

Maynard, Chief Justice, concurring, in part, and dissenting, in part:

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

I concur with the new law formulated by the Court which recognizes privacy interests as constituting a BFOQ under W.Va. Code § 5-11-9 (1998). As set forth in the majority opinion, many jurisdictions have held that privacy interests may constitute a BFOQ. In contrast, the plaintiff fails to cite even one case in which a BFOQ based on privacy was expressly rejected. Plainly, the holdings in this case find solid support in reason and common sense, and I wholeheartedly agree with them.

However, I dissent, in part, because I believe that the application of the law to the facts herein mandates affirming the circuit court's grant of summary judgment on behalf of Camden-Clark Memorial Hospital. In its summary judgment order, the circuit court found that,

based upon the privacy concerns of the hospital's patients and their families, as well as factual evidence that the presence of male nurses in the obstetrics ward has previously caused, and would continue to cause, conflicts among patients, doctors, and hospital staff, Camden-Clark Hospital has factually established sufficient grounds to demonstrate that it is a permissible BFOQ in the hiring of obstetrical ward nurses that they be females.

The circuit court is correct.

To illustrate just how delicate and sensitive this issue is, I find it necessary to include the remainder of this paragraph, although I find it uncomfortable to do so. An obstetrical nurse at Camden-Clark is routinely required to check a patient's cervix for dilation and perform complete and invasive vaginal exams on patients to check for progress of labor; shave a patient's perineum; sterilize a patient's vaginal area; check patients for vaginal bleeding; massage a patient's fundus; monitor fetal heartbeats both internally and externally; assist mothers with breast feeding; examine a mother's nipples after breast feeding; and visually and manually check the perineum for bruising and edema. Basically, obstetrics patients constantly have their genitalia exposed. In spite of this, the majority finds the "lack of definition of the extent of the privacy interests at stake[.]" In contrast, I believe that the legitimate privacy interests of female patients in not having strange men constantly examine, poke, prod, and stroke their genitalia are crystal clear.

Also, while the majority's reasoning that "[p]ersonal conduct issues such as modesty are not universally defined" may well be true, this case concerns female patients in Parkersburg, West Virginia, not Copenhagen, Denmark, although I suspect that Danish women would see this issue the same as American women. I doubt that female patients in Parkersburg have a significantly different reaction to exposing their genitalia to strange men than female patients in Delaware, Oklahoma, Pennsylvania, Minnesota, Mississippi, or

Illinois where courts have recognized privacy concerns as justifying a BFOQ. Finally, although modesty issues may be “ever-changing in our society” to some degree, the privacy concerns at issue here are basic to human nature which has been essentially unchanged for thousands of years. Therefore, I find no legitimate reason to reverse and remand this case.

In conclusion, I agree with the legal holdings in the majority opinion, but I simply would affirm the circuit court’s grant of summary judgment on behalf of Camden-Clark. Accordingly, I concur, in part, and dissent, in part.