

There are No Calories in Eye Candy: Appellate Division Approves BorgataBabes' Personal Appearance Standards Based on Weight and Appearance but Reverses Dismissal of Hostile Work Environment Claims

by Andrew M. Moskowitz

"They're beautiful. They're charming. And they're bringing drinks....Part fashion model, part beverage server, part charming host and hostess. All impossibly lovely....The memory of their warm, inviting, upbeat personalities will remain with you long after the vision has faded from your dreams. ARE YOU A BABE?"

—an excerpt from the Borgata's recruiting brochure for the BorgataBabes

In *Schiavo v. Marina District Development Co., LLC, d/b/a Borgata Casino Hotel & Spa*,¹ the Appellate Division found that a casino's adoption of "personal appearance standards" for a category of its employees called BorgataBabes, and its requirement that male and female "Babes" wear different "costumes," did not violate the New Jersey Law Against Discrimination (LAD). However, the court reversed the lower court's dismissal of the plaintiffs' hostile work environment claim. Specifically, the Appellate Division found that factual issues existed as to whether, in the course of enforcing the personal appearance standards, the employer had targeted gender-specific characteristics such as pregnancy or gender-related medical conditions.

Factual Background

The Appellate Division took pains to note that, in many respects, the fact pattern presented by the *Schiavo* case was *sui generis*. To that end, the court noted that the Borgata Casino Hotel & Spa was Atlantic City's first "Las Vegas-style resort," and created the BorgataBabes in seeking to differentiate itself from other Atlantic City casinos. All 21 plaintiffs were present or former female BorgataBabes.²

The BorgataBabe position was described as "[p]art fashion model, part beverage server, part charming host and hostess." More than 4,000 male and female

individuals applied for the approximately 200 positions. The final candidates underwent two "rigorous" interviews and a 20-minute audition "in costume." Those individuals chosen for the final round of interviews were informed that "[p]ersonal appearance in costume" was one evaluative criteria....³

Borgata adopted "personal appearance standards" (known as the PAS), which required both male and female Babes to be physically fit, with "their weight proportionate to height, and [to] display a clean, healthy smile." The PAS required women "to have a natural hourglass shape" and men to have "a natural 'V' shape with broad shoulders and a slim waist." In Feb. 2005, the Borgata amended the PAS to provide that, in the absence of a medical reason, no BorgataBabe could increase his or her baseline weight, as established when hired, by more than seven percent. According to the Borgata, it "selected the 7% standard because it reasonably approximated a change of one clothing size and because it was consistent with the scientific definition of a clinically significant weight gain."⁴

It was undisputed that, between Feb. 2005 and Dec. 2010, "686 female and 46 male associates were subject to the PAS, of which 25 women and no men were suspended for failure to comply with the weight standard." Of the 21 plaintiffs, nine were suspended for allegedly exceeding the seven percent weight gain limit.⁵

Legal Claims

The plaintiffs alleged that the Borgata had subjected them to unlawful gender stereotyping, disparate treatment and disparate impact, and sexual harassment in violation of the LAD. The lower court granted the defendant's motion for summary judgment dismissing the plaintiffs' complaint. The Appellate Division reversed the lower court's dismissal of the sexual harassment claims but otherwise affirmed the lower court's holding.⁶

Claim that the PAS or Differentiated Costumes Were Facially Discriminatory

The Appellate Division panel noted that the LAD specifically permits "an employer to require employees to adhere to reasonable workplace appearance, grooming and dress standards..."⁷ The panel noted further that, as established by prior precedent under Title VII, "[w]hen 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, and by extension, the LAD."⁸ The court cited to a number of federal and out-of-state cases in which dress codes were upheld "as long as they, like other work rules, [we]re enforced evenhandedly between men and women, even though the specific requirements may differ."⁹ Thus, for example, a court held that a casino that prohibited men but required women to wear makeup did not engage in discriminatory treatment in violation of Title VII.¹⁰ Similarly, in another case, an airline's use of height and weight standards was deemed permissible because "there [was] no evidence in the record that [the airline] intended to deprive one sex of equal opportunity or treatment, or that the weight requirements were somehow applied in a discriminatory manner."¹¹ In contrast, in another case involving flight attendants, *Frank v. United Airlines, Inc.*, the court deemed such standards to be discriminatory because the plaintiffs demonstrated that the airline's weight requirement imposed different standards on men and women.¹²

In *Schiavo*, the court noted that, unlike in the *Frank* case, the PAS did not set a designated weight limit or use different standards for the weight of men and women. Instead, the PAS accepted an employee's baseline weight, imposed the same seven percent "above baseline weight" increase for men and women, and recognized pregnancy as an exception to enforcement. Accordingly, the Appellate Division found that the PAS was not facially discriminatory.¹³

With regard to the use of "differentiated costumes for male and female BorgataBabes," the court held that, because both male and female employees were required to wear a costume as a condition of employment, this requirement was also not discriminatory. Although the court acknowledged that the female BorgataBabes' costume was "form fitting" and "skimpy," it emphasized the difference between a BorgataBabe and a regular employee.¹⁴ Unlike the real estate firm that required its lobby attendant "to wear a short, revealing outfit"¹⁵ or the airline which claimed that its "male business travelers" preferred attractive, female flight attendants,¹⁶ the Borgata had designated the BorgataBabes as performers who "appeared as the face of the casino outside the casino floor." BorgataBabes were afforded lower and more flexible hours than other Borgata employees, and they were provided "more beneficial earning opportunities and perquisites of employment not extended to defendant's other associates." The court, therefore, found that "[a]s a casino, defendant's entertainment business distinguishes this matter from other cases, as the costume may lend authenticity to the intended entertainment atmosphere."¹⁷

Disparate Impact

The Appellate Division devoted only two pages of its 56-page opinion to the disparate impact issue. Although the parties had stipulated that, over nearly a six-year period, 25 women but no men were suspended for failing to comply with the PAS's weight standard,¹⁸ the Appellate Division made no mention of that fact in its discussion of disparate impact (although the court noted that the evidence demonstrated that "few men were reweighed and none were disciplined").

The court found the plaintiffs could not demonstrate a disparate enforcement of the PAS. The court dismissed as insufficient the plaintiffs' claims that they had "observed men 'who gained significant amounts of weight without being subject to a weigh-in [or the] subsequent requirement to come into conformance with the PAS.'" The court also rejected as inadequate the plaintiffs' claims that men did not have to wear the Borgata costume but instead could purchase their own pants, as well as the plaintiffs' testimony that they were told that male BorgataBabes were not weighed. The court found that "[t]estimony relating what some men said or a plaintiff's observation of what she considered a significant weight gain by a male," or plaintiffs' claims that some male associates had "big bellies," was not

competent proof. Accordingly, the court affirmed the dismissal of the plaintiffs' claims for disparate impact.¹⁹

Gender Stereotyping

As it did in the case of the plaintiffs' disparate impact claim, the court gave the plaintiffs' gender stereotyping claim short shrift. The court found no evidence that any gender stereotypes were "accompanied by a burden on one sex over the other or [we]re otherwise used to interfere with employment opportunities of the discriminated group." For this reason, the court affirmed the dismissal of this claim.²⁰

Sexual Harassment/Hostile Work Environment Claim

The Appellate Division reversed the lower court's dismissal of the plaintiffs' hostile work environment claim. Specifically, the court found that there were material factual disputes regarding whether, in the course of enforcing the weight standard of the PAS, the defendant targeted a "gender specific characteristic such as pregnancy or a medical condition...."²¹ Many of the cited

examples involved harassment of the plaintiffs due to their pregnancy or upon their return from a maternity leave. The court found that, "but for the subjected plaintiffs' sex, they would not have been the object of the harassment."²² Accordingly, it reinstated the plaintiffs' claims for hostile work environment.

Conclusion

The *Schiavo* opinion should provide some comfort to employers that apply reasonable workplace appearance, grooming, and dress standards. Even where such policies have gender-based differences, they are permissible provided they do not have a disparate impact on one gender. However, the *Schiavo* case makes clear that employers who use such policies to target one gender due to gender-specific characteristics may face liability for creating a hostile work environment. ■

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Endnotes

1. 442 N.J. Super. 346 (App. Div. 2015).
2. *Id.* at 357.
3. *Id.* at 360.
4. *Id.* at 362.
5. *Id.* at 364.
6. *Id.* at 387-92.
7. N.J.S.A. 10:5-12(p).
8. *Schiavo*, 442 N.J. Super. at 379.
9. *Bellissimo v. Westinghouse Elec. Corp.*, 764 F.2d 175, 181 (3d Cir. 1985), *cert. denied*, 475 U.S. 1035 (1986).
10. *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1111 (9th Cir. 2006).
11. *Delta Air Lines v. N.Y. State Div. of Human Rights*, 229 A.D.2d 132, 134 (1st Dept. 1996), *aff'd*, 689 N.E. 2d 898 (1997).
12. *Frank v. United Airlines, Inc.*, 216 F.3d 845, 855 (9th Cir. 2000).
13. *Schiavo*, 442 N.J. Super. at 379-80.
14. *Id.* at 381.
15. *Equal Employment Opportunity Commission v. Sage Realty Corp.*, 507 F. Supp. 599, 602-04 (S.D.N.Y. 1981).
16. *Wilson v. S.W. Airlines Co.*, 517 F. Supp. 292, 302-03 (N.D. Tex. 1981).
17. *Schiavo*, 442 N.J. Super. at 382-83.
18. *Id.* at 363.
19. *Id.* at 383-85.
20. *Id.* at 386.
21. *Id.* at 387-88.
22. *Id.* at 388.