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Can Gender Discrimination or Provocative Dress Requirements Ever be Appropriate for Your Employees?

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What if a business such as a hotel or restaurant blatantly hired only young, attractive women to fill a particular position? What if that same business's staff was required to dress in revealing and sexually provocative outfits or else face termination? Sounds like clear-cut employment discrimination, right? Not necessarily. Hospitality establishments such as bars, restaurants, and casinos have successfully used exceptions to discrimination laws to capitalize on sex appeal while still remaining within the bounds of the law. This article examines "provocative" defenses to gender discrimination in the context of food and beverage service establishments.

Legalized Gender Discrimination?

On February 5, 2009, Nikolai Grushevski, a man who allegedly applied for and was denied a food server position at a Hooters restaurant in Corpus Christi, Texas, filed a gender discrimination class action lawsuit against the restaurant chain. Grushevski v. Texas Wings, Inc., C.A. No. 09-cv-00002 (S.D. Tex. 2009). Grushevski alleged that the on-duty manager told him that "Hooters, locally and nationally, would not hire males for waiter's positions," and Grushevski argued that he was "denied a waiter's position because of his gender in violation of Title VII." (Complaint, ¶ 11). Grushevski is correct that that the exclusive hiring of women, on its face, violates Title VII's prohibition against sex discrimination. However, as explained below, the bona fide occupational qualification ("BFOQ") exception could apply and, if so, would allow Hooters to avoid the proscriptions of Title VII despite the apparently discriminatory practice.

The BFOQ defense provides that, even though clearly discriminatory, it is not an unlawful employment practice for an "employer to hire and employ employees . . . on the basis of his [or her] religion, sex, or national origin in those instances were religion, sex or national origin is . . . a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." [i] 42 U.S.C. § 2000e-2(e)(1).

Thus, the BFOQ defense may apply where exclusion of a protected class (like men) is reasonably necessary to ensure authenticity or genuineness. For example, the Equal Employment Opportunity Commission concluded that sex is a BFOQ with respect to dramatic productions. 29 C.F.R. § 1604.2. The integrity of a dramatic production would be comprised if a director was required to consider both sexes equally when casting a role written for one particular gender. The BFOQ defense has also been successfully used when discrimination was necessary to ensure safety. Thus, the exclusive hiring of male prison guards was upheld to maintain security in an environment characterized by "rampant violence." Dothard v. Rawlinson, 433 U.S. 321, 335 (1977).

A leading case considering the BFOQ defense as applied to alleged sex discrimination, Int'l Union v. Johnson Controls, Inc., 499 U.S. 197 (1991), interpreted the defense narrowly. Specifically, the United States Supreme Court held that an employer may properly use the BFOQ defense only if sex: (1) relates to the "essence" or "central mission" of the employer's business, and (2) is objectively and verifiably necessary to the employee's performance of his or her job tasks and responsibilities. Int'l Union, 499 U.S. at 201. Whether or not Hooters, or any establishment choosing to hire males or females exclusively, could successfully employ a BFOQ defense depends upon these two factors. The defense's applicability likely turns upon whether sex appeal is integral to the business's operations. For example, the BFOQ defense was rejected where an airline refused to hire male flight attendants based upon alleged customer preference, because the court found that the primary function of an airline is safe transportation and excluding men did not further that function. Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388 (5th Cir. 1971). On the other hand, the New York Human Rights Appeal Board found that being female was a BFOQ for the position of Playboy Bunny at the Playboy Club, finding the purpose of the job was to titillate and entice men and that female sexuality was reasonably necessary to achieve that purpose. See St. Cross v. Playboy Club, Appeal No. 773, Case No. CFS 22618-70 (New York Human Rights Appeal Board, 1971).

One can only speculate whether Hooters could have prevailed on a BFOQ defense because, on April 21, 2009, Hooters and Grushevski reached a confidential settlement. This was not the first such settlement for Hooters. In 1997, Hooters agreed to pay $3.75 million to settle a similar lawsuit brought by a group of men. That settlement allowed Hooters to continue to hire only Hooters Girls to serve food and beverages but required the restaurant to create gender-neutral positions such as kitchen staff, bartenders, and hosts.

Were the case to have proceeded to trial, Hooters would have needed to show it was not a typical restaurant. Rather, to prevail on a BFOQ defense, Hooters would have to show that its essential mission was not foodservice, but rather the entertainment of heterosexual men via "sexy" female servers, or something to that effect. Likewise, to the extent the restaurant could portray its Hooters Girls more like actresses playing a role rather than just waitresses, this argument could be effective. In sum, gender-specific hiring may be appropriate to preserve the authenticity of a thematic establishment like Hooters because the line between foodservice and showmanship is blurred.

Sexually Provocative Dress Requirements

In 2003, the Rio Hotel and Casino garnered publicity when it replaced its casino-floor cocktail waitresses with self-proclaimed "Bevertainers." Bevertainers are not considered servers, but rather entertainers who perform singing and dancing routines intermittently while they serve drinks on the casino floor. Notably, they do so in scanty outfits. In fact, the Bevertainer website includes a press release which boasts the "Bevertainers at Rio All-Suite Hotel & Casino are sexier than ever with brand new attire sure to tantalize the senses" and that the new costumes were designed "to create immediate sex appeal." [ii]

Can a hotel/casino like Rio require certain members of its wait-staff to dress in this sexually provocative manner? Where an establishment requires its employees to dress in a sexually provocative manner, it raises concerns of discriminatory or sexually stereotypical intent. For example, in EEOC v. Sage Realty Corp., 507 F. Supp. 599 (S.D.N.Y. 1981), the court held that a hotel that employed only female lobby attendants could not require them to dress in revealing clothes without violating Title VII. The Bevertainers situation is different for at least two reasons.

First, the Rio is no ordinary hotel. It is a Carnival-themed hotel/casino located in "Sin City" itself, Las Vegas. A dress or grooming code implemented to project a company image is permissible if it is reasonable. Craft v. Metromedia, Inc., 766 F.2d 1205, 1215 (8th Cir. 1985). Under the circumstances, the costumes that Bevertainers wear, revealing as they might be, are arguably reasonable because they enhance the Brazilian Carnival theme of the hotel and the fantasy/adult playground image that visitors to Las Vegas are accustomed to expect.

Second, the dress code applies to both female and male Bevertainers. Yes, there are male Bevertainers. In Jespersen v. Harrah's Operating Co., Inc., 444 F.3d 1104 (9th Cir. 2006), a female bartender at Harrah's Reno Casino challenged a Harrah's grooming and appearance policy that required female bartenders and bar-backs to wear makeup. The Ninth Circuit ruled that Harrah's policy was not impermissibly discriminatory because it imposed equal burdens upon male and female employees. Jespersen, 444 F.3d at 1111. The fact that both male and female Bevertainers are required to wear exotic costumes suggests that both sexes share a similar burden and that the dress requirement is non-discriminatory.

Gender or sex discrimination is, of course, never appropriate. However, the fact that a hospitality establishment capitalizes on sex appeal is not in and of itself illegal. The distinction likely turns upon whether gender-specific hiring enhances the authenticity of the establishment, and whether provocative dress is reasonable under the circumstances and is applied equally to both male and female employees.

[1] The BFOQ defense does not protect an employer from race or color-based discrimination.
[2] http://www.dickfosterproductions.com/PressReleases/index.cfm, "Rio's Bevertainers Spice It Up With Sexier Costumes- Access Vegas.com"

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