STATE OF MAINE

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Inter-Departmental Memorandum

Date July 12, 1979

To Paul D. Pierce Dept.

n John Carnes Dept.

Subject The BFOQ defense and the [redacted] case.

This particular case against St. Regis is a straight forward Level I (intentional) discrimination case. The employer states that it intentionally and purposefully will not promote or hire females to work in the men's shower facility for one reason: the sex of the female janitors.

It is not a Level II (unequal treatment) case because the employer is not applying different standards to different groups, e.g., requiring that female janitors have a college degree while male janitors need only a high school diploma. Here, there is no standard, test, requirement, etc., which will ever allow the females to obtain this assignment because the jobs are denied them solely because of their sex.

It is also not a Level III (disparate impact) case because there is no employment practice or standard which is applied equally to all but which has an adverse effect on a minority group, e.g., a height and weight requirement.

In this case the employer says plainly and simply that male janitors can be given this assignment and female janitors cannot. In other words, [redacted] admits a prima facie violation of 5 M.R.S.A., §4572 which states:

> "It shall be unlawful employment discrimination...for any employer... because of sex...to...discriminate with respect to hire, tenure, promotion, transfer, compensation, terms, conditions, or privileges of employment..."

But the company asserts, by way of an affirmative defense, that the position of janitor for the men's shower facility fits within the exception, found in §4572, to the general prohibition of discrimination based on sex, i.e., that sex is a bona fide occupational qualification for this particular job.

The burden of proof is on [redacted] to demonstrate that this position fits within the BFOQ exception. And the Maine Human Rights Commission Employment Guidelines, EEOC's Guidelines and the federal courts, maintain that this exception ought to be narrowly construed. This means that the employer has the burden of proving that he had reasonable cause to believe that all or substantially all women would be unable to perform safely and efficiently the duties of the job. Weeks v. Southern Bell, 408 F. 2d 228, 235 (1969); MHRC Employment Guidelines, §3.04 B (3).

The courts and our Commission will look at the duties or requirements of the job. Then, in order to prevail, [redacted] will have to come forward with evidence to show that the circumstances surrounding the performance of these duties are such that no woman could perform them safely and efficiently because of the constant disruption resulting from the need to protect the male employees's right to privacy within the men's shower facility. It is not enough for [redacted] to merely assert that the women would be unable to perform their duties, [redacted] must offer evidence in support of their assertion.

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However, Even though the BFOQ exception is to be narrowly construed, [redacted] the requirement of "conventional decency or privacy" has been a category of BFOQ accepted by EEOC and the courts.

In Forts v. Ward, 434 F. Supp. 946 (1977), ten female inmates moved for a preliminary injunction enjoining the state from assigning male guards to their female facility. In the course of their duties (maintaining security), the males would see the females bathing, sleeping and using the toilet. The court ruled, among other things, that Title VII does not require that male guards be hired at a female prison and stated that "...even the most considerate male guard cannot help but invade an inmate's privacy."

Of course this case can be distinguished from the [redacted] case because of the fact that prisoners are required to be visible at all times whereas employees are not. The significant point here is that the court states that, even in the case of prisoners, the right to privacy is an important, fundamental right guaranteed by the Constitution. Privacy is one aspect of "liberty" protected by the due process clause of the 14th Amendment, Carey v. Population Services Int'l., 52 L.Ed.2d 675 (1977).

In several of the privacy cases, the courts suggest that a solution to the problem may be selective job assignments which will allow for the protection of the right to privacy, Reynolds v. Wise, 10FEP Cases 131 (1974). How can [redacted] make selective job assignments within the men's shower facility?

In Long v. California State Personnel Board, 13 FEP Cases 1322, 1330 (1974), a case concerning a female chaplain who applied for a position at an institution for rehabilitating youthful male offenders, the court said: "...we do not view the duty of an employer to refrain from discrimination based on sex as requiring him to alter substantially his facility and procedure to suit the sex of the person involved. Certainly reasonable adjustments should be made, otherwise equal protection rights of either sex could be thwarted by contrived nonsensical conditions."

Would the [redacted] case require substantial alterations or only reasonable adjustments? The cases indicate that the Respondent has the burden of showing that no female employee can perform the job efficiently under existing circumstances. The Complainant must then come forward with evidence that reasonable adjustments could be made to eliminate the problem. And, finally, the Respondent can show that such adjustments would be substantial and therefore not required.

A discussion of the "business necessity" defense to a Level II or III discrimination case is to follow.