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### Discrimination Helps Companies Trade on Women's Sexuality

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# Sex Discrimination

## Does refusing to hire men as food servers violate the Civil Rights Act?

The "Hooters girl" figures to be an endangered species if the federal Equal Employment Opportunity Commission has its way.

This past November, when Hooters—the Atlanta-based restaurant chain—publicly re-aired charges that it discriminates against men by hiring only female food servers, bartenders and hosts, it invited a new assessment of whether a job can be defined as for women only.

According to the EEOC, Hooters cannot claim that sex is a bona fide occupational qualification, and an exemption to the Civil Rights Act, since the essence of its business is selling food, not

atmosphere. Hooters thinks differently and claims compliance will drive it out of business.

Of course, the legal issue of whether gender should be a job qualification is not new. Some entertainment and fashion jobs have been held to require females exclusively. Whether this is true for some of the staff at a theme restaurant is an open question.

Debating the point here are Mary Becker, professor and employment law specialist at the University of Chicago law school, and Patricia A. Casey, Hooters' attorney and partner at Akin, Gump, Strauss, Hauer & Feld in Washington, D.C.

## Yes: Discrimination helps companies trade on women's sexuality

In the 1970s, Southwest Airlines dressed its stewardesses in hot pants and go-go boots, and ran an ad campaign with the theme, "Fly me." Southwest argued that sex was the essence of its marketing to male business travelers, and that its females-only hiring policy was "necessary for the continued success of its image and its business."

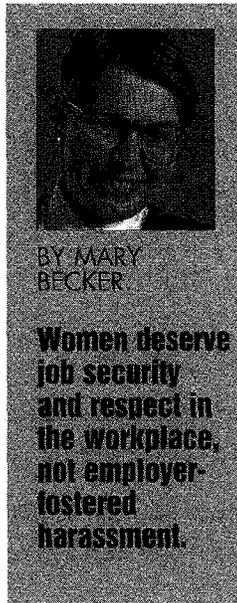
Judge Patrick Higginbotham of the U.S. District Court for Northern Texas held that "sex does not become a bona fide occupational qualification merely because an employer chose to exploit female sexuality as a marketing tool, or to better [e]nsure profitability." Higginbotham said employing male stewards would not doom the airline, and he was right. Southwest went on to find a new focus as a budget airline.

Now, a restaurant chain is arguing its business is not food but the ambiance and entertainment created for men by Hooters "girls." These women usually wear tight short-shorts and tank tops or half-tees with a large-eyed owl on the front; some shirt backs read "More than a mouthful."

If the case goes to trial, the question will be whether to hold the line defined in the Southwest case: no defense for selling sex unless sex—not transportation or food—is the essence of the business.

How can opening these jobs to men be good for women or necessary to avoid sex discrimination? If Hooters hires men, fewer women will be hired. Hooters might go out of business, especially if forced to pay the \$22 million being claimed in back wages for men who were not hired.

Nevertheless, a loss for Hooters will be a win for women and certainly does not mean the chain will



have to close shop. In fact, it may gain from having more women patrons. Also:

- Women employees, like women who work as Southwest Airlines flight attendants today, will be allowed to wear reasonable, comfortable uniforms.

- Sexual harassment of Hooters girls by customers and male managers will go down (levels now are reportedly quite high).

- Women at the unisex Hooters will be allowed to keep working even when they stop looking like the youthful cheerleader-surfer girl-next-door.

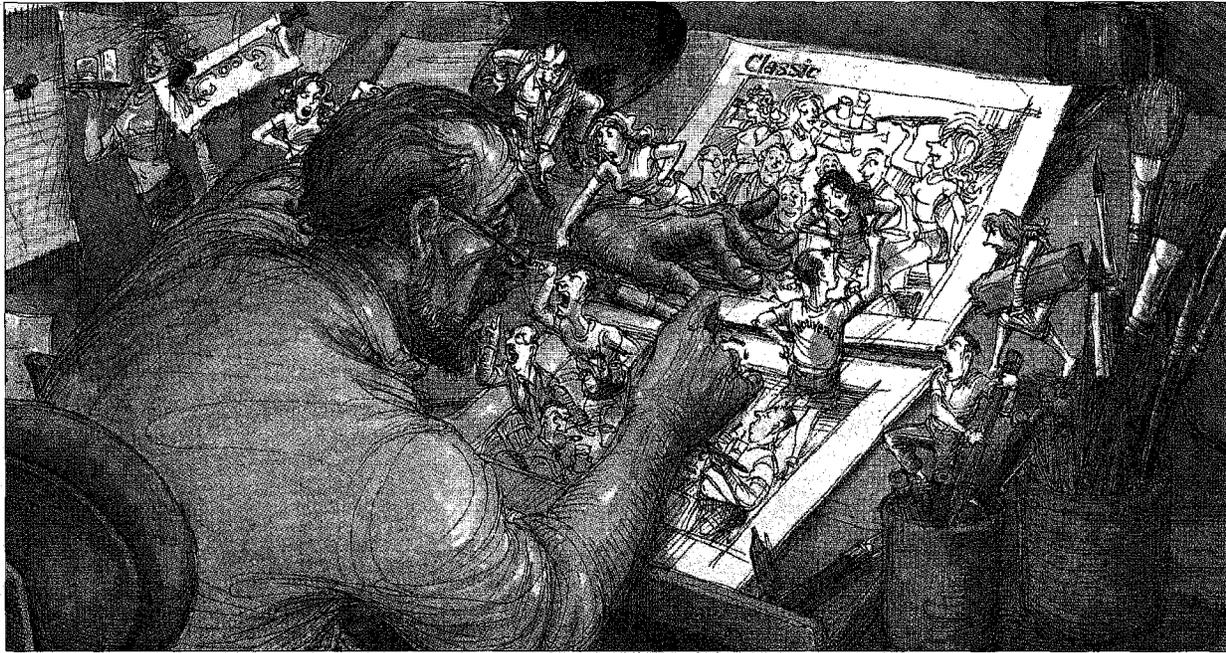
It is true that, in a world without a discriminatory Hooters, women will not be able to trade their youth, beauty and sex appeal for a job with good wages and (often) a lot of sexual harassment. But the woman who does get the job will have greater job security, as well as better working conditions.

On a broad, societal level, the importance of Hooters to women is even clearer. Think of the jobs that could become part of the sex industry were employers simply free to add female sexuality to any job de-

scription: all customer-contact jobs in transportation, restaurants, sales, marketing, service industries, etc.

What would be the result of a Hooters victory if other employers followed the lead? Those in so-called women's jobs would have little job security and be subject to higher levels of harassment. I suspect women might earn even less per hour than they do today.

It is true that some women—and many men—will not be pleased if the Hooters girl goes the way of the Playboy bunny. But the great majority of women don't enjoy wearing a skimpy costume and putting up with sexual harassment just to earn a living.



## No: A business has a right to choose its own character

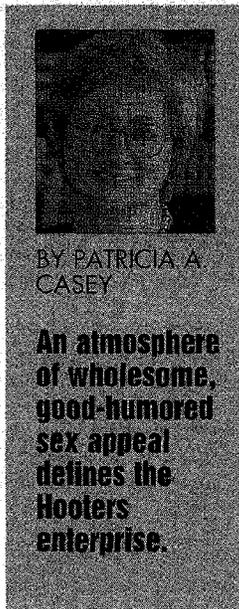
The EEOC's charge of sex discrimination against Hooters restaurants invites observers to muddle the legal and political issues.

Under the law, an employer may hire on the basis of gender (or national origin or religion, but never race) if sex "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business." For Hooters, the real issue turns on statutory construction and common sense: Do you have to be female to perform the job of a Hooters girl? I say yes. Politically incorrect it may be, but unlawful it is not.

The EEOC has concluded that being a restaurant is the essence of the Hooters business, and that males and females are equally capable of serving food there. If Hooters was only a restaurant, one might agree. But food service is not the defining essence of the Hooters business. Food is secondary to the actual focus of the enterprise: the sexiness of the Hooters girls.

The EEOC seems to believe that a business can have only one defining characteristic, or "essence." Consider this: Is the essence of *Playboy* magazine the articles or the photos? Do people enjoy the Rockettes because of the synchronized dancing or the glamorous, long-legged females? Don't these businesses have the right to decide exactly what products to offer on the market? And who is the EEOC to say that only one of the many elements of Hooters is the essential, defining one?

The 7th U.S. Circuit Court of Appeals at Chicago recently explained that prisons have more than one essential, defining function: punishment, rehabilitation,



BY PATRICIA A. CASEY

**An atmosphere of wholesome, good-humored sex appeal defines the Hooters enterprise.**

deterrence and public safety. Of course Hooters sells food, drink, posters, T-shirts, calendars and other products, but it also offers an atmosphere of good-humored, wholesome sex appeal that the Hooters girls embody. Their sexy cheerleader image defines the enterprise. *Playboy* markets provocative photos as well as interesting interviews and articles; who is to say what the purchaser believes he is paying for when he buys *Playboy* magazine?

Hooters' case demonstrates the limitations of the EEOC's expertise—quite simply, the agency lacks the business acumen necessary to determine what elements are "essential" to an enterprise. Indeed, it currently is making a similar mistake in a case against the Lillie Rubin clothing stores, in which it is asking the women's store to hire men as well as women to assist patrons in the dressing rooms. (According to an EEOC spokesperson, women might "love" to be fitted by male attendants.)

Opponents say that because Hooters welcomes children, it is basically a "family" restaurant. Children may be taken to R-rated movies, too, but that doesn't mean the target market is the family. Obviously Hooters' target audience is adult males. If some patrons choose to bring their children, Hooters of course will make them feel welcome.

And don't tell me about flight attendants unless you are prepared to argue that sexiness is just as important as a safe and timely arrival to your next business trip. Hooters can argue that its patrons care as much—or more—about being in the presence of the Hooters girls as they do about the burgers and beer. ■