

NEW GUIDANCE OFFERED IN NEW JERSEY ON THE USE OF PERSONAL APPEARANCE STANDARDS IN THE EMPLOYMENT CONTEXT

By Kevin J. O'Connor*

A new decision from the New Jersey Appellate Division, *Schiavo et al. v. Marina District Development Co.* (Simonelli, J.A.D.), released yesterday for publication, offers extensive guidance on when and how to impose personal appearance standards ("PAS") in the workplace without running afoul of anti-discrimination statutes.

Schiavo involves twenty-one women who are present or former employees of Borgata Casino Hotel & Spa. They appealed from the summary judgment dismissal of their complaint which had alleged violations of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, as informed by Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C.A. §§ 2000e to 2000e- 17. Plaintiffs alleged that Borgata's adoption and application of PAS subjected them to illegal gender stereotyping, sexual harassment, disparate treatment, disparate impact, and as to some plaintiffs, resulted in adverse employment actions.

The appeal was hard fought, with amici putting in briefs on behalf of the "Borgatababes," and claiming that the PAS was used to subject plaintiffs to "stereotypical images of femininity . . . to retain their jobs." According to the employer, the PAS was necessary because the BorgataBabes reflected "the fun, upscale, sensual, international image that is consistent with the Borgata brand" bringing "Las Vegas[-]style to Atlantic City." All Babes were expected to comply with the "Five Fs": "Fun, Friendly, Focused, Fresh, and Fast."

The Appellate Division provided a thorough review of the permissiveness of a PAS in general, and the decision is certainly a must read for any employer thinking of imposing any

such restrictions. The Court held that PAS requirements were permitted by N.J.S.A. 10:5-12(p), a provision allowing an employer to establish reasonable employee appearance standards,

"Nothing in the provisions of this section shall affect the ability of an employer to require employees to adhere to reasonable workplace appearance, grooming and dress standards not precluded by other provisions of State or federal law, except that an employer shall allow an employee to appear, groom and dress consistent with the employee's gender identity or expression."

The Court further held that the LAD does not encompass allegations of discrimination based on weight, appearance, or sex appeal. On this basis, the Court held that the evidence did not support plaintiffs' claims of gender stereotyping, disparate treatment, and disparate impact. The PAS was applied to both males and females and not in a facially discriminatory manner. While women were required to wear costumes, so were men. While the weight requirements were enforced and disproportionately affected women because they constituted a greater number of employees, the weight standards were also applied to the men.

However, and significantly, the Court ruled that there was an issue of material fact regarding Borgata's alleged application of the PAS weight standard to allegedly harass certain plaintiffs whose lack of compliance resulted from documented medical conditions and post-pregnancy, thus targeting them because of their gender. As to those claims, summary judgment was reversed on their hostile work environment claims, and the matter remanded for further proceedings.

The decision in *Schiavo* shows that the use of a PAS in the workplace can generate litigation and such standards must be adopted and applied in a facially neutral manner, and constantly watched in terms of how they are being administered. While the case was decided in

the context of a casino, the principles identified in the case can lend guidance to employers generally who adopt a PAS in the workplace.

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