

SAFEHER, BUT NOT FOR HIM: TITLE VII DISCRIMINATION IN RIDESHARING

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INTRODUCTION

On April 19th, an app named SafeHer will launch in cities nationwide this fall.¹ The app is strikingly similar to ridesharing apps like Uber and Lyft: download the app, provide your payment information, and request a ride. Yet SafeHer comes with one major difference—both drivers and passengers are exclusively women.² The goal of the app is simple: providing safe travel for women, by women, who fear the risk of violent crimes in taxicabs or traditional ridesharing methods.³

The app's creator, Michael Pelletz, may see himself as a real-life equivalent of the feminist-friendly Dev Shah from Aziz Ansari's *Master of None*,⁴ but in reality, he may be breaking federal law. SafeHer, by design, may violate Title VII of the Civil Rights Act of 1964. The law stops employers from hiring, or refusing to hire a person because of their "race, color, religion, sex, or national origin."⁵ It is fairly obvious, given SafeHer's business model that their hiring practices would qualify as a *prima facie* violation of Title VII.⁶ However,

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1. Amanda Manning, *All Female Ride-Sharing App Is Launching Nationwide After Overwhelming Demand*, OBSERVER (Apr. 20, 2016, 12:13 PM), <http://observer.com/2016/04/all-female-ride-sharing-app-is-launching-nationwide-after-overwhelming-demand> (the app's original name, Chariot for Women, was changed on April 20 to SafeHer).

2. *Id.* (While SafeHer is marketed towards women, customer's children under 13, of any gender, will also be permitted to ride along).

3. *Our Mission*, SAFEHER, <http://safeher.com> (last visited July 24, 2016).

4. See Mallika Rao, *Master of None Recap: It's Harder Being a Woman*, VULTURE (Nov. 19, 2015, 10:00 AM), <http://www.vulture.com/2015/11/master-of-none-recap-season-1-episode-7.html> (Rao describes Ansari's character, Dev Shah, as being idolized by women for his acceptance of everyday problems that women face).

5. 42 U.S.C. § 2000e-2(a)(1) (2012).

6. *Id.*

SafeHer will argue that the Bona Fide Occupational Qualification (BFOQ) exception applies here, saving the app from a Title VII violation.⁷

While the app's purpose may be noble, noble intentions do not excuse discrimination. This short essay gives a four-part overview of the legal issues SafeHer will inevitably face, and argues that allowing SafeHer to fall under the BFOQ exception would overextend a purposefully narrow rule. Part I explains the BFOQ exception, and how it applies to a Title VII enforcement action. Part II argues that the plain text of the law does not support SafeHer. Part III explains that SafeHer will fail a multi-part test for establishing a BFOQ. Part IV will show examples of reasonable, nondiscriminatory alternatives available to SafeHer. The essay concludes by mentioning policy arguments for and against SafeHer, and arguing that ultimately, SafeHer does not have a place within the law.

I. HOW THE BFOQ EXCEPTION APPLIES TO TITLE VII

When Congress passed the Civil Rights Act of 1964, the law included Title VII, specifically prohibiting employment discrimination. Title VII is broad in scope, outlawing any business's attempt to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin".⁸ Congress defined the rule to include only private businesses that "affect commerce", and employ fifteen or more people.⁹

Recognizing a need for certain exceptions to this general rule, the Bona Fide Occupational Qualification exception was promulgated by Congress within Title VII.¹⁰ This exception allows businesses to discriminate based on religion, sex, or national origin, when such discrimination is reasonably necessary to the normal operation of that particular business.¹¹ While race is never considered a BFOQ, in the context of gender discrimination, hiring one gender exclusively is permitted when the business in question cannot function without doing so.¹²

7. *Id.* § 2000e-2(e).

8. *Id.* § 2000e-2(a)(1).

9. *Id.* § 2000e(b) ("commerce", within the statute, is broadly defined as "trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof." *See* § 2000e(g)).

10. *Id.* § 2000e-2(e)(1).

11. *Id.*

12. Although race discrimination is never an exception within Title VII, the 1st Amendment will override Title VII in artistic works where the race of the employee is integral to the story or artistic purpose. This exception allows, for example, movie studios to exclusively cast white men for the role of Superman. *See generally* Russel K Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CALIF. L. REV. 1 (2007) (illustrating allowable race-based discrimination in the context of casting roles in movies).

When a Title VII claim is litigated, the complaining party has the burden of proof to show that an employer's hiring practice is discriminatory.¹³ Simply put, when a court finds that a business does indeed discriminate against a class of persons protected under Title VII, they will find a *prima facie* violation. These violations can be found in a number of situations, such as racial discrimination,¹⁴ wage disparity,¹⁵ and gender discrimination.¹⁶ However, because SafeHer openly refuses to hire men, a Title VII violation is clearly evident. If the complainant is successful in showing a *prima facie* violation, the respondent then has the burden of proving a BFOQ exception within their business as an affirmative defense.¹⁷ Successful BFOQ defenses have ranged from safety concerns,¹⁸ to privacy rights.¹⁹ Since Title VII's implementation, courts have expounded upon the reach of this exception, and in what situations it may apply. For SafeHer to succeed at trial, because a *prima facie* violation is already evident, they will need to show that their hiring practices fall under the BFOQ exception.

II. THE PLAIN TEXT AND LEGISLATIVE INTENT OF THE BFOQ EXCEPTION DOES NOT ENDORSE SAFEHER'S BUSINESS MODEL.

The Supreme Court directly addressed the BFOQ defense, explaining that it "provides only the narrowest of exceptions to the general rule requiring equality of employment opportunities."²⁰ The Court also explained that the exception "contains several terms of restriction that indicate that the exception reaches only special situations."²¹ Justice Blackmun listed five different limiting phrases that show the statute's very narrow reach.²² These five terms, "certain," "occupational," "reasonably necessary," "normal operation," and "particular," could have been completely omitted without affecting the substance of the statute.²³ Nevertheless, these words were included by Congress to ensure that the BFOQ exception is only allowed in very unusual circumstances, and that the exception does not detract from the fundamental purpose of Title VII.²⁴

13. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

14. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

15. *Vanguard Justice Soc., Inc. v. Hughes*, 471 F. Supp. 670 (D. Md. 1979).

16. *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518 (11th Cir. 1992).

17. *Id.* at 1528.

18. *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976); *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

19. *Torres v. Wis. Dep't of Health & Soc. Servs.*, 859 F.2d 1523, 1528 (7th Cir. 1988).

20. *Dothard*, 433 U.S. at 333.

21. *Automobile Workers v. Johnson Controls*, 499 U.S. 187, 201 (1991).

22. *Id.*

23. *Id.*

24. *Dothard*, 433 U.S. at 333.

The most telling term is “occupational,” which indicates that these objective, verifiable requirements must directly affect job-related skills.²⁵

Looking to Congressional intent, the Senate rejected an amendment from Senator McClellan, the purpose of which “was to protect an employer's right to make hiring decisions based on its own business judgment.”²⁶ This rejected amendment indicates that Congress wanted an objective, verifiable standard for proving a BFOQ. While the plain text and legislative history of the BFOQ make it clear that the exception is extremely narrow, SafeHer will advance several arguments in favor of their hiring practices based on other factors.

First, SafeHer will claim, under the text of the law, that the BFOQ standard must be “*reasonably necessary*,” not indispensable to the business.²⁷ As long as the necessity of female-only drivers and passengers is closely tied to their business, their App should fall within the confines of the law.²⁸ Yet this argument sounds strong only by ignoring Justice Blackmun’s limiting phrases. Considering the entirety of the text and the legislative history materials discussed above, it is, at best, unclear whether the BFOQ exception protects SafeHer.

Second, SafeHer will argue that their business is not founded on a basis of customer preference or stereotypes,²⁹ but on an option for women who have no other choice. The target employees and customers of SafeHer are women who cannot use current methods of public transportation, and may be financially or practically unable to own a personal car.³⁰ The app was designed to provide women a safe method of transportation, free from violence or sexual harassment.³¹ And after all, harm avoidance is not exactly a “choice” that people consciously make. But this argument falls short. Not all men are incapable of providing a safe ride for a female passenger, nor is every male passenger a clear threat to a female driver. Even if, in the case of a victim of past assault, every male driver or passenger does cause a debilitating anxiety, these select few will surely not be a majority, or even a large percentage of SafeHer’s customers.

III. SAFEHER CANNOT PASS THE MULTI-PART TEST FOR AN AFFIRMATIVE DEFENSE OF TITLE VII.

The current legal framework uses the “essence of business” test, and the “all or substantially all” test in tandem, to determine whether a BFOQ excep-

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

26. *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 298 (N.D. Tex. 1981).

27. Ari Herbert, *Portlandia, Ridesharing, and Sex Discrimination*, 115 MICH. L. REV. ONLINE 18 (2016).

28. *Id.*

29. 29 C.F.R. § 1604.2 (1972).

30. SAFEHER, *supra* note 4.

31. *Id.*

tion can be granted.³² The 5th Circuit considered the “essence of business” test, requiring a non-discriminatory hiring practice to undermine a business in order to qualify for a BFOQ.³³ The court admitted that while women flight attendants may address psychological needs of passengers better than men, these needs were tangential to Pan-American Airlines’ essence— transportation.³⁴ Only mechanical duties could be considered essential to the transportation business.

Like any other ridesharing app, the essence of SafeHer’s business is to safely and efficiently transport passengers from one place to another.³⁵ In order to satisfy the “essence of business” test, they would need to show that hiring male drivers would completely undermine this objective, by proving that women are more capable of the mechanical duties of a driver. For SafeHer, demonstrating that either sex is the superior driver will be nearly impossible. So SafeHer will not attempt to claim that women are superior drivers than men. Instead, they will claim that the safety a woman provides in transportation is safety from assault, or sexual harassment. The Supreme Court has evaluated the “essence of business” test in terms of safety, by looking at degrees of severity.³⁶ The more likely a risk will occur, the more stringent job qualifications can be, to justify safety from that risk. In the context of ridesharing, SafeHer will need to prove that the risk of assault or sexual harassment inherent in a male driver is high enough to justify their business model. Unfortunately, statistics showing specific rates of violent crimes or sexual assaults are difficult to find, given the manner in which police reports are made.³⁷ However, studies have shown that ridesharing companies generally provide a safer means of transportation than a taxi, for both the driver and passenger.³⁸ Despite the dearth of evidence for SafeHer’s claim, or the opposite, one thing is made clear—the horror stories about the safety and risks of ridesharing are wildly overblown.³⁹ The American judicial system has yet to address the safety of ridesharing apps in comparison to traditional transportation methods. So despite evidence pointing towards one side, the role that safety plays in a ridesharing business is ultimately unclear.

The other BFOQ standard, the “all or substantially all” test, is fairly similar to the “essence of business” test. To satisfy the “all or substantially all” test, SafeHer must show that there is a “factual basis for believing that substantially

32. *Johnson Controls*, 499 U.S. at 203, 207.

33. *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971).

34. *Id.* at 388.

35. *See id.* (stating the same primary function for an airline).

36. *W. Airlines, Inc. v. Criswell*, 472 U.S. 400, 416-17 (1985).

37. Adrienne LaFrance & Rose Eveleth, *Are Taxis Safer than Uber?*, THE ATLANTIC (Mar 3, 2015), <http://www.theatlantic.com/technology/archive/2015/03/are-taxis-safer-than-uber/386207..>

38. Matthew Feeney, *Is Ridesharing Safe?*, THE CATO INST. POL’Y ANALYSIS 1, 11 (Jan. 27, 2015), <http://object.cato.org/sites/cato.org/files/pubs/pdf/pa767.pdf>.

39. *Id.*

all employees” of a single sex would be unable to perform the duties of their particular job.⁴⁰ The 5th Circuit found that in order to justify a BFOQ defense through the “all or substantially all” test, a business cannot assume on the basis of a “stereotyped characterization” that few or no men would be able to perform the duties of a driver sufficiently.⁴¹ The Supreme Court has addressed sex-based differences within the confines of this test, stating that “even a true generalization about [a particular sex] is an insufficient reason for disqualifying an individual to whom the generalization does not apply.”⁴² For SafeHer’s business model to satisfy this test, all, or substantially all men would need to be unable to perform the duties of a driver.⁴³ SafeHer will argue that one hundred percent of men are unable to perform this job. The job of a SafeHer driver is not only about safe transportation, but it is also about passenger safety from anxiety. Critics will argue that this is a psychological need, and thus only a customer preference. Regardless, the “all or substantially all” test may be SafeHer’s best hope for survival.

SafeHer can also mention that their app provides a rehabilitative function to their passengers. BFOQs have been found in the 7th Circuit, for businesses that provide a type of rehabilitation.⁴⁴ In many of these cases, usually involving prisons, there is also a recognized need for privacy to ensure the rehabilitative effects. SafeHer might claim this this function is tied to their business, because many of their potential passengers could be recovering from a sexual assault. But privacy interests recognized in a prison entail changing clothes and using the bathroom—something few people would think to attempt while in a moving car.

While SafeHer certainly has some good points to address each of these issues, it seems unlikely that the law will be on their side. Even if a court were to decide that SafeHer satisfies these two tests, there is still one more hurdle to jump.

IV. THERE ARE REASONABLE, NONDISCRIMINATORY ALTERNATIVES TO SAFEHER’S EMPLOYMENT MODEL.

In order to constitute a BFOQ defense, SafeHer must show that there are no alternatives equally suited to accomplish the same goals.⁴⁵ Further, any alternatives cannot simply be inconvenient to the business. In the 7th Circuit, the court found that any alternative must be intolerable.⁴⁶ Even if a business were to satisfy the two tests shown above, it would still need to prove that there are

40. *Criswell*, 472 U.S. at 415.

41. *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228, 235-236 (5th Cir. 1969).

42. *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978).

43. *Criswell*, 472 U.S. at 414.

44. *Torres*, 859 F.2d at 1528.

45. *Johnson Controls*, 499 U.S. at 194.

46. *Henry v. Milwaukee Cnty.*, 539 F.3d 573, 585 (7th Cir. 2008).

no reasonable alternatives available.⁴⁷ Unfortunately for SafeHer, these alternatives exist, and can likely accomplish the same goals that SafeHer seeks to accomplish with their hiring policy.

First, SafeHer could simply employ male drivers. While this immediately seems contrary to their entire business model, it would instantly rid them of any discrimination claim. When a female passenger feels unsafe with a male driver, she could have the ability to choose the sex of the driver in her request for a ride. By implementing this model, SafeHer's goals of safe travel for women would be accomplished, and no discrimination would occur. However, SafeHer will argue that this alternative would destroy their business, by requiring them to employ drivers who they would not otherwise. Unfortunately, the Supreme Court has expressly stated that the increase in cost of hiring members of both sexes does not justify discrimination in hiring only members of one sex.⁴⁸ Since rideshare drivers are typically paid on commission, not on payroll, SafeHer might not even have to pay out-of-pocket the male drivers they allow. SafeHer could merely create a gender-selection option on the app.

SafeHer also claims that their business is not just about transportation, but *safe* transportation. Yet, there are other measures that can be taken in order to improve the safety in a ridesharing app. SafeHer could require surveillance cameras, or partitions installed between driver and passenger, both of which are proven to reduce the likelihood of violent crime.⁴⁹ These measures could provide not only psychological assurance of lowered risk, but also a concrete reduction in threat of any assault or sexual harassment occurring.

SafeHer's key counterargument to these alternatives is a similar theme to their other arguments. The goal of their app is not about true safety, but about psychological safety from a man, which cannot be accomplished through cameras or an installed barrier. In fact, cameras would pose an even greater privacy risk than a driver alone. But as the list of possible alternatives grows, SafeHer's chances of proving a BFOQ shrink.

CONCLUSION

If their business is found to be illegal, SafeHer will argue that the law should find a place for them. The market economy has produced SafeHer,

47. Katie Manley, *The BFOQ Defense: Title VII's Concession to Gender Discrimination*, 16 DUKE J. GENDER L. & POL'Y 169, 174 (2009).

48. *Johnson Controls*, 499 U.S. at 210.

49. See John R. Stone and Daniel C. Stevens, *The Effectiveness of Taxi Partitions:*

The Baltimore Case, SOUTHEASTERN TRANSPORTATION CENTER (June 1999), available at <http://www.taxi-library.org/stone99.pdf>, (showing increased safety in taxicabs by installing partitions between driver and passengers); Cammie K.C. Menéndez et al., *Effectiveness of Taxicab Security Equipment in Reducing Driver Homicide Rates*, 45 AM. J. PREVENTATIVE MED. (July 2013), available at [http://www.ajpmonline.org/article/S0749-3797\(13\)00212-2/fulltext](http://www.ajpmonline.org/article/S0749-3797(13)00212-2/fulltext) (showing that installing cameras into taxicabs is a proven safety measure for reducing homicide rates).

which gives a tailored solution to a niche problem—something the government seldom accomplishes. By disallowing apps like theirs, SafeHer will say, the law is rejecting innovation and experimentation. Yet, a certain line must be drawn between public good, and the law. At a certain level, business will be allowed to discriminate on some basis, because of the nature of the work they do, or specific duties of the job. And SafeHer does not quite meet this bar.

SafeHer's business has noble intentions. But noble intentions don't automatically grant an exception to the law. SafeHer's business model is a *prima facie* violation of Title VII, and it is unlikely that they will establish a narrow BFOQ exception. Fortunately, there are reasonable alternatives that SafeHer can incorporate, and their goal of safe transportation for women can be accomplished.