9-29-2015

Hit the Gym, BorgataBabes

Joanna L. Grossman
Maurice A. Deane School of Law at Hofstra University

Verdict
SEPTEMBER 29, 2015 | JOANNA L. GROSSMAN

Hit the Gym, BorgataBabes

This was more or less the message from a New Jersey appellate court, which rejected most of the discrimination claims brought by a group of female casino waitresses who were suspended, fired, or otherwise subjected to a policy restricting weight gain. In a rambling and sometimes poorly reasoned opinion, ***Schiavo v. Marina District Development Company (http://law.justia.com/cases/new-jersey/appellate-division-published/2015/a5983-12.html)***, a New Jersey appellate court joins a long line of courts that simply refuse to see the illegal and harmful stereotyping embodied in sex-specific dress codes.

Just What Exactly is a BorgataBabe?

According to the appellate court in *Schiavo*, Atlantic City was "changed forever" in 2003 by the opening of the Borgata, a "Las Vegas-style resort." Among other differentiating features, the casino created a special group of costumed beverage servers called BorgataBabes, who were supposed to reflect the "fun, upscale, sensual international image that is consistent with the Borgata brand."

A recruiting brochure spells out the image in more detail. The BorgataBabes are "beautiful," "charming," and "bringing drinks." She "moves toward you like a movie star," and her smile melts "the ice in your water." Helpfully, when "you forget your own name," she "kindly remembers it for you." And you "relax in the knowledge that there are no calories in eye candy."

More than 4000 people applied to be one of the first 200 BorgataBabes. Applicants who made it to the final round were interviewed and made to perform, in costume, mock customer scenarios. The court emphasizes that applicants were advised of the Personal Appearance Standards (PAS) to which they would have to adhere to get hired—and to stay employed. Women were to have a "natural hourglass shape," while men were to have a natural "V" shape (broad shoulders and a slim waist). Women were to have naturally styled hair and "tasteful, professional makeup that complimented their facial features." Men were to be clean shaven or have neatly trimmed and "sculpted" facial hair.

When the initial group was hired, they signed a contract providing that they would have to "maintain approximately the same physical appearance in the assigned costume" and "appear to be comfortable while wearing the assigned costume for which you were fitted." For men, the costume consisted of a fitted black t-shirt and black pants. For women, the costume was, in the court's description, "form fitting, skimpy, and reminiscent of a Las Vegas-themed casino." (Searching #BorgataBabe will take you to many pictures on the Internet, showing the standard costume of a black bustier and miniskirt with high heels.) The costumes were designed by Zac Posen, who designed Emmy gowns this year for the likes of Amy Schumer, Sarah Hyland, and Tracee Ellis Ross.

A year after the casino opened, the PAS were modified to make the "maintain your appearance" requirement more objective. BorgataBabes were not permitted to gain or lose more than 7 percent of their baseline weight—roughly the amount of weight that would cause a change of one clothing size. There was no fixed schedule for weigh-ins; they occurred when a manager observed an "ill-fitting" costume, when a server returned from a leave of absence, and when a costume change was requested. According to company policy, a BorgataBabe who failed the weigh-in—whose weight had increased by more than 7 percent—would be given a period to bring his or her weight into compliance, with the assistance of company-funded weight-loss programs and gym memberships.

In 2008, one woman filed a complaint alleging that the PAS violated state anti-discrimination law, "as informed by Title VII." Subsequently, several other complaints were filed, and the cases were all consolidated. All told, twenty-one women who had been subjected to the PAS—many suspended for excessive weight gain—were discriminatory in form and implementation. Women in that group had different outcomes—some brought their weight into compliance and retained their jobs; some requested transfers to a non-PAS position in anticipation of termination; some quit; and some were excused based on a medical condition affecting weight control.

The lawsuit raised the following complaints:

- the PAS were based on gender stereotypes;
- the weight-gain standard was not applied equally to men and women (e.g., men were not subjected to weigh-ins and could avoid requesting larger costumes by replacing the nondescript shirt and pants themselves);
- the policy had a disparate impact—no men were suspended for noncompliance, while over twenty women were;
- enforcement of the weight-gain policy was harassing and sexually suggestive (e.g., managers would snort like pigs when a woman suspected of excessive weight gain walked by or would ask if she "was pregnant or just getting fat").

Is any of this, if proven, actionable?

A Long Path with Little Progress: The Law of Dress and Grooming Codes

Sex-specific dress and grooming codes have been challenged under Title VII, which bans all forms of sex discrimination by employers, since the mid-1970s. (These lawsuits often include claims under analogous state anti-discrimination laws.

Title VII prohibits employment actions "based on sex," making no exception for specific types of discrimination or "de minimis" inequalities. Yet, there has been a longstanding anomaly in Title VII case law that permits employers to maintain sex-specific dress and grooming codes. In an early case, ***Willingham v. Macon Telegraph Publishing Company (http://law.justia.com/cases/federal/appellate-courts/F2/507/1084/4877/)*** (1975), a federal appellate court upheld a rule requiring men (and only men) to have short hair, while women were permitted to wear theirs long. The court refused to acknowledge the stereotypes reflected in the rule, observing simply that hair length was not immutable, and men could comply with the rule simply enough by just getting a hair cut. (For a modern twist on this scenario in the educational context, read **here (https://verdict.justia.com/2014/03/18/hair-makes-man)** .) In later cases, courts have ruled that employers can require men to wear business suits and ties, while

requiring women to wear dresses. They have also allowed employers to impose requirements that women wear makeup, while prohibiting men from doing the same thing.

I describe these decisions as anomalous because they seem to permit precisely what Title VII forbids: treating employees differently on the basis of sex. And the reasoning courts offer is generally unconvincing, question-begging, and employs the very same stereotyping that led the employers to adopt the rule in the first place. Take the *Willingham* case, mentioned above. The court in that case stated that discrimination laws generally protect people based on immutable characteristics—on the theory that people should not be arbitrarily disadvantaged because of something they can't change. And hair length, the court noted, is *mutable*, not *immutable*. But *hair* is not the alleged basis for discrimination, sex is. And sex cannot easily be changed.

Courts often resort to platitudes about "good business" and the latitude employers need to run things the way they see fit. But the thrust of anti-discrimination law is to override the decisions of employers that unfairly disadvantage certain groups of workers, regardless in most cases of the impact on business. We do not, for example, allow employers to hire only white workers even if customers prefer them; nor do we allow employers to fire older workers and replace them with younger ones based on the stereotype that they will be more energetic and efficient.

Other courts have had the gall to suggest that dress and grooming codes, though sex-specific, are actually gender neutral because men and women are both required to adhere to a dress code based on generally accepted community standards. That these standards are different and largely, if not exclusively, the product of sex stereotypes is ignored.

The one exception that emerged in more recent cases is that employers cannot impose an undue burden on one sex, but not the other. An employer thus cannot require women to wear uniforms, while allowing men to choose their own attire. But employers can force men and women to wear different uniforms, as long as they are deemed "comparable."

The early dress and grooming code cases, which preceded the Supreme Court's 1989 decision in ***Price Waterhouse v. Hopkins*** **(http://supreme.justia.com/us/490/228/)** , are less surprising. In that case, the Court held that sex stereotyping is a form of illegal sex discrimination. A logical extension of that ruling might be that sex-specific codes are invalid if they reflect, reinforce, or perpetuate gender stereotypes. And although some modern courts have used this analysis in dress and grooming cases brought by transgender individuals (challenging policies forcing them to align their dress with their anatomical sex), they have all but refused to do the same in cases brought by women. (Some of the transgender cases are discussed

here (http://writ.news.findlaw.com/grossman/20090303.html) and **here (http://writ.news.findlaw.com/grossman/20080930.html)**.)

This oversight was nowhere more apparent than in ***Jespersen v. Harrah's Operating Co.* (http://law.justia.com/cases/federal/appellate-courts/F3/444/1104/546333/)**, in which an *en banc* panel of the Ninth Circuit Court of Appeals upheld a grooming code that required female bartenders to wear teased hair, a full face of makeup, and painted fingernails, while requiring of male bartenders only that they have short hair and be clean. And while the court acknowledged the unequal burden test, it refused to take judicial notice of the fact that the dress code for women was time-consuming and expensive, while the dress code for men was quick and cheap. As Deborah Rhode has noted, however, even a "proper" application of the unequal burden test does not "capture all of what makes these regulations objectionable. Darlene Jespersen resisted Harrah's makeup requirement not because it took more time and money for her to be presentable than her male counterparts, but because she felt that being "dolled up" was degrading and undermined her credibility with unruly customers. Dress codes that require women to wear skirts and high heels are problematic for similar reasons, regardless of what the codes demand of men.

The BorgataBabes case adds in an additional issue: grooming codes based on weight. Is discrimination law relevant to such rules? There is strong research showing that women are judged more harshly than men for exceeding conventional weight expectations. Weight discrimination results in a variety of adverse consequences, including disproportionately low pay. And because being overweight is more common for poor women and women of color, weight discrimination exacerbates discrimination based on race and class. But Title VII does not directly protect against weight discrimination, and neither do most state anti-discrimination laws. But when weight standards are set or applied unevenly, they can be challenged as sex discrimination.

For example, in ***Frank v. United Airlines, Inc.* (http://law.justia.com/cases/federal/appellate-courts/F3/216/845/570308/)**, the Ninth Circuit Court of Appeals concluded that a policy that permitted men's weight to vary more by height than women's was invalid sex discrimination. But aligning weight ranges might be just the tip of the iceberg. Women tend to gain more weight as they get older than men and can have dramatic shifts in body weight and shape because of pregnancy. Thus even a neutral rule limiting weight gain can have a disparate impact on women.

The Ruling in *Schiavo v. Marina District Development Company*

At the trial level, all of the plaintiffs' claims were dismissed on summary judgment. The

presiding judge found that the PAS were "reasonable in light of casino industry standards and customer expectations," and did not reflect discriminatory treatment of women.

On appeal, the court affirmed the dismissal of most of the claims, but reversed as to one. The plaintiffs are entitled, in the court's view, to go to trial on the sex-based harassment claims. The court recited a long list of examples that might constitute illegal harassment based on gender, including: requiring a post-partum woman to weigh in more than once on the day she returned; punishment under the PAS even when proper medical documentation should have warranted an exception under the policy's own terms; comments to the effect that women shouldn't come back to work after having children because they are too fat; suggestion to one postpartum woman that she should pump out breast milk to make weight; accusing women of lying about being pregnant to avoid weigh-ins. The court correctly recognized that these instances support the claim that women were singled out for harassing conduct not based on weight alone, but on the interaction with gender and pregnancy. (It is somewhat shocking that the trial court, reviewing the same evidence, concluded that these claims did not even warrant further fact-finding before being dismissed.)

But the clear reasoning of the appellate opinion ends here. The court affirmed the grant of summary judgment to the employer on all other claims—that the PAS embodied gender stereotyping; that the weight standard was enforced in a discriminatory fashion; and that the PAS weight standard had a disparate impact on women. Let's take the court's analysis of each claim in turn.

With respect to the first theory of discrimination—a facial policy embodying gender stereotyping—the appellate court resorted to the familiar, if erroneous, reasoning that dress codes can be sex-specific and yet non-discriminatory. The court cited *Price Waterhouse* for the proposition 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" and yet upheld the legality of a dress policy that required women to dress in skimpy, form-fitting outfits, while allowing men to wear a t-shirt and pants. Although the court purports to agree with the statement that customer preferences cannot justify "the use of stereotyping gender roles in employment positions," it notes, in defense of the dolled-up female costume, that in the casino business the "costume may lend authenticity to the intended entertainment atmosphere." And if it forces women to wear revealing, sexy clothing, but not the men, well so be it. The court actually admits that the "costume and physical fitness standards imposed what many would label an 'archaic stereotype' of male and female physiques,'" but finds no fault in it despite the ruling in *Price Waterhouse*.

And after reviewing a series of cases that also refuse to engage with the real issue—that

dress codes like this are drowning in sex stereotypes—the court identified the following "general principle":

> When 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 [New Jersey analog.]"

So, in other words, a policy that complies with the law does not violate the law?

The court then also rejects the claim of disparate impact. Federal and state anti-discrimination laws prohibit neutral policies that have a disparate impact on one sex unless justified by business necessity. Given that no men were punished under the weight-gain policy, while many women were, this claim seems at least worthy of serious analysis. But the court is unimpressed and criticizes the plaintiffs for relying on "sheer numbers," even though that is the crux of a disparate impact claim. (The court then confusingly concludes that "simple statistical disparities are insufficient to show the weight standard was *facially* discriminatory," as if that damns the disparate impact claim.) The court never explains *why* it rejects the disparate impact claim. Is the sample size too small to generate statistically significant comparisons? Is the disparity between men and women too small to be significant? Was the disparate impact justified by business necessity? None of these questions is answered. Nor is the employer forced to explain why men were re-weighed so much less frequently than women. Instead, the court just concludes that there was no evidence of a disparate impact. The numbers, however, would seem to suggest otherwise.

Conclusion

This is a disappointing case, but not only because of the outcome. The disappointment is in the refusal of modern-day courts, against a backdrop of strong anti-discrimination laws and Supreme Court precedent, even to look more closely at dress and grooming policies that so obviously reflect and reinforce gender stereotypes. We aren't supposed to be living in Archie Bunker's world anymore—where "girls were girls and men were men"—and yet people are afraid of the alternative. Equal opportunity in employment means more than allowing women to work; it means respecting their competence and ability whether or not they live up to stereotype.

Joanna L. Grossman, a Justia columnist, is the Sidney and Walter Siben Distinguished Professor of Family law at Hofstra University. She is the coauthor of Inside the Castle: Law and the Family in 20th Century America (Princeton University Press 2011), co-winner of the 2011 David J. Langum, Sr. Prize for Best Book in American Legal History, and the coeditor of Gender Equality: Dimensions of Women's Equal Citizenship (Cambridge University Press 2009). Her columns focus on family law, trusts and estates, and sex discrimination.

Follow @JoannaGrossman

Tags Legal, Title VII
Posted In Civil Rights, Employment Law

Access this column at http://j.st/4s8X