

New Jersey Casino Employee Weight Policy Fairly Applied, Court Approves

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A New Jersey casino did not violate the state's anti-discrimination law by enforcing a weight standard for its costumed beverage servers, called "BorgataBabes," a three-judge panel of the state appellate court has ruled, upholding summary judgment for the employer as to the policy. *Schiavo, et al. v. Marina District Dev. Co., LLC, d/b/a Borgata Casino Hotel & Spa*, No. A-5983-12 (N.J. App. Div. Sept. 17, 2015). However, finding the record included adequate evidence that the policy was applied to some plaintiffs (women returning from medical and maternity leave) in a discriminatory, harassing manner, the appeals court reinstated the charge of sexual harassment hostile work environment discrimination.

Background

Striving to differentiate itself from the other Atlantic City, New Jersey, casinos, defendant Borgata Casino Hotel & Spa created a specialized group of employees known as the "BorgataBabes." Described in the recruiting brochure as "[p]art fashion model, part beverage server, part charming host and hostess," these beverage servers were hired not only to serve drinks on the casino floor, but also to project to the public a certain Las Vegas-style image of the casino. In an effort to maintain this image, all BorgataBabes were advised of and agreed to adhere to personal appearance standards.

For example, both the male and female employees were required to be physically fit; the women were to maintain a "natural hourglass shape," while the men were required to have a "V" shape with broad shoulders and slim waist. Men were to be clean shaven or maintain neatly trimmed facial hair. Women were required to have clean, naturally styled hair and wear makeup that tastefully complimented their features. While both men and women wore costumes, the men's consisted of a tight-fitting "club" shirt and pants, and the women's, a "form-fitting [and] skimpy" outfit reminiscent of a Las Vegas casino.

In 2005, the Borgata amended its personal appearance standards to prohibit any BorgataBabe, either male or female, from increasing their baseline weight by more than seven percent, absent a bona fide medical condition or pregnancy. Adherence to the amended policy would be regulated by periodic weigh-ins, and, over a five-year period, 25 of the 686 female BorgataBabes were suspended for violating the standards. None of the 46 male BorgataBabes were similarly suspended for non-compliance.

Procedural History

Twenty-one present and former female BorgataBabes filed suit against the Borgata, alleging their employer's "personal appearance standards" violated the New Jersey Law Against Discrimination (LAD) by subjecting them to gender stereotyping, sexual harassment hostile work environment, and disparate impact and disparate treatment discrimination.

After finding the personal appearance standards reasonable in light of casino industry standards and customer expectations, and noting that the standards applied equally to both male and female "BorgataBabes," the trial court dismissed all of plaintiffs' claims on summary judgment.

Appellate Division Decision

On appeal, the Appellate Division affirmed on September 17, 2015, the dismissal of the plaintiffs' discrimination challenges to the personal appearance standards, but reversed and remanded the claims based on sexual harassment hostile work environment discrimination. The Court determined genuine disputes of material fact precluded summary judgment as there was evidence that some of the plaintiffs' failure to comply with the personal appearance standards arose from documented medical or post-pregnancy conditions.

With respect to the discrimination claims, the Appellate Division first determined that the personal appearance standards were not facially discriminatory. After noting the absence of any reported New Jersey

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decision considering a challenge to an employer's appearance standards under the LAD (N.J.S.A. 10:5-12(p)), the Court reiterated the following general principle: "When an employer's 'reasonable workplace appearance, grooming and dress standards' comply with State or federal law prohibiting discrimination, even if they contain sex-specific language, the policies do not violate Title VII [of the Civil Right Act], and by extension, the LAD."

The Court noted that Borgata's personal appearance standards applied to both male and female BorgataBabes, and while the standards varied based on gender with respect to hair, makeup, and the like, the seven-percent weight restriction applied to all BorgataBabes, regardless of gender. The fact that the plaintiffs disliked or struggled to comply with the weight standard, the Court said, did not demonstrate that the facially neutral policy more adversely affected women than men.

In addition, the Court found, the fact that the male and female costumes differed did not render the policy facially discriminatory. While it acknowledged the females' "form-fitting [and] skimpy" outfits "stereotyped the hour-glass figure," it found that was important to the entertainment nature of the Borgata's business. After rejecting the general idea that patrons' expectations may justify policies that violate the LAD, the Court nevertheless determined that the BorgataBabes' costumes related to the very nature of Borgata's business. Moreover, the plaintiffs' contention that the male BorgataBabes were not sexualized or marketed in the same way as their female counterparts, the Court said, did not support a claim for hostile work environment gender stereotyping. That the female BorgataBabes donned more provocative costumes was insufficient to support such a claim, as they were required to show that the stereotypes burdened females over males, or otherwise interfered with their employment opportunities, the Court concluded.

According to the Appellate Division, "the LAD does not encompass allegations of discrimination based on weight, appearance, or sex appeal."

Implications

An employer's reasonable appearance standards may be imposed on employees, so long as one gender is not required to abide by more onerous standards and the standards are enforced equally between the sexes. Moreover, if an employer imposes standards with which compliance may be affected by medical conditions, pregnancy, or other protected statuses, it is important to be vigilant in ensuring the policy does not disparately affect those individuals because of their status.

Employers should regularly review their policies and practices with employment counsel to ensure they address specific organizational needs effectively and comply with applicable law. Jackson Lewis attorneys are available to answer inquiries regarding this and other workplace developments.

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