



NINTH CIRCUIT UPDATE: SPRING 2006

This bulletin provides an update of recent employment laws for employers in states served by the United States Court of Appeals for the Ninth Circuit including Alaska, Arizona, California, Guam, Hawaii, Idaho, Mariana Islands, Montana, Nevada, Oregon and Washington. Please contact us if you have any questions about these decisions or about their effects on your organization.

Can Employers Make Women Wear Makeup?

For the latest skirmish in the battle of the sexes, see Jespersen v. Harrah's Operating Co., (9th Cir. April 14, 2006). The female plaintiff had been a bartender at the casino for two decades when Harrah's began enforcing its appearance standards. Although the policy required a standard unisex uniform for both men and women, the grooming standards drew distinctions. Women were required to wear makeup and men were prohibited from cosmetic use. Additionally, women were required to tease, curl, or style their hair while men were required to keep hair short. The plaintiff refused to comply with the makeup requirement and was terminated for that reason. She sued Harrah's for sex discrimination under Title VII.

The court held that appearance standards, grooming policies, and makeup requirements could serve as the subject of a Title VII claim, but that the bartender had failed to present enough evidence that the policy imposed an unequal burden on women or that the policy was motivated by sex stereotyping. The court emphasized that appearance standards may differentiate between women and men and may also impose different burdens, so long as those burdens are essentially equal. The court also refused, without any evidence on the record in support, to assume added cost and time from the makeup requirement. Finally, there was not enough evidence for the court to find that the policy had been adopted to make women bartenders conform to a stereotypical image of women.

Although this particular case did not find sex discrimination, the court made it clear that it might have reached a different conclusion if the plaintiff had presented

different evidence to make her case. The courts have said that a “reasonable” appearance policy will likely be acceptable – whatever that means – but employers should err on the side of caution. Review your policy if it requires different grooming standards for men and women to make sure it does not impose greater burdens on one sex or unfairly force compliance with a stereotype.

“Oh Yeah, I Forgot To Mention That I Tried To Kill Someone A Few Years Back”

For an interesting reminder of issues involved in background checks of employees, see Josephs v. Pacific Bell (9th Cir. Dec. 27, 2005). Pacific Bell Telephone Company (“PacBell”), hired a service technician in January 1998 to perform unsupervised, in-home telephone installation and repair. On his employment application, the technician stated that he had never been convicted for any felony or misdemeanor. Three months into his work with PacBell, the employer ran a lawful criminal background check, determining that he had been arrested for attempted murder in 1982, though found not guilty by reason of insanity, and also convicted in 1985 for a misdemeanor battery on a police officer. Based on his insanity plea, he was committed to a California mental hospital for over two years. PacBell terminated the technician for the fraudulent entries on his application.

He then filed a grievance with PacBell, but was denied reinstatement by the company. Evidence showed that PacBell management was concerned about whether the technician would be an appropriate candidate for an in-home service technician position. He eventually filed a charge of discrimination based on the Americans with Disabilities Act (ADA). He charged that PacBell both terminated and refused to reinstate him because they regarded him as mentally disabled. The jury found that PacBell regarded him as mentally disabled and had discriminated against him on that basis, awarding him compensatory damages for refusing to put him back to work in violation of the ADA.

In reviewing the jury decision, the Ninth Circuit Court of Appeals found that PacBell regarded the technician as having a substantial limitation from a broad class of jobs because PacBell staff management had said that he was “unfit for any job within

the company.” Also, PacBell’s lack of a company policy prohibiting employment of individuals who had committed past violent acts weighed against a finding that the technician was unqualified for the position. In fact, PacBell had reinstated another service technician with a felony domestic violence conviction.

Because workplace violence issues are both increasing in number and severity, we agree that employers should err on the side of protecting customers and workers against threats of violence. These concerns, however, must be standardized within company policy and consistently-enforced in a way that balances with employee privacy rights and rights under statutes such as the ADA.

Hospital Loses The Race to Outsource Employees

For a case with implications for both outsourcing and unionization, see the Ninth Circuit Court of Appeals decision of Healthcare Employees Union v. National Labor Relations Board, (Mar. 17, 2006). For many years, St. Vincent Medical Center in Los Angeles, California, had difficulties with its respiratory care department employees. The unit’s productivity declined and employees complained regularly about staffing problems and lack of proper support from management. As a result, the Healthcare Employees’ Union began organizing the Medical Center’s technical staff sometime between 1998 and 1999. At around this same time, the Medical Center began discussions of how to handle its continuing quality issues in the respiratory care department, including potentially outsourcing responsibility for the department. Between January and February 2000, the Medical Center made its decision to subcontract its respiratory care department. On February 1, the Medical Center announced its decision and stated that the changeover would be effective February 5.

The union filed an unfair labor practice charge, alleging that the Medical Center had outsourced the respiratory employees only to prevent them from voting in a union election. The court agreed and ruled that, in light of the union’s organizing activities, the decision to subcontract Medical Center staff was highly suspicious. The Healthcare Employees’ Union had filed a National Labor Relations Board petition on January 5 for a union election which would include members of the respiratory department. On January

21, the union and the Medical Center stipulated that the election would be held on February 18. Then, the Medical Center announced its decision on February 1 and the Union filed its charge. Although the Medical Center argued that the decision to subcontract its respiratory care unit was an ordinary business decision and made without regard to organizing activity, the court noted that this reason “seemed to lack plausibility,” was “almost too much to believe,” and “appeared to be a fabrication, and not a very good one at that.”

This decision touches on several relevant issues facing employers. First, the Medical Center’s problems started in a department that was under-performing and unsatisfied for over a decade. We agree with Ben Franklin’s saying, “An ounce of prevention is worth a pound of cure.” Get on top of workplace problems as they happen and stop them from festering into bigger, more complicated issues or expensive litigation. Further, both union organization and outsourcing can involve multifaceted issues for employers. Although outsourcing in this case might truly have had nothing to do with the union campaign, the company’s timing was at least suspicious and could have been softened with proper planning.

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