

Give Me \$5 Chips, a Jack and Coke—Hold the Cleavage: A Look at Employee Appearance Issues in the Gaming Industry

GREGORY J. KAMER and EDWIN A. KELLER JR.

INTRODUCTION

WITH THE CONTINUED CREATION of regional gaming locations, riverboat gambling, Indian gaming, and the formation of new international gaming ventures, competition among gaming establishments is fiercer than ever. There is constant pressure to find that certain niche, image, or theme that will set a gaming establishment apart from the others. Take a close look around Las Vegas, for example, and count the number of new risqué nightclubs, tantalizing themed bars, and topless showgirl productions, all just a short distance from the casino floor.

You also may have noticed efforts by managers to enhance the image of their respective casinos with scantily clad “Barbie doll” cocktail servers, beefcake bartenders, and smartly dressed dealers with sex appeal and gregarious personalities. These changes typically involve personnel policies, as well as hiring and retention decisions, based on employees’ personal appearance, dress, and grooming.

Unfortunately, taken to the extreme, these types of appearance based policies and employment decisions can subject employers to liability under federal, state, and local employ-

ment laws that protect employees from discrimination premised on race, sex, color, national origin, age, disability, religion, and in some instances, actual or perceived sexual orientation (“protected classes”).¹ It is not enough that casino management believe their customers want or prefer employees to look a certain way. Indeed, the courts have routinely held that employers cannot justify employment discrimination on the basis of actual or perceived customer preference.²

This article seeks to highlight some of the potential legal minefields gaming establishments face when working to create a particular image or theme for their casino and surrounding services.

“RUN OF THE MILL” DRESS CODES, GROOMING POLICIES, AND HYGIENE STANDARDS

As a general rule, employers can lawfully issue and enforce personal appearance standards that regulate employees’ dress, grooming habits, and hygiene while at work. Indeed,

Mr. Kamer is the founding partner, and Mr. Keller is a partner, at Kamer Zucker & Abbott in Las Vegas, Nevada. The firm exclusively represents employers in labor and employment law matters. Mr. Kamer and Mr. Keller would like to thank Andrew Hagopian, a summer associate and second year law student at Georgetown University Law Center, for his diligent research and drafting assistance.

¹ These laws include Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (Title VII); the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12111-17; the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621-34; the state counterparts to these federal laws; and state and local laws that offer additional protection to employees.

² See, e.g., *Gerdom v. Continental Airlines*, 692 F.2d 602, 609 (9th Cir. 1982); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 387 (5th Cir. 1971).

many courts recognize that the appearance of a company's employees may contribute greatly to the company's image and success such that reasonable dress and grooming requirements are a proper management prerogative.³ Thus, the key to avoiding legal liability for unlawful employee appearance standards is to have an appreciation for what is, and what is not, reasonable, particularly for employers in the gaming industry that are sometimes willing to push the issue of employee appearance standards to the outer limits.

Because workplace appearance standards are a hot-button issue for employees, it should come as no surprise that a fair amount of case law exists on the subject. From these cases, we know that appearance standards regulating employees' mutable or changeable characteristics—such as mode of dress; hair length, style and color; facial hair; fingernail length; the use of nail polish and cosmetics; tattoos and the use of earrings, piercings, and other jewelry—are generally lawful. However, appearance policies cannot seek to regulate the unchangeable characteristics of an employee's sex, race, color, or national origin. For example, a practice of allowing only "light-skinned" females to work as cocktail servers in the high roller portion of the casino would unlawfully regulate employment opportunities based on sex, race, and color.

Appearance standards can be gender specific if the standards are: (1) based on social norms; (2) equally enforced as to both sexes; and (3) do not result in an undue burden being placed on one sex.⁴ For example, it is generally permissible for an employer to require male employees to wear dress shirts and ties and female employees to wear skirts or dresses. However, it is unlawful to require female employees in a particular job classification to wear a uniform, while male employees in the same classification only have to wear normal business attire.⁵

Even today, the most innocuous of appearance policies are under attack. Take, for instance, a 2001 lawsuit filed by Darlene Jespersen, a former bartender at Harrah's Reno, accusing Harrah's of sex discrimination after the company terminated her for refusing to comply with a company-wide appearance policy for casino employees called the "Personal Best" program. Pursuant to the program, men are purportedly required to keep their hair cut

above the collar, their fingernails trimmed and their faces free from makeup, whereas women in the beverage department are required to wear makeup and have their hair teased, curled, or styled. After the District Court for the District of Nevada granted summary judgment to Harrah's, finding that the allegations had no merit, Ms. Jespersen filed an appeal to the United States Court of Appeals for the Ninth Circuit in June 2003, contending that Harrah's appearance policy is a form of unlawful sexual stereotyping.⁶ The court has not, as of yet, issued a ruling.⁷

Besides sex and race issues, appearance policies can violate employees' sincerely held religious beliefs. For example, there are religions that forbid women from wearing pants, prohibit men from cutting their facial hair, require the wearing of certain garments and the use of certain types of body art and jewelry.⁸ Employers sometimes forget that Title VII of the Civil Rights Act of 1964 (Title VII) and its state law counterparts also require employers to rea-

³ See *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1215 (8th Cir. 1985).

⁴ See *Fagan v. Nat'l Cash Register Co.*, 481 F.2d 1115, 1117 n.3 (D.C. Cir. 1973) (holding that "reasonable regulations prescribing good grooming standards are not at all uncommon in the business world, indeed, taking account of basic differences in male and female physiques and common differences in customary dress of male and female employees, it is not usually thought that there is unlawful discrimination").

⁵ See *Carroll v. Talman Fed. Sav. & Loan Ass'n of Chicago*, 604 F.2d 1028, 1032 (7th Cir. 1979).

⁶ See Liz Benton, *Fired Harrah's Bartender Presses Case*, LAS VEGAS SUN, June 17, 2003, at C12; see also *Jespersen v. Harrah's Operating Co., Inc.*, No. CV-N-01-0401-ECR (VPC) (D. Nev.) (Order of Oct. 22, 2002).

⁷ See *Jespersen v. Harrah's Operating Co., Inc.*, No. 03-15045 (9th Cir. 2003).

⁸ See, e.g., *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382 (9th Cir. 1995); *Alsaras v. Dominick's Finer Foods, Inc.*, No. 99C 4226, 2001 WL 740515 at *1 (N.D. Ill. June 28, 2001); *Carter v. Bruce Oakley, Inc.*, 849 F. Supp. 673, 675 (E.D. Ark. 1993).

⁹ A bona fide occupational qualification, or "BFOQ," is a defense to a claim of discriminatory impact on a protected class of individuals based on a facially discriminatory policy that results in sex, religion or national origin discrimination. The defense is not available to claims of discrimination based on race or color. The United States Supreme Court characterizes a BFOQ as an "extremely narrow" exception that permits discrimination only in special situations limited to certain instances where it is reasonably necessary to the normal operation of the particular business. *Auto Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991); see 29 C.F.R. § 1604.2.

sonably accommodate the religious practices of employees, unless doing so would pose an undue hardship or the policy in question amounts to a business necessity or a bona fide occupational qualification (BFOQ).⁹ A “religious practice” is broadly defined as any “moral or ethical beliefs as to what is right and wrong, which are sincerely held with the strength of traditional religious views.”¹⁰ Also, the fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious one.¹¹ While an employer’s showing of undue hardship has been defined as anything more than a *de minimis* or administrative cost,¹² the EEOC will take into account the size of the employer and the number of individuals who will need the particular accommodation when determining whether the cost will be more than *de minimis*.¹³ Often times what employers believe to be more than a *de minimis* cost or impact on operations does not comport with the EEOC’s or court’s interpretation.¹⁴

A closer examination of some of the more common appearance policy issues underscores the need for a careful approach to employee appearance policies.

Clean-shaven policies

In seeking to promote a neat and clean company appearance, employers frequently require employees to be clean-shaven, thus precluding the wearing of mustaches and beards. Such policies are often attacked using three theories: sex, race, and religious discrimination. In the recent past, the EEOC has pursued these types of cases with particular zeal. While it is well-settled that employer prohibitions on facial hair do not constitute sex-based disparate treatment, so long as dress and grooming policies are enforced evenhandedly for both sexes,¹⁵ the more problematic questions concern race and religious issues.

As many as 60% of African-American men have a condition called pseudofolliculitis barbae, or “PFB,” which is characterized by severely painful shaving bumps. The bumps form when facial hairs curl back into the skin, causing inflammation and keloidal scarring.¹⁶ The condition is easily cured by growing a

beard, with the bumps disappearing in about four weeks.¹⁷ Because PFB is predominantly exhibited by African-American males, employers’ clean-shaven policies may have a discriminatorily adverse impact on African Americans. Such a claim was pursued successfully on appeal by the plaintiff in *Bradley v. Pizzaco of Nebraska, Inc.*¹⁸ Although the trial court held that the defendant’s no-beard policy did not adversely affect African-Americans, the United States Court of Appeals for the Eighth Circuit reversed the trial court’s ruling, finding that “PFB almost exclusively affects black males”¹⁹ and the employer’s no-beard policy “effectively operates to exclude these black males from employment” with the defendant.²⁰ The case was sent back to the trial court for a determination as to whether the adverse impact could be justified by a business necessity defense.²¹

A contrary result was reached in *Brown v. D.C. Transit Systems, Inc.*,²² in which several African American bus drivers filed suit after being terminated for failing to comply with the bus company’s facial hair regulations that pro-

¹⁰ 29 C.F.R. § 1605.1.

¹¹ See *id.*

¹² See *Trans World Airlines v. Hardison*, 432 U.S. 63, 84 (1977).

¹³ See 29 C.F.R. § 1605.2.

¹⁴ See *Opuka-Boating v. California*, 95 F.3d 1461, 1470-71 (9th Cir. 1996) (holding that preplanned scheduling arrangements or voluntary trading of shifts, or a combination of the two to permit an employee from not working on the Sabbath is not an undue hardship and the employer should have investigated these options).

¹⁵ See EEOC COMPLIANCE MANUAL § 619.3 (BNA) (2002).

¹⁶ See Pseudofolliculitis Barbae, available at (http://www.aocd.org/skin/dermatologic_diseases/pseudofolliculitis.html), accessed June 19, 2003.

¹⁷ See *id.*

¹⁸ *Bradley v. Pizzaco of Neb., Inc.*, 939 F.2d 610 (8th Cir. 1991).

¹⁹ *Id.* at 612.

²⁰ *Id.* at 613.

²¹ See *id.* at 614. A “business necessity” defense is available to a claim that a facially neutral policy has a discriminatory adverse impact on a protected class of individuals. 42 U.S.C. § 2000e-2(k)(1)(A)(i); *Harris v. Pan Am. World Airways*, 549 F.2d 670, 674 (9th Cir. 1980). What will constitute a “business necessity” is still a hotly debated topic, but the term implies the existence of a significant need linked to an employer’s legitimate business interests. See *Contreras v. City of Los Angeles*, 656 F.2d 1267, 1280 (9th Cir. 1982).

²² *Brown v. D.C. Transit Sys., Inc.*, 523 F.2d 725 (D.C. Cir. 1975).

hibited beards, sideburns and mustaches. The D.C. Circuit Court found that such regulations were not prohibited by Title VII or any other then existing federal or District of Columbia statute.²³ In what may foreshadow things to come in other parts of the United States, the District of Columbia has since amended its employment discrimination laws to prohibit discrimination based on personal appearance, which it has defined as the “outward appearance of any person, irrespective of sex, with regard to bodily condition or characteristics, manner or style of dress, and manner or style of personal grooming, including, but not limited to, hair style and beards.”²⁴ The definition expressly excludes any “requirement of cleanliness, uniforms, or prescribed standards, when uniformly applied for admittance to a public accommodation, or when uniformly applied to a class of employees for a reasonable business purpose; or when such bodily conditions or characteristics, style or manner of dress or personal grooming presents a danger to the health, welfare or safety of any individual.”²⁵

Clean-shaven policies have also been attacked under a Title VII religious accommodation theory. As discussed earlier, when an employee’s religious beliefs require him to wear a beard, the employer must allow an exception to its no-beard policy, or otherwise accommodate the employee’s religious beliefs, unless doing so would pose more than a *de minimis* cost or amount to a business necessity or a BFOQ.²⁶ Thus, in *Carter v. Bruce Oakley, Inc.*,²⁷ a former employee brought a Title VII action alleging that he was illegally discharged for refusing to cut the beard he wore for religious reasons. The district court held that the employer did not accommodate the employee’s religious beliefs and failed to show an undue hardship or business necessity.²⁸

For prudent employers seeking to avoid tangling with the EEOC or irate former employees in the court system, the guidance that can be extracted from the various clean-shaven policy cases is this: (1) insure that all grooming and dress requirements are enforced evenhandedly for men and women; (2) allow exceptions to clean-shaven policies for African-Americans and other individuals due to PFB if the rule is not linked to a business necessity or BFOQ; and (3) accommodate employees whose religions

require them to wear beards, unless doing so would present more than a *de minimis* cost or the rule can be linked to a business necessity or BFOQ defense.

Tattoo restrictions

Employers can generally require that employees be free of visible tattoos or cover their tattoos while at work. Thus, in *Riggs v. City of Fort Worth*,²⁹ the District Court for the Northern District of Texas found that a police department could lawfully require that an officer with tattoos all over his body wear long sleeves and long pants while on duty.³⁰ However, there could be instances where the wearing or displaying of a tattoo could be linked to a sincerely held religious belief.

It appears that only one reported case has squarely addressed the relationship between Title VII and tattoos. In *Swartzentruber v. Gunit Corp.*,³¹ the plaintiff, a self-professed member of the American Knights of the Ku Klux Klan, filed a complaint alleging that his employer violated Title VII by failing to accommodate his religious beliefs. The employer required the plaintiff to cover a tattoo on his forearm that depicted a “hooded figure standing in front of a burning cross.”³² The plaintiff attempted to connect the controversial tattoo to a religious belief by claiming that the “Firey Cross tattooed on his arm is one of [his] church’s seven sacred symbols.”³³

The court rejected the argument that covering the tattoo conflicted with the plaintiff’s religious

²³ See *id.* at 729.

²⁴ D.C. CODE ANN. §§ 2-1401.01, 2-1401.02 (2003).

²⁵ *Id.* § 2-1401.02.

²⁶ See notes 9 and 21 for the definitions of business necessity and BFOQ.

²⁷ *Carter v. Bruce Oakley, Inc.*, 849 F. Supp. 673, 675–76 (E.D. Ark. 1993).

²⁸ See *id.*; but see *E.E.O.C. v. Sambo’s of Georgia, Inc.*, 530 F. Supp. 86, 91 (N.D. Ga. 1981) (holding that a restaurant’s enforcement of a “clean shaven” policy on a member of the Sikh religion was not unlawful discrimination).

²⁹ *Riggs v. City of Fort Worth*, 229 F. Supp. 2d 572, 582–83 (N.D. Tex. 2002).

³⁰ See *id.*

³¹ *Swartzentruber v. Gunit Corp.*, 99 F. Supp. 2d 976 (N.D. Ind. 2000).

³² *Id.* at 978.

³³ *Id.* at 979.

belief because he failed to present any evidence proving this element of the case. The court went on to conclude that, even if the plaintiff had proven that displaying the tattoo was part of a religious practice, the plaintiff would still have lost because allowing the controversial tattoo to be exposed would have resulted in an undue hardship, as “some would certainly view a burning cross as a precursor to physical violence and abuse against African-Americans and . . . an unmistakable symbol of hatred and violence based on virulent notions of racial supremacy.”³⁴

Although the defendant won this case, it is likely that a plaintiff with a less controversial tattoo and a sincere belief that the tattoo had to be displayed for religious reasons could have been successful, absent the existence of a business necessity, a BFOQ or more than a *de minimis* cost.

“Unconventional hairstyles,” dreadlocks, and cornrows

Employers typically are able to enforce policies prohibiting so-called unconventional hairstyles, including the wearing of dreadlocks, cornrows, and other forms of beaded and braided hairstyles. While the EEOC maintains that such hair styles are cultural symbols, so as to make their suppression an automatic badge of racial prejudice,³⁵ the courts that have addressed this particular appearance trait almost uniformly hold that all-braided hair styles are an easily changed characteristic and, even if socially or culturally associated with a particular race or nationality, are not an impermissible basis for distinctions in the application of appearance policies by an employer.³⁶

For example, in *Eatman v. United Parcel Service*,³⁷ the plaintiff argued that the UPS policy prohibiting dreadlocks constituted disparate treatment because it “single[s] out African-Americans on the basis of a characteristic—locked hair—that is unique to African-Americans;”³⁸ and resulted in an adverse impact on African-Americans because seventeen out of the eighteen UPS employees required to wear hats over their unconventional hairstyles were black.³⁹ The plaintiff also argued that UPS failed to accommodate his religious practice because the only accommodation offered by UPS

was a wool hat that damaged the plaintiff’s hair and was stifling in hot weather.⁴⁰

The court rejected all three arguments. First, there was no disparate treatment because UPS did not differentiate between black employees with locked hair and other employees with locked hair.⁴¹ Second, there was no adverse impact because the plaintiff failed to produce statistics showing the percentage of black employees who had to wear a hat compared to the number of non-black employee who had to do so.⁴² Third, there was no need to accommodate the plaintiff’s wearing of dreadlocks because he admitted that he was not engaging in a religious practice.⁴³

While employers may prevail on challenges to their hairstyle policies in the courts, the potential for negative publicity over the enforcement of such policies on what is viewed as an expression of African American culture and pride may mitigate against using such rules. In 2000, Airport Slots, Inc., a company providing slot machine services at McCarran Airport in Las Vegas, was the subject of press coverage and appeals by the NAACP and ACLU to reverse disciplinary action it took against a female, African-American employee who refused to stop wearing her hair in cornrows in violation of the company’s appearance standards.⁴⁴

CUTTING-EDGE APPEARANCE ISSUES IN THE GAMING INDUSTRY

In trying to obtain and maintain a public contact staff with “the look” that will set a gaming

³⁴ *Id.* (internal quotation marks and citations omitted).

³⁵ See EEOC Decision No. 71-2444, CCH EEOC Decisions (1973) ¶ 6240.

³⁶ See *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 232 (S.D.N.Y. 1981) (citing *Garcia v. Gloor*, 618 F.2d 264, 269 (5th Cir. 1980)); *Carswell v. Peachford Hosp.*, No. C80-222A, 1981 WL 224, at *2 (N.D. Ga. May 26, 1981).

³⁷ *Eatman v. United Parcel Serv.*, 194 F. Supp. 2d 256 (S.D.N.Y. 2002); see also *McManus v. MCI Communications Corp.*, 748 A.2d 949 (D.C. 2000).

³⁸ *Eatman*, 194 F. Supp. 2d at 262.

³⁹ See *id.* at 266.

⁴⁰ See *id.* at 268.

⁴¹ See *id.* at 262.

⁴² See *id.* at 267.

⁴³ See *id.* at 268.

⁴⁴ See *Glen Puit, Suspension Raises Ire of Civil Rights Groups*, LAS VEGAS R.J., Feb. 2, 2000, at 1A; *Glen Puit, Woman with Braids Loses Job*, LAS VEGAS R.J., Feb. 26, 2000, at 1B.

establishment apart from all other competitors, casino managers are engaging in high-risk employment actions, many not even appreciating the possible legal ramifications. So, before setting out to create a cocktail server department full of scantily dressed, young, thin Barbie doll cocktail servers, or beefcake bartenders, learning and planning for the possible legal ramifications is essential.

BFOQ's and customer preference for a particular sex or age

As alluded to earlier, facially discriminatory policies can only be defended if the discriminatory requirements rise to the level of bona fide occupational qualifications (BFOQ). In that regard, federal courts have continually held that customers' preferences for one sex of employees over the other because of stereotypical expectations or cultural biases typically do not justify discrimination based on sex or establish a BFOQ.⁴⁵ Thus, in *Fernandez v. Wynn Oil Co.*, the Court of Appeals for the Ninth Circuit Court rejected an employer's claim that maleness was a bona fide occupational qualification for doing business in South America given the region's cultural biases.⁴⁶ In *Gerdom v. Continental Airlines, Inc.*,⁴⁷ the court also rejected the possibility of customer preference for female flight attendants as being a valid BFOQ defense. Additionally, because employees over forty are a protected class under the ADEA, using age standards—written or otherwise—to determine when a cocktail server or other casino employee is over-the-hill and due for replacement by a younger, more appealing employee can result in legal liability for age discrimination, unless the employer can show that the position requires a younger employee's skills (or lack of advanced age) as a bona fide occupational qualification. This is particularly problematic as only the rare employer under exceptional circumstances prevails in proving a valid BFOQ defense.⁴⁸

The BFOQ defense provides that it is not an unlawful employment practice for an employer to hire or employ an individual on the basis of religion, sex, or national origin "in those certain instances where religion, sex or national origin is a bona fide occupational qualification

reasonably necessary to the normal operation of that particular business or enterprise."⁴⁹ Race and color can never be a BFOQ.⁵⁰ However, the BFOQ defense is available in ADEA age discrimination cases.⁵¹ Notwithstanding the broad language used in the definition of a BFOQ, the United States Supreme Court characterizes the defense as an "extremely narrow" exception that permits sex, [religion, national origin or religious] discrimination only in "special situations" limited "to 'certain instances' where [it] is 'reasonably necessary' to the 'normal operation' of the 'particular business.'"⁵²

A BFOQ defense is difficult to establish because an employer must prove that: (1) a direct relationship exists between an employee's protected class and an employee's ability to perform the duties of the job, such that members of the excluded class cannot perform the duties of the job; and (2) the required qualification goes to the "essence" of the business operation. The first element requires a focus upon the job-related skills and aptitudes necessary for the position in question. In the context of cocktail servers, for example, an employer must essentially demonstrate that a server's sex and physical appearance are necessary for them to perform their work. Assuming that cocktail servers must be able to serve drinks, carry heavy trays, walk long distances, and be friendly and courteous, their

⁴⁵ See *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276 (9th Cir. 1981) (explaining that "stereotyped customer preference [does not] justify a sexually discriminatory practice").

⁴⁶ *Wynn Oil*, 653 F.2d at 1277.

⁴⁷ *Gerdom v. Continental Airlines, Inc.*, 692 F.2d 602, 609 (9th Cir. 1982).

⁴⁸ See *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 235-236 (5th Cir. 1976) (holding that employer must establish that: (1) age qualifications are reasonably necessary to essence of business, and (2) employer had reasonable cause to believe that all or substantially all persons over the age qualifications would be unable to perform safely and efficiently the duties of the job in question, or that individual testing of employees is impractical or impossible).

⁴⁹ 42 U.S.C. § 2000e-2.

⁵⁰ See *Morton v. United Parcel Serv., Inc.*, 272 F.3d 1249, 1260 fn. 11 (9th Cir. 2001).

⁵¹ See 29 U.S.C. § 623(f)(1).

⁵² *Auto Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991).

sex or age is not likely to be considered necessary to their ability to acceptably perform their job. The second element of the BFOQ exception focuses upon the employer's business. While customer preference does not support a BFOQ defense, if an employer can establish that the absence of sex, appearance, or age requirements would undermine the employer's ability to perform its *primary* business function or *central mission* of the business, an employer may be able to mount a successful BFOQ defense.⁵³

Such a successful BFOQ defense was asserted by the Playboy Club in New York. Playboy limited its Playboy Bunnies to females that had the "Bunny image." Because vicarious sexual entertainment was the primary service of the Playboy Club, female sexuality was found by the New York Human Rights Appeals Board to be reasonably necessary to perform the duties of the job.⁵⁴

Hooters attempted to utilize such a BFOQ defense when the EEOC targeted it for litigation over only hiring women to be "Hooter girl" waitresses. Hooters maintained that its principle service was vicarious sexual recreation and that female sexuality was a BFOQ. The EEOC disagreed, concluding that Hooters principal function was serving food. In the end, Hooters entered into a \$3.75 million settlement that allowed it to continue to hire only women waitresses, but forced Hooters to create new gender-neutral positions.⁵⁵

Recently, the Imperial Palace tried to rely upon the Playboy Bunny BFOQ theory to support its argument that its "geisha girl" cocktail server costume was essential to its business and its ability to entice customers, such that the Imperial Palace should be able to decline to allow pregnant servers to work once they could no longer wear the uniform. However, the argument was unsuccessful at the summary judgment stage, and the federal district court ruled that the parties should proceed to trial. The parties settled prior to the completion of a jury trial.⁵⁶

Based on the Playboy decision, if an employer can establish that vicarious sexual entertainment is a primary service provided to customers, *i.e.* "the essence" or central mission of the company, an employee's female sex and

sexuality could be a BFOQ. However, it will be extremely hard for most employers to argue that their primary service is to provide vicarious sexual entertainment. Take, for example, Southwest Airlines' experience with this type of litigation. In *Wilson v. Southwest Airlines Co.*,⁵⁷ male applicants for the jobs of flight attendant and ticket agent challenged Southwest's refusal to hire them. Southwest's defense was that female sex appeal was a BFOQ for the jobs of flight attendant and ticket agent because it had developed a marketing plan to use only attractive female flight attendants and ticketing agents and to base its planes out of Dallas' Love Field. Southwest maintained that its decision to hire only females in these positions and to require them to wear hot pants and high boots was an integral part of its sexy, feminine image.⁵⁸

The court rejected Southwest's argument, finding that the sex-linked job functions were only tangential to the essence of the jobs of flight attendant and ticket agent in particular and of the airline business in general. The court held that, because Southwest was not a business where vicarious sexual entertainment was the primary service provided to customers, the ability of the airline to perform its main business function—the transportation of passengers—would not be at risk if males were hired. Thus, the court refused to define the essence of Southwest's business as including the need for female employee sex appeal.⁵⁹

The Rio's recent decision to replace its cocktail waitresses with "bevertainers," employees

⁵³ See *id.* at 201-02.

⁵⁴ *St. Cross v. Playboy Club of New York*, Appeal No. 773, Case No. CFS 22618-70 (N.Y. Human Rights App. Bd. 1971); *Weber v. Playboy Club of New York*, Appeal No. 774, Case No. CFS 22619-70 (N.Y. Human Rights App. Bd. 1971); see BARBARA LINDEMANN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 409 (3^d ed. 1996).

⁵⁵ Joshua Burnstein, *Testing the Strength of Title VII Sexual Harassment: Can It Support A Hostile Work Environment Claim By A Nude Dancer?*, 24 N.Y.U. REV. L. & SOC. CHANGE 271, 291-296, n.122 (1998).

⁵⁶ See *EEOC v. Imperial Palace*, District Court for the District of Nevada, Case No. CV-S-97-01361 DWH (RLH).

⁵⁷ *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292 (N.D. Tex. 1981).

⁵⁸ *Id.* at 295.

⁵⁹ See *id.* at 302-304.

that incorporate singing and dancing performances in the casino with the delivery of drinks, is an interesting development.⁶⁰ In addition to the change being a very clever entertainment experience, one could speculate that the Rio is also trying to obtain a younger and sexier cocktail server staff by creating a job position closely linked to its carnival gaming theme. It could be argued that Rio's carnival gaming theme requires a certain "look" for a bevertainer, which could be protected as a BFOQ. Certainly, the Rio's decision to change cocktail servers into performers is not problematic. Rather, it is any attempt to utilize sex, age and physical appearance requirements that could be subject to successful legal challenges. In defense of any such requirements, the Rio could try to assert that its carnival gaming theme is the essence of the Rio's business such that, for the purposes of authenticity and genuineness, its bevertainers' sex, age and physical appearance are BFOQs.

Unfortunately, such a BFOQ defense by a gaming establishment has never been tested in the courts. Only time and future litigation will tell if a gaming establishment can successfully tie employee sex, age or physical appearance requirements to a gaming establishment theme that is found to be the essence of the company's business. Given the stringent standards for establishing a BFOQ, such a legal theory is fraught with substantial uncertainty.

Conformance with sexual stereotypes

When hiring or retaining only Barbie doll servers or those beefcake bartenders, managers are also arguably engaging in unlawful sexual stereotyping. Preconceived notions of what a sexy woman should look and act like or what qualities an attractive and virile man should possess involve the use of stereotypes that the Supreme Court has indicated violate Title VII.

In *Price Waterhouse v. Hopkins*,⁶¹ the Supreme Court held that a woman who was denied a partnership position in an accounting firm because she did not match a sex stereotype had an actionable claim under Title VII. In that case, Ann Hopkins, the plaintiff, was described by various partners as "macho," in need of "a

course in charm school," and someone who was "a tough-talking somewhat masculine hard-nosed manager." Hopkins was told that she could improve her chances at making partner if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." Writing for the Court, Justice Brennan held that, in the specific context of sex stereotyping, "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."⁶² More importantly, Justice Brennan wrote that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'"⁶³

Based on the Supreme Court's *Price Waterhouse* decision, the Court of Appeals for Ninth Circuit, in *Nichols v. Azteca Restaurant Enterprises, Inc.*,⁶⁴ recently held that a male restaurant employee could maintain a lawsuit for being subjected to sexual harassment in the form of teasing by coworkers and a supervisor based on his perceived effeminacy, given that Title VII has been construed to protect discrimination related to an employee's failure or inability to conform to a sexual stereotype. The court firmly held that *Price Waterhouse* established a rule barring discrimination on the basis of sex stereotypes, while at the same time clarifying that such a rule does not imply that any violation of Title VII is created by reasonable regulations that require male and female employees to conform to different dress and grooming

⁶⁰ Rod Smith, *Rio to Replace Cocktail Servers*, LAS VEGAS R. J., Feb. 20, 2003, at 1A.

⁶¹ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

⁶² *Id.* at 235, 250; *see id.* at 272-73 (O'Connor, J., concurring in the judgment) (characterizing the failure to conform to sex stereotypes as criterion of discrimination).

⁶³ *Id.* at 251.

⁶⁴ *Nichols v. Azteca Restaurant Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001).

standards.⁶⁵ In so ruling, the Ninth Circuit expressly abrogated a 1979 decision, which held that discrimination is permissible when based on a stereotype that a man should have a virile rather than effeminate appearance.⁶⁶

The Ninth Circuit's application of the Supreme Court's *Price Waterhouse* decision to bar the use of sexual stereotypes is not an isolated one. Numerous other courts now find that Title VII claims premised upon sexual stereotyping are viable.⁶⁷ Thus, before adopting policies geared toward creating the hottest group of cocktail servers or the like, serious thought should be given to this quickly expanding Title VII discrimination theory.

Revealing uniforms

Some clever employers, seeking to avoid litigating the merits of specific employee appearance policies or hiring decisions geared toward obtaining employees with "the look," merely inform applicants of their scanty uniform requirements, playing the odds that those actually willing to wear such salacious uniforms will be those with the desired body type. While some legal issues are avoided by merely having a skimpy uniform, at least in the short term before the employees no longer "compliment" the uniform, new legal issues arise. There is a small, but often cited, body of case law that recognizes that employers can be liable for sexual discrimination under Title VII when they require employees to wear uniforms that invite sexual harassment. In the seminal case, *EEOC v. Sage Realty Corp.*,⁶⁸ the employer, a realty company, required a lobby attendant to wear revealing uniforms while on the job. The attendant's job included security, safety, maintenance and information functions. She reported elevator problems, offered assistance and information to people entering the building, kept people from loitering, and replaced defective light bulbs. Throughout her tenure, she was asked to wear a different uniform each season, such as a horse riding outfit, a blue jean outfit, a tennis dress, a kilt and a jumper. In the spring of 1976, she was asked to wear a "Bicentennial outfit," which consisted of a poncho resembling the United States flag. The uniform was open at the sides and very short. When the

plaintiff raised her arms or moved, portions of her buttocks, thighs and body were exposed. While wearing the uniform, the plaintiff was subjected to repeated harassment such as sexual propositions and lewd comments and gestures.⁶⁹ The plaintiff refused to wear the uniform and was later discharged for this reason. The court held that the "requirement that [the plaintiff] wear the Bicentennial uniform, when the [defendant] knew that the wearing of this uniform on the job subjected her to sexual harassment, constituted sex discrimination . . ." ⁷⁰

Likewise, in *EEOC v. Newtown Inn Associates*,⁷¹ the EEOC filed suit on a theory of sexual discrimination because the employer required its fe-

⁶⁵ *Id.* at 875, n.7; see *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1069 (9th Cir. 2002) (Pregerson, J., concurring opinion) (stating that homosexual former male employee could maintain Title VII action based on his nonconformity with male sexual stereotype for same reasons as in *Nichols* that Title VII bars discrimination on the basis of sex stereotypes).

⁶⁶ See *DeSantis v. Pac. Tel. & Tel. Co., Inc.*, 608 F.2d 327 (9th Cir. 1979). The Ninth Circuit Court decision in *Azteca* also calls into question an earlier District of Nevada Court decision holding that hiring and transfer decisions based on sexual attractiveness are not actionable under Title VII. See *Alam v. Reno Hilton Corp.*, 819 F. Supp. 905, 913 (D. Nev. 1993).

⁶⁷ See *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 262-63 (3d Cir. 2001) (finding that "a plaintiff may be able to prove that same-sex harassment was discrimination because of sex by presenting evidence that the harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender," but not reaching the issue as it was not asserted at the trial court level); *Simonton v. Runyon*, 232 F.3d 33, 37-38 (2d Cir. 2000) (discussing sexual stereotype theory of Title VII liability, but not ruling on the issue as it was not adequately alleged below); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259-61 (1st Cir. 1999) (stating that "a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity" but denying relief because that theory was not raised at trial court level); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (denying summary judgment motion and holding that lesbian former line cook employee could present evidence sufficient for a jury to find that she was harassed and ultimately discharged because she did not conform to Executive Chef's stereotype of how a woman ought to behave).

⁶⁸ *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599 (S.D.N.Y. 1981).

⁶⁹ *Id.* at 604.

⁷⁰ *Id.* at 609.

⁷¹ *EEOC v. Newtown Inn Assoc.*, 647 F. Supp. 957, 958 (E.D. Va. 1986).

male cocktail servers wear provocative clothes that subjected them to harassment. Cocktail waitresses were required to participate in a marketing scheme called the “confetti concept” to project an air of sexual availability to customers through the use of provocative outfits. Cocktail waitresses were required to dress in revealing, thematic attire for events such as “Bikini Night,” “P.J. Night,” and “Whips and Chains Night.” As a consequence, the employees were subjected to unwelcome sexual proposals and both verbal and physical abuse of a sexual nature.⁷²

In a similar case, *Priest v. Rotary*,⁷³ a federal district court ruled that the plaintiff, a cocktail waitress, established a *prima facie* violation of Title VII by demonstrating that her employer removed her from her position because she refused to wear sexually suggestive clothing. As the employer failed to articulate any legitimate nondiscriminatory reason for the requirement, the court ruled in the waitress’ favor.⁷⁴

Based on this case law, sexy uniforms could cause big headaches for employers. If the decision to use such uniforms is made, employers need to have a well planned program for preventing, responding and remedying complaints of sexual harassment.

Weight limits

There is probably no personal appearance issue more emotionally charged than weight limits. While such limits generally do not violate Title VII if they are applied across the board to male and females in similar positions, so as not to unduly burden one sex, employers invariably seek to impose weight limits on their female employees or in all female job classifications, but fail to do so with male employees. These standards are closely linked to the issues of sexual stereotyping and employers’ images of how they want their female employees to look. In one of the most recent weight standard cases, *Frank v. United Airlines, Inc.*,⁷⁵ the court struck down United’s maximum weight policies because, although limits were placed on both males and females, the burden placed on females was greater than that placed on males.⁷⁶ Women were not allowed to exceed MetLife’s published standard weight for *medium*-frame females, while men were permitted to weigh as much as the pub-

lished standard weight for *large*-frame males.⁷⁷ This policy could only be justified if a BFOQ were established, but the court concluded that “United made no showing that having disproportionately thinner female than male flight attendants bears a relation to flight attendants’ ability to greet passengers, push carts, move luggage and, perhaps most important, provide physical assistance in emergencies.”

In the gaming context, when weight limits are placed on female cocktail servers, but not male bartenders or other public contact personnel in general, the EEOC or a court will be more likely to find that sex-based discrimination has occurred. The best advice for employers that want to implement weight requirements for employees is to apply reasonable weight standards to *all* public contact positions. However, such a requirement is not a panacea as employers will still be vulnerable to challenges if the weight standards are not enforced consistently or if unequal burdens are placed on males and females. There are also some limited state and local laws—such as those in New Jersey, Michigan, the California cities of Santa Cruz and San Francisco and the District of Columbia—that prohibit or restrict making employment decisions or policies based on weight.⁷⁸ Additionally, employment decisions based on weight can, in certain circumstances, lead to liability under the Americans

⁷² *Newtown Inn Assoc.*, 647 F. Supp. at 958; see *Marentette v. Michigan Host, Inc.*, 506 F. Supp. 909 (E.D. Mich. 1980) (recognizing viability of claim for sex discrimination based on provocative uniforms).

⁷³ *Priest v. Rotary*, 634 F. Supp. 571, 581 (N.D. Cal. 1986).

⁷⁴ *Id.*

⁷⁵ *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2000).

⁷⁶ *Id.* at 854.

⁷⁷ *Id.*

⁷⁸ See *Gimello v. Agency Rent-A-Car Sys., Inc.*, 594 A.2d 264, 273–78 (N.J. Super. Ct. App. Div. 1991) (holding that obese employee protected under the New Jersey Law Against Discrimination); N.J. Stat. Ann. §§ 10:5-1 to -42; Mich. Comp. Laws Ann. § 37.2202(1)(a) (West Supp. 2001); Santa Cruz, Cal., Mun. Code § 9.83.010 (1995); San Francisco, Cal., Compliance Guidelines to Prohibit Weight and Height Discrimination (July 26, 2001); D.C. Code Ann. § 2-1401.01 (2001); Elizabeth Kristen, *Addressing the Problems of Weight Discrimination in Employment*, 90 CAL. L. REV. 57, 101-08 (2002) (discussing Michigan and California state and local ordinances); D.C. Code Ann. §§ 2-1401.01, 2-1401.02 (2003).

With Disabilities Act ("ADA") and state disability laws.⁷⁹

High heels

As part of their employee appearance standards, some employers require female employees to wear high heels, asserting that the requirement is an acceptable dress code rule based on social norms and gender specific dress. However, such policies have been the subject of litigation under Title VII and the ADA. In the gaming context, high heel policies also have been the subject of public protests and political pressure by Nevada casino cocktail servers and activists such as the Nevada Empowered Women's Project, Alliance for Worker's Rights and Planned Parenthood.⁸⁰

The legal argument under Title VII is that disparate treatment occurs when women are forced to wear uncomfortable and purportedly harmful footwear, while men are free to wear less restrictive shoes. Claims under the ADA are made alleging high heel requirements impact foot, leg or back related disabilities and that an employer failed to reasonably accommodate the disability.

There are only a few known cases where these issues have been litigated. One case, *EEOC v. Great Bay Hotel & Casino, Inc.*,⁸¹ involved a lawsuit brought by the EEOC challenging a casino's requirement that cocktail servers wear three-inch heels, whereas male counterparts were not subject to such an onerous shoe policy.⁸² The case was settled before the federal district court was able to rule on the issue. Another case involved the shoe requirement of the Rio's Ipanema girl costume for cocktail servers. In *Kwist v. Rio Properties, Inc.*,⁸³ a cocktail server asserted that she could no longer wear the required high heel shoes due to leg and knee injuries and surgery. The District Court for the District of Nevada granted summary judgment to the Rio, finding that the plaintiff could not prove that she was substantially limited in the major life activity of walking or working, as she was not precluded from a class of jobs or a broad range of jobs. The court also found that the Rio did not perceive her as disabled, due in part to the Rio's efforts to find an alternative position for her.⁸⁴

As there are only a few known cases, it is hard to predict how the courts will rule in high heel lawsuits brought by cocktail server plaintiffs. Prudent employers should be concerned about imposing high heel requirements on job positions, such as cocktail servers, that require employees to remain on their feet for extended periods of time and to carry heavy items. Additionally, employers should be flexible in addressing legitimate medical conditions that impact their employees' abilities to wear certain types of footwear.

CONCLUSION

From observable marketing efforts and costuming practices, the adage "sex sells" is alive and universally accepted by gaming establishments. However, the dilemma casino managers find themselves in is that they are in the business of "rooms, restaurants and gaming," unlike a topless bar owner or bordello operator who can credibly argue that sex is the product being sold. Therefore, casino managers may not rely upon their perception of customer preference to ignore laws that restrict discrimination on the basis of sex stereotype, race and age.

Nevertheless, nothing in the published cases would make it illegal to have a particular uniform or require employees to maintain neat

⁷⁹ While the ADA, except in rare circumstances, does not cover obese individuals, morbidly obese individuals and those who can establish they were perceived as being disabled have had some limited success in maintaining ADA claims. Also, successful actions have been brought under more liberal state disability laws. See Elizabeth Kristen, *Addressing the Problems of Weight Discrimination in Employment*, 90 CAL. L. REV. at 83-98 (ADA and state counterparts).

⁸⁰ Angie Wagner, *Cocktail Waitresses Want Out of High Heels*, CHI. SUN-TIMES, Jun. 17, 2001, at 29; David Strow, *Casino High Heel Policies Targeted*, LAS VEGAS SUN, Feb. 11, 2000, available at <http://www.lasvegassun.com>.

⁸¹ *EEOC v. Great Bay Hotel & Casino, Inc.*, No. 92-CV-2906(SSB) (D.N.J. filed July 2, 1992).

⁸² Marc Linder, *Smart Women, Stupid Shoes, and Cynical Employers: The Unlawfulness and Adverse Health Consequences of Sexually Discriminatory Workplace Footwear Requirements for Female Employees*, 22 J. CORP. L. 295, 324 (1997).

⁸³ *Kwist v. Rio Properties, Inc.*, No. CV-S-95-00229-DWH (RJJ) (D. Nev.).

⁸⁴ *Id.* (Orders of Sept. 19, 1997 and Jun. 2, 1998).

and trim appearances. With this in mind, we offer the following guidelines to gaming establishments that are risk adverse and not willing to litigate these issues in court:

- Appearance standards should be clear and detailed such that they are readily understood by both employees and supervisors.
 - Appearance policies should apply to both male and female employees, with reasonable distinctions between the sexes as necessary.
 - Dress codes that may subject female employees to sexual harassment should be avoided. At the very least, an aggressive anti-harassment program that is geared to quickly intervene and remedy any sexual harassment, complete with annual training and refresher courses, should be developed.
 - Appearance policies should be uniformly applied, but be flexible enough to make reasonable accommodations, if necessary.
 - Appearance policies should not be unduly burdensome to one sex.
- Prior to hiring, prospective employees should be provided information on the employer's appearance requirements.
 - If an employee has a problem complying with an appearance policy, instead of a knee-jerk response, employers should investigate the grounds for the employee's objection, particularly whether the employee's objection is related to a disability or an employee's membership in a legally "protected class," and if so, what accommodations, if any, are possible.⁸⁵
 - Avoid creating policies and making employment decisions that involve forcing employees to conform to gender stereotypes.
 - Remember that customer preference or manager preference, without more, is not a valid defense against employment discrimination lawsuits.

⁸⁵ Gregory B. Reilly, *Employees' Personal Appearance*, 11 LAB. LAW. 261, 272 (1995).