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The recommended citation for this paper is:
Rotegard, L., Hill, Bradley K., & Lakin, K.C. Sex as a Bona Fide Occupational Qualification for Direct Care Staff in Residences for Mentally Retarded People. Minneapolis: University of Minnesota, Department of Educational Psychology, 1983.

Sex as a Bona Fide Occupational
Qualification for Direct Care Staff
in Residences for Mentally Retarded
People

Brief #17

April, 1983

This research is supported by a grant (54-P-71173/5-04) from the Administration on Developmental Disabilities, Office of Human Developmental Services, Health Care Financing Administration, Department of Health and Human Services. Contractors undertaking such projects under government sponsorship are encouraged to express freely their professional judgment in the conduct of the project. Points of view or opinions stated do not, therefore, necessarily represent the official position of the Administration on Developmental Disabilities.

Abstract

Title VII of the Civil Rights Act of 1964 strictly limits discrimination on the basis of sex as a qualification for employment. At the same time, many courts have found individual right to privacy, primarily the right to be free from observation by the opposite sex while undressing, bathing, using toilet facilities, or being searched, to be a basis for determining sex to be a bona fide occupational qualification (BFOQ). The mental retardation literature has not addressed this issue with regard to residential care for mentally retarded people. In order to avoid future litigation it is necessary that job descriptions be carefully defined in a manner that will assure residents' rights to privacy without barring employment on the basis of sex.

Sex as a Bona Fide Occupational Qualification
for Direct Care Staff in Residences
for Mentally Retarded People

The enactment of Title VII of the Civil Rights Act of 1964 provided an important new tool for fighting sex discrimination in employment. The purpose of Title VII was to remove arbitrary and unnecessary employment barriers based on sex, race, religion, or national origin. Enforcement of employment rights, however, has sometimes conflicted with another area of litigation--a person's right to privacy.

With the support of at least three amendments to the United States Constitution, the Supreme Court and lower federal courts have articulated several formulations of the right to privacy, each of which may be construed as recognizing the role of privacy in preserving personal dignity, autonomy, and individuality (Bonner vs. Coughlin, 1975; Forts vs. Ward, 1977; Roe vs. Wade, 1973; York vs. Story, 1963).

There is a mechanism whereby exception to Title VII protection is granted to employers who make distinctions based on sex, religion, race, or national origin; it is called the bona fide occupational qualification (BFOQ). In order to make gender a BFOQ for a specific job, it must be shown that job responsibilities cannot be arranged in such a way as to lessen the infringement on the privacy rights of the clients while still allowing meaningful work and promotional opportunity, and that the BFOQ is based on administrative necessity rather than simple convenience (Gunther vs. Iowa State Men's

Reformatory, 1979). In addition, courts have insisted that there be a factual basis for believing that substantially all members of the gender disallowed from the job would be unable to appropriately or safely discharge their duties (City of Philadelphia vs. Pennsylvania Human Rights Commission, 1973; Dothard vs. Rawlinson, 1977). In *Forts vs. Ward* (1978) the court upheld female prison inmates' right to privacy in dressing and toileting but did not find gender to be a BFOQ. Instead of denying equal employment rights to the male guards, privacy screens were installed.

The right to privacy has been recognized as a basis for a BFOQ in prisons and numerous rehabilitation centers as well as in a nursing home (*Backus vs. Baptist Medical Center*, 1981) and in a hospital labor and delivery room (*Fesel vs. Masonic Hospital*, 1978). The courts have defined privacy interest as the need to be free from observation or intimate touching by members of the opposite sex. In the context of youth in detention facilities the state courts have been concerned not only with the need for bodily privacy, but also with psychological harm caused by embarrassment or degradation of being observed by members of the opposite sex (*Tharnish*, 1980; *Long vs. CA State Personnel Board*, 1974; *Philadelphia vs. PA Human Rights Commission*, 1973).

No previous case law has addressed the extent of privacy rights for mentally retarded people. However, a Michigan case in which female direct-care staff persons working on an all male ward of a state institution were laid off, while male staff with less seniority were retained, is currently in arbitration (*AFSCME sues State*, 1982). Since such treatment will be found to constitute sex discrimination unless sex

is seen as a bona fide occupational qualification, a court action that more specifically defines another aspect of the rights of mentally retarded people in residential care is likely.

The issue of care person gender bears great potential impact upon the residential service system for mentally retarded people. A nationally representative interview study of 236 public and private residential facilities in 1978-79 (Hauber, Bruininks, Wieck, Sigford & Hill, Note 1; Hill, Lakin & Bruininks, in press; Lakin, Bruininks, Hill & Hauber, 1982) provides data that suggests the scope of the problem. After randomly selecting a sample of residents in each facility, for each resident the facility administrator was asked: "What is the name of the staff person here who is most directly involved with (RESIDENT'S NAME) day-to-day care?" It is important to point out that the staff person interviewed did not necessarily assist residents with dressing, bathing or toileting. It is only possible to infer that "most directly involved with day-to-day care" meant that these interactions frequently were a part of the care person's job.

In 75 public residential facilities (institutions) among 150 male staff interviewed, 129 (86%) worked with (were interviewed regarding) a male resident and 21 (14%) worked with a female resident. Among 497 female staff, 242 (49%) worked with a male resident, 255 (51%) worked with a female resident. Among 371 male residents, 65% had female staff; among 276 female residents, 7.6% had male staff.

In 161 community residential facilities (group homes and larger community residences) among 32 male staff interviewed, 31 (97%) worked with a male resident and 1 (3%) worked with a female resident. Among 139 female staff, 67 (48%) worked with a male resident and 72 (52%) worked with a female resident. Among 98 male residents, 68% had female staff; among 73 female residents, 1.4%

had male staff.

These data, which include only residents age 12 and above, suggest a consistent pattern in both public and community facilities. Female residents have female staff (92.4% in public facilities, 98.6% in private facilities), but because 697 of all 883 direct care staff are women (79%), relatively fewer male residents have male staff (35% in public facilities, 32% in private facilities).

Section 6010 of the Developmentally Disabled Assistance and Bill of Rights Act (1975) outlines a "Bill of Rights" for developmentally disabled people. Section 6010 (4) says that:

"All programs for persons with developmental disabilities should meet standards which provide for the humane care of the residents of the facilities, are sanitary, and protect their rights."

Section 6010 was amended in 1978 to further specify:

"The rights of persons with developmental disabilities described in findings made in this section are in addition to any constitutional or otherwise afforded to all persons."

This language would suggest that concern about residents' right to privacy is clearly legally warranted. However, the issue further permeates principles that have been considered foundational to programmatic decisions in recent years. The philosophy of normalization stresses that each handicapped individual must be treated with consideration, respect, and full recognition of his or her dignity and individuality. Consistent with that philosophy, residents must be given privacy during habilitation or care of certain personal needs. At the same time, normalization posits that residents have the right to access to members of the opposite sex, just as non-handicapped people interact with opposite sex peers, teachers, and other acquaintances.

The issue of the extent of residents' right to privacy may soon lead to litigation that weighs privacy against employment rights. However, with or

without such litigation it is time that we sought ways to arrange job responsibilities of modify job descriptions to insure appropriate resident-staff relations for dressing, bathing, toileting, and other private activities as well as recreation, general supervision or habilitation. Fully acknowledging the humanity of developmentally disabled people demands no less. Such provisions will be difficult with large homogeneous groups of severely handicapped persons, who because of mental retardation, may not be able to articulate their feelings or demand their rights, and where the traditional job market has found 75% female staff and 57% male residents. However, to ignore the issues of privacy for developmentally disabled people will only continue to deny them the dignity which is the foundation of care and habilitation and will ultimately result in courts developing conventions to protect privacy by naming gender as BFOQ for care personnel.

FOOTNOTES

1. This research was supported by a grant (54-P-71173/5-04) from the Administration on Developmental Disabilities, Office of Human Development Services, Department of Health and Human Services and a grant (18-P-98078/5-01) from the Health Care Financing Administration, Department of Health and Human Services.
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Reference Notes

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