## 10.14 Civil Rights—Title VII—Defense—Bona Fide Occupational Qualification

 The defendant contends that [religion] [sex] [national origin] is part of a bona fide occupational qualification. The defendant has the burden of proving both of the following elements by a preponderance of the evidence:

1. that the occupational qualification is reasonably necessary to the normal operation of the defendant’s business or enterprise; and

2. [that the defendant had reasonable cause to believe that all [*describe the class*] would be unable to perform the job safely and efficiently] [or] [that it was impossible or highly impractical to consider the qualifications of each [*describe the class*] employee.]

 If you find that the plaintiff has proved [his] [her] claim[s], your verdict should be for the plaintiff, unless you find that the defendant has proved this defense, in which event your verdict should be for the defendant.

**Comment**

 *See* 42 U.S.C. § 2000e-2(e)(1) (“it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of [their] religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . ..”). “We reiterate our holdings in [*Western Airlines, Inc., v. Criswell*, 472 U.S. 400 (1985)] and [*Dothard v. Rawlinson*, 433 U.S. 321 (1977)] that an employer must direct its concerns about a woman’s ability to perform her job safely and efficiently to those aspects of the woman’s job-related activities that fall within the ‘essence’ of the particular business.” *Int’l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 206-07 (1991) (finding no “factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved”); *see also Criswell*, 472 U.S. at 413 (suggesting that bona fide occupational qualification relates to the “essence” or “central mission” of employer’s business) (citing *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976)); *Frank v. United Airlines, Inc.*, 216 F.3d 845, 855 (9th Cir. 2000) (discrimination pursuant to bona fide occupational qualification must be “reasonably necessary” to the “normal operation” of the employer’s particular business, and must concern “job-related skills and aptitudes”).

 When asserting a “business necessity” defense, an employer may offer proof that it “relied on a government safety standard, even where the standard is not applicable to the category of conduct at issue.” *Bates v. United Parcel, Inc*., 511 F.3d 974, 998 (9th Cir. 2007) (involving employer’s requirement that employee meet DOT hearing standard even when vehicle driven was non-DOT regulated package vehicle).

 A bona fide occupational qualification defense does not bar a claim for discrimination if this defense is merely pretextual. *See Zeinali v. Raytheon Co*., 636 F.3d 544 (9th Cir. 2011)

(holding Iranian engineer may have Title VII claim for discrimination based on race and national origin when termination was based on failure to obtain security clearance while non-Iranian engineers who did not have security clearances were retained).

 “Under Title VII, the [bona fide occupational qualification] defense is not available at all where discrimination is based on race or color.” *Morton v. United Parcel Serv*., 272 F.3d 1249, 1260 n.11 (9th Cir. 2001). Limited gender discrimination may be permissible in prison employment but the employer must have an objective “basis in fact” that the gender discrimination is “reasonably necessary” to the business operation. *Teamsters Local* *Union No. 117 v. Washington Dep’t of Corr.*, 789 F.3d 979, 986 (9th Circ. 2015).

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