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Ninth Circuit Rules That Female Bartender Who Refused To Wear Makeup Could Be Terminated

The federal court of appeals governing California has ruled that a woman who was fired for refusing to comply with a company rule requiring female bartenders to wear makeup could not prove sex discrimination because she failed to offer evidence that the grooming requirement imposed a greater burden on one sex than the other. *Jesperson v. Harrah's Operating Co.*, 9th Cir., No. 03-15045, 12/28/04.

The facts.

The employee was a bartender at Harrah's Casino in Reno, Nevada. Harrah's maintained strict appearance standards for employees in order to create a "brand standard of excellence" throughout its operations. All beverage servers were required to be "well groomed, appealing to the eye, [] firm and body toned, and be comfortable with maintaining this look while wearing the specified uniform." In addition to these general appearance standards applicable to both sexes, female beverage servers were required to wear stockings and colored nail polish, and were required to wear their hair "teased, curled, or styled." Male beverage servers were prohibited from wearing makeup or colored nail polish, and they were required to maintain short haircuts and neatly trimmed fingernails.

When Harrah's amended its appearance standards to require all female beverage servers (including bartenders) to wear makeup, plaintiff refused to comply because wearing makeup made her feel sick, degraded, exposed, and violated. After giving plaintiff 30 days to apply for a position that did not require makeup to be worn, Harrah's fired her when she failed to apply for another position. She then sued, claiming that the company's requirement that female bartenders wear makeup constituted sex discrimination under Title VII.

The majority opinion.

In rejecting the plaintiff's sex discrimination claim, a divided Ninth Circuit confirmed its prior holdings that employers are free to adopt grooming and appearance standards that apply differently to men and women so long as the rules do not create "unequal burdens." In order to evaluate the relative burdens of the policy, the Court held that it must weigh the cost and time necessary for employees of each sex to comply with the policy. The Court agreed with Harrah's that the burden of the makeup requirement must be evaluated with reference to *all* of the requirements of the policy, including those that burden men only, such as the requirement that men maintain short haircuts and neatly trimmed fingernails. In this case, the Court determined that the female employee had failed to provide any evidence that the company's makeup requirement imposed any additional costs or significant investment of time on women.

The Ninth Circuit also rejected the employee's argument that, even if the makeup requirement survived the "unequal burdens" test, it should be invalidated in light of the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which held that an employer may not force its employees to conform to the sex stereotype associated with their gender as a condition of employment. Although the Ninth Circuit noted that *Price Waterhouse* did hold that Title VII bans discrimination against an employee on the basis of that employee's failure to dress and behave according to the stereotype corresponding with her gender, the Court distinguished *Price Waterhouse* on the grounds that it did not address the "specific question of whether an employer can impose sex-differentiated grooming and appearance standards on its male and female employees."

The Ninth Circuit also noted that, following *Price Waterhouse*, it had held that sexual harassment of an employee because of that employee's failure to conform to commonly accepted gender stereotypes is sex discrimination in violation of Title VII. The Ninth Circuit refused, however, to extend the reasoning of *Price Waterhouse* to appearance and grooming standards, in part because it felt bound to follow the decision of a

prior panel of the Ninth Circuit that upheld the “unequal burdens” test in the context of appearance standards following the *Price Waterhouse* decision.

The dissent.

The dissent argued that the trial court erred in granting summary judgment for Harrah's because the employee had established her claim under *Price Waterhouse* and because there was a triable issue of fact as to whether the policy imposed “unequal burdens” on men and women, given that wearing makeup is both time consuming and expensive.

Lessons learned.

While this case confirms that, in the Ninth Circuit, general grooming standards do not necessarily constitute illegal sex discrimination, it demonstrates that determining how far employers can go in requiring different grooming standards for men and women can be a difficult and fact-intensive inquiry. The employee's failure in this case to provide evidence of any unequal burden proved fatal to her claim. Employers who wish to maintain sex-differentiated grooming standards should be careful to ensure that those standards are no more time consuming or costly for one sex than the other. California employers should be especially cautious because California courts analyzing a claim of sex discrimination under the California Fair Employment and Housing Act are not bound to follow the Ninth Circuit's “unequal burdens” test and may not read the Supreme Court's *Price Waterhouse* decision so narrowly.

LEGISLATIVE UPDATE

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New California Employment Legislation Took Effect On January 1, 2005

For those who did not open their annual present from the California legislature (and the Governor) before the holidays, now is the time because there are a number of new employment laws that took effect on January 1, 2005. The following is a summary of some of the new California laws of greatest interest to employers:

Mandatory Sexual Harassment Training For Supervisors (AB 1825)

This bill requires employers with 50 or more employees to provide two hours of sexual harassment training to all supervisory employees within one year of January 1, 2005, unless the employer has already provided such training after August 1, 2002. Covered employers must provide training to new supervisors within 6 months of hiring. Compliance does not insulate employers from any liability for harassment.

The training must be conducted through “classroom or other effective interactive training” by individuals with “knowledge and expertise” in preventing harassment, discrimination and retaliation. The training must cover prohibition and prevention of harassment, discrimination and retaliation, and the remedies available to victims. For more information, contact one of the employment law partners at Howard Rice or click on http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_1801-1850/ab_1825_bill_2004-930_chaptered.html.

Domestic Partner Rights (AB 205 and AB 2208)

The California Domestic Partner Rights and Responsibilities Act of 2003 (AB 205), which was enacted last year, became effective on January 1, 2005. Although the law does not specify what effect it will have on employers, the law generally extends the “rights, protections, [] benefits, [] responsibilities, obligations, and duties” of marriage to domestic partners who have registered with the Secretary of State. The law, however, does not extend to domestic partners any of the rights or duties provided to spouses under federal law, to the extent those rights or duties are not provided by California law. Of particular importance for employers, employers will likely be required to provide registered domestic partners health and welfare benefits to the same extent that such benefits are offered to spouses, the right to take leave (in excess of California legal requirements) to care for a domestic partner, and any other non-ERISA benefits that are provided to spouses.

The California Insurance Equity for All Families Act (SB 2208) requires California insurance carriers and health care service plans to provide health coverage for registered domestic partners that is equal to the coverage provided to spouses. An insurer may require proof of registered domestic partnership status or termination of that status only if it also requests verification of marital status and notification of dissolution of

the marriage from the employee whose spouse is provided coverage. Although this bill does not apply specifically to employers, it will affect California employers who are not self-insured because it requires their insurers to offer equal coverage to registered domestic partners and spouses.

Extended COBRA Coverage For Seniors (AB 254)

Currently, any health care service plan contract or disability insurance policy subject to COBRA or Cal-COBRA is required to offer extended health coverage to former employees and their spouses where the employee was at least 60 years old when employment terminated. After January 1, 2005, terminating employees (and their spouses) cannot extend their health care coverage once COBRA or Cal-COBRA is exhausted.

Changes To Workers' Compensation Laws (SB 899)

Most sections of this workers' compensation reform bill became effective on April 19, 2004, but a brief refresher for the new year is in order. The highlights are as follows:

- Permits employers and insurers to contract with approved provider networks for treating work-related injuries and illness.
- Employees may seek second and third opinions from doctors of their choice within the network.
- An injured worker who is unsatisfied with network doctors' recommendations may appeal to an Independent Medical Reviewer. If he agrees with the injured worker, the injured worker may seek treatment from a doctor of his or her own choosing, and the employer loses medical control.
- Provides that employees may only pre-designate treating physicians who are part of the employer's health benefits plan.
- Limits temporary disability payments to 24 months from the first payment. (Some injuries have extended temporary disability periods of up to 240 weeks within five years from the injury.)
- Requires an employer/insurer to authorize medical treatment within a day of receiving an occupational injury claim, even though the claim may be delayed for up to 90 days for investigation.
- Limits liability for pre-acceptance medical treatment at \$10,000.
- Refers all medical disputes regarding disability to a panel of Qualified Medical Examiners (QME) for resolution.
- Encourages good faith reporting of fraud and protects the reporting party from civil liability.
- Promotes return to work programs by providing employers of fewer than 50 employees with subsidies for workplace modifications and special equipment.
- Provides incentives to employers of 50 or more employees who return disabled employees to work.
- Allows a 15% reduction in permanent disability payments if an employer brings an employee back to the same job, at the same pay, or accommodates him with a modified job, as long as the job pays at least 85% of the previous job and lasts at least 12 months.
- Gives injured workers who work for employers of 50 or more employees who are not offered return to regular, modified or alternative work a 15% increase in their permanent disability award.
- Expands alternative dispute resolution procedures allowing employers and groups of employers of union-represented employees to negotiate pilot programs.
- Retroactively eliminates the primary treating physician presumption of correctness, but does not permit reopening prior decisions.
- Prohibits permanent disability awards in excess of 100% for any region of the body over an employee's lifetime.
- Revises the standard for evaluating permanent disability from "ability to compete in the open labor market" to "diminished future earning capacity," with the final determination to be based on AMA Guides.
- Increases benefits for injured workers with more than 70% disability and reduces benefits for those with less than 15% disability.
- Requires revisions to the workers' compensation claim form and posters.

Employment Discrimination (AB 2900 and AB 2870)

AB 2900 amends various labor and employment-related laws to conform to the bases of discrimination currently prohibited by the Fair Employment and Housing Act. These bases are race, religion, color, national origin, ancestry, disability, medical condition, sex (including gender identity), age, marital status, and sexual orientation. This law expands protection under many statutes that did not include all of these protected classes, which often resulted in confusion for those charged with implementing and complying with these laws.

AB 2870 specifically authorizes the Fair Employment and Housing Commission to conduct mediations upon the request of the Department of Fair Employment and Housing (DFEH). This should help promote early settlement of discrimination claims filed with the DFEH.

New Tax Law Allowing Deductions For Attorneys' Fees May Make It Easier To Settle Employment Discrimination Cases

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The American Jobs Creation Act of 2004 (signed into law by President Bush on October 22, 2004) ensures that plaintiffs who win judgments or settlements in discrimination cases will not pay federal income tax on those portions of the recovery used to pay court costs and attorneys' fees. This may make it easier for employers to settle discrimination lawsuits because the plaintiff will ultimately pocket a greater percentage of the settlement amount.

The new law adds a section to the Internal Revenue Code—Section 62(a)(19)—which provides an “above-the-line” deduction for attorneys' fees and costs paid by, or on behalf of, the taxpayer in connection with most discrimination actions. An above-the-line deduction is a deduction directly against gross income and is not subject to the rules on miscellaneous itemized deductions, the overall limitation on itemized deductions, or the disallowance of miscellaneous itemized deductions under the Alternative Minimum Tax. In short, the taxpayer can offset costs and attorneys' fees against the total recovery, and will therefore be taxed only on the net recovery.

RECENT LEAVE LAW DEVELOPMENTS

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Employees Must Be Returned To Work Immediately After FMLA Leave

The Family Medical Leave Act (“FMLA”) provides that an employee who takes FMLA leave shall be restored by the employer to his previous position or its equivalent “on return from such leave.” Does an employer have a reasonable amount of time to return the employee to work under the circumstances or must the employer do so immediately? In *Hoge v. Honda of America Mfg., Inc.*, 384 F.3d 238 (6th Cir. 2004), the Sixth Circuit held that the FMLA requires an employer *immediately* to restore an employee returning from FMLA leave to her former position or its equivalent.

In this case, the employee, an assembly line worker, took a one-month FMLA leave. Because the employer had reengineered the assembly line during her leave, her former position did not exist. When she returned, the employer took approximately five weeks to find a suitable position for her. The employee sued, claiming that the employer violated her rights under the FMLA by not immediately restoring her to her former position or its equivalent. The employer argued that the FMLA should be interpreted to afford employers a reasonable amount of time to restore employees returning from FMLA leave to their former positions or to identify equivalent positions.

The Sixth Circuit affirmed the trial court's grant of summary judgment to the employee and held that the language of the statute was unambiguous and meant that restoration had to be immediate, rather than within a reasonable amount of time. The court found that this interpretation was further supported by regulations issued by the Secretary of Labor concerning the FMLA that state that “[a]n employee may not be required to take more leave than necessary to address the circumstances for which leave was taken.” 29 C.F.R. §825.312(e). The Sixth Circuit reasoned that if employers could take a “reasonable” amount of time to restore their employees to their former position or its equivalent upon return from FMLA leave, this would force the employees to take more leave than was necessary to address the reasons for which they took their leave and would therefore interfere with their FMLA rights.

This case is important for employers because it creates a bright-line rule that employees must be restored to their former positions or their equivalents as soon as they are fit to return to work from FMLA leave. Thus employers need to recognize that employees may return from FMLA leave at any time, and must be ready to accommodate those returning employees on very short notice.

Failure To Inform Employees Of Right To FMLA Leave When The Need For Leave Is Foreseeable Can Result In Large Damages

The Alaska Supreme Court recently upheld a damage award of \$628,706 for FMLA violations where the employer failed to inform an employee of her right to FMLA leave. *Municipality of Anchorage v. Gregg*, 2004 WL2569287 (Nov. 12 2004 Alaska Supreme Court).

After being involved in a car accident, the employer placed the employee (who was pregnant) on sick leave. Although her doctors released her to work, she remained on sick leave and informed her employer that she needed to “work things out” and continue treatment. When the employer learned that the employee had been medically released back to work, it changed her leave status from sick leave to “leave without pay” status. The employer then informed the employee that she must return to work or be terminated for abandoning her position. After her request to remain on unpaid status was denied, the employee resigned. The employee later reapplied for a job, but her applications were rejected. She then sued, claiming that her FMLA rights had been violated. The employee prevailed on her FMLA claims and was awarded \$628,706.

The employer argued on appeal that the trial court erred in finding that it violated the FMLA because, among other things, (1) the employee did not suffer from a “serious health condition” as defined by the act, (2) the employee failed to give notice as the Act requires and (3) the employer had already given her leave equivalent to the amount the FMLA would have granted her. The Alaska Supreme Court rejected all of these arguments.

The Court held that although the FMLA allows employers to request a contemporary diagnosis at the time they grant FMLA leave, an employee’s failure to obtain a contemporary diagnosis when it is not requested does not invalidate the employee’s FMLA claim, as long as the employee can show that a medical professional considered them to be incapacitated in the relevant time period. In this case, the Court held that there was substantial evidence—including the retroactive diagnosis provided by the employee’s medical expert—that she was actually incapacitated at the time she requested leave. The Court also rejected the employer’s argument that the employee could not have been incapacitated because two of her doctors had cleared her to return to work. The Court held that these releases did not compromise the employee’s claims because there was substantial evidence that the issues for which she was cleared were limited to her pregnancy and her car accident injuries and that the full extent of her incapacity was never fully diagnosed.

As to notice, the Court noted that when an employee’s need for leave is unforeseeable, the “employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed.” 29 C.F.R. §825.303(b). The Court found that the employer initially put the employee on sick leave but did not alert her of her rights under the FMLA when they changed her status to annual leave.

The Court also rejected the employer’s argument that it had already granted the full twelve weeks of leave available under the FMLA, citing a regulation stating that “[i]f an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee’s FMLA entitlement.” 29 C.F.R. §825.700(a).

This case holds several lessons for employers. First, employers should make all levels of management aware of employee’s rights under the FMLA so that they can appropriately communicate them to employees when necessary. Second, human resources personnel need to familiarize themselves as much as possible with the technical details of the FMLA and its accompanying regulations. For example, employers should always ask for a contemporaneous medical diagnosis if they are concerned about the legitimacy of a request for FMLA leave. Finally, employers should create a mechanism for designating leave as FMLA.

OTHER NOTEWORTHY CASES

Individualized Assessment of Employee Disabilities Required Where Government Regulation Does Not Automatically Exclude Employee from Specific Position

An employer may generally restrict employees with a particular disability from a class of jobs where a government regulation prohibits such employees from working in that class of jobs. A recent federal district court decision from California, however, shows that an employer may not rely on such a regulation beyond the strict scope of the prohibition.

In *Bates v. United Parcel Service, Inc.*, Dkt. No. C99-2216 (N.D. Cal. Oct. 21, 2004), the federal district court for the Northern District of California held that UPS violated the Americans with Disabilities Act (ADA) and California anti-discrimination laws by applying a U.S. Department of Transportation (DOT) regulation to bar deaf workers from driving all package trucks. The DOT regulation requires that any worker who cannot pass the DOT hearing standard cannot drive a truck weighing more than 10,000 pounds.

UPS had applied the DOT standard to all its package trucks, including trucks weighing less than 10,000 pounds, resulting in a categorical exclusion of deaf workers from driving package trucks. The court held that such a policy, on its face, violated the ADA and analogous California statutes because the policy ran contrary to the statutory requirement that employers interact with disabled employees to attempt to reach a reasonable accommodation of a disability. By extending the prohibition beyond the scope of the DOT regulation, UPS had refused to interact with employees not subject to the regulation. Under the statute, UPS had a legal obligation

to engage in the interactive process on an individual basis with potential drivers not covered by the DOT regulation.

Bates demonstrates that employers must use caution in justifying refusals to discuss reasonable accommodations by relying on a government regulation. Where a government regulation clearly excludes a particular employee or group of employees from certain jobs, the employer should comply with the regulation. Beyond the specific scope of the regulation, the exclusion may provide a helpful guidepost for determining the essential functions of other jobs, but the employer may not use the regulation as a per se exclusion for such positions.

Military Reservists' Right to Return to Job Does Not Include Right to Rest Prior to Returning to Work

The Uniformed Services Employment and Reemployment Rights Act (USERRA) provides that members of U.S. military reserve units who leave their jobs to perform military service have a right to return to their jobs following the completion of their military duties. In *Gordon v. Wawa, Inc.*, 388 F. 3d 78 (3rd Cir. 2004), a United States Court of Appeal addressed for the first time whether a reservist has a right to a rest period following his return from weekend reservist training. On his way home from weekend training, Willie Gordon stopped at the convenience store where he worked to get his work schedule for the next week. The store manager directed Gordon to work the late shift that same night, threatening to terminate him if he did not comply. Gordon worked the late shift but fell asleep at the wheel of his car on his way home the next morning, resulting in an automobile accident that killed him. Gordon's mother sued the convenience store owner, alleging that the failure to permit a rest period violated USERRA.

The Third Circuit Court of Appeals, affirming a lower court ruling in favor of the employer, ruled that USERRA did not grant a right to "rest time" before returning to work where the employee has reported his return from service to his employer. Because Gordon had worked fewer than 31 days, USERRA afforded him eight hours after returning home to report to work for the next full work shift. The Court of Appeals stated that USERRA is to be interpreted liberally in favor of returning reservists but that the plain language of the statute permitted the employer to insist that the employee go to work immediately after the employee reported to the employer that he had returned from military service. The Court of Appeals ruled that the "eight hours" provision sets a deadline by which the employee must report his availability to his employer, not a guarantee of eight hours' rest time after the employee has reported his return. In essence, the Court of Appeals stated that, had Gordon gone home and rested eight hours and then reported to his employer, he would have been protected. The Court did not directly address the application of this rule to soldiers returning from military service of longer than 31 days, but the decision certainly implies that it covers such absences to the extent they are protected by USERRA.

The Court acknowledged that some legislative history underlying USERRA indicates a congressional intention to allow rest time for returning reservists prior to their return to work, but the Court found that the plain language of the statute — making the eight hours a reporting limitation as opposed to an affirmative right to rest — overrode the limited contrary legislative history.

Gordon, while a favorable decision for employers, should be relied upon very cautiously. Only one Court of Appeals has addressed the issue, and considering traditionally favorable national sentiment toward returning soldiers, employers should be very careful in declining to afford a liberal return policy to such employees.

Employer May Not Be Forced to Place Its Own Unionized Employees into a Bargaining Unit with Workers That Are Jointly Employed with Another Employer

In 1973, in *M.B. Sturgis, Inc.*, 205 NLRB 250 (1973), the National Labor Relations Board (NLRB) ruled that its personnel can direct an election among employees in a single bargaining unit where the unit will contain (1) employees that are solely employed by one employer and (2) employees jointly employed by that employer and another employer. This situation typically arises where an employer has its own regular employees as well as a significant temporary workforce for which the temporary agency is a joint employer. Such a bargaining unit results in one union representing employees having a single employer alongside employees with two distinct employers. *Sturgis* has been an ongoing source of controversy because it imposes a multi-employer unit on an employer, even though multi-employer units generally cannot be imposed without the employer's consent. Prior to 1973, the NLRB had stated that such units could not be involuntarily imposed on an employer.

Recently, an NLRB majority composed of members appointed by President Bush overruled *Sturgis* and returned to the prior NLRB rule requiring employer consent to such an arrangement. In *Oakwood Care Center*, 343 NLRB No. 76 (Nov. 19, 2004), the NLRB declined to find an appropriate bargaining unit composed of a combination of health care workers employed solely by Oakwood Care Center and temporary health care

workers provided to Oakwood by a temporary staffing agency, the N&W Agency. The NLRB criticized *Sturgis* for creating conflicts between (a) employers with varying obligations to different groups of employees, including situations where one or more employers may have no obligation to bargain with the union; and (b) employers and employees where various employees look to different entities for their terms and conditions of employment.

Oakwood Care Center confers an important right on a primary employer that uses a combined workforce of its own solely controlled employees and temporary personnel from staffing agencies: the right to avoid a bargaining unit that is larger than necessary, especially where such a unit will create problems for the employer in terms of coordinating the rights of employees jointly employed with one or more other entities. Employers can and should avoid such units, for all the reasons stated by the NLRB in *Oakwood Care Center*.

NLRB Confirms That Non-Union-Represented Employees Have No Right To Witness During Employer Interviews

In *Wal-Mart Stores, Inc.*, 343 NLRB No. 127 (Dec. 16, 2004), the NLRB confirmed that employers need not permit non-union-represented employees to have a co-worker or witness present during employer interviews, even though the employee reasonably believes the meeting might result in disciplinary action. In 2001, the NLRB had reversed this longstanding rule in its *Epilepsy Foundation* decision, finding that non-represented employees should have the same rights in such investigative hearings as union-represented employees. Union employees were found to have the right to have a union representative present at such meetings in the NLRB's 1970s *Weingarten* decision, giving rise to the term "Weingarten rights." In 2004, following turnover in membership based on the change in presidential administrations, the NLRB returned to the traditional rule and confirmed its stance in the *Wal-Mart* decision.

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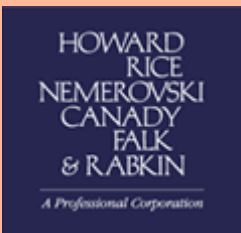
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