

1 **IN THE SUPREME COURT OF**

2 **THE STATE OF BOYD**

3  
4 Tyler Carter, an individual,

5 Petitioner,

Case No.: 18-0326

6 vs.

7 NJN, a Boyd corporation,

8 Respondent.

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11 *WRIT OF CERTIORARI GRANTED*

12 NOTICE is hereby given that the petition for writ of certiorari is hereby GRANTED, limited to  
13 the following two questions:

- 14 1. Whether gender is a bona fide occupational qualification for a bartending job at NJN Casino  
15 Center Bar.  
16 2. Whether summary judgment is appropriate on Tyler Carter's request for a declaratory  
17 judgment that he lacked capacity to sign a gambling marker with NJN.

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19 Decision below: *Carter v. NJN*, 47 Boyd. Adv. Op. 45 (Boyd. Ct. App. 2019).  
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1 **THE COURT OF APPEALS FOR**

2 **THE STATE OF BOYD**

3  
4 Tyler Carter, an individual,

5 Petitioner,

6 vs.

7 NJN, a Boyd Corporation,

8 Respondent.

Case No.: 18-CIV-951218

**OPINION**

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11 Appeal from the Boyd District Court

12 County of Nirvana

13 Argued: August 1, 2019

14 Decided: November 1, 2019

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16 **Before Stafford, Meyer, and Huggins, Appellate Division Judges.**

17 **STAFFORD, J.:**

18 **I. Background and Procedural History**

19 The gaming industry in Boyd has become increasingly important to the state's economy since  
20 Boyd Governor Lucky MoneyMaker signed into law a bill that legalized gaming in the state in 2012.  
21 Pursuant to that bill, the Boyd Legislature approved licenses for four large Las Vegas style casinos  
22 throughout the state, and the four casinos were all completed and open to the public by early 2015.  
23 Because Boyd is a small state, all Boyd residents live within a one-hour drive of one of Boyd's four  
24 casinos. Boyd's casinos are popular with Boyd residents and were also visited by over three million  
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1 tourists in 2018. In addition to gaming, these visitors patronize the many shows, restaurants, nightclubs,  
2 theme parks, and other entertainment venues in and around Boyd’s casinos. Boyd’s newly thriving  
3 gaming industry has also attracted many new residents to Boyd because of the numerous jobs created in  
4 the gaming and related industries. In 2018, Boyd’s casinos generated approximately \$1.3 billion in tax  
5 revenue and contributed \$4 billion of economic activity to the state’s economy. This figure includes not  
6 only direct economic impact, but also money indirectly contributed to the economy via employee wages  
7 and third-party services hired by casinos. More than 20,000 people now work in Boyd’s gaming  
8 industry. In short, gaming has quickly grown into one of Boyd’s most lucrative industries and most  
9 powerful job creators.

10 Boyd’s largest casino, the NJN Brand (“NJNI”), is located at the busy intersection of Citrus  
11 Avenue and Boyd Boulevard in a bustling nightlife and entertainment district in downtown Boyd City.  
12 NJN is surrounded by high-rise hotels, condominiums, bars, nightclubs, and adult entertainment venues,  
13 including a gentleman’s club adjacent to NJN that advertises “exotic dancers” and a large adult store  
14 across the street from NJN that advertises “adult videos and accessories.” Since the opening of the NJN,  
15 the surrounding area has become a major tourism hub in Boyd.

16 The NJN’s entertainment offerings reflect the surrounding neighborhood. The NJN’s most  
17 popular show, “Candy’s Cabaret,” is located in a theater adjacent to the casino floor and advertises “the  
18 hottest dancers in Boyd.” There are four, hour-long performances each day that feature scantily clad  
19 female dancers performing in front of a primarily male audience. Patrons must be at least twenty-one  
20 years of age to attend. The NJN is also home to Lakkazzon nightclub, the largest nightclub in Boyd,  
21 seven bars, eight restaurants, a small video arcade, a pool open to guests of all ages, and an adult pool  
22 where topless sunbathing is permitted. While the NJN attracts tourists of all ages, its entertainment  
23 offerings mostly cater to persons who are at least twenty-one years of age.

1 Tyler Carter is one of many individuals who recently moved to Boyd from out of state to seek  
2 employment. He is an experienced and skilled bartender who completed a comprehensive 100-hour  
3 bartending course in 2014 and has worked as a bartender in hotels, restaurants, and nightclubs for more  
4 than four years. He is also an avid gambler who enjoys playing various casino games recreationally. In  
5 early August 2018, Carter moved to Boyd in search of a bartending job where he could earn more in tips  
6 than he earned in his former job. He also wanted to be near casinos where he could wager on blackjack,  
7 sports, and other casino games in his free time. At the time of his move, he had not secured employment.  
8 Carter rented a small apartment in downtown Boyd City near the NJN.

9 Later in August 2018, approximately two weeks after he relocated to Boyd, Carter saw an online  
10 job advertisement for bartenders at the NJN Casino Center Bar. Carter subsequently walked from his  
11 apartment to the NJN to check out the new bar and decide whether to apply for a job there. The Casino  
12 Center Bar is located on the casino floor approximately sixty feet from the Candy's Cabaret Theater.  
13 Carter observed many customers at the bar who either sat at the bar or took their drinks from the bar to  
14 other areas at the NJN. He also noticed a bartender from the Casino Center Bar bringing drinks into the  
15 Candy's Cabaret Theater during a performance. The three bartenders that Carter observed were female  
16 and were all wearing short white skirts with an NJN logo. Carter immediately realized that he could earn  
17 far more in tips from a job at the NJN Casino Center Bar than he did from his previous jobs. With  
18 customers sitting at the bar, customers coming to the bar and taking their drinks elsewhere, and  
19 customers in the Candy's Cabaret Theater ordering from the bar, business was booming. Carter  
20 promptly submitted his resume to the NJN Human Resources Department expressing interest in a  
21 bartending job at the Casino Center Bar. He was contacted a few days later to come in for an interview.

22 The parties do not dispute the series of events that occurred after Carter arrived for his interview.  
23 He was greeted by Daphne Mason, the Director of Human Resources at the NJN Brand. After a few  
24 minutes discussing Carter's resume and previous work experience, Mason asked Carter if he would be  
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1 interested in a bartending position at the NJN Café, a casual 24/7 restaurant located away from the  
2 casino floor and near the elevators to the Brand Tower, the main hotel tower of the NJN. “NJNI Café is  
3 busy all day and all night with hotel guests,” Mason told Carter. “There are no slow shifts there. We  
4 have a few late night and afternoon shifts open. We are still interviewing other candidates, but I think  
5 you would be a good fit for the job.”

6 Carter replied that he was interested in the Casino Center Bar position that he applied for and did  
7 not wish to work at the NJN Café. Carter had previously been a customer at the NJN Café and saw few  
8 patrons ordering alcoholic beverages. Carter told Mason that he believed that most customers at the NJN  
9 Café wanted a quick bite to eat during the day or a late night snack before returning to their hotel rooms.  
10 He believed that he would earn far less in tips at the NJN Café than at the Casino Center Bar. He asked  
11 Mason whether the Casino Center Bar position had been filled.

12 Mason replied that the Casino Center Bar was still hiring but told Carter, “You’re not really the  
13 right type for the Casino Center Bar if you know what I mean.” Carter replied that he thought he would  
14 be a good fit for the Casino Center Bar position based on his extensive bartending training and  
15 experience, outgoing personality, and strong interest in the position.

16 Mason replied that she did not want Carter to take any offense but that he might not be the “best  
17 fit” at the Casino Center Bar and that Carter was “not exactly what the customers are looking for.” She  
18 proceeded to inform Carter that the Casino Center Bar position involved bringing drinks to patrons  
19 inside the Candy’s Cabaret Theater during shows and that the casino needed to project a “certain image”  
20 at the Casino Center Bar. Carter interpreted these comments to mean that he was not being considered  
21 for a position at the Casino Center Bar because of his gender. He asked Mason whether the Casino  
22 Center Bar position was only open to females. Mason replied that “NJNI does not discriminate on the  
23 basis of race, gender, religion or any other characteristics. We hire males at many of our bars and  
24 restaurants and encourage you to apply for the NJN Café position or other positions that might open up  
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1 in the future. The Casino Center Bar is located in a high traffic area of the casino near the Candy’s  
2 Cabaret Theater, which features scantily clad female dancers. Bartenders are required to provide drink  
3 service to theater patrons during cabaret shows. Patrons at Candy’s Cabaret expect to be served by  
4 attractive female bartenders because they are attending an adult performance featuring female dancers.”  
5 Carter thanked Mason for her time and stated that he was not interested in the NJN Café position.

6 Carter was very upset after the interview. He felt that he was denied a potentially lucrative  
7 bartending job solely because of his gender. He immediately consulted with a Boyd attorney and filed a  
8 charge of gender discrimination with the Equal Employment Opportunity Commission (“EEOC”). He  
9 then began looking for another job. In October 2018, he found a bartending job at Pink Rock Casino in  
10 northwest Boyd. The bar was located in a shopping area near the casino floor. Because he did not own a  
11 car, Carter commuted by bus to his job at Pink Rock, which took approximately forty-five minutes each  
12 way. While Carter earned enough money to pay his bills from his job at Pink Rock, he believed that he  
13 could have earned more at the NJN Casino Center Bar, which was also conveniently located within  
14 walking distance of his apartment. In February 2019, the EEOC issued Carter a Notice of Right to Sue.<sup>1</sup>

15 On November 10, 2018, approximately three months after his job interview at NJN, Carter  
16 received a \$95,000 inheritance from his recently deceased uncle. After paying some bills and paying off  
17 his credit card debt, he put \$78,375 in his bank account.

18 On November 18, 2018, he visited the NJN and applied for a \$16,000 casino marker. A marker is  
19 a type of casino credit that allows players to wager funds immediately without bringing those funds to  
20 the casino. Markers essentially function as short-term loans, and players who pay their markers on time  
21 do not pay interest on them. In order to apply for a marker, players fill out an application at the casino  
22 and provide information about their finances. A marker is like a check in that players who obtain a

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24 <sup>1</sup> NJN does not contest that Carter properly exhausted his administrative remedies on his gender discrimination claim.  
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1 marker for a certain amount of money must actually have that amount of money in their bank account. If  
2 a player takes out a marker and loses money, the player is responsible for repaying the marker. Under  
3 Boyd law, a player is entitled to at least seven days to repay a marker of less than \$1,000, fourteen days  
4 for a marker of greater than \$1,000 and less than \$5,000, forty-five days for a marker of greater than  
5 \$5,000 and less than \$20,000, and ninety days for a marker of greater than \$20,000. A marker is legal  
6 tender much like a personal check and can be cashed by a casino just like a check. If a player fails to  
7 repay a marker within the allotted amount of time, the casino is authorized to withdraw the funds from  
8 the bank account listed on the player's marker application. When a player's bank balance is insufficient  
9 to cover the marker, Boyd Revised Statute ("BRS") § 213.343 authorizes casinos to bring civil actions  
10 against the player to recover the money owed.

11 NJN approved Carter's \$16,000 marker approximately two hours after Carter applied for the  
12 marker. Carter left the casino at 9:15 a.m. after applying for the marker and returned at approximately  
13 11:30 a.m. upon receiving a text message from NJN Relationship Manager Barry Higgins informing him  
14 that his marker had been approved. He proceeded to the NJN Sportsbook and made three wagers of  
15 \$4,000 each on NFL games that would be played later that day. He then went to the NJN Café, where he  
16 ordered a breakfast burrito and a bottle of beer.<sup>2</sup> His meal was "comped" by NJN, meaning that he had  
17 placed enough wagers to receive a free meal. He then proceeded to the Mezzanine Bar around noon,  
18 where he ordered and paid for two regular sized cocktails.

19 At 1 p.m., he returned to the NJN Sportsbook to begin watching the games that he had placed  
20 bets on, all of which began at that time. At 1:05 p.m., Carter flagged down a cocktail waitress and  
21 ordered a bottle of beer. At 1:15 p.m., the same waitress returned to Carter and asked him if he wanted  
22 anything else. He ordered another bottle of beer. At 1:35 p.m., she came back and asked Carter if he  
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24 <sup>2</sup> Carter's food and drink consumption throughout the day was verified by NJN's records and video footage.  
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1 needed anything else. He asked for another bottle of beer. All of the drinks ordered at the Sportsbook  
2 were comped by NJN. After he finished his third drink, the waitress returned and asked Carter whether  
3 he wanted anything else. He declined.

4 At 2:25 p.m., Carter decided to play blackjack. He began playing on a \$100 minimum bet  
5 blackjack table, and he bought in for \$2,000. He wagered between \$100 and \$500 per hand of blackjack.  
6 As he sat down, a waiter greeted him and asked if he wanted anything to drink. He ordered and  
7 consumed a cocktail, which was comped. By 3 p.m. Carter had lost the \$2,000. After losing the money,  
8 he made an obscene gesture to the dealer with his middle finger and walked away from the table. He  
9 then returned to the Sportsbook to find that the three teams he had bet on were losing. At 3:20 p.m., he  
10 took the last \$2,000 from his marker and brought it to a different blackjack table. Upon sitting down, he  
11 ordered another cocktail, which was comped. He played blackjack for twenty minutes, this time winning  
12 approximately \$1,500. Throughout the session, he gave his dealer several high fives. At one point, a  
13 security guard asked Carter to calm down after he screamed in celebration and began pounding his fists  
14 on the table. At 4:10 p.m., Carter returned to the Sportsbook to find that he had lost all of his sports  
15 wagers. He then had \$3,500 remaining on his marker.

16 Carter then sent a text message to NJN Relationship Manager Barry Higgins explaining that he  
17 had lost most of the money from his first marker and that he wanted “to talk.” Higgins met Carter at the  
18 Cashier’s Cage. Carter told Higgins that he had “lost big” on football, that he was “down a bit at  
19 blackjack due to a stupid buffoon of a dealer,” that he wanted to “punch that dealer in the face,” and that  
20 Carter planned to “win it back.” Carter eventually signed another marker for \$30,000. Higgins informed  
21 Carter that he owed the casino \$12,500 for the first marker and that he could either pay it immediately or  
22 at any time within forty-five days. Higgins further explained to Carter that after NJN issued the second  
23 marker, Carter would have \$33,500 in total casino credit to wager. Higgins then asked Carter if there  
24 was anything the casino could do for him, and Carter replied that he wanted “a hamburger and fries” and  
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1 to “keep the booze flowing.” Carter signed the marker and proceeded to the blackjack tables. Higgins  
2 then summoned a cocktail waitress to comp Carter the food he requested and to take his drink order.

3 Carter then entered the high limit gaming area of the NJN and began playing blackjack at his  
4 own private table with \$33,500 in chips in front of him. Over the course of the next six hours, he  
5 wagered between \$100 and \$1,000 per hand of blackjack. During those six hours, he ordered and  
6 consumed five additional cocktails that were comped by NJN. At the end of six hours, Carter had lost all  
7 \$33,500. He then walked out of the casino and returned home.

8 One week later, NJN sent Carter a certified letter explaining that Carter owed NJN \$16,000 for  
9 the first marker and \$30,000 for the second marker. The letter explained that he would have forty-five  
10 days from the date of his receiving the marker to pay the first marker and ninety days to pay the second  
11 marker. Carter immediately contacted his bank and requested that the bank transfer \$16,000 to NJN to  
12 pay the first marker. Three days later, after receiving confirmation from his bank that the first marker  
13 had been paid, he called Barry Higgins to discuss the second marker. During that conversation, Carter  
14 asked Higgins whether they could work out a deal regarding the second marker. Carter told Higgins that  
15 he was highly intoxicated when he took out the second marker. Higgins replied that Carter would have  
16 to pay the marker in full. He offered to extend the deadline for payment until March 1, 2019, stating that  
17 NJN would withdraw the money from the bank account that Carter listed on his marker application on  
18 that date if Carter failed to repay the marker earlier. Higgins informed Carter that if Carter’s bank  
19 account had insufficient funds at that time, NJN would file a lawsuit against Carter for the full amount  
20 of the marker plus interest, penalties, and attorney’s fees. Carter had no further discussions with Higgins  
21 or anyone from NJN after that conversation.

22 In February 2019, shortly after receiving his Notice of Right to Sue letter from the EEOC, Carter  
23 filed a lawsuit in Boyd state district court against NJN for: (1) gender discrimination in violation of Title  
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1 VII of the Civil Rights Act of 1964<sup>3</sup> and (2) a declaratory judgment that the \$30,000 marker was void  
2 because he lacked capacity to contract due to his voluntary intoxication.<sup>4</sup>

3 Carter argued that NJN refused to hire him as a bartender at Casino Center Bar due to his gender,  
4 in violation of Title VII's prohibitions on gender discrimination. NJN acknowledged that it did not hire  
5 Carter due to his gender but argued that it could legally refuse to hire males for bartending positions at  
6 Casino Center Bar because gender is a bona fide occupational qualification for the job. Carter also  
7 argued that the \$30,000 marker was void because he lacked capacity to enter into a contract due to his  
8 voluntary intoxication. NJN argued that Carter was not intoxicated to a point that he lacked capacity to  
9 enter into a contract and, in the alternative, that even if Carter lacked capacity to enter into a contract,  
10 Carter failed to promptly disavow the contract after regaining capacity.

11 The district court granted summary judgment to NJN on both claims and held that: (1) gender is  
12 a bona fide occupational qualification for the bartending position at Casino Center Bar and (2) Carter  
13 failed to present evidence to create a dispute of material fact that he lacked capacity to sign a marker,  
14 and that even if Carter could present evidence to create a triable issue of fact on his voluntary  
15 intoxication, he failed to promptly disavow the contract upon regaining capacity.

16 We affirm.

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<sup>3</sup> Under the Boyd Rules of Civil Procedure, Boyd state courts have jurisdiction to hear claims brought under federal law.  
23 Boyd also has no state anti-discrimination laws.

24 <sup>4</sup> While Carter's bank account had sufficient funds to pay the marker at the time he applied for it, there were insufficient  
25 funds at the time he requested the declaratory judgment. Because Carter reasonably anticipated NJN would take legal action  
against him regarding the marker, the appropriateness of Carter's use of a declaratory judgment is not at issue.

1 **II. Standard of Review**

2 We review *de novo* a district court’s grant of summary judgment. BRS § 322.94(3). But the  
3 district court’s factual determinations are reversed only if its findings are clearly erroneous or clearly  
4 against the preponderance of the evidence. *Pre-Paid Solutions, Inc. v. City of Little Rock*, 34 S.W.3d  
5 360, 362 (Ark. 2001).

6 **III. Discussion**

7 Title VII prohibits employment discrimination on the basis of gender unless gender is a bona fide  
8 occupational qualification (“BFOQ”) for a position. 42 U.S.C. § 2000e-2. It provides in pertinent part as  
9 follows: It shall be an unlawful employment practice for an employer—

- 10  
11 (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against  
12 any individual with respect to his compensation, terms, conditions, or privileges of  
13 employment, because of such individual's race, color, religion, sex, or national origin

14 . . . .  
15 Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful  
16 employment practice for an employer to hire and employ employees, for an employment  
17 agency to classify, or refer for employment any individual, for a labor organization to  
18 classify its membership or to classify or refer for employment any individual, or for an  
19 employer, labor organization, or joint labor-management committee controlling  
20 apprenticeship or other training or retraining programs to admit or employ any individual  
21 in any such program, on the basis of his religion, sex, or national origin in those certain  
22 instances where religion, sex, or national origin is a bona fide occupational qualification  
23 reasonably necessary to the normal operation of that particular business or enterprise.

24 29 C.F.R. § 1604.2 interprets the BFOQ exception narrowly by prohibiting hiring discrimination based  
25 on assumptions, stereotypes, and customer preferences. It provides in pertinent part that:

- (a) The commission believes that the bona fide occupational qualification  
exception as to sex should be interpreted narrowly. Label—“Men's jobs” and “Women's  
jobs”—tend to deny employment opportunities unnecessarily to one sex or the other.

1 (1) The Commission will find that the following situations do not warrant the  
application of the bona fide occupational qualification exception:

2 (i) The refusal to hire a woman because of her sex based on assumptions of the  
comparative employment characteristics of women in general. For example, the  
3 assumption that the turnover rate among women is higher than among men.

4 (ii) The refusal to hire an individual based on stereotyped characterizations of the  
sexes. Such stereotypes include, for example, that men are less capable of assembling  
intricate equipment; that women are less capable of aggressive salesmanship. The  
5 principle of nondiscrimination requires that individuals be considered on the basis of  
individual capacities and not on the basis of any characteristics generally attributed to the  
6 group.

7 (iii) The refusal to hire an individual because of the preferences of coworkers, the  
employer, clients or customers except as covered specifically in paragraph (a) (2) of this  
8 section.

9 (2) Where it is necessary for the purpose of authenticity or genuineness, the  
Commission will consider sex to be a bona fide occupational qualification, e.g., an actor  
or actress.

10  
11 **A. Gender is a BFOQ for the Casino Center Bar bartending position.**

12 NJN does not dispute that it refused to hire Carter because he is a male. The only issue presented  
13 on Carter's first claim is whether female gender is a BFOQ for the Casino Center Bar bartending  
14 position. We affirm the district court's grant of summary judgment in favor of NJN on Carter's Title VII  
15 gender discrimination claim because we find that gender is a BFOQ for the position.

16 Establishing that gender is a BFOQ for a position is difficult because courts and federal  
17 regulations define the BFOQ exception narrowly. *See* 29 C.F.R. § 1604.2; *Dothard v. Rawlinson*, 433  
18 U.S. 321, 334 (1977); *Intl. Union, United Auto., Aerospace and Agr. Implement Workers of Am., UAW*  
19 *v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991). Customer preferences, stereotypes, and  
20 assumptions about a particular group are each insufficient to establish a BFOQ. 29 C.F.R. § 1604.2.

21 Establishing that gender is a BFOQ requires proof by a preponderance of the evidence that: (1) the job  
22 qualification justifying discrimination is necessary based on the essence of the business; and (2) sex is  
23 an appropriate proxy for qualifications. *Breiner v. Nevada Dept. of Corrections*, 610 F.3d 1202, 1210  
24

1 (9th Cir. 2010).<sup>5</sup> Because the Casino Center Bar position requires bartenders to serve drinks to patrons in  
2 an adult cabaret theater that features scantily clad female dancers, and the bartenders are an essential  
3 part of the customer experience, we find that female gender is a BFOQ for the job as a matter of law.

4 **1. Female gender is necessary based on the essence of the business.**

5 The first prong of the BFOQ test requires proof by a preponderance of the evidence that a job  
6 qualification used by an employer to justify discrimination is necessary due to the essence of a business.  
7 *Breiner*, 610 F.3d at 1210. While courts have not established an exact test for the essence of a business,  
8 they have stated that the essence of a business is its central mission. *Johnson Controls*, 499 U.S. at 206.

9 In prison cases, employers can satisfy the “essence” prong of the BFOQ test by establishing that  
10 safety and privacy of inmates are the essence of their business. *Teamsters Loc. Union No. 117 v.*  
11 *Washington Dept. of Corrections*, 789 F.3d 979, 990 (9th Cir. 2015). In *Teamsters*, the court affirmed a  
12 ruling of summary judgment in favor of a women’s prison that hired exclusively women for certain jobs  
13 requiring close and intimate contact with female inmates. *Id.* The court determined as a matter of law  
14 that protecting female inmates from sexual assault, maintaining security in the prison, and protecting  
15 inmate privacy were necessary to the essence of administering a prison. *Id.* While courts determine the  
16 essence of a business as a matter of law, they do take into account a business’s articulation of the  
17 essence of its business. *Id.*

18 NJN contends that the essence of Casino Center Bar’s business is having “bartender models”<sup>6</sup>  
19 provide “entertainment” to bar and cabaret show patrons. We agree.

20 The dissent’s contention that the essence of a bartending job is to serve drinks and nothing more  
21 ignores the reality of the customer experience at NJN. Alcoholic beverages can be purchased at all of the  
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23 <sup>5</sup> The state of Boyd is located in the Thirteenth Circuit. Because the Thirteenth Circuit has not addressed the BFOQ issue, we  
24 look to federal statutes, federal regulations, Supreme Court cases, and cases from other circuits.

25 <sup>6</sup> Throughout its briefs, NJN refers to the bartenders as “bartender models.”

1 casino's restaurants and bars as well as the casino's gift shop and several liquor stores located within  
2 walking distance of the casino. If most of these establishments refused to hire people based on their  
3 gender, they would undoubtedly be in violation of Title VII.

4         What differentiates Casino Center Bar from these other establishments is its proximity to and  
5 intertwined relationship with Candy's Cabaret Theater, an adult entertainment venue that provides  
6 regular performances by scantily clad female dancers. A substantial part of a Casino Center Bar  
7 bartender's job involves physically entering the cabaret theater and bringing drinks to patrons of the  
8 cabaret performances. During a typical cabaret performance, there are several scantily clad female  
9 dancers on stage as well as several scantily clad female bartenders from Casino Center Bar walking in  
10 and out of the venue to serve drinks to the customers. NJN cites to the examples in 29 C.F.R. § 1604.2  
11 of actors and actresses, contending that just as gender is a BFOQ for the dancers in a female cabaret  
12 show, gender is similarly a BFOQ for the "bartender models" in the venue, who are an "integral part of  
13 the cabaret theatre experience." We agree. The bartenders visibly walking in and out of the venue are  
14 interacting with and seen by the theater patrons. As NJN convincingly argues, both the Candy's Cabaret  
15 Theater and the Casino Center Bar are providing adult entertainment featuring female entertainers to a  
16 primarily male audience. Both the bar and the cabaret theater are selling a sexualized experience.

17         The fact that the bartenders at Casino Center Bar also serve customers who sit at the bar or take  
18 their drinks elsewhere in the casino does not sever the close ties between the bar and the adjacent cabaret  
19 theater. While customers who consume their drinks at the bar are not physically located inside the  
20 cabaret venue, those customers are close enough to the cabaret theater to experience it. During cabaret  
21 performances, patrons at the bar can clearly hear the music coming from the cabaret theater, and  
22 customers on the side of the bar facing the theater can see inside and view part of the stage. They are  
23 thus experiencing the cabaret entertainment to a significant extent even though they are not physically  
24 present in the theater. The customers who purchase drinks at the bar and take them elsewhere in the

1 casino are similarly choosing to purchase their drinks at the Casino Center Bar rather than other venues  
2 and spend time at the bar interacting with the bartenders and waiting for their drinks to be prepared.  
3 They are thus also experiencing the adult entertainment offered by the bar and its neighboring cabaret  
4 venue if only for a short period of time.

5 The fact that the bartenders at Casino Center Bar serve customers in addition to cabaret patrons  
6 does not detract from the essence of the bar's business being closely intertwined with the adjacent  
7 cabaret venue. Both the bar and the theater are selling an adult entertainment experience that features  
8 female entertainers and caters primarily to heterosexual males. NJN can thus satisfy the "essence" prong  
9 of the BFOQ test.

10 **2. Female gender is a proxy for qualifications for bartenders at Casino Center Bar.**

11 An employer can satisfy the "proxy" prong of the BFOQ test by showing that all or substantially  
12 all people of one gender are unqualified for a job. *Breiner*, 610 F.3d at 1210. In *Dothard v. Rawlinson*,  
13 for example, the United States Supreme Court found that male gender was a proxy for qualification for  
14 prison guards with direct inmate contact. *Dothard v. Rawlinson*, 433 U.S. 321, 334-36 (1977).

15 Given that the essence of Casino Center Bar's business involves providing adult entertainment  
16 featuring female entertainers, NJN can easily prevail on the "proxy" prong of the BFOQ test. Its  
17 decision to hire only female bartenders is not about customer preference any more than a movie  
18 producer seeking to hire men for a male role is about customer preference. The dissent's emphasis on  
19 customer preference is misplaced. NJN can hire only female dancers in the Candy's Cabaret Theater  
20 without running afoul of Title VII, not because the mostly male customers prefer female dancers, but  
21 because the essence of the cabaret's business involves adult performances by female entertainers. The  
22 bartender position is no different. Forcing the bar to hire male bartenders would be akin to forcing the  
23 cabaret to hire male dancers.

1           Allowing NJN to hire exclusively female dancers and bartenders is not about satisfying  
2 discriminatory customer preferences. It is about allowing an adult entertainment venue that features  
3 female entertainers performing in front of a primarily heterosexual male audience to hire female  
4 entertainers. Adopting the dissent’s position would be a threat to Boyd’s entertainment industry that  
5 relies in large part on adult entertainment to attract customers and create jobs.

6           **B. Summary Judgment for NJN is Appropriate on Carter’s Declaratory Judgment.**

7           Boyd Revised Statute 213.342 requires that gamblers bring their grievances against casinos in  
8 Boyd state court. Boyd Revised Statute 213.343 provides that gambling markers are legally enforceable  
9 negotiable instruments and that a casino can bring a civil action in Boyd state court to collect on an  
10 unpaid marker.<sup>7</sup>

11           **1. Voluntary Intoxication**

12           Boyd courts have long recognized voluntary intoxication as a defense to breach of contract,  
13 following the approach of the Second Restatement of Contracts. Under that standard, a person:

14           incurs only voidable contractual duties by entering into a transaction if the other party has  
15 reason to know that by reason of intoxication

16           (a) he is unable to understand in a reasonable manner the nature and consequences of the  
17 transaction, or

18           (b) he is unable to act in a reasonable manner in relation to the transaction.

19           Restatement (Second) of Contracts § 16 (Am. Law Inst. 1981). Voluntary intoxication as a defense to  
20 the obligation to pay back a gambling marker is an issue of first impression for Boyd courts. We  
21 therefore look to contract principles generally as articulated in the Second Restatement of Contracts,  
22 case law from other jurisdictions that have considered the issue, and public policy.

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24           <sup>7</sup> NJN does not contest that Boyd state courts have jurisdiction over this case.



1           When a casino seeks to enforce a marker against a patron, it is attempting to enforce a  
2 contractual obligation. *Hakimoglu v. Trump Taj Mahal Associates*, 876 F. Supp. 625, 633 (D.N.J.  
3 1994), *aff'd*, 70 F.3d 291 (3d Cir. 1995). The patron is thus entitled to raise all common law contract  
4 defenses, including the defense that the patron lacked capacity to contract due to voluntary intoxication.  
5 *Id.* Courts in other jurisdictions have found that because casino markers are contractual in nature,  
6 patrons are entitled to a voluntary intoxication defense to declare the markers voidable. *See Adamar of*  
7 *New Jersey, Inc. v. Luber*, No. 09-CV-2800 NLH KMW, 2011 WL 1325978, at \*3 (D.N.J. Mar. 30,  
8 2011); *Hakimoglu*, 876 F.Supp. at 633; *LaBarbera v. Wynn Las Vegas, LLC*, 422 P.3d 138, 139 (Nev.  
9 2018). Courts in this jurisdiction and others have recognized that the burden for proving a voluntary  
10 intoxication defense is a high one. *See, e.g., LaBarbera*, 422 P.3d at 139. Because a voluntary  
11 intoxication defense is available to Carter, we turn to whether NJN is entitled to summary judgment on  
12 his declaratory judgment.

13           Carter seeks a declaratory judgment that the \$30,000 marker he signed was voidable because he  
14 lacked capacity to contract due to his voluntary intoxication. There is evidence in the record that Carter  
15 did consume multiple alcoholic beverages prior to signing the marker. However, if this fact alone  
16 precluded summary judgment in favor of NJN, we would be opening up the floodgates to litigation  
17 brought by gamblers who consume alcoholic beverages, sign casino markers, lose money, and then seek  
18 to avoid paying their gambling debts. Under the Second Restatement standard, Carter must be able to  
19 present evidence creating a disputed material fact that he was unable to understand the nature and  
20 consequences of the transaction or unable to act in a reasonable manner in relation to the transaction and  
21 that NJN had reason to know of his incapacity. *See Restatement (Second) of Contracts* § 16 (Am. Law  
22 Inst. 1981). Such evidence is lacking.

23           Based on Carter's interactions with Higgins and other casino staff, and construing the evidence  
24 in the light most favorable to Carter, at the time he signed the \$30,000 marker, Carter was able to engage  
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1 Higgins in a conversation about his gambling fortunes that day, his desire to obtain more credit, his  
2 opinion about some of the NJN dealers, his desire to consume alcohol, and his desire to have a  
3 hamburger and fries brought to him. While his comments about the dealers could be construed as  
4 belligerent, nothing about the exchange indicated anything more than a gambler having a losing day  
5 expressing his displeasure. There is simply no evidence that Carter, an avid gambler, did not understand  
6 what he was doing when he signed the marker. Rather, the record shows that Carter wanted to obtain  
7 more credit to try and win back the money he had previously lost gambling.

8 Further, allowing this claim to proceed to trial would encourage more gamblers to attempt to  
9 “freeroll” casinos by taking out markers while intoxicated, collecting their winnings if they win, and  
10 then refusing to pay their markers if they lose. As courts in other jurisdictions have noted, casino games  
11 are largely based on luck, and sober gamblers can lose while intoxicated gamblers can win. *Hakimoglu*,  
12 876 F. Supp. at 636; *Great Bay Hotel & Casino v. Tose*, 34 F.3d 1227, 1233 N. 8 (3d Cir. 1994).  
13 Allowing these types of claims to proceed is harmful to Boyd’s gaming industry and does not provide  
14 any substantial consumer protection. If Carter could present evidence that he was intoxicated to the point  
15 where he did not know what he was doing, Carter’s voluntary intoxication defense would be able to  
16 survive summary judgment. But that evidence is simply not present here.

## 17 **2. Failure to Disavow the Contract**

18 Even if Carter was able to present a disputed issue of material fact regarding his voluntary  
19 intoxication, summary judgment in favor of NJN is still appropriate because Carter failed to promptly  
20 disavow his obligation to repay the marker upon regaining sobriety. “On becoming sober,  
21 the intoxicated person must act promptly to disaffirm [the contract].” Restatement (Second)  
22 of Contracts § 16 cmt. c. “The power of avoidance also terminates if the incapacitated party, upon  
23 regaining capacity, affirms or ratifies the contract.” *Hernandez v. Banks*, 65 A.3d 59, 67 (D.C. App.

1 2013); *see also* *Wynn Las Vegas, LLC v. Tofani*, 69936, 2017 WL 6541827, at \*2 (Nev. App. Dec. 14,  
2 2017);<sup>8</sup> *Merrill v. DeMott*, 951 P.2d 1040, 1044–45 (Nev. 1997).

3 Carter did not clearly disaffirm his contract with NJN. Rather, his conversation with NJN  
4 Relationship Manager Barry Higgins that took place approximately ten days after Carter took out the  
5 marker was more of a negotiation than a disaffirmance. Carter willingly paid the \$16,000 marker,  
6 thereby affirming his obligation to repay the markers. He did not plainly disaffirm that he owed NJN an  
7 additional \$30,000. The fact that he hoped to reduce or eliminate his debt does not constitute a  
8 disaffirmance of his contractual obligation. Rather, his attempt at negotiating implicitly affirmed his  
9 legal obligation to pay the \$30,000 to NJN. Summary judgment in favor of NJN is thus appropriate on  
10 Carter’s declaratory judgment request.

#### 11 **IV. Conclusion**

12 Summary judgment in favor of NJN is appropriate on both of Carter’s claims. The issues decided  
13 by this Court today go to the heart of Boyd’s economy and livelihood. We are confident that our  
14 decision comports with Title VII, contract principles, and public policy.

15 We affirm.

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<sup>8</sup> The Boyd Rules of Appellate Procedure allow Boyd courts to cite unpublished opinions from all levels of courts in Boyd  
25 and other states.

1 **MEYER, J., dissenting:**

2 Today, the majority holds that female gender is a bona fide occupational qualification for a  
3 bartending job and that a gambler who consumed several alcoholic beverages over a short period of time  
4 and exhibited bizarre, aggressive behavior failed to present an issue of material fact that he lacked  
5 capacity to contract due to his intoxication. I respectfully dissent from both of these holdings because  
6 they misconstrue the scope of the “BFOQ” exception under Title VII and grant summary judgment on  
7 factual questions that should be determined by the finder of fact rather than this Court.

8 **A. Gender is not a BFOQ for the Bartender Position at Casino Center Bar.**

9 The majority correctly points out that the “BFOQ” exception to Title VII is a narrow one.  
10 *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977); *Intl. Union, United Auto., Aerospace and Agr.*  
11 *Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991). 29 C.F.R. §  
12 1604.2 specifies that customer preferences should not be taken into account when determining whether  
13 gender is a BFOQ for a position. While the majority contends that NJN’s refusal to hire male bartenders  
14 at Casino Center Bar is based on the essence of the position rather than customer preference, it  
15 misconstrues the essence of a bartending position and incorrectly suggests that only females are capable  
16 of performing the bartender job at Casino Center Bar.

17 **1. The essence of a bartending job is serving drinks.**

18 While NJN refers to the bartenders at Casino Center Bar as “bartender models,” this title does  
19 little to change the reality that the essence of the job is serving drinks both to patrons of the bar and  
20 patrons of the adjacent cabaret theater. The bartenders spend time both at the bar and in the theater, and  
21 they serve both theater patrons and others who either drink at the bar or bring their drinks to other  
22 locations in the casino. While it is undoubtedly true that the bartenders “entertain” customers to an  
23 extent by conversing with them, the essence of the job is serving drinks. The majority essentially  
24 contends that female gender of both the bartenders and the dancers in the theater is necessary because

1 both the theater and the bar are selling sexual entertainment. While NJN's ability to hire exclusively  
2 female dancers is not at issue here, the essence of the dancing position is clearly different from the  
3 essence of the bartending position. Put simply, the essence of a dancing position is to dance while the  
4 essence of a bartending position is to serve drinks. A venue like Candy's Cabaret Theater should not be  
5 required to hire male dancers because doing so would destroy the authenticity of its business, which is  
6 providing adult all-female entertainment. But this reasoning does not apply to the bartenders who, rather  
7 than perform on stage in the theater, merely serve drinks to the patrons of the theater. Rather,  
8 discriminating against male bartenders based on the preferences of predominantly heterosexual male  
9 customers who might prefer to have females bring them their drinks is the exact kind of invidious  
10 discrimination that Title VII prohibits.

11 This case is largely analogous to the Fifth Circuit case of *Diaz v. Pan Am. World Airways, Inc.*,  
12 in which the Fifth Circuit held that female gender was not a BFOQ for a flight attendant position. *Diaz*  
13 *v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971). The *Diaz* court explained:

14  
15 The primary function of an airline is to transport passengers safely from one point to  
16 another. While a pleasant environment, enhanced by the obvious cosmetic effect that  
17 female stewardesses provide as well as, according to the finding of the trial court, their  
18 apparent ability to perform the non-mechanical functions of the job in a more effective  
19 manner than most men, may all be important, they are tangential to the essence of the  
20 business involved. No one has suggested that having male stewards will so seriously  
21 affect the operation of an airline as to jeopardize or even minimize its ability to provide  
22 safe transportation from one place to another. Indeed the record discloses that  
23 many airlines including Pan Am have utilized both men and women flight cabin  
24 attendants in the past and Pan Am, even at the time of this suit, has 283 male stewards  
25 employed on some of its foreign flights.

22 *Diaz*, 442 F.2d at 388. Just as the essence of an airline's business is providing safe transportation for  
23 passengers, the essence of a bar's business is providing drinks to the bar's customers. The fact that the  
24 bar's customers might prefer to be served by female bartenders does not allow for the bar to discriminate

1 against male job applicants. Such discrimination based on customer preferences is the exact kind of  
2 discrimination that Title VII seeks to prevent. *See* 29 C.F.R. § 1604.2. I do not take issue with the  
3 majority’s position that a movie director could permissibly seek only male actors to play a male part or  
4 that an adult entertainment venue such as Candy’s Cabaret Theater could permissibly hire adult  
5 entertainers based on gender. But the majority’s reasoning fails to extend to a bartending position.

6 Further, the majority places too much emphasis on the connection between the Casino Center  
7 Bar and the Candy’s Cabaret Theater. While it is true that Casino Center Bar staff do provide drink  
8 service to theater patrons, that is only one aspect of their job and does not make up a majority of their  
9 work. There are only four hour-long cabaret performances each day, and the bar is open 24/7, meaning  
10 that there is usually no performance taking place. Most of the bartenders’ time is therefore spent serving  
11 customers at the bar, many of whom take their drinks away from the bar and have no connection  
12 whatsoever to the cabaret performances. The majority’s position would have more merit if the position  
13 at issue solely involved serving cabaret theater patrons. However, this is primarily a bartending position,  
14 one aspect of which involves bringing drinks into a theater. It is therefore illogical to conclude that the  
15 essence of the business of Casino Center Bar is anything other than providing drinks to the customers of  
16 the bar and the adjacent theater.

17 **2. All or substantially all men are capable of doing the job.**

18 While NJN’s position fails the first prong of the BFOQ test, making it unnecessary to address the  
19 second prong, it is clear that NJN also fails the second prong. Given that the essence of the bartending  
20 position involves serving drinks, it would be absurd to conclude that all or substantially all men are  
21 incapable of performing the job. As the *Diaz* court explained, courts can “take into consideration the  
22 ability of individuals to perform the non-mechanical functions of the job.” *Diaz*, 442 F.2D at 388.  
23 However, the *Diaz* court found that the airline could not permissibly exclude all males from flight  
24  
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1 attendant positions just because some men would be unable to perform the non-mechanical aspects of  
2 the job well. *Id.*

3         It is undoubtedly true that a good bartender must do more than simply make a good drink.  
4 Bartenders need to provide a comfortable and enjoyable environment in which patrons can enjoy their  
5 drinks. Bartenders need to figure out when it is appropriate to chat with customers and when the  
6 customers want to be left alone. There are obviously many skills that make a good bartender. But the  
7 bartender's gender has nothing to do with these skills, and even if it could be proven that female  
8 bartenders on average performed the job better, Title VII prohibits gender discrimination based on  
9 generalizations and stereotypes about a group. *See* 29 C.F.R. § 1604.2. Tyler Carter has the right under  
10 Title VII to be evaluated as an individual based on his qualifications for the job.

11         The majority contends that adopting the dissent's position could threaten Boyd's entertainment  
12 industry and harm Boyd's economy. These fears are unfounded and hyperbolic. It would be hard to  
13 conceive a scenario where patrons of the cabaret show would refuse to attend the show because male  
14 bartenders were bringing drinks into the theater. And even if there are such customers, it is not the role  
15 of this court to allow violations of federal anti-discrimination law in the name of a modest boost to  
16 Boyd's entertainment industry. If anything, public policy strongly favors prohibiting discriminatory  
17 hiring so that all persons have access to jobs in Boyd's thriving gaming and entertainment industries  
18 regardless of their gender.

19         **B. Summary Judgment is not appropriate on Carter's declaratory judgment.**

20         In granting summary judgment to NJN on Carter's declaratory judgment claim, the majority  
21 improperly assumed the role of the fact finder. While it may be true that Carter would have a difficult  
22 time persuading a fact finder that his voluntary intoxication rendered him incapable of contracting and  
23 that NJN was aware of his incapacity, that judgment should be made by the fact finder, not by this  
24 Court. The evidence in the record that Carter consumed several alcoholic beverages in a short period of  
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1 time that were provided to him by NJN staff is sufficient to create a dispute of material fact that his  
2 voluntary intoxication rendered him incapable of contracting. He can also present disputed issues of  
3 material fact that he promptly disavowed the contract upon regaining sobriety.

4 **1. There are disputed material facts regarding Carter’s capacity to contract.**

5 In *Adamar of New Jersey, Inc. v. Luber*, a New Jersey district court facing a very similar set of  
6 facts denied summary judgment to a casino when a gambler alleged that his voluntary intoxication  
7 rendered him incapable of executing a marker at an Atlantic City casino. *Adamar of New Jersey, Inc. v.*  
8 *Luber*, No. 09-CV-2800 NLH KMW, 2011 WL 1325978, at \*5 (D.N.J. Mar. 30, 2011). The court  
9 explained that the gambler had “received alcoholic beverages throughout the night while he gambled”  
10 and that the gambler “always had a beverage in front of him.” *Id.* Even though the gambler had a high  
11 alcohol tolerance and a history of using casino credit that might suggest he was aware of the transaction  
12 he was performing, the court found that summary judgment was not appropriate because the gambler  
13 had presented enough evidence to create an issue of material fact regarding his intoxication defense. *Id.*

14 Here, like in *Luber*, there was evidence that Carter consumed a considerable amount of alcohol  
15 prior to signing his second marker. While the majority emphasized that Carter, an avid gambler, likely  
16 knew what he was doing, that is ultimately a question of fact for the fact finder to determine. Just as the  
17 gambler in *Luber* was able to survive summary judgment, Carter should be able to present his case to a  
18 fact finder.

19 Carter’s bizarre and aggressive behavior further provide evidence of his intoxication that creates  
20 material factual issues regarding his capacity to contract. In *Lomonaco v. Sands Hotel Casino and*  
21 *Country Club*, a New Jersey court found that a gambler’s bizarre behavior while gambling was sufficient  
22 to preclude summary judgment on the plaintiff’s claim that the gambling markers he signed were void  
23 due to duress and unconscionability. *Lomonaco v. Sands Hotel Casino and Country Club*, 614 A.2d 634,  
24 638–39 (N.J. Super. L. Div. 1992). Prior to his signing the second casino marker, Carter made an  
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1 obscene gesture towards a dealer, was asked to calm down by security for his unruly behavior at the  
2 table, and made aggressive and hostile statements to an NJN employee about blackjack dealers. While  
3 the majority dismisses this behavior as being typical of a gambler expressing his frustration on a losing  
4 day, whether or not Carter lacked capacity to contract due to his intoxication and whether NJN had  
5 reason to know of his intoxication are questions for the fact finder.

6 **2. There are disputed issues of material fact regarding whether Carter ratified the**  
7 **contract.**

8 A party claiming voluntary intoxication has a duty to disaffirm the contract within a reasonable  
9 period of time. *Seeley v. Goodwin*, 156 P. 934, 936 (Nev. 1916). In finding no disputed issues of  
10 material fact regarding whether Carter failed to disaffirm his obligation to pay NJN \$30,000 for the  
11 marker, the majority improperly construed Carter's conversation with NJN Relationship Manager Barry  
12 Huggins in a manner that was unfavorable to Carter when the summary judgment standard requires just  
13 the opposite: that all justifiable inferences be made in Carter's favor. *See Anderson v. Liberty Lobby,*  
14 *Inc.*, 477 U.S. 242, 255 (1986) (explaining that at the summary judgment stage all justifiable inferences  
15 should be drawn in favor of the non-moving party). Because Carter's conversation with Huggins can  
16 reasonably be interpreted as disaffirming his obligation to pay the \$30,000 marker, summary judgment  
17 in favor of NJN is not appropriate on Carter's declaratory judgment.

18 Upon receiving a letter from NJN notifying him of his obligation to repay two markers, Carter  
19 behaved distinctly differently regarding each marker. He immediately contacted his bank to pay the  
20 \$16,000 marker, thereby ratifying his obligation to pay the first, and only the first, marker. The majority  
21 implausibly suggests that by paying his first marker, Carter somehow ratified his obligation to pay the  
22 second marker as well. This is not the case. In fact, after paying the first marker, Carter contacted Mr.  
23 Higgins at NJN to dispute his obligation to pay the second marker. While the majority construed his  
24 conversation as an attempt at negotiation that implicitly acknowledged an obligation to pay, Carter did  
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1 mention his intoxication during that conversation, thereby suggesting that he lacked capacity to sign the  
2 second marker. The bottom line is that Carter immediately paid the first marker but called NJN to  
3 dispute his obligation to pay the second marker. This fact alone creates a question of material fact as to  
4 whether Carter disaffirmed his obligation.

5         The majority raises a legitimate point that failing to grant summary judgment to NJN will  
6 encourage gamblers to attempt to cheat casinos by claiming they were too intoxicated to sign their  
7 markers when they lose while walking away happily when they win. But, while likely true, the Boyd  
8 Legislature has not enacted any statutes that deprive Carter of his voluntary intoxication defense under  
9 these facts. Voluntary intoxication, as the majority acknowledges, is therefore a defense to breach of  
10 contract in Boyd. While a fact finder at trial might take this policy concern into consideration, it is not  
11 the role of this Court to deprive Carter of his common law contract defenses.

12         Further, casinos have ample opportunities to avoid the concerns raised by the majority. Casinos  
13 could simply refuse to allow gamblers to sign markers when they know the gamblers have been  
14 drinking. They could also use their discretion to limit the size of markers to certain gamblers for any  
15 reason. While the majority is worried that allowing Mr. Carter's case to survive summary judgment  
16 could be harmful to Boyd's casino industry, there are competing policy concerns regarding allowing  
17 casinos to lure intoxicated gamblers into incurring debts. When casino employees have been providing a  
18 patron with alcoholic beverages all day, the casino should be aware that the patron may be too  
19 intoxicated to contract with the casino.

20         Carter's Title VII gender discrimination claim and declaratory judgment action present issues of  
21 material fact such that summary judgment in favor of NJN is not appropriate.

22         I respectfully dissent.



1 6. Mr. Carter was able to walk and talk in a normal manner when signing each marker, and I had no  
2 reason to believe that he was intoxicated to the point that he would be unable to understand what he was  
3 doing. He provided verbal a verbal assurance that he understood how the markers worked and signed the  
4 markers in the appropriate places.

5 7. Upon signing the second marker, Mr. Carter expressed to me that he wanted a hamburger and  
6 fries while he gambled, that he had consumed some alcoholic beverages that day, and that he wanted a  
7 cocktail waitress to take his drink order.

8 8. Mr. Carter made some remarks to express his displeasure at losing some money earlier that day  
9 and expressed his dislike for some of the blackjack dealers, calling one of the dealers a “buffoon.”

10 9. When Mr. Carter finished gambling on November 18, 2018, I observed him walk out of the  
11 casino without stumbling or otherwise appearing highly intoxicated.

12 10. In late November 2018, Mr. Carter called me to inform me that he had paid his \$16,000 marker  
13 in full and asked to have his obligation to pay the \$30,000 marker reduced or eliminated. I explained that  
14 his obligation to pay the marker was not negotiable, extended his deadline to pay the marker, and  
15 informed him that NJN would take legal action against him if he did not fulfill his obligation by the  
16 deadline. At no point in this conversation did Mr. Carter state that he believed he was not legally  
17 obligated to pay the marker.

18 11. Mr. Carter mentioned in our phone conversation that he was intoxicated at the time he signed the  
19 second marker. He also mentioned that he was a loyal customer of NJN and that he hoped NJN would  
20 give him “a break” because he had paid the first marker in full.

21 12. I have met Mr. Carter several times during the course of my employment and bear him no ill  
22 will.

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Barry Higgins  
Print Full Name

/s/ Barry Higgins  
Signature

Sworn to and subscribed before me this 13th day of April, 2019.

Larry Lerner  
Notary Public



1 Customers in the VIP section are also permitted to remain in the theater for half an hour after  
2 performances to meet the performers and can continue ordering drinks after the show.

3 6. All bartender models at Casino Center Bar wear a uniform that consists of a short white skirt and  
4 top with an NJN logo.

5 7. Over the course of my employment, I have found that the Casino Center Bar is very busy before,  
6 during, and immediately after the cabaret performances and that there are far fewer customers between  
7 performances.

8 8. I have also found that most customers who come to the bar during performances sit in the seats  
9 that have a partial view of the cabaret theater stage.

10 9. During cabaret performances, most of the customers who sit at the bar are male, but many  
11 customers also take their drinks away from the bar. The customers who take their drinks away from the  
12 bar are about half male and half female.

13  
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16 Talia Gonzalez  
Print Full Name

/s/ Talia Gonzalez  
Signature

17 Sworn to and subscribed before me this 19th day of April, 2019.

18 Larry Lerner  
19  
20 Notary Public





- 1 7. After winning a large hand, Mr. Carter gave me a high five, began pounding his fists on the  
2 table, and screamed loudly in celebration.
- 3 8. A security guard came over to the table and asked Mr. Carter to calm down shortly afterwards.
- 4 9. Mr. Carter apologized to the security guard and resumed his playing.
- 5 10. After the security guard spoke to him, Mr. Carter stopped shouting and then played quietly for  
6 several more minutes.
- 7 11. At the conclusion of his session, Mr. Carter gave me a high five, thanked me for my dealing, and  
8 walked away.
- 9 12. Mr. Carter was able to walk normally away from the table.
- 10 13. I bear Mr. Carter no ill will and have only dealt to him once.

11  
12 Jasmine Palmer  
Print Full Name

/s/ Jasmine Palmer  
Signature

13 Sworn to and subscribed before me this 24th day of April, 2019.

14 Larry Lerner

15 Notary Public  
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1 9. From my observations, approximately two thirds of customers who sit at the bar during the  
2 performances are male, and approximately half of the bar customers are male during breaks between  
3 performances. Based on my conversations with the customers, most of the male customers who sit at the  
4 bar during performances are heterosexual and are eager to catch a glimpse of the scantily clad female  
5 performers on stage in the theater.

6 10. Children are not permitted in the Casino Center Bar or the Candy's Cabaret Theater. There is  
7 public walkway in between the bar and the theater where persons of all ages are permitted to walk. A  
8 small part of the theater stage is visible from this public walkway.

9 11. During a typical cabaret performance, there are several scantily clad female dancers on stage as  
10 well as several scantily clad female bartender models from Casino Center Bar walking in and out of the  
11 venue to serve drinks to the customers.

12  
13 Patricia Ramirez  
Print Full Name

/s/ Patricia Ramirez  
Signature

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16 Sworn to and subscribed before me this 19th day of April, 2019.

17 Larry Lerner  
18  
19 Notary Public

1 **IN THE SUPREME COURT OF**

2 **THE STATE OF BOYD**

3  
4 Tyler Carter, an individual,

5 Petitioner,

6 vs.

7 NJN, a Boyd corporation,

8 Respondent.

Case No.: 18-0326

**Affidavit of Tyler Carter**

9  
10 State of Boyd)

11 ) ss:

12 )

13 County of Klark

14 Tyler Carter, being duly sworn, deposes and says:

15 1. I submit this affidavit in opposition to NJN's motion for summary judgment pursuant to Rule 56  
16 of the Boyd Rules of Civil Procedure.

17 2. In August 2018, I noticed an advertisement for a bartender position at the Casino Center Bar at  
18 the NJN Brand in downtown Boyd City.

19 3. I immediately submitted a resume to apply for that job.

20 4. Shortly thereafter, I was contacted to come in for an interview with Daphne Mason, Director of  
21 Human Resources at the NJN Brand.

22 5. Ms. Mason encouraged me to apply for a job at NJN Café even though my application only  
23 expressed interest in the job at Casino Center Bar.  
24

1 6. Ms. Mason informed me that part of the job of Casino Center Bar bartenders involves bringing  
2 drinks to patrons of the Candy's Cabaret Theater and that theater patrons preferred having attractive  
3 female bartenders bring them their drinks. She told me that I wasn't what the patrons were looking for.

4 7. On November 18, 2018, I consumed several alcoholic beverages throughout the day prior to  
5 signing two gambling markers of \$16,000 and \$30,000 respectively.

6 8. I remember placing three bets on NFL games and playing blackjack at two different tables after  
7 signing the \$16,000 marker.

8 9. After winning \$1,500 playing blackjack at the second table, I partially blacked out because I was  
9 highly intoxicated and remember little of the rest of the day.

10 10. I remember speaking with Barry Higgins about my gambling losses and my desire to win my  
11 money back.

12 11. I remember telling Mr. Higgins that I had been drinking heavily, that I was annoyed with the  
13 blackjack dealers, and that I wanted to win my money back. I also remember him giving me some forms  
14 to sign.

15 12. I have no further memories from that day until returning home and finding receipts for markers  
16 of \$16,000 and \$30,000 in my pocket.

17 13. Because I remembered taking out the first marker, I instructed my bank to wire \$16,000 to NJN  
18 after receiving a letter from NJN stating that I was obligated to pay the two markers.

19 14. After instructing my bank to wire money to NJN to pay the first marker, I called Mr. Higgins to  
20 discuss the second marker and attempt to work out a deal with NJN to eliminate or reduce my obligation  
21 to pay the second marker. I told Mr. Higgins that I was intoxicated when I signed the second marker. I  
22 told Mr. Higgins that I did not think it was fair for me to have to pay the marker because I was so drunk  
23 that I could not remember signing it.

24 15. Mr. Higgins informed me that I would need to pay the second marker in full.  
25

1 16. I do not recall signing the second marker or discussing its terms with Mr. Higgins.

2  
3 Tyler Carter  
Print Full Name

/s/ Tyler Carter  
Signature

4 Sworn to and subscribed before me this 27th day of April, 2019.

5 Larry Lerner  
6 Notary Public

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