/22/05).
- La Von Lanigan v. Bartlett & Co. Grain (1979), 466 F. Supp. 1388, 1392 (W.D. Mo. 1979).
- Martineau, Pierre (1958), "The Personality of the Retail Store," *Harvard Business Review*, 36, (January-February): 47-55.
- Mayer, Morris L., Joseph B. Mason, E.A. Orbeck (1970), "The Borden Case--A Legal Basis for Private Brand Price Discrimination," *MSU Business Topics*, Winter, vol. 18, no. 1: 56-63.
- McGowan, Sharon M. (2003), "The Bona Fide Body: Title VII's Last Bastion of Intentional Sex Discrimination. (Bona Fide Occupational Qualification)," *Columbia Journal of Gender and Law*, 12, no. 1: 77-127. (January 1). Retrieved March 21 2006, from <http://web.lexis-nexis.com>.
- Merger Guidelines (1992), United States Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 1 ("Market Definition, Measurement and Concentration").
- Rehabilitation Act (1973), Public Law No. 93-112, 29 U.S.C. 791.