FLYING INTO MECCA: WHEN GENDER SHOULD BE A BONA FIDE OCCUPATIONAL QUALIFICATION FOR EXPATRIATION ASSIGNMENTS IN FEMALE-HOSTILE HOST COUNTRIES

RICHARD F. BRUECKNER*

TABLE OF CONTENTS

Introduction 170
I. Title VII of the Civil Rights Act of 1964 175
A. Disparate Impact & Disparate Treatment 176
B. Bona Fide Occupational Qualification 177
II. Equal Employment Opportunities and the Foreign Trade Milieu 178
III. Application of Title VII to Sex Discrimination in Expatriation 180
A. The All or Substantially All Test 181
B. Sex as a BFOQ by Proxy. 182
C. The Essence of the Business 184
IV. Proposals Of Other Scholars 191
V. This Note's Proposal: A Factual and Causal Approach 195
A. The Defendant MNC had a Factual Basis for Determining that the Expatriate was Likely to Encounter a Female-Hostile Culture. 195
B. The Hostility is Sufficiently Likely to Impede the Success Of All or Substantially All Female Expatriates 196
C. The Impeded Performance Of The Expatriate Is Sufficiently Detrimental To The Essence Of The MNC's Business, Her Duties, Or The MNC's Operations 197
D. The MNC Can Make No Reasonable Accommodations to Ensure the Expatriate Could be Successful. 198
VI. Conclusion 198

* Editor-in-Chief, CARDOZO J. L. & GENDER; J.D. Candidate, Benjamin N. Cardozo School of Law, Class of 2015; B.A. English, Muhlenberg College, 2004. The author would like to thank Professor Kerin Coughlin, whose insight was invaluable. He would also like to thank his Note Editor, Laura Tatelman, as well as Paula Shulman, Bret Ruber, Julia Morpurgo, and Richard Brueckner, Sr. for their helpful comments.

INTRODUCTION

> *The challenge in this era of globalization—for countries and individuals—is to find a healthy balance between preserving a sense of identity, home and community and doing what it takes to survive within the globalization system.*[1]

The fifth pillar of Islam requires that all Muslims who are physically and economically capable make a pilgrimage to Mecca.[2] During this pilgrimage,[3] the marchers travel along the path of Mohammad, live in tents, and cook with fire that frequently sets the tents ablaze.[4] Imagine a helicopter company incorporated in Delaware[5] is contracted to provide assistance to these pilgrims,[6] by breaking up skirmishes and putting out fires.[7] Because the pilgrimage requires entry into Mecca, the helicopter must enter Mecca to assist the pilgrims.[8] However, Islamic law[9]—and, thus, Saudi Arabian law[10]— prohibits non-Muslims from entering the city. The consequence of breaking this law is beheading.[11] Thus, the Delaware helicopter company necessarily requires its pilots to convert to Islam.[12]

Now imagine a Baptist helicopter pilot from Texas signs a contract to fly for this helicopter company. He, like many of the other pilots,[13] flies to Tokyo[14] and begins his conversion to Islam. The process requires him to learn the tenets of the faith, choose a new name, and embrace Islam.[15] Our pilot, having chosen his name and completed his course, has a change of heart and decides not to convert.[16] Unable to fly into Mecca, and thus unable to perform his job duties, he returns home at his own expense.[17] Has the helicopter company illegally discriminated against the Baptist pilot?

---

1 THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALIZATION, 35 (Farrar, Straus and Giroux 1999) [hereinafter *THE LEXUS AND THE OLIVE TREE*].

2 HUSTON SMITH, THE WORLD'S RELIGIONS 247 (John Loudon ed., 1991).

3 This scenario is based on the facts from Kern v. Dynalectron Corp., 577 F. Supp. 1196-97 (N.D. Tex. 1983) *aff'd,* 746 F.2d 810 (5th Cir. 1984); *see also* James David Phipps, *Kiss of Death: Application of Title VII's Prohibition Against Religious Discrimination in the Kingdom of Saudi Arabia*, 1994 B.Y.U.L. REV. 399, 415 (1994).

4 *Kern,* 577 F. Supp. at 1197-98; *see also* Phipps, *supra,* note 3 at 415-16.

5 *Kern,* 577 F. Supp. at 1197-98.

6 *Id*.

7 *Id*.; *See also* Phipps, *supra,* note 3, at 415.

8 *Kern,* 577 F. Supp. at 1197-98.

9 Qur'an, *Sûrah At-Tawbah* 9:28 (Majid Fakhry trans.) ("The Qur'an says, "O believers, the polytheists are truly unclean; so let them not come near the Sacred Mosque after this year of theirs . . . .").

10 *Kern,* 577 F. Supp. at 1198. *see also* Phipps, *supra,* note 3, at 416.

11 *Kern,* 577 F. Supp. at 1198; *see also* Phipps, *supra,* note 3, at 416.

12 *Kern,* 577 F. Supp. at 1197-98; *see also* Phipps, *supra,* note 3, at 416.

13 *Kern,* 577 F. Supp. at 1198.

14 *Id*. at 1197-98.

15 *Id*.

16 *Id*.

17 *Id*. at 1198.

Globalization, "the relatively free movement of goods, services, technology, capital, information and people over the entire planet,"[18] is changing the landscape of the world. As a result, some scholars even call it "flat."[19] The barriers that once insolated foreign cultures are diminishing.[20] While this process has many positive effects, it can also lead to a culture clash.[21] Thus, the globalizing world requires an enhanced sensitivity to cultures with values different from our own.[22]

The tension between American values and the increased demand for sensitivity to foreign cultures is particularly taut in the context of equality. When the United States of America was founded, it declared, "all men are created equal."[23] Ever since, America has steadily progressed towards this goal.

In 1965, Congress took a major step forward towards this ideal when it passed the embattled Civil Right Act of 1964 ("Title VII" or "the Act"),[24] which prohibits employers from making hiring decisions based on race, color, religion, sex, or national origin . . . ."[25] It also created the Equal Employment Opportunity Commission ("EEOC"), which is an administrative agency tasked with enforcing Title VII of the Act.[26]

In the fifty years since the Act's passage, the United States has made great strides towards gender equality.[27] In 1960—four years before the Act was passed—one source indicates that only 37.7% of women participated in the workplace compared to 83.3% of men.[28] Only a third of the workforce was

---

[18] DANIEL C.K. CHOW & SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS 21 (Vicki Been et al. eds., 2nd ed. 2010).

[19] THOMAS L. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY 5, 7 (Farrar, Straus & Giroux eds. 2006) [hereinafter *THE WORLD IS FLAT*].

[20] Stephen B. Moldof, *Determining If U.S. Labor Laws Apply And Contracts Are Enforceable With Regard To Work Performed Outside The Borders Of The United States,* SS051 ALI-ABA 609, 611 (2011) ("With products and services moving at a rapid pace between nations and continents, the significance of national borders has eroded."); FRIEDMAN, THE LEXUS AND THE OLIVE TREE, *supra,* note 1, at 15.

[21] CHOW & SCHOENBAUM, *supra* note 18, at 10 (citing JEANNE M. BRETT, NEGOTIATING GLOBALLY 8 (2001)).

[22] *Id*. at 9.

[23] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[24] Vicki Lens, *Supreme Court Narratives on Equality and Gender Discrimination: 1971-2002*, 10 CARDOZO WOMEN'S L.J. 501, 507 (2004).

[25] 42 U.S.C.A. § 2000e-2(a)(1) (West 2014) unconstitutional as applied by Rweyemamu v. Cote, 520 F.3d 198 (2d Cir. 2008).

[26] 42 U.S.C.A. § 2000e-4 (West 1995).

[27] Allie Christiansen Tucker, *Multi-National Corporations Closing the Borders for Female Professionals: Should Gender Discrimination Be Allowed for Expatriation Assignments Under Title VII Law?*,34 WOMEN'S RTS. L. REP. 58, 58 (2012) ("Ever since women achieved the right to vote with the passing of the Nineteenth Amendment to the United States Constitution in 1920, they have been gradually increasing their presence in the workplace, and the government has continually fought to ensure equal treatment for men and women."). *See also* Lens*, supra* note 24; Deborah L. Rhode, *The "No Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1740 (1991); and 42 U.S.C. § 2000e (2014).

[28] Mitra Toossi, *A Century of Change: The U.S. Laborforce, 1950-2050*, MONTHLY LAB. REV. 15, 22 (May, 2002), *available at* www.bls.gov/opub/mlr/2002/05/art2full.pdf.

female.[29] The Bureau of Labor Statistics reported in 2013 that 47% of the workforce was female,[30] with 57.2% of women participating in the labor force.[31] Today, men and women also achieve relatively equal levels of education: of individuals twenty-five years and older, 32% of men and 31.4% of women hold a bachelor's degree.[32]

Despite these achievements, there is still great disparity between men and women employment opportunities.[33] Men still dominate upper management, holding approximately 62% of managerial positions,[34] while women hold only a little more than a quarter of chief executive positions.[35] Meanwhile, statistics show that diversity in executive positions is beneficial to corporate success.[36] Business leaders are learning that "[m]eritocracy—letting talent rise to the top regardless of where it is found and whether it is male or female . . . . [is becoming] essential to business success."[37] Indeed, "most global managers know their companies can no longer afford to ignore potential talent simply because it's wearing a skirt."[38]

At least part of the explanation for this under-representation of women in upper management may be the gender-skewed availability of expatriation opportunities. Globalization is making international experience increasingly valuable.[39] As a result, current and potential employees with international experience are often more attractive candidates for employment and promotion.[40]

Women are more under-represented in expatriate employment than they are

---

29 Toossi, *A Century of Change, supra* note 28, at 24.

30 U.S. Dep't of Labor, *Household Data Annual Averages –Employed Persons by Detailed Occupation, Sex, Race and Hispanic or Latino Ethnicity*, BUREAU OF LABOR STATISTICS, http://www.bls.gov/cps/cpsaat11.htm (last visited Sept. 4, 2014) [hereinafter *Employed Persons by Detailed Occupation*].

31 U.S. Dep't of Labor, *Household Data Annual Averages–Employment Status of the Civilian Noninstitutional Population 16 years and Over by Sex, 1973 to Date*, BUREAU OF LABOR STATISTICS, http://www.bls.gov/cps/cpsaat02.htm (last visited Sept. 4, 2014) [hereinafter *Employed Status of the Civilian*].

32 *Educational Attainment in the United States – Detailed Tables, Table 3: Detailed Years of School Completed by People 25 Years and Over by Sex, Age Groups, Race and Hispanic Origin: 2013*, U.S. CENSUS BUREAU, https://www.census.gov/hhes/socdemo/education/data/cps/2013/tables.html (last visited Nov. 10, 2014).

33 *Id*.

34 *See Employed Persons by Detailed Occupation*, *supra* note 30.

35 *Id*.

36 *See infra* Part II.

37 Nancy J. Adler, *Global Managers: No Longer Men Alone*, 13 THE INT'L J. OF HUM. RESOURCE MGMT 743, 743 (18 Feb 2011) [hereinafter *Global Managers*] (quoting R.M. Kanter, 'Comments on Nancy' *Reach for the Top: Women and the Changing Facts of Work Life*, HARV. BUS. SCH. PRESS., (1994)).

38 Adler, *Global Managers*, *supra* note 37, at 743 (citing Fisher, A.B., *When Will Women Get to the Top?,* 21 FORTUNE 44–56 (September 1992)); *see also infra* Part II.

39 Nancy J. Adler, *Women Do Not Want International Careers: And Other Myths About International Management*, 13 ORG. DYNAMICS 66, 75 (Aug. 1984) [hereinafter *Women Do Not Want International Careers*]; *see also* Tucker, *supra* note 27, at 64.

40 Tucker, *supra* note 27, at 65 ("It is generally undisputed that working abroad can advance your career and make you a more attractive employee.").

in upper management.[41] Between the 1980s and the late 1990s, female expatriation grew from three to fourteen percent.[42] Since the 1990s, however, the rate of female expatriation has plateaued, with women making up an average of only sixteen percent of expatriates.[43] Scholars have suggested several reasons for this continuing disparity between male and female expatriation: (1) "unwillingness to self-nominate; (2) family and childcare responsibilities; (3) lack of proper mentoring or networks; and (4) the impression that the host country will not accept women as professional equals."[44] This Note focuses on the last of these issues—that employers decline to sponsor female expatriation because of concerns that foreign attitudes will be hostile to female professionals.

Ensuring that women have equal expatriation opportunities is not just vital for the broad social goal of equal employment, but also for corporate efficiency and success.[45] Nonetheless, a multinational corporation's ("MNC") success often depends on its ability to understand and operate within the frameworks of different cultures.[46] As one scholar aptly notes, "the United States [cannot] enjoy the luxury of pretending that the rest of the world does not exist."[47] MNCs have much at stake when they enter new foreign markets.[48] They may find themselves unable to compete in female-hostile markets against discriminating foreign competitors.

Few legal sources illuminate the application of Title VII's prohibition on sex discrimination in expatriation employment. In the most relevant, Allie Christensen Tucker's *Multi-National Corporations Closing the Borders for Female Professionals: Should Gender Discrimination Be Allowed for Expatriation Assignments Under Title VII Law?*,[49] Tucker strives to "spark a discussion among legal scholars that will adequately analyze all of the interests involved" in fashioning a standard for determining whether, and in what context, an employer should be able to legally discriminate against women when choosing candidates for

---

[41] Sebastian Reiche, *Statement: Men are Taking More International Assignments than Women*, EXPATRIATUS, http://blog.iese.edu/expatriatus/2011/03/29/statement-men-are-doing-more-international-assignments-than-women (last visited March 2, 2014).

[42] Tucker, *supra* note 27, at 65 (citing Charles M. Vance et al., *Tracking Bias Against the Selection of Female Expatriates: Implications and Opportunities for Business Education*. 48 THUNDERBIRD INT'L BUS. REV. 823, 824 (Nov.-Dec. 2006)).

[43] Reiche, *supra* note 41 (quoting 2010 Brookfield Global Relocation Trends Survey), http://knowledge.brookfieldgrs.com/content/insights_ideas-grts, (last visited March 2, 2014)) ("the gender distribution has remained stable, with women representing a much smaller share of international assignees than men." And "only 17% of expatriates were female . . . this has been a long-term trend with a historical average of 16%".) (In 2010, female expatriation was at seventeen percent).

[44] Adler, *Women Do Not Want International Careers*, *supra* note 39, at 68; *see also* Tucker, *supra* note 27, at 66.

[45] See *infra* Part II.

[46] CHOW & SCHOENBAUM, *supra* note 18, at 9.

[47] Adler, *Women Do Not Want International Careers*, *supra* note 39, at 66 ("Thus, neither Canada nor the United States can enjoy the luxury of pretending that the rest of the world does not exist.").

[48] *See infra* Part II.

[49] Tucker, *supra* note 27.

expatriation assignments in countries with female-hostile cultures. If legal, it would be so under an exception to Title VII that allows an employer to intentionally discriminate when hiring for a position in which sex is a bona fide occupational qualification ("BFOQ").[50] An example of when sex is a BFOQ is when a movie studio hires actors for male roles and actresses for female roles.[51]

This Note aims to develop a rubric for MNCs and courts to follow when determining whether sex is a BFOQ for an expatriate position. Because of the competing—yet equally valid—interests of American society to promote equal opportunity and MNC's to select candidates most likely to succeed in expatriation assignments,[52] MNCs and courts should rarely deem sex a legitimate factor when an MNC is choosing candidates for expatriation assignments. Specifically, this Note argues that sex should only qualify as a "BFOQ" exception to Title VII in such instances where hiring a woman for an expatriate assignment in a female-hostile culture would lead the MNC to undertake excessive risk, such that either (1) the female expatriate would be unable to perform duties integral to the position, or (2) that her appointment would create "costs . . . so prohibitive as to threaten the survival of the business."[53]

Part I of this Note will address Title VII of the Civil Rights Act of 1964 ("Title VII"), the statute prohibiting discrimination in employment. Title VII permits an employer to intentionally discriminate only when the position has a BFOQ.[54] Thus, the BFOQ is a statutorily created defense against employment discrimination claims.[55] Cases interpreting Title VII indicate that a BFOQ exists only when (1) all, or substantially all, women could not satisfy the position's requirements, and (2) that the requirement goes to the essence of the employer's business.[56] This section will briefly discuss the two types of gender discrimination claims that courts have identified: disparate impact and disparate treatment.[57] Then, it will examine the BFOQ.

Part II of this Note will address the conflicting interests in expatriation employment. First, it will discuss the legitimate business concerns of MNCs in selecting candidates most likely to succeed in overseas assignments. Then, Part II

---

50 *Id*.

51 29 C.F.R. § 1604.2(a)(2) (1972) ("Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress.").

52 See *infra* Part II.

53 Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc., 499 U.S. 187, 211 (1991).

54 *Id*. at 188 ("Because respondent's policy involves disparate treatment through explicit facial discrimination, ... [its] policy may be defended only as a BFOQ, a more stringent standard than business necessity.").

55 42 U.S.C.A. § 2000e-2 (a)(1) (West 2014).

56 *Id*.

57 Int'l Bhd. of Teamsters v. U.S., 431 U.S. 324, 335 (1977).

will address the importance of expatriation assignments to women.

Part III will apply the current judicial interpretation of Title VII to expatriation employment. There are two tests that courts use to examine BFOQ claims. An MNC may be able to persuade a court that the expatriate position meets the first test, which requires that the position be one that all or substantially all females would be unable to perform.[58] However, it is unclear under the current framework whether an MNC could successfully show that an expatriate position meets the second test—that the discrimination is necessary to preserve the essence of the business.[59]

Part IV will discuss existing proposals, with special attention to Tucker's *Multi-National Corporations Closing the Borders for Female Professionals: Should Gender Discrimination be Allowed for Expatriation Assignments Under Title VII Law?*[60] Tucker offers the most relevant legal analysis to date and proposes a test for courts to adopt when evaluating sex discrimination in expatriation employment. Part IV concludes with an analysis of that proposal.

Part V proposes a new test for evaluating an MNC's defense of sex as a BFOQ against claims of employment discrimination in expatriation assignments. Specifically, the MNC should have to prove four elements to establish that sex is a BFOQ and thus worthy of the exception provided by Title VII: (1) the MNC had a factual basis for determining that the expatriation assignment was likely to encounter a female-hostile culture; (2) the hostility is sufficiently likely to impede the success of a female expatriate; (3) the impeded performance of the female expatriate is sufficiently detrimental to her duties and/or the MNC's operations; and (4) the MNC can make no reasonable accommodations to ensure that the expatriate could be successful.

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Under Title VII, it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . ."[61]

In 1991, the Supreme Court addressed whether Title VII applied extraterritorially in companion cases *EEOC v. Arabian American Oil Co*. and *Boureslan v. Arabian American Oil Co.*[62] There, the Court held that Title VII did

[58] Dothard v. Rawlinson, 433 U.S. 321, 332-337 (1977).

[59] Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir. 1971).

[60] Tucker, *supra* note 27.

[61] 42 U.S.C.A. § 2000e-2 (a)(1) (West 2014).

[62] EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991); *see also EEOC Notice 915.002*, U.S. EQUAL EMP'T COMM'N (Oct. 20, 1993), http://www.eeoc.gov/policy/docs/waiver.html [hereinafter *EEOC Notice*].

not apply extraterritorially[63] because, unless Congress had indicated that it intended extraterritorial application, legislation is interpreted to only apply domestically.[64] The Court noted that should Congress wish Title VII to apply abroad, it could affirmatively do so through legislation.[65] Congress thus passed the Civil Rights Act of 1991, which, among other things, extended Title VII to extraterritorial disputes.[66] Because the BFOQ exception is part of the statute, it too was extended extraterritorially. However, the answer to the question of territoriality does not answer whether an employer can intentionally discriminate in selecting candidates for expatriation assignments in female-hostile countries.

A. Disparate Impact & Disparate Treatment

Courts have recognized two ways that an employer can unlawfully discriminate: disparate treatment and disparate impact. Disparate treatment occurs when an employer discriminates against a class outright,[67] such as intentional discrimination against members of a certain sex.[68] Disparate impact occurs when an employer takes actions that appear unbiased but affect one class more negatively than another.[69] This Note addresses disparate treatment, considering whether there should ever be instances in which an MNC may legally discriminate based on sex when selecting a candidate for expatriation assignments in female-hostile countries.[70]

In order to establish a prima facie case of disparate treatment, a plaintiff must show "(1) she was within a protected group; (2) she applied and was qualified for a job for which the company was seeking applicants; (3) she was rejected; and (4) after her rejection, the employer continued to seek applicants."[71] Once the plaintiff

---

63 *Arabian Am. Oil Co*., 499 U.S. at 248 (holding that Title VII does not apply extraterritorially to regulate the employment practices of United States employers who employ United States citizens abroad); *see also EEOC Notice*, *supra* note 62.

64 *Arabian Am. Oil Co*.. 499 U.S. at 248 (citing Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949)) (internal quotation marks omitted) ("It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.").

65 *Arabian Am. Oil Co*., 499 U.S. at 245.

66 42 U.S.C. § 2000e-1 (2014).

67 Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1275 (9th Cir. 1981) (quoting Int'l Bhd. of Teamsters v. U.S., 431 U.S. 324, 335 n.15 (1977)) ("In disparate treatment cases, the employer 'treats people less favorably than others because of their race, color, religion, sex, or national origin.'").

68 *Teamsters*, 431 U.S. at 335 n.15.

69 *Fernandez*, 653 F.2d at 1275 (quoting *Teamsters* 431 U.S. 324, 335 n.15) ("In disparate impact cases, the employer uses 'employment practices that are facially neutral . . . but in fact fall more harshly on one group than another.").

70 Tucker, *supra* note 27 at 61.

71 *Fernandez*, 653 F.2d at 1275 (1981) (quoting McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802, (1973). *See also Teamsters,* 431 U.S. at 357-58 ("We concluded that this burden was met by showing that a qualified applicant, who was a member of a racial minority group, had unsuccessfully sought a job for which there was a vacancy and for which the employer continued thereafter to seek applicants with similar qualifications.").

has successfully demonstrated that she has been treated differently based on her sex, the burden of proof shifts to the employer to prove the discrimination was justified because the position had a BFOQ.[72]

B. Bona Fide Occupational Qualification

Under Title VII,[73] an employer may be exempt from liability if it can demonstrate that religion, sex, or national origin is a BFOQ reasonably necessary to the normal operation of that particular business or enterprise.[74] The legislative history indicates that the BFOQ is not a substitute for a firm's right to make employment decisions based on "general qualifications for the job, such as skill or intelligence."[75] Rather, when the nature of the job is such that membership of a certain class is necessary or would provide considerable advantages for the position, than to intentionally hire someone of that class is not in violation of Title VII.[76] The legislative history provides illustrations of the BFOQ and acceptable discrimination: "the preference of a French restaurant for a French cook, the preference of a professional baseball team for male players, and the preference of a business which seeks the patronage of members of particular religious groups for a salesman of that religion[.]"[77]

Interestingly, the BFOQ exception is not available in cases of racial discrimination.[78] The concern was that it could "establish a loophole that could well gut this title."[79] The courts have adopted this language when addressing BFOQs in cases of discrimination against sex, religion, etc., and have construed the exemption very narrowly.[80] The courts emphasize that "the restrictive scope of the BFOQ defense is grounded on both the language and the legislative history of § 703."[81] In order for a qualification to be justified under the exception, it "must be

---

[72] Tucker, *supra* note 27, at 61.

[73] Wilson v. Sw. Airlines Co., 517 F. Supp. 292, 299-300 (N.D. Tex. 1981).

[74] 42 U.S.C.A. § 2000e-2(e) (West 2014).

[75] 110 CONG. REC. 7213 at Part VI (1964). ("It would not be an unlawful employment practice to hire or employ employees of a particular religion, sex, or national origin in those situations where religion, sex, or national origin is a bona fide occupational qualification for the job. This exception must not be confused with the right which all employers would have to hire and fire on the basis of general qualifications for the job, such as skill or intelligence. This exception is a limited right to discriminate on the basis of religion, sex, or national origin where the reason for the discrimination is a bona fide occupational qualification.").

[76] *Id*.

[77] *Id*.

[78] Kate Manley, *The BFOQ Defense: Title VII's Concession to Gender Discrimination*, 16 DUKE J. GENDER L. & POL'Y 169, 198 (2009).

[79] Manley, *supra* note 78, at 198 *quoting* 110 CONG. REC. 2556 (statement of Rep. Celler).

[80] Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc., 499 U.S. 187, 201 (1991) (citing: Dothard v. Rawlinson, 433 U.S. 321, 332-37 (1977); Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 122-25, (1985). *See also* Debra A. Stegura, *The Biases of Customers in a Host Country as a Bona Fide Occupational Qualification: Fernandez v. Wynn Oil Co*., 57 S. CALIF. L. REV. 335, 345 (1983).

[81] *Johnson Controls*, 499 U.S. at 201.

reasonably necessary to the essence of his business."[82] Thus, it is not reasonably necessary to the business of an airline to employ only female flight attendants,[83] but it may be reasonably necessary to hire only male guards in an all male penitentiary where the inmates could be hostile to a female guard.[84] Courts are concerned that an excessively broad interpretation of the exception will render the statute meaningless.[85] Thus, the court determined that the word "necessary" requires that an employer show that discrimination was a necessity, and not mere convenience.[86]

II. EQUAL EMPLOYMENT OPPORTUNITIES AND THE FOREIGN TRADE MILIEU

Empirical evidence proves that, all things equal, men and women are equally competent to perform managerial positions.[87] Furthermore, studies have shown a positive correlation between a high proportion of women in senior management and the financial successes of a company.[88] Indeed, "Fortune 500 companies with a statistically higher proportion of women in management outperformed their industry competition in the median range of women managers by eighteen percent to sixty-nine percent of profits." [89] Diversity—including but certainly not limited to sex—in corporate employment is considered likely to provide better overall business results for a firm than expertise.[90] This should serve as an incentive for corporations to promote diversity throughout its various operations.

---

[82] *Id*. *See also* Wilson v. Sw. Airlines co., 517 F. Supp.292, 299-300 *citing* Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 388 (5th Cir. 1971) ("[T]he use of the word "necessary" in Section 703(e) requires that we apply a business necessity test, not a business convenience test. That is to say, discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively.") (emphasis in original).[17]

[83] *Diaz*, 442 F.2d 385; *see also Wilson*, 517 F. Supp. 292.

[84] Dothard v. Rawlinson*,* 433 U.S. 321, (1977).

[85] Manley, *supra* note 78, *quoting* 110 Cong. Rec. 2556 (statement of Rep. Celler) ("As Congressman Celler precisely explained in rejecting an amendment to add race as a BFOQ, '[T]he basic purpose of Title VII is to prohibit discrimination in employment on the basis of race or color. Now, the substitute amendment, I fear would destroy this principle. It would permit discrimination on the basis of race or color. It would establish a loophole that could well gut this title.'").

[86] *Diaz*, 442 F.2d at 388.

[87] Paul Lansing & Paulina Boonman, *Selecting Candidates for Expatriation: Is it Unethical for Companies to Use Gender as a Factor,* 37 EMP. REL. L. J. 2 (2011), *available at* http://news.alacrastore.com/Business-and-Management-Practices/Selecting...tion-is-it-unethical-for-companies-to-use-gender-as-a-factor-266221433 (last visited March 2, 2014).

[88] Katty Kay & Claire Shipman, *Fixing the Economy Is Women's Work*, THE WASH. POST (July 12, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/07/10/AR2009071002358.html) (last visited March 2, 2014).

[89] Lansing & Boonman, *supra* note 87, at 1 ("Firms must take great care in using human resources effectively to minimize these costs . . . . Research has documented a positive relationship between the number of women in senior management and corporate financial performance.").

[90] *Id*. ("[T]he Diversity Prediction Theorem . . . mathematically proves that diversity is more likely to produce the correct answer than expertise in a problem-solving situation.") (internal quotation marks omitted). *See also* Claudia Dreifus*, A Conversation With Scott E. Page: In Professor's Model, Diversity = Productivity*, N.Y. TIMES, Jan. 8, 2008, http://www.nytimes.com/2008/01/08/science/08conv.html?_r=0 (last visited March 2, 2014).

Another critical factor in this analysis is that foreign trade has become an integral component of business. The U.S. Census reported for 2012, on a balance of payment basis, that the US exported $2.2105 trillion of goods and services, of which goods comprised $1.516 trillion and services $649 billion.[91] Imports were just as important, totaling $2.745 trillion in 2012, of which goods comprised $2302.7 billion and services $442.5 billion.[92] Participation in foreign markets can be beneficial to companies for a variety of reasons, and, depending on the organization, may be critical to the firm's success.[93]

In day-to-day operations, payroll and human resources contribute largely to a firm's overhead costs.[94] In order to be competitive, companies must be careful to effectively manage these costs.[95] This is especially true in overseas operations, which are riskier than their domestic counterparts in terms of cost and efficiency.[96] The simple, yet defining, attribute of expatriates—being sent overseas to a foreign operation—includes increased relocation and training costs.[97] Expatriates can play a critical role in the management of overseas operations if, for example, they are liaisons between the parent and foreign subsidiary.[98] In such positions, it is essential that the representative have the ability to knowledgeably and effectively communicate information to the parent company.[99] Assigning an expatriate to a position that is a poor fit can often cause greater detriment in overseas operations than it would in domestic contexts.[100] Thus, when the values and demands of a female-hostile culture threaten to render a female expatriate's efforts ineffective, this leads MNCs into an ethical and legal quandary.

Globalization has potential benefits for individuals as much as it does corporations. Expatriation offers individuals opportunities to develop new skills and has become a valuable avenue for career advancement.[101] Employers look for, and sometimes require, international experience when they hire and promote.[102]

---

91 *United States Census Bureau, Foreign Trade: Data - Historical Series - Census*, CENSUS.GOV, www.census.gov/foreign-trade/statistics/historical (last visited March 2, 2014).

92 *Id*.

93 CHOW & SCHOENBAUM, *supra* note 13.

94 Lansing & Boonman, *supra* note 87, at 1 ("Human resources and employee salaries make up a significant portion of a firm's overhead costs.").

95 *Id*. ("Firms must take great care in using human resources effectively to minimize these costs.").

96 *Id*. ("In the context of expatriation assignments, there is a higher inherent risk of excess costs in inefficient foreign projects than in domestic operations.").

97 *Id*. ("In addition to the measurable costs of relocation and training, an expatriate also has more responsibility in the role of "knowledge carrier," or the primary information liaison between the foreign operation and headquarters.").

98 *Id*.

99 *Id*.

100 *Id*. ("A poor candidate for expatriation will ineffectively transmit critical information for which he or she is the main authority, subverting the likelihood of the project's overall success.").

101 Tucker, *supra* note 27, at 64.

102 *Id*. at 64-5 ("Often times international experience is required for certain higher level management positions.").

MNCs also recognize the importance of international work in career advancement.[103] Experience abroad is beneficial because it can help the expatriate develop cross cultural skills and expertise.[104]

Expatriating is recognized as an excellent way to advance an individual's career, as it indicates flexibility and dedication to one's employer.[105] Often, expatriate experience is either a prerequisite for certain positions, or the expatriation assignment is a reward, such as when it is a promotion.[106] Despite the potential advancement prospects stemming from overseas assignments, women comprise only around 16% of total expatriates.[107] In addition to an MNC's concerns about female performance in other cultures, there may be other factors that contribute to this low figure.[108] However, women comprise about half of self-initiated expatriates.[109] This is highly indicative that women are not uninterested in expatriating, but that, instead, some external factor—such as assigning managers' fear of females' failure in a foreign culture—is limiting expatriation opportunities for women.[110] As long as women are denied expatriation assignments, achieving equality in the work place will be difficult.[111] Because diversity is so beneficial to corporate success, this harms not only women, but also the business community at large.

III. APPLICATION OF TITLE VII TO SEX DISCRIMINATION IN EXPATRIATION

The distinction between disparate treatment and disparate impact is intent.[112] As discussed *supra*,[113] this Note considers if it should ever be legal for an MNC to discriminate based on sex when selecting a candidate for expatriation assignments in female-hostile countries—therefore, it is the disparate treatment branch of Title VII that is concerned.[114] Disparate treatment is only defendable when the

[103] *Id*. ("Potential or current employers will see the expatriate as dedicated to the job and flexible." One study indicates that "[f]ifty-eight percent of [Mutltinational] MNCs surveyed said that 'international assignment was important to career advancement.'").

[104] *See id*. at 64.

[105] *See id*. ("One study found that 78% of workers believe experience abroad is beneficial to finding jobs . . . . Fifty-eight percent of MNCs surveyed said that 'international assignment was important to career advancement.'").

[106] *Id*. at 64 ("Potential or current employers will see the expatriate as dedicated to the job and flexible.").

[107] Reiche, *supra* note 41.

[108] Adler, *Women Do Not Want International Careers*, *supra* note 39; *see also* Tucker, *supra* note 27, at 64.

[109] Tucker, *supra* note 27, at 66 (citing Phyllis Tharenou, *Women's Self-Initiated Expatriation as a Career Option and Its Ethical Issues*, 95 J. BUS. ETHICS 73 (2010)).

[110] Tucker, *supra* note 27, at 66.

[111] *See* Lansing & Boonman, *supra* note 87, at 2.

[112] *See* Int'l Bhd. of Teamsters v. U.S., 431 U.S. 324, 335 n.15 (1977).

[113] *See supra* Part I.A.

[114] Tucker, *supra* note 27, at 61. *See also Teamsters,* 431 U.S. at 335 n.15 (1977).

employer's discrimination is consistent with a legitimate BFOQ.[115] While the precise method of evaluating a BFOQ is amorphous and varies somewhat between circuits, and by the nature of the circumstances under which the defense is invoked, the case law reveals two tests that are relevant in analyzing the BFOQ defense: the "all or substantially all" and the "essence of business."[116] In order for an employer to satisfy the "all or substantially all" test it must prove that "all or substantially all" members of the protected class against which the employer is discriminating, would be unable to perform the duties that the job required, or in other words, that no woman, or substantially no women, could perform the duties of the position for which the employer is hiring.[117] There is an exception to this rule: being in a protected class can be used as a proxy for some other disqualifying condition if the consequences are sufficiently dire and there is a strong correlation between the condition and membership of the class being discriminated against.[118] In order to satisfy the "essence of business" test, the employer must prove that the discrimination is necessary to preserve the essence of its business.[119] Some courts also require employers to prove that there are no reasonable alternatives or accommodations that could be made so as to render unnecessary the use of discriminatory practices.[120]

A. The All or Substantially All Test

In *Weeks v. Southern Bell Telephone and Telegraph Co.*, the defendant argued that sex was a BFOQ for the position because a component of the job required the ability to lift thirty pounds.[121] The Fifth Circuit held that sex was not a BFOQ because, while it is probably true that men tend to be physically stronger than women, sex is only a BFOQ for a position when the defendant can prove that no member of the class against which they discriminate could perform the task.[122] The "all or substantially all" construct of a BFOQ is designed to weed out discriminatory employment practices that are based on stereotypes rather than true

---

115 *Id*. at 69 (citing Dothard v. Rawlinson, 433 U.S. 321, 331 (1977)).

116 Manley, *supra* note 78, at 174.

117 *Id*. (citing 1 ABA SECTION OF LABOR AND EMPLOYMENT LAW, EMPLOYMENT DISCRIMINATION LAW, 404 (BARBARA T. LINDEMANN & PAUL GROSSMAN eds., 4th ed., 2007) ("Initially, courts constructing a BFOQ standard required that an employer prove that 'all or substantially all women' would be unable to fulfill the requisite job duties.").

118 W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 413-15 (1985).

119 Manley, *supra* note 78, at 175 (citing Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir. 1971) ("The essence of the business test was established with the court's finding that discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively.") (internal quotations marks omitted).

120 *Id*. at 176 (citing 1 ABA SECTION OF LABOR AND EMPLOYMENT LAW, EMPLOYMENT DISCRIMINATION LAW, 404 (BARBARA T. LINDEMANN & PAUL GROSSMAN eds., 4th ed. 2007). *See also* Hardin v. Stynchcomb 691 F.2d 1364 (11th Cir. 1982) ("Additionally, courts often consider whether any reasonable alternatives exist to forgo discriminatory practices.").

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

122 *Id*.

inability to perform the job.[123] Hence, sex is not a BFOQ for a job that requires lifting thirty pounds because not all or substantially all women are incapable of lifting thirty pounds.[124]

Another purpose, closely related to this principle, is that job applicants should be treated as individuals, and not mere members of a class.[125] For example, assuming *arguendo*, that the vast majority of women could not lift thirty pounds, it would be unfair and would undermine the statute to deny a woman who could lift thirty pounds (and who otherwise is qualified) the position simply because she is a member of a class that normally cannot lift thirty pounds.[126]

If an MNC can successfully establish that the culture to which the candidate would expatriate is sufficiently female hostile, then it would likely be able to show that "all or substantially all" women would have the same difficulty in the foreign country. This is because a sex based BFOQ for an expatriation assignment would be premised on a foreign culture's hostility towards females; what would prevent the candidate from succeeding is that hostility. It is not a question as to the quality of work a female can perform,[127] nor is it a question of overcoming a stereotype that women lose their business skills once they leave American soil. The hostility to females would render *all* women incapable of succeeding in the expatriate assignment. It is the quality of being female—or the foreign culture's refusal to work with females—that prevents the expatriate from succeeding.[128] Thus, the all or substantially all test would be met.

B. Sex as a BFOQ by Proxy.

In *Western Air Lines, Inc. v. Criswell*, the Supreme Court held that a corporation's requirement that its flight engineers be under the age of sixty was not a valid BFOQ.[129] The Court reasoned that while the flight engineer was third in line to fly the plane, should both the pilot and the co-pilot become incapacitated,[130] this event was very unlikely to happen.[131] However, under FAA regulations, pilots

---

[123] *See Diaz*, 442 F.2d at 385.

[124] *Weeks*, 408 F.2d at 228.

[125] Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc., 499 U.S. 187, 214 (1991) (White, J., concurring) ("[In Manhart] we held that a requirement that female employees contribute more than male employees to a pension fund, in order to reflect the greater longevity of women, constituted discrimination against women under Title VII because it treated them as a class rather than as individuals.").

[126] *See id*.

[127] *See id*. *See also* Lansing & Boonman, *supra* note 87.

[128] Tucker, *supra* note 27.

[129] W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 403 (1985).

[130] *Id*. (quoting 49 Fed. Reg., at 14694) ("[The 'flight engineer'] does not operate the flight controls unless the captain and the first officer become incapacitated.") (internal quotations marks omitted).

[131] *Id*. at 404 (quoting 49 Fed. Reg., at 14694) ("The FAA has refused to establish a mandatory retirement age for flight engineers. 'While a flight engineer has important duties which contribute to the safe operation of the airplane, he or she may not assume the responsibilities of the pilot in command' . . .

and first officers have mandatory retirement ages of sixty.[132] The Court discussed the legality of this, saying:

> [T]he employer could establish that age was a legitimate proxy for the safety-related job qualifications by proving that it is "impossible or highly impractical" to deal with the older employees on an individualized basis. One method by which the employer can carry this burden is to establish that some members of the discriminated-against class possess a trait precluding safe and efficient job performance that cannot be ascertained by means other than knowledge of the applicant's membership in the class.[133]

The Court recognized that a pilot's good health is critical to the safety of the passengers and that there is no better way to ensure the health of the pilots than by the use of age as a proxy for good health. [134] Thus, because there is a factual link between age and the deterioration of health, the Court and the FAA believed there is no better way to ensure the good health of a pilot other than age, and since the gravity of the consequences of employing an unhealthy pilot are catastrophic, age can be used as a proxy for health.[135]

This proxy concept is important because, as Tucker notes, it could provide an argument for finding sex as a BFOQ for expatriate assignments in female-hostile countries.[136] Tucker suggests that sex could possibly be a BFOQ by proxy because the success of women as expatriates in certain female-hostile countries is impossible to test *ex ante*.[137] However, this seems unlikely. The proxy concept is an exception to the general prohibition against stereotyping in employment.[138] The Court accepts that the mandatory age requirement of pilots and copilots is justified because the gravity of the consequences of hiring an unhealthy pilot could be catastrophic.[139] However, in the context of expatriation employment, such catastrophes would be unusual. In addition, the quality of being female is not correlated with any underlying condition that would render the expatriate incapable of succeeding in a host country. Finally, a BFOQ by proxy is not necessary, as the "all or substantially all" test would be met.[140]

---

flight engineers have rarely been a contributing cause or factor in commercial aircraft 'accidents' or incidents.") (internal quotations marks omitted).

[132] *Id*.

[133] *Id*. at 414-15 (quoting Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228, 235, n.5 (5th Cir. 1969) (internal quotation marks omitted).

[134] *Criswell*, 472 U.S. at 404 (quoting 49 Fed. Reg., at 14694) ("The inability to detect or predict with precision an individual's risk of sudden or subtle incapacitation, in the face of known age-related risks, counsels against relaxation of the rule.″) (internal quotations marks omitted).

[135] *See id*. *See also* Tucker, *supra* note 27, at 61-2.

[136] Tucker, *supra* note 27, at 69-70.

[137] *Id*.

[138] *See supra* Part III.A

[139] *Johnson Controls*, 499 U.S. at 216.

[140] *See supra* Part IV.

C. The Essence of the Business

Under the "essence of business test," an MNC must show that the discrimination is necessary to prevent undermining of the position's function or to preserve the essence of the business.[141] For example, in *Dothard v. Rawlinson* the Supreme Court held that sex was a valid BFOQ for the position of a prison guard in an all-male penitentiary where the prisoners were not segregated by offense or level of dangerousness.[142] The Court believed that the inmates were likely to react poorly and possibly violently to female security guards.[143] It was not the safety of the female employee that validated the penitentiary's BFOQ defense,[144] but rather, it was the fact that "employment of a female guard would create real risks of safety to others if violence broke out because the guard was a woman."[145] This potential disruption in the facilities would undermine the function of the position.[146] Because the function of a guard is to maintain order in the prisons, the Court reasoned hiring a female guard would threaten "the essence of her job function."[147]

This will be a more difficult test for the MNC to pass. The MNC will have to argue that the people in the host country will not work with the female expatriate.[148] There are at least three ways an MNC could argue that the hostility of a foreign culture threatens the essence of the business: (1) the people with whom the expatriate is working will not cooperate with her; (2) the customers will not buy from her; (3) the costs of placing her in the position are so prohibitive as to threaten the business.

If the people who will not work with the expatriate are people from within the MNC, or vendors, the MNC may have an argument under the *Dothard* reasoning.[149] The argument would be that because the culture in which the expatriate will be working is female-hostile and the people with whom she needs to

---

141 Manley, *supra* note 78, at 175 ("An employer must prove that gender is absolutely essential to the business' primary function and that members of the opposite gender could not successfully perform the duties that constitute the employer's essence of the business.").

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

143 *Id*. at 332-38.

144 *Id*. at 335 ("In the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself. More is at stake in this case, however, than an individual woman's decision to weigh and accept the risks of employment in a 'contact' position in a maximum-security male prison."). *See also* Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991).

145 *Dothard,* 433 U.S at 332-37.

146 Tucker, *supra* note 27, at 62, 69.

147 *Johnson Controls*, 499 U.S. at 202 ("Sex discrimination was tolerated [in *Dothard*] because sex was related to the guard's ability to do the job-maintaining prison security. [It] also required in *Dothard* a high correlation between sex and ability to perform job functions and refused to allow employers to use sex as a proxy for strength although it might be a fairly accurate one."). *See also* Tucker, *supra* note 27, at 69.

148 *See* Tucker, *supra* note 27, at 69.

149 *Id*.

work will refuse to cooperate with her, she will be unable to perform the duties the job requires: this goes to the essence of her job function.[150] Tucker's proposal focuses primarily on this issue.[151]

Alternatively, a customer may not make purchases from an expatriate female. However, customer preference does not usually constitute a BFOQ.[152] In *Diaz v. Pan American,* the Fifth Circuit held that sex was not a BFOQ for airline cabin attendants even though the airline demonstrated to the trial court that its customers preferred females, thus females would keep a more pleasant, calm atmosphere during the flight.[153] The Court indicated that the "pleasant atmosphere" was secondary in flight attendant responsibilities.[154] Thus the "essence of the business" test was not satisfied.[155] As in *Dothard*, when the employer argued that sex was a BFOQ for the position, the court looked to the purpose of the position and the gravity of the consequences.

In *Wilson v. Southwest Airlines*—a case very similar to *Diaz*—the Northern District of Texas held that sex was not a BFOQ for flight attendants at Southwest Airlines, which had almost gone bankrupt but revived itself through changing its image to that of a woman:

> This lady is young and vital . . . she is charming and goes through life with great flair and exuberance . . . you notice first her exciting smile, friendly air, her wit . . . yet she is quite efficient and approaches all her tasks with care and attention . . .[156]

Southwest Airlines "revived itself" through sexy marketing.[157] Its advertisements included: "AT LAST THERE IS SOMEBODY ELSE UP THERE WHO LOVES YOU,"[158] and "WE'RE SPREADING LOVE ALL OVER TEXAS."[159] It traded its stock under the ticker symbol "LUV."[160] As a matter of customer service, "[t]he airline also encourage[d] its attendants to entertain the passengers and maintain an atmosphere of informality and 'fun' during flights." [161] Southwest viewed that "its female flight attendants had come to 'personify'

[150] *Id*.
[151] *Id*. at 72-4.
[152] Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 387 (5th Cir. 1971)
[153] *Id*. at 414.
[154] *Id*. at 415.
[155] *Id*. at 414.
[156] Wilson v. Sw. Airlines Co., 517 F. Supp. 292, 294 (N.D. Tex. 1981) ("Bloom suggested that Southwest break away from the conservative image of other airlines and project to the traveling public an airline personification of feminine youth and vitality. A specific female personality description was recommended and adopted by Southwest for its corporate image.").
[157] *Id*.
[158] *Id*. at 294.
[159] *Id*.
[160] *Id*.
[161] *Id*. at 295.

Southwest's public image."[162]

The court held that the essence of Southwest's business was that of an airline—to transport passengers[163]—and not sex, despite its sexual branding.[164] The court held the discrimination was not necessary for the "essence of the business," and therefore sex was not a BFOQ.[165]

This brings us to the few legal authorities that have addressed the BFOQ in the context of expatriation employment. The Equal Employment Opportunity Commission ("EEOC") has held that the need to accommodate racially discriminatory policies of other nations cannot be the basis of a valid BFOQ exception.[166] The EEOC has promulgated regulations stating that the only customer preference allowed as a BFOQ exception is one necessary for the purpose of genuineness or authenticity (e.g., a performer like an actor or actress).[167]

In *Fernandez v. Wynn Oil Co*., the Ninth Circuit held that the plaintiff failed to establish a prima facie case of disparate treatment.[168] However, it answered the defendant's BFOQ argument that its South American customers preferred women by stating that the preferences of customers overseas would not qualify as a valid BFOQ. The court reasoned that the prohibition of allowing stereotypes to pervade the legal system would be offended by allowing an employer to cater to a female-hostile culture.[169] The court concluded, "[t]hough the United States cannot impose standards of non-discriminatory conduct on other nations through its legal system . . . [n]o foreign nation can compel the non-enforcement of Title VII here."[170]

In *Kern v. Dynalectron*—our helicopter case—being Muslim was held by the Northern District of Texas, a decision affirmed without an opinion by the Fifth Circuit, to be a valid BFOQ for helicopter pilots flying into Mecca when non-Muslims are beheaded if caught there.[171] The court said:

> As to the statement contained in *Fernandez* that no foreign nation can compel the non-enforcement of Title VII here, this too is inapplicable to

162 *Id*.

163 Manley, *supra* note 78, at 175.

164 Wilson v. Sw. Airlines Co., 517 F. Supp. 292, 301 (N.D. Tex. 1981).

165 *Id*. at 304; *see infra* Part IV.

166 Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1277 (9th Cir. 1981) *citing* EEOC Decision No. 72-0697, CCH EEOC Decisions 1971, P 6317, at 4569.

167 29 C.F.R. § 1604.2(a)(2) (2014).

168 *Fernandez*, 653 F.2d at 1277.

169 *Id*. at 1276-77; Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir. 1971) ("[S]tereotypic impressions of male and female roles do not qualify gender as a BFOQ . . . [n]or does stereotyped customer preference justify a sexually discriminatory practice.").

170 *Id*. at 1277.

171 Kern v. Dynalectron Corp., 577 F. Supp. 1196, 1201 (N.D. Tex. 1983) *aff'd*, 746 F.2d 810 (5th Cir. 1984). It is true that the Civil Rights Act of 1991 created an exemption from Title VII where "compliance . . . would cause such employer (or such corporation) . . . to violate the law of the foreign country in which such workplace is located." 42 USCA § 2000e-1 (West 2014). However, the court in *Kern* addresses the issue as a BFOQ.

> the present case. Title VII was written with a BFOQ exception which was clearly applicable to religious discrimination. Merely by using this exception and applying it to the instant facts, this Court is not engaging in the non-enforcement of Title VII. It clearly is applying Title VII's BFOQ exception as it was intended to be applied (*i.e.* in those limited instances where one must tolerate religious discrimination where it is a necessity, in fact, a prerequisite for the performance of a job). Thus, this Court is in no way allowing a foreign nation, here Saudi Arabia, to compel the non-enforcement of Title VII in this country.[172]

Thus, the court in *Kern* interpreted an MNC's acquiescence to the demands of a foreign culture not as compelling non-enforcement of Title VII, but the proper application of the BFOQ.[173]

There are two notable exceptions to the general rule that customer preference is not a BFOQ—those concerning a customer's privacy or when the employer is in the business of selling sex, as explained below.[174] While this Note addresses broader concerns than these two issues, how the court looks at them is illuminating. In matters of customer privacy, courts have held that the quality of being a particular sex, usually female, can be a BFOQ.[175] *Fesel v. Masonic Home of Delaware,*[176] *Backus v. Baptist Medical Center,*[177] and *Norwood v. Dale Maintenance System*[178] are cases that indicate an exception to the general rule that customer preference does not provide an employer with a valid BFOQ. In situations where the customer's preference is based on privacy, such as nurses in maternity wards, bathroom attendants, and nurses in retirement homes, gender based hiring may qualify as a valid BFOQ. Courts may find sex is a BFOQ if "(1) [the MNC] has a factual basis for believing that employees of a particular sex are

---

172 *Kern*, 577 F. Supp. at 1202.

173 *Id*.

174 *See* Manley, *supra* note, 78 at 175.

175 *See generally* Fesel v. Masonic Home of Delaware, Inc., 447 F. Supp. 1346 (1978), *aff'd*, 591 F.2d. 1334 (3d Cir. 1979); Backus v. Baptist Med. Ctr., 671 F.2d 1100 (8th Cir. 1982); Norwood v. Dale Maint. Sys., 590 F. Supp. 1410 (1984).

176 Fesel v. Masonic Home of Del., Inc., 447 F. Supp. 1346,1354 (1978), *aff'd*, 591 F.2d. 1334 (3d Cir. 1979). Defendant argued that sex was a BFOQ for the position of nurse's aide, which required intimate personal care of twenty-two female and eight male guests in a residential retirement home. The court held that the defendant "had a factual basis for believing that the employment of a male nurse's aide would directly undermine the essence of its business operation because (1) many of the female guests would not consent to intimate personal care by males, and (2) the operation of the Home in November of 1973 was such, and the size of the staff was sufficiently small, that the Home could not hire a male nurse's aide for any shift in such a manner that there would always be at least one female on duty to attend to the personal care needs of those female guests objecting to male care.".

177 Backus v. Baptist Med. Ctr., 671 F.2d 1100, 1101-02 (8th Cir. 1982) ("the district court, [510 F.Supp. 1191], (concluded that . . . 'sex constituted a bona fide occupational qualification for a position as a nurse in the hospital's labor and delivery section.'" However on appeal, the Eighth Circuit dismissed the case as moot because "[shortly after receiving his right-to-sue letter [from the EEOC] . . . . Backus [the plaintiff] voluntarily left . . . for a position at a different hospital").

178 Norwood v. Dale Maint. Sys., 590 F. Supp. 1410 (1984) (sex was a BFOQ for a washroom janitor).

necessary in order to protect the privacy interests of third parties involved; (2) the asserted privacy interest is entitled to protection under the law; and (3) there is no reasonable alternative to protect those privacy interests other than a sex-based policy."[179] Courts have reasoned that the customers' or patients' privacy rights outweigh the employment rights established by Title VII.

The second exception[180] is for employers who are actually in the business of selling sex.[181] While challenges to the employment practices of employers selling sex are rare—if not non-existent—it is likely that an employer in the business of selling sex, such as a gentleman's club or legal brothel, would succeed in establishing sex as a BFOQ.[182] This inference is based on the reasoning in *Diaz* and *Wilson* that airlines were not in the business of selling sex, so sexual appeal did not go to the essence of the airlines' business.[183] The negative inference is that if the employer were in the business of selling sex, the gender of their employees would go to the essence of the business and therefore would be a BFOQ.[184]

Ultimately, without a revised lens[185] through which to interpret the role of the customer in a BFOQ defense, under current law, an MNC would be unlikely to prevail if its motives for expatriation discrimination were customer-based.

This Note suggests that the crux of the problem in expatriation employment discrimination is risk and cost. In some cases, the cost of expatriating women could be so prohibitive as to threaten the MNC's business. When determining to whom to assign an expatriate position in a potentially female-hostile country, how

[179] Manley, *supra* note 78, at 177.

[180] Wilson v. Sw. Airlines Co., 517 F. Supp. 292, 299-301 (N.D. Tex. 1981) (the Court eloquently explains that "Diaz and its progeny establish that to recognize a BFOQ for jobs requiring multiple abilities, some sex-linked and some sex-neutral, the sex-linked aspects of the job must predominate. Only then will an employer have satisfied Weeks' requirement that sex be so essential to successful job performance that a member of the opposite sex could not perform the job . . . [I]n jobs where sex or vicarious sexual recreation is the primary service provided, e. g. a social escort or topless dancer, the job automatically calls for one sex exclusively; the employee's sex and the service provided are inseparable. Thus, being female has been deemed a BFOQ for the position of a Playboy Bunny, female sexuality being reasonably necessary to perform the dominant purpose of the job which is forthrightly to titillate and entice male customers . . . . Consistent with the language of Diaz, customer preference for one sex only in such a case would logically be so strong that the employer's ability to perform the primary function or service offered would be undermined by not hiring members of the authentic sex or group exclusively.").

[181] Manley, *supra* note 78, at 185; Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CALIF. L. REV. 147, 156 (2004).

[182] Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 Calif. L. Rev. 147, 157 (2004) ("[T]hough I know of no challenges to the sex-based hiring of prostitutes (where legal) or lap dancers by businesses that employ such workers, it seems likely that courts would permit such sex-based hiring as a BFOQ") (citing ARTHUR LARSON & LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 15.10 at 4-27 (1992)) (contending that the job of a prostitute is an "obvious" example of a BFOQ).

[183] Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir. 1971). *See also Wilson*, 517 F. Supp. at 299-300.

[184] *Wilson*, 517 F. Supp. at 299-300.

[185] For a revised lens, *see* discussion *infra* Part VI.B.

much is at stake is too much and how high a probability of failure is too high? The courts have not yet answered these questions. However, in *City of Los Angeles, Dep't of Water & Power v. Manhart*, the Supreme Court held that an employer violated Title VII by requiring its female employees to pay more into the pension fund each pay cycle than its male employees, even though women statistically live longer than men (and thus, as a whole, would have greater pension needs than men).[186] The Court noted that "no cost justification defense" is included in Title VII.[187]

The Court discussed a similar issue in *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc.,* when it addressed a battery manufacturer's potential tort liability when its employees—including women who may become pregnant—may be exposed to lead.[188] The Court held that the employer violated Title VII by only hiring males for positions that have increased exposure to lead.[189] When discussing the possibility of a cost-based BFOQ, Justice Blackmun writing for the majority said:

[W]e, of course, are not presented with, nor do we decide, a case in which costs would be so prohibitive as to threaten the survival of the employer's business. We merely reiterate our prior holdings that the incremental cost of hiring women cannot justify discriminating against them.[190]

Two concurring opinions take issue with this phrasing. Justice White disagreed with the extreme language of the majority opinion, which he believed indicated that any costs short of those so burdensome as to require the employer to shut its doors will always fail to constitute a BFOQ.[191] He suggests that tort liability *could* constitute a BFOQ,[192] however, here the defendant failed to

---

186 City of L.A., Dep't of Water & Power v. Manhart, 435 U.S. 702, 716-17 (1978).

187 *Id*. ("In essence, the Department is arguing that the prima facie showing of discrimination based on evidence of different contributions for the respective sexes is rebutted by its demonstration that there is a like difference in the cost of providing benefits for the respective classes. That argument might prevail if Title VII contained a cost justification defense comparable to the affirmative defense available in a price discrimination suit. But neither Congress nor the courts have recognized such a defense under Title VII.").

188 Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991).

189 *Id*. at 210 ("The tort-liability argument reduces to two equally unpersuasive propositions. First, Johnson Controls attempts to solve the problem of reproductive health hazards by resorting to an exclusionary policy. Title VII plainly forbids illegal sex discrimination as a method of diverting attention from an employer's obligation to police the workplace. Second, the specter of an award of damages reflects a fear that hiring fertile women will cost more. The extra cost of employing members of one sex, however, does not provide an affirmative Title VII defense for a discriminatory refusal to hire members of that gender.").

190 *Id*. at 210-11.

191 *Id*. at 211 (White, J., concurring) ("The Court erroneously holds, however, that the BFOQ defense is so narrow that it could never justify a sex-specific fetal-protection policy.").

192 *Id*. at 212-13 (White, J., concurring) ("On the contrary, a fetal-protection policy would be justified under the terms of the statute if . . . an employer could show that exclusion of women from

establish sufficient risk of a tort liability to warrant such a holding.[193] Justice White suggests that the majority misconstrued the holding in *Manhart*, which he believes was not really about cost, but about the treatment of women as a "class rather than as individuals" in the context of pension planning.[194] Justice White recommends a narrower reading of *Manhart*—that Title VII does not contain a statutory cost defense comparable to price discrimination suits.[195] Justice White's rejection of the majority's framing suggests that there may be room for the law to recognize a middle range of costs rising above that of incidental, but not to the level of fatal to the employer.

Agreeing with Justice White, Justice Scalia adds further:

> Last, the Court goes far afield, it seems to me, in suggesting that increased cost alone-short of "costs . . . so prohibitive as to threaten the survival of the employer's business," cannot support a BFOQ defense I agree with Justice White's concurrence, that nothing in our prior cases suggests this, and in my view it is wrong. I think, for example, that a shipping company may refuse to hire pregnant women as crewmembers on long voyages because the on-board facilities for foreseeable emergencies, though quite feasible, would be inordinately expensive. In the present case, however, Johnson has not asserted a cost-based BFOQ.[196]

Justice Scalia's example provides some context as to how this middle range of costs could provide a BFOQ defense, but it is uncertain how these three different levels of cost would legally function.

It is clear from these decisions that incremental costs associated with adopting nondiscriminatory practices are not a defense to discrimination and must be borne by the employer. It is equally clear that whether the cost of employing nondiscriminatory practices that threaten the survival of an employer's business would constitute a BFOQ defense remains an open question. [197] Justices White

certain jobs was reasonably necessary to avoid substantial tort liability. Common sense tells us that it is part of the normal operation of business concerns to avoid causing injury to third parties, as well as to employees, if for no other reason than to avoid tort liability and its substantial costs.").

193 *Id*. at 223-24 (White, J., concurring).

194 *Id*. at 214 (White, J., concurring) ("[The majority] misrepresents our decision in Manhart. There, we held that a requirement that female employees contribute more than male employees to a pension fund, in order to reflect the greater longevity of women, constituted discrimination against women under Title VII because it treated them as a class rather than as individuals. We did not in that case address in any detail the nature of the BFOQ defense, and we certainly did not hold that cost was irrelevant to the BFOQ analysis. Rather, we merely stated in a footnote 'there has been no showing that sex distinctions are reasonably necessary to the normal operation of the Department's retirement plan.'").

195 *Id*. at 214-15, 113 L. Ed. 2d 158 (1991) (White, J., concurring)) (referring to a footnote in Manhart that stated "[T]here has been no showing that sex distinctions are reasonable necessary to the normal operation of the Department's retirement plan. And further reasoning that while Title VII does not contain a "cost-justification defense comparable to the affirmative defense available in a price discrimination suit . . . [n]o defense based on the total cost of employing men and women was attempted in this case.").

196 *Id*. at 224 (1991) (Scalia, J., concurring).

197 *Id*. at 210-11 (Scalia, J., concurring).

and Scalia indicated that they believe that costs associated with nondiscrimination could be substantial enough to constitute a BFOQ defense without necessarily rising to the level of threatening the survival of the employer's business.[198]

Incidental costs that arise from the prohibition against employment discrimination are not a BFOQ defense, and must be borne by the employer.[199] So too, are the costs (and risks) an employer may bear in ending discriminatory practices.[200] However, the Supreme Court has not addressed the issue of "costs . . . so prohibitive as to threaten the survival of the employer's business."[201] And it remains an open question what would precisely constitute those costs.[202] An MNC could easily be faced with a situation in which a female expatriate assigned to a female-hostile country could not perform her job effectively. This could impose significant costs on the MNC, such as lost sales or failed operations. An MNC may be able to argue that sex is a BFOQ if it can establish that selecting a female candidate for an expatriation assignment would force the MNC to incur a loss beyond incremental costs. However, this is currently an unanswered legal question.

IV. PROPOSALS OF OTHER SCHOLARS

There are at least two[203] articles that directly address the legal aspects of sex discrimination in expatriation employment and both are particularly noteworthy. The first is Paul Lansing & Paulina Boonman's *Selecting Candidates for Expatriation: Is it Unethical for Companies to Use Gender as a Factor*.[204] Lansing and Boonman address the competing interests of gender equality with legitimate business concerns.[205] They frame the issue as an ethical dilemma asking "should the American MNC choose the candidate that will have the highest likelihood of success on an individual and firm level, or should an agenda of

---

198 *Id*. at 214 (Scalia, J., concurring).

199 *Id*. at 216-17 (Scalia, J., concurring).

200 Wilson v. Sw. Airlines Co., 517 F. Supp. 292, 304 (N.D. Tex. 1981) (as one court has noted in the context of racial discrimination, ″(t)he expense involved in changing from a discriminatory system . . . (fails to constitute) a business necessity that would justify the continuation of . . . discrimination″); Bush v. Lone Star Steel Co., 373 F. Supp. 526, 533 (E.D.Tex.1974); *see also* Robinson v. Lorillard Corp., 444 F.2d 791, 799 n. 8 (4th Cir.) *cert. dismissed* 404 U.S. 1006, 92 (1971) (″dollar cost alone is not determinative″).

201 *Johnson Controls*, 499 U.S. at 224.

202 *Id*.

203 There is a third, Debra A. Stegura's *The Biases of Customers in a Host Country as a Bona Fide Occupational Qualification: Fernandez v. Wynn Oil Co*., 57 S. CALIF. L. REV. 335, 345 (1983), which opines that the quality of being of a particular gender should never be a BFOQ. Stegura argues that Title VII should apply internationally as well as domestically and offers several methods by which the law could achieve this goal. Unfortunately, the piece is from 1981 and subsequent developments in the law have rendered much of it antiquated.

204 Lansing & Boonman, *supra* note 87.

205 *Id*.

equality override selection of expatriation assignments to correct an existing imbalance that defies the purposes of Title VII?"[206]

The article initially identifies three potential answers to this question.[207] The first is that the MNC should discriminate when selecting candidates for expatriation assignments and choose the candidate most likely to succeed in the assignment.[208] The second position is that the likelihood of failure in the overseas assignment should never be a factor when selecting expatriate candidates and that gender equality always outweighs the business interest of the MNC.[209] Finally, Boonman and Lansing propose a middle ground by which the MNC should consider sex when assigning expatriates only when it would truly be detrimental to the MNC's overseas operations not to; in this case, the MNC should offset the resulting inequity by assigning women to positions better situated to accommodate females.[210]

Allie Christiansen Tucker's *Multi-National Corporations Closing the Borders for Female Professionals: Should Gender Discrimination be Allowed for Expatriation Assignments Under Title VII Law?*[211] weighs both the business and public policy considerations when addressing discrimination in expatriation employment. Tucker proposes a balancing test that courts should use when determining if gender is a BFOQ in expatriation assignments.[212] First, the court should examine the relationship between the female expatriate and the overseas corporation.[213] Tucker proposes that only when the position would be subordinate to the people with whom she is working should sex be a BFOQ; in cases where the position is equal or superior, sex should not be a BFOQ.[214] Second, Tucker proposes that the court should weigh the evidence that a country is actually hostile to females.[215] Finally, the court should examine whether the MNC can make accommodations so that females could succeed in the expatriation assignment.[216] In addition, Tucker adopts Lansing and Boonman's suggestion, recommending that MNC's that do justifiably discriminate in appropriate contexts "provide alternate opportunities that carry equal weight as international experience when being considered for promotions."[217]

This Note agrees with much of Tucker's analysis and that a fact heavy

---

[206] *Id*.
[207] *Id*.
[208] *Id*.
[209] *Id*.
[210] *Id*.
[211] Tucker, *supra* note 27.
[212] *Id* at 72.
[213] *Id*. at 72-4.
[214] *Id*. at 72-4.
[215] *Id*. at 74.
[216] *Id*. at 75-6.
[217] *Id*. at 76-7.

balancing test should be adopted to determine if sex is a BFOQ for a particular expatriation assignment. However, parts of her proposal seem to invite problematic results. The first prong in Tucker's test would require the court to examine the hierarchical position of the expatriate in relation to the female-hostile people with whom she would work.[218] Only if the female were subordinate to female-hostile men, would sex be a BFOQ.[219] Tucker's reasoning is that when the expatriate is in a position of authority, she will necessarily demand respect and she will likely have firing power.[220] If the expatriate is on equal terms with the female-hostile compatriots, then any benefits to hiring a male would be merely matters of convenience, which is akin to incidental costs and not a BFOQ. In either situation, Tucker believes that finding a BFOQ would be inappropriate. However, a BFOQ will less likely be found the lower the expatriate position is in the chain of command. This means that when the stakes are lower and the MNC has less to lose, sex would not be a BFOQ.

Generally, the higher a person is in management, and the more critical their position is, the more potentially disastrous their failures become.[221] According to Tucker's proposal, when the expatriate position is more senior in the organization-—where the stakes are much higher and failure would result in more detrimental results—a BFOQ will still be denied.[222] This is because under her proposed test, a BFOQ would only be valid if the hostility to females came from her corporate superiors.[223] This result is undesirable because it provides phantom relief for the MNC. While appearing to provide a protection to Title VII liability, the MNC remains incapable of successfully expanding into certain territories without violating Title VII because in situations where the cost of failure is greater, a BFOQ will be less likely to be found.

---

[218] *Id*. at 72-4.

[219] *Id*. at 72-4.

[220] *Id*. at 73 (arguing that subordinates are incentivized to give women in superior positions respect in the interest of keeping their jobs).

[221] This is because of their greater power and responsibilities. For example, Bill Gates may have cost Microsoft billions in 1998 when he directed the technology group to stop working on an e-reader, *Microsoft's Downfall: Inside the Executive E-mails and Cannibalistic Culture That Felled a Tech Giant* VANITY FAIR, (July 3, 2012), *available at* http://www.vanityfair.com/online/daily/2012/07/microsoft-downfall-emails-steve-ballmer.print ("Microsoft had a prototype e-reader ready to go in 1998, but when the technology group presented it to Bill Gates he promptly gave it a thumbs-down, saying it wasn't right for Microsoft. 'He didn't like the user interface, because it didn't look like Windows,' a programmer involved in the project recalls."). Further, the examples of the worst frauds are performed by the most senior management. *E.g*., Enron's Kenneth Lay and Jeffrey Skilling, Jean Eaglesham, *The Shadow of Enron Still Lingers*, WALL ST. J. (Oct.17, 2011), http://online.wsj.com/news/articles /SB10001424052970204774604576633413245885214; Dionne Searcey, Kara Scanne & Shawn Young, *Ebbers Is Sentenced to 25 Years For $11 Billion WorldCom Fraud*, WALL ST. J. (July 14, 2005), http://online.wsj.com/news/articles/SB112126001526184427; and Bernie Madoff, *Top Broker Accused of $50 Billion Fraud;* WALL ST. J. (Dec. 12, 2014), *available at* http://online.wsj.com/articles/ SB122903010173099377.

[222] Tucker, *supra* note 27, at 72-5.

[223] *Id*.

In addition, Tucker adopts Lansing and Boonman's suggestion[224] in that she recommends that MNC's that do justifiably discriminate in appropriate contexts "provide alternate opportunities that carry equal weight as international experience when being considered for promotions."[225] According to Tucker, the candidate would be either assigned a different expatriate assignment, or be enrolled in training program that provides the candidate with experience equivalent to that of expatriation. Unfortunately, while providing training opportunities analogous to actual expatriate experience is probably a wise business decision, this would likely be an unworkable factor for courts to use in determining whether an MNC has violated Title VII.

First, nothing in the statute suggests that employers have an obligation to offset any discrimination an employer propagates under the BFOQ exception. The BFOQ statutorily allows discrimination in certain situations, but has no requirement for employers who hire for positions that have a BFOQ to offset that discrimination. For example, when a movie studio casts men for male roles and females for female roles, it is neither required to have an equal number of female roles as male roles, nor is it required to create another role for a person who, but for their sex, would be qualified for a part. Second, not all candidates who are qualified for one expatriation assignment are qualified for another expatriation assignment. For example, a French-speaking candidate maybe qualified for an expatriation assignment in France, but this does not necessarily mean they are qualified for an expatriation assignment in Japan. Third, if the MNC were unable to assign the candidate to a different expatriate position (because, for example, its other expatriate positions are filled at the time the expatriate applies), it would be difficult for a court to evaluate how effective the training program is.[226] Tucker does not explicitly explain how a court would scrutinize a training program. She merely suggests that corporations provide this experience and when considering an employee for a promotion, it should give equal weight to the training that it would to true expatriation experience. Fourth, even if a court could evaluate the opportunities the MNC provides, the MNC could only control whether or not it gives equal weight to the person's training as it would if the person had actually expatriated. In the current job market, people change jobs frequently and often the

---

224 Lansing & Boonman, *supra* note 87, at 9 ("For example, the corporation may decide to have a policy where it places men in the higher management positions for Saudi Arabian assignments, but then for each case it affords a career-building opportunity to an equally qualified female candidate. The opportunity can be in the form of first choice on a different country's assignment, partial domestic decision-making power from headquarters for the foreign assignment, increased mentorship and sponsorship availability, more training hours, an important domestic project, increased international business trips, or other suitably equal career advancement opportunities.").

225 Tucker, *supra* note 27, at 76.

226 *See id*. ("Of course, just because the company provides an opportunity it claims to carry equal weight as international experience, does not guarantee it will be seen as equal in the eye of hiring executives.").

route for people to ascend in business is not through promotion, but via applying for higher position at another firm.[227] Expatriation experience is likely to make an applicant attractive to other employers. These other employers may not recognize the training as an adequate substitute to expatriation experience.

V. THIS NOTE'S PROPOSAL: A FACTUAL AND CAUSAL APPROACH

In the context of expatriation assignment in female-hostile countries, the legitimate interest of MNCs—the success of their overseas operations—conflicts with the societal goal of gender equality and the private goals of individual women with executive-level corporate aspirations. These interests are legitimate concerns with high stakes.[228] Therefore, this Note seeks to provide a middle-ground solution that recognizes the competitive nature of international business, while ensuring that the progress the United States has made towards equality in the work place is not undermined.

To prove that the position of the expatriate plaintiff had a BFOQ of sex and thus was worthy of an exception of Title VII, the defendant MNC should have to satisfy a four prong test: (1) the MNC had a factual basis for determining that the expatriate assignment was in a female-hostile culture; (2) the hostility is sufficiently likely to impede the success of all or substantially all female expatriates; (3) the impeded performance of the expatriate is sufficiently detrimental to her responsibilities or the MNC's operations, and (4) the MNC can make no reasonable accommodations to ensure the expatriate could be successful. The value of reasons and benefits of each of these prongs is explained below.

A. The Defendant MNC had a Factual Basis for Determining that the Expatriate was Likely to Encounter a Female-Hostile Culture.

A chief reason that managers are failing to assign women to expatriate positions appears to be the concern that women will be unable to succeed in a host-country due to its apparent female-hostile position.[229] In order to support a BFOQ, these concerns of a female-hostile culture must rise above that of vague apprehension. Neither should the MNC rely on stereotypes about the host culture, but should present clear and convincing evidence that the culture to which it is sending the expatriate is female-hostile.[230]

[227] Josh Zumbrun, *Lower Job Churn Hurts Young Workers,* WALL ST. J. (July 13, 2014, 8:00 PM), http://online.wsj.com/articles/lower-job-churn-hurts-young-workers-1405295773; *see also* Jeanne Meister, *Job Hopping Is the 'New Normal' for Millennials: Three Ways to Prevent a Human Resource Nightmare*, FORBES (Aug. 14, 2012), http://www.forbes.com/sites/jeannemeister/2012/08/14/job-hopping-is-the-new-normal-for-millennials-three-ways-to-prevent-a-human-resource-nightmare/.

[228] *See infra* Part II.

[229] Adler, *Women Do Not Want International Careers*, *supra* note 39, at 68.

[230] Tucker, *supra* note 27, at 72 ("Large discrepancies exist between the perceptions of domestic supervisors and the reality of situations abroad. Hence, MNCs should have hard evidence that suggests

Tucker suggests a very high burden of persuasion because "allowing MNCs to discriminate with biased evidence would only perpetuate unfounded negative perceptions of women's abilities to conduct business overseas."[231] This Note generally agrees with, and would adopt, Tucker's proposal concerning the MNC's burden of proof. However, this Note would modify the proposal in terms of burden of persuasion, which will be addressed in the following sections.

B. The Hostility is Sufficiently Likely to Impede the Success Of All or Substantially All Female Expatriates

Under this Note's proposal, the MNC seeking to escape liability through a BFOQ must prove that the hostility of the foreign culture would cause the female expatriate to fail. This question can be framed as: "but for the position's required duty of X, which all or substantially all female candidates can not successfully perform because of the host countries' hostility for females manifested as Y, could an otherwise qualified female expatriate succeed in the assignment?"

By framing the MNC's defense in this way, a court can decrease the chances that vague apprehension might allow an MNC to deny assignment to a qualified female expatriation candidate. First, by requiring that all or substantially all female expatriates would succeed in the host country, the "all or substantially all" test would be satisfied. This would minimize the extent to which the stereotype that women cannot succeed overseas pervades the legal system. Second, requiring a causal relationship between the female-hostile culture and the success of the female expatriate (or lack thereof) prevents an MNC from using a culture's general hostility towards females—one that does not manifest itself in a way that would interfere with a female expatriate's duties—to justify discriminating against females.

In evaluating whether to discriminate, an MNC is *ex ante* evaluating the likelihood of a female expatriate's failure. This requires evaluating the probability that the culture's manifestation of female hostility will impede a female expatriate's success. Much of business judgment[232] is about risk management, and when the court is evaluating this probability it should keep in mind the risks that the MNC faces. At the same time, the likelihood of the expatriate's failure must be sufficient to make the decision to discriminate reasonable. This will require an in depth analysis of the third prong: the potential detriment, or what's at stake for the MNC should the expatriate fail. Thus, if the entire MNC would fail as a business, it should be deemed reasonable for the MNC to be more conservative. As the stakes

a woman could not adequately represent the company in the host country instead of general conclusions about the prejudicial nature of a host country.").

[231] *Id.* at 74.

[232] This Note is not endorsing deference akin to the Business Judgment Rule in Corporate Law. *E.g.* Kamin v. American Express, 86 Misc.2d 809, *aff'd,* 54 A.D. 654 (N.Y. 1976). It is merely suggesting an acknowledgement of what the corporation has at stake in its analysis.

become less dire, the MNC should be less risk averse, and thus more inclined to dispatch a woman to a female-hostile culture. Discrimination regarding positions in which failure would be disastrous to the MNC should require a lower probability of failure than positions in which failure would be merely troublesome. If the goal of the legal analysis is to eliminate gender inequality in foreign cultures, it may be more effective to eliminate prejudices gradually. For example, if women are introduced into a female-hostile host country first in low to midrange positions, then in gradually higher positions, the host country may be persuaded over time to accept top level executives who are women.

C. The Impeded Performance Of The Expatriate Is Sufficiently Detrimental To The Essence Of The MNC's Business, Her Duties, Or The MNC's Operations

Although incidental costs of adopting non-discriminatory practices have been held not to constitute a valid BFOQ,[233] the Supreme Court has not addressed whether costs so prohibitive as to destroy the employer's business constitute a BFOQ. Further, at least two Justices, one of whom is still on the bench, have indicated that there may be a range on the spectrum of costs between incidental and so prohibitive as to destroy the employer's business. This Note argues that costs so prohibitive as to destroy the business should be a valid BFOQ because that is consistent with the "essence of business" test that courts use to determine the validity of a defendant employer's BFOQ defense.

One of those costs could be loss of sales. In *Diaz*, the court said "it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid.[234] Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome."[235] Customer preference rarely constitutes a BFOQ. However, a critical issue to the success of an operation may be the customer and without customers, clients, or patients, an operation cannot survive. If a sales person cannot make sales, that undermines their job function. Thus, courts have recognized exceptions to the general rule that customer preference does not provide an employer with a BFOQ.[236]

This Note proposes that the difference between the examples of customer preference that have been held to constitute a BFOQ—customer privacy and the sex industry[237]—and those that have not is the distinction between customer

---

[233] Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc., 499 U.S. 187, 211 (1991).

[234] Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir. 1971).

[235] *Diaz*, 442 F.2d at 389.

[236] *E.g*. Fesel v. Masonic Home of Delaware, Inc., 447 F. Supp. 1346 (D. Del. 1978), *aff'd,* 591 F.2d. 1334 (3d Cir. 1979); *Backus* 671 F.2d at 1101-02; Norwood v. Dale Maintenance Sys., 590 F. Supp. 1410 (sex was a BFOQ for a washroom janitor).

[237] *See supra* Part III.B

preference and customer *demand.* Customers can prefer female flight attendants, but still be willing to be served by male flight attendants.[238] However, when customers refuse to purchase from a female salesperson, as gentleman's club patrons would likely refuse a lap dance from a male dancer, it would be consistent with the statutory BFOQ exception—and the case law that interprets it—to find that sex was a BFOQ. This is because it would otherwise undermine the "essence of the business" by leaving it impossible for the corporation to operate.[239]

This Note proposes that customer demand is more significant in the international context than in the domestic setting. Title VII is a federal statute, and applies to all employers (statutorily defined) in the United States. Domestic customers do not have a choice between dealing with a company who discriminates against a protected class and one who does not because all domestic companies are forbidden to discriminate under Title VII. This is not true abroad. A foreign customer hostile to women can choose not to do business with a company who employs women. In a sufficiently hostile female culture, this would leave American corporations at a serious competitive disadvantage and unable to operate, which would undermine the essence of its business.

D. The MNC Can Make No Reasonable Accommodations to Ensure the Expatriate Could be Successful.

If the MNC can take affirmative actions to reasonably assure the success of the expatriate, it should do so. This is a prong that some courts have adopted in their BFOQ analysis[240] and should be incorporated into a court's evaluation of an MNC's attempted BFOQ defense. The MNC should consider what it could do to create an environment in which a female expatriate could succeed in the host country. Training should be modified to better prepare the female expatriate.[241]

VI. CONCLUSION

The test proposed by this Note will not allow the BFOQ exception to "gut" Title VII, nor allow the exception to swallow the rule. It does not allow stereotypes to inform business decisions but would require clear and convincing evidence of hostility that would be detrimental to a female expatriate's success. By recognizing that MNC's have legitimate concerns about female-hostility in some host countries, courts can provide the MNC's with better guidance on how and when discrimination is permissible. This will, in turn, help MNCs know what they can do to promote female expatriation in what is likely the vast majority of countries that do not have hostility to females sufficient to warrant discrimination. Clarity in

[238] *E.g., Diaz*, 442 F.2d. at 385.
[239] Manley, *supra* note 78.
[240] Manley, *supra* note 78.
[241] *See* Tucker, *supra* note 27, at 75.

the law, therefore, would help to endorse female expatriation[242] and will help close the gap between the number of male executives and the number of female executives.

Globalization is about integration,[243] and this integration requires that we reassess how we do things. It is also about tolerance. Hopefully, by showing a little tolerance for intolerance,[244] we can integrate with other cultures and provide positive examples of females succeeding in business. After all, globalization is much like a pilgrimage. They both "bring together people from various countries[245] and expatriates, like pilgrims "pick up information about other lands and peoples, and return to their homes with better understanding of one another."[246]

---

242 Tucker, *supra* note 27, at 77-8.
243 FRIEDMAN, THE LEXUS AND THE OLIVE TREE, *supra,* note 1.
244 Phipps, *supra,* note 3, at 427.
245 Smith, *supra* note 2, at 248.
246 *Id.*