THE NEVADA LABOR LETTER

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THIS ISSUE

EMPLOYEE WITH MORNING SICKNESS GETS NO BREAK FROM COURT

The Seventh Circuit Court of Appeals recently held that the Pregnancy Discrimination Act ("PDA") did not protect a pregnant employee who was terminated because she was routinely tardy as a result of "morning sickness." The judge explained that an employer is only required to avoid discriminating against pregnant employees as compared to other employees, but is not required "to make it easier for pregnant women to work." ***Troupe v. May Department Stores Co.,*** *No. 93-2523, CA 7 (March 31, 1994).*

Factual Background and Legal Analysis

Kimberly Troupe was working as a sales clerk for Lord & Taylor when she became pregnant. During her pregnancy, she experienced severe morning sickness and was chronically tardy. As a result, she received warnings, was put on probation and was eventually fired. She filed a lawsuit claiming that her termination violated the PDA.

Under the PDA, which amended Title VII of the Civil Rights Act of 1964, "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work."

In determining whether discrimination occurred, the court looked to the wording of the statute and found that as long as other (nonpregnant) employees were or would have been treated similarly if they had been consistently tardy, then the employer did not *discriminate* against Troupe based upon her pregnancy. The court noted that if the employer ignored its own policy, "[e]mployees would be encouraged to flout work rules knowing that the only sanction would be a toothless warning or a meaning less period of probation."

Thus, according to the court, Troupe

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ATTORNEY GENERAL FINDS TIP POOLING LEGAL

Nevada's Chief Deputy Attorney General, Scott Bodeau, recently determined that casinos may unilaterally pool employee tips for distribution at a later date if employers do not benefit from such policies. The legal analysis came in response to a challenge of a policy started by Caesars Palace of pooling and holding dealers' tips for distribution every two weeks.

The five page letter written by Bodeau reportedly concluded that tip pooling agreements are legal, that an employer may unilaterally require employees to participate in such agreements and that the legislature has given the responsibility for implementing and operating these agreements to employers and employees. Bodeau did note in the letter that it was not an official attorney general's opinion on tip pooling, but only an analysis of prior opinions and court decisions.

Tony Badillo, who had filed a lawsuit challenging Caesars Palace's policy, had agreed to drop the lawsuit so that an attorney general's opinion could be released. However, according to Bodeau, the opinion will not be released because litigation on the issue is expected. □

SEXUALLY PROVOCATIVE DRESS CODE MAY RESULT IN LIABILITY

Some employers in service industries (such as restaurants and casinos) require that their female employees wear sexually provocative uniforms as a way to attract customers to their establishments. These employers, whose policies may have the effect of perpetrating sexual harassment by third parties, could be subjected to liability.

Cases Result In Liability

The EEOC guidelines provide that employers may be held liable for sexual harassment perpetrated by third parties in the workplace "where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action." In using these guidelines, the EEOC will consider the *extent of control* which the employer may have over the conduct of third parties who are allegedly sexually harassing its employees. However, when dealing with the issue of control over third parties in connection with employee attire, courts have generally not found in favor of employers.

In the 1981 case of *EEOC v. Sage Realty Corp.*, the employer ordered its female lobby attendants to wear suggestive uniforms. Specifically, the uniforms resembled an American flag to be worn as a poncho. Underneath the poncho, the lobby attendants were only allowed to wear blue dancer pants and sheer stockings, thus exposing their thighs and a portion of their buttocks and revealing much of their breasts. The uniform prompted several individuals to whistle and make rude comments to the women.

One of the lobby attendants refused to wear the uniform and was subsequently discharged. The court held that the employer violated Title VII, finding that the employer knew that wearing the uniform would subject the lobby attendants to sexual harassment.

Similarly, in *EEOC v. Newton Inn Associates*, hotel cocktail waitresses alleged that the employer required them to "project an air of sexual availability to customers through provocative outfits." The waitresses allegedly were told to flirt with customers in a "sexually provocative and degrading fashion," which allegedly elicited unwelcome sexual advances from customers. The court agreed with the waitresses and found in their favor.

Some Favorable Results

There have been some rulings in favor of employers on the topic of employee attire. A 1985 EEOC administrative ruling determined that no discrimination existed where a retail store owner required its female employees to wear swimsuits at work as part of a swimwear promotion. The women refused to wear the swimsuits and were subsequently discharged.

The EEOC found no cause to believe discrimination occurred, reasoning that the swimwear, consisting of a swimsuit and a cover-up, was not sexual in nature. However, the EEOC noted that a swimsuit can be a revealing outfit depending upon the particular suit and the fit. In this case, the Commissioner determined that the revealing nature of the suit was not exposed due to the presence of the cover-up. Furthermore, the EEOC determined that since the women refused to, and thus never actually wore the suits, they were never subjected to unwelcome sexual conduct.

The EEOC has stated that a costume requirement is unlawful only if the outfit required to be worn is sexually provocative or revealing and wearing the outfit would result in unwelcome sexual activity. In the swimsuit case, it was determined that although male customers would stare, whistle and try to get employees' attention, their remarks were not vulgar or sexual in nature. Based on the nature of the job in relation to the swimwear requirements, the EEOC held that the outfit was reasonably related to the sales job that the female employees were hired to perform.

In an October 1993 decision, *EEOC v. Great Bay Hotel and Casino, Inc.*, the EEOC charged the Sands Hotel & Casino in Atlantic City with promoting "sexual stereotypes" in violation of Title VII by requiring female cocktail servers to wear sexually provocative costumes while male servers wore tuxedo pants and shirts. Initially, the Sands responded to the suit by characterizing the litigation as "indescribably silly" and "a wasteful use of scarce government resources." Ultimately, however, the casino settled the case.

The settlement allows female cocktail servers to choose between the outfit currently in use and a new one that will be available in about a year. No provision was made requiring a change in costume prior to the availability of the new costume, and no monetary damages were assessed against the hotel. Both parties involved in this recent settlement acknowledged that the area of law involving dress codes is somewhat uncertain and emphasized the importance of compromise and accommodation in dealing with such gray issues.

Although it is unclear whether employers will be exposed to liability for requiring their employees to wear provocative costumes, it is clear in view of the developing case law that employers walk a fine line. Furthermore, since employers have been held liable for the actions of third parties (*e.g.*, customers), employers requiring their employees to wear provocative attire will be increasing the likelihood of meritorious employee suits based upon hostile environment theories of liability where the costumes encourage unwanted sexual flirtations from customers or coworkers. □

In Brief

Strippers in wheelchairs covered by equal access law. Officials at the Disabled Access Division of the Department of Building and Safety in Los Angeles believe that a strip club is in violation of equal access laws for disabled persons. A shower stall meant for nude dancing at the Odd Ball Cabaret in Los Angeles has been ordered shut down because it does not allow disabled people a chance to work as nude dancers. The shower stall was used by nude women who would shower through one song while patrons of the club watched. The club is arguing that the shower is a prop and not a stage and is thus not subject to the ordinance. No disabled dancers have actually complained about being denied a job at the club.