

Christian Legal Society

The Elimination of Bias in the Legal Profession

Wendy L. Patrick, Esq.

Benefits of Diversity



24th - 25th May 2021 | 11 am WAT | 1pm EAT | 6am EST (NY)



ENGINEER ABDULLAHI A. SULE

Executive Governor of Nasarawa State,
Nigeria



ABDULKARIM ABUBAKAR KANA

Attorney General and Commissioner for
Justice, Ministry of Justice, Nasarawa State



MARKUS GREEN ESQ

AGA-Africa Board Member



HON JUSTICE KASHIM ZANNAH

Chief Judge, Borno State High Court
Nigeria



YAHAYA YAKUBU SHAFA

Judge Nasarawa State Revenue Court &
Secretary of Justice Sector Reform Team



MELBA PEARSON

Civil Rights and Criminal Law Attorney,
Center for the Administration of Justice,
Florida International University (FIU).



WENDY L. PATRICK

Deputy District
Attorney, San Diego



BARR. ISHAKA MUDI DIKKO SAN

Senior Advocate Of Nigeria (SAN)



Detecting Bias and Prejudice



Definition of Bias (Merriam-Webster)

- Bent, tendency, an inclination of temperament or outlook; especially: a personal and sometimes unreasoned judgment: prejudice: an instance of such prejudice

**Education is a method whereby
one acquires a higher grade of
prejudices.**

-Laurence J. Peter (1919-1988)

Pay Attention or Pay the Consequences

**Knew or Should
Have Known**



Birds of a Feather: Affinity Bias



Stereotypes



Home Court Disadvantage



Cultural Humility

- “a lifelong commitment to self-evaluation and critique, to redressing power imbalances . . . and to developing mutually beneficial and non-paternalistic partnerships with communities on behalf of individuals and defined populations”
- (Tervalon & Murray-Garcia, 1998).

Cultural Competence

“behaviors, attitudes, and policies that can come together on a continuum that will ensure that a system, agency, program, or individual can function effectively and appropriately in diverse cultural interaction and settings. It ensures an understanding, appreciation, and respect of cultural differences and similarities within, among and between groups.”

Social Climate Change



Perception of Bias in the Legal Profession

- ❑ Opposing Counsel
- ❑ Judge
- ❑ Colleagues
- ❑ Clients
- ❑ Witnesses
- ❑ Public Opinion



LAWS

- **Title VII of the Civil Rights Act of 1964: race, color, religion, national origin, sex.**
- **Reverse Discrimination.**

Title VII permits a gender based assignment if gender is a “bona fide occupational qualification” reasonably necessary to the normal operation of the particular business or enterprise.



Weighing the Options



Legal Evolution



Ignorance of the Law is No Excuse



What is a BFOQ?



What is a BFOQ?

- Quality or attribute employers may consider when making decisions re hiring and retention—qualities that when considered in other contexts would constitute discrimination, and thus violate civil rights employment law. Such qualifications must be listed in the employment offering.

Lawyer Selection

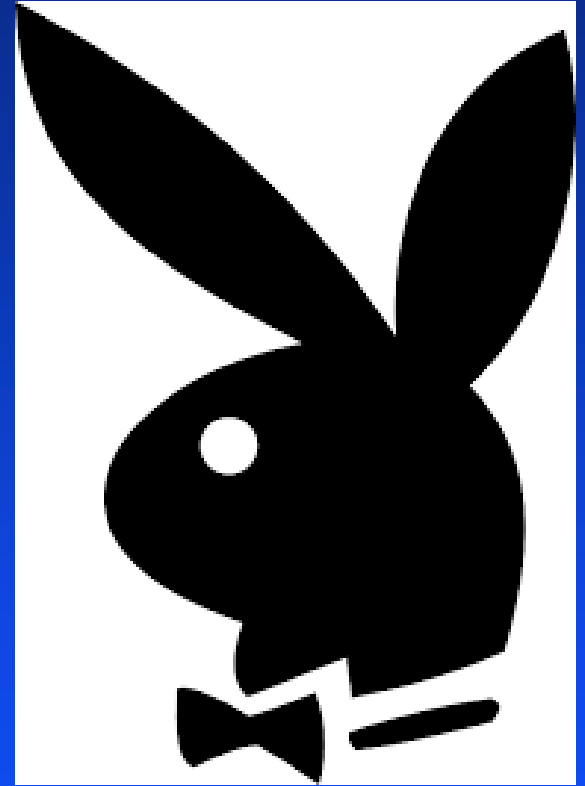


Bohemian Club v. FEHC



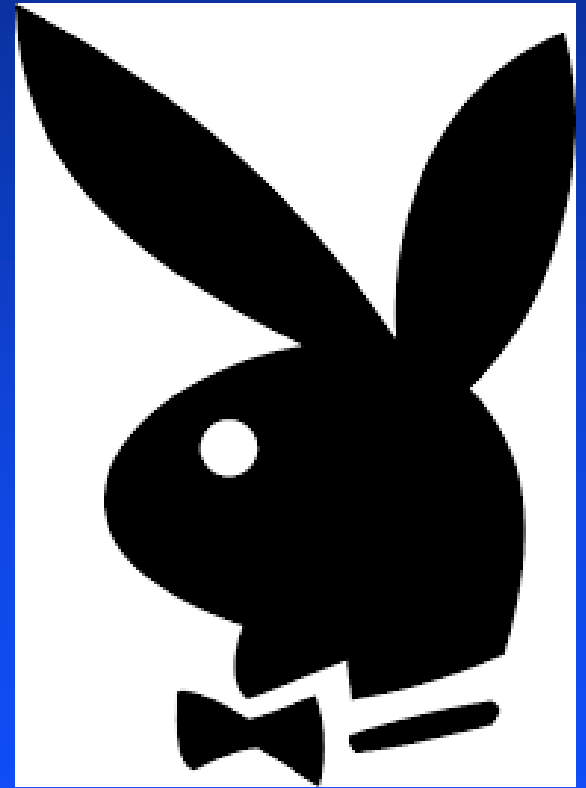
What is Not a BFOQ?

- n Customer preference for employees of one sex.
- n Necessity for providing separate facilities for one sex



What is Not a BFOQ?

n Fact that members of one sex have traditionally been hired to perform the particular type of job.



Recognized BFOQ

Personal privacy considerations which may justify a BFOQ:

- n Job req EE to observe individuals in a state of nudity or to conduct body searches
- n Would be offensive to prevailing social standards to have person of opp sex present

Recognized BFOQ

- n Detrimental to mental or physical welfare of individuals being observed or searched to have an individual of the opposite sex present.
- n *Bohemian Club v. FECH.*

Sexual Favoritism



Sexual Favoritism



Sex Crime v. Sexual Harassment



Disclosure



Male on Male Sexual Harassment Cases on the Rise



Boundary Probing

- n Downplay the significance of their conduct by making victims seem unreasonable
- n Complain that the victim is uptight or can't take a joke
- n Shaming or embarrassing the victim in a group setting to make it look like he or she is the problem

CA Dept of Fair Employment & Housing

- In employment, the FEHA prohibits discrimination and harassment on the basis of age (40 and over), ancestry, color, religious creed (including religious dress and grooming practices), denial of family and medical leave,

CA Dept of Fair Employment & Housing

- disability (mental and physical) including HIV and AIDS, gender, gender expression, gender identity, genetic information, marital status, medical condition (cancer and genetic characteristics),

CA Dept of Fair Employment & Housing

- national origin, race, sex (including pregnancy, childbirth, breastfeeding, and medical conditions related to pregnancy, childbirth or breastfeeding) and sexual orientation.

ADA Amendments Act (2008)

Expands “major life activities” to encompass “major bodily functions.”

Major life activities include things like breathing, reading, concentrating, and walking,

ADA Amendments Act (2008)

Major bodily functions include things like functions of the brain, respiratory system, circulatory system, and reproductive system.

Philadelphia: Disability Bias



Age-Related Protective Bias



Modern Mentoring



Age Discrimination



Shades of Grey: Age is Just a Number



Mandatory Retirement



- Judges
- Pilots
- Air traffic controllers
- Federal law enforcement
- Fire fighters

- *103-yr-old lawyer died while still practicing trusts and estate law

ABA Rule 8.4 (g)

Professional Misconduct

- To engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.

ABA 8.4 Comment [3]

- Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others.

ABA 8.4 Comment [3]

- Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature.

ABA 8.4 Comment [3]

- The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

ABA 8.4 Comment [4]

- Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business *or social activities in connection with* the practice of law.

ABA 8.4 Comment [4]

- Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

Courtroom Conduct



Company Culture



Break Room Banter



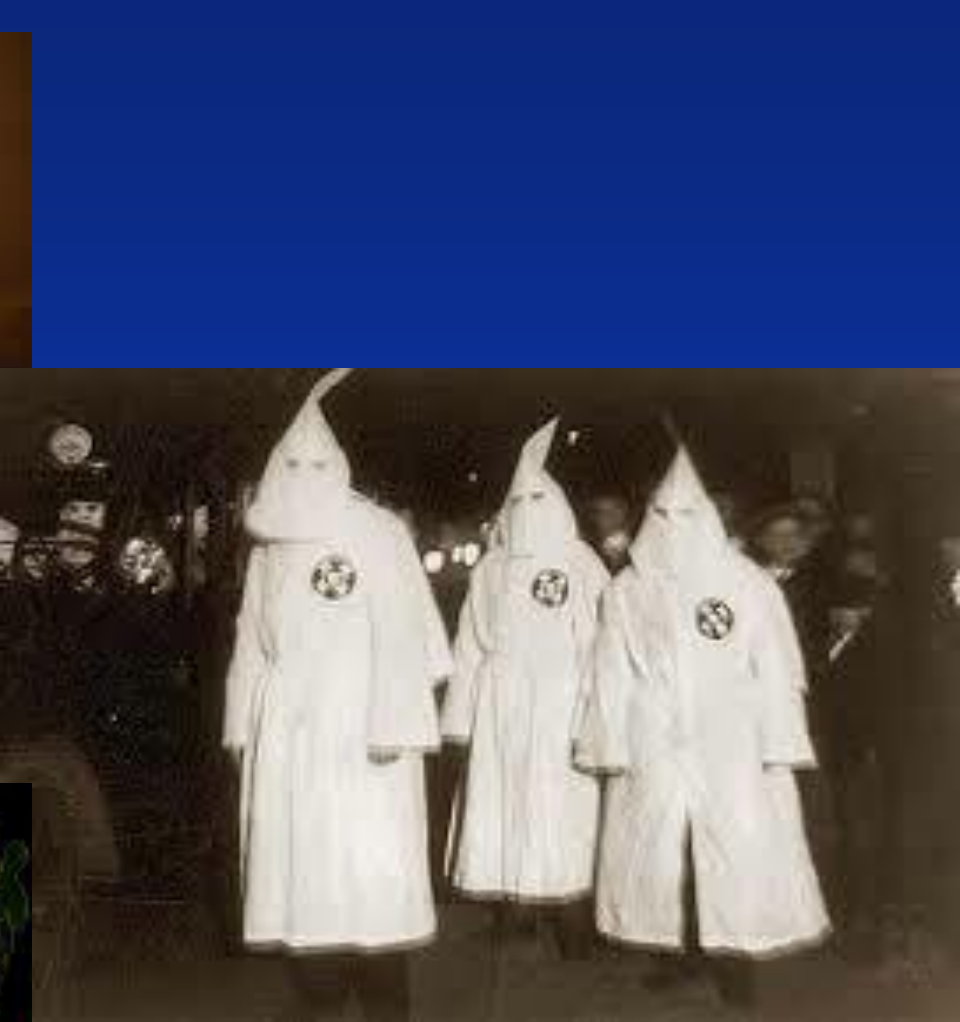
Community Groups



Religion



- *Friedman (CA)*: a religious belief must constitute something other than “a philosophy or a way of life,” but “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection”



World Church of the Creator

Teachings occupy “a place in his life parallel to that held by a belief in God for believers in more mainstream theistic religions.”



Practicing Religion in the Workplace



What is Not Protected



Turbans in the Courtroom

- *Jensen v. Superior Court of San Diego* (1984): Test is whether it “interferes with courtroom decorum by disrupting justice, i.e., whether it tends to cause disorder or interfere with or impede the functioning of the court.”

Courtroom Exhibitionism



The Fashion Felony: No Socks No Service



Investigating Complaints

- ❑ Confidentiality
- ❑ Witness Statement Forms
- ❑ Proactive Interviews
- ❑ Source of Bias



Who is Not Protected?

- ❑ Regional/ State Flair
- ❑ Victims
- ❑ Hairstyle/ Facial hair
- ❑ Cultural preferences
- ❑ Recovering Substance Abusers





Protective Bias



Strategies for Playing it Safe



The Lawyer's Higher Calling



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