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Fenwick Employment Brief

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Ninth Circuit Permits Requirement that Women Bartenders Wear Makeup

The Ninth Circuit recently upheld summary judgment for a casino resort that fired a female bartender for failure to comply with its grooming standards that required women to wear makeup and prohibited men from doing the same, based on a lack of concrete evidence that the policy unequally burdened women. In *Jespersen v. Harrah's Operating Company*, Darlene Jespersen was a bartender at Harrah's Casino in Reno for almost 20 years with stellar performance reviews. In 2000, Harrah's implemented a "Personal Best" image program, which had general neatness standards that applied to both genders, as well as certain gender-specific standards. Specifically, men were required to keep their hair short, their fingernails neatly trimmed and without colored nail polish, and to not wear makeup. Women were required to wear their hair "teased, curled, or styled," to use clear, white, pink or red nail polish, and to wear makeup consisting of foundation, blush, mascara and lip color. When Jespersen refused to comply with the makeup requirement because she thought it was degrading and would make patrons view her as a sexual object, Harrah's fired her.

The trial court granted Harrah's motion for summary judgment on Jespersen's sex discrimination claim. On appeal, the Ninth Circuit (which covers Nevada and California, among other states) upheld the dismissal. The court found that because appearance and grooming standards affect "mutable" characteristics, they are permissible so long as they do not impose unequal burdens on men and women. Although one dissenting judge though the court was ignoring "common sense," the majority found that Jespersen failed to submit any concrete evidence that Harrah's "Personal Best" policy imposed greater time or cost burdens on women when viewing all of the policy's standards in the aggregate.

While the employer prevailed in this case, companies should carefully consider the potential risks of imposing materially different grooming and appearance standards on men and women, as the next litigant may be able to submit sufficient evidence regarding the relative burdens of such policies.

Indefinite Leave of Absence Not A Reasonable Accommodation When Employee Unlikely to Return Within Reasonable Time

The Third Circuit (covering Pennsylvania, among other states) recently held that an indefinite unpaid leave of absence is not a reasonable accommodation under the Americans with Disabilities Act (ADA) when there is no indication that the employee will be able to return to work in the near future. In *Fogleman v. Greater Hazleton Health Alliance*, Aurea Fogleman was terminated from her position as a pharmacy technician because of excessive absenteeism. Fogleman sued under the ADA, claiming she was not provided the reasonable accommodation of an unpaid leave of absence. After two days of a jury trial, the district court granted the employer's motion for judgment in its favor and dismissed the complaint.

On appeal, the court acknowledged that a requested unpaid leave of absence might constitute a reasonable accommodation if it would enable the employee to perform the essential functions of the job in the "near future." However, in this case, the requested leave was for an "indefinite and open-ended period of time."

In fact, in a separate workers' compensation action, Fogleman had prevailed on her claim of "full disability" after June 3, 2000. Consequently, the employer could reasonably assume, without further evidence from Fogleman that she would be able to perform the essential functions of the job with or without accommodation, that she would not be able to return to work anytime soon.

While this case is encouraging for employers, companies should be mindful that the ADA requires that they engage in an interactive process with employees to determine what, if any, reasonable accommodations might exist, and they should evaluate each case on an individualized basis.

Second Circuit Defines What Constitutes "Willful" Violations Under the FMLA

In a case that defines what actions constitute "willfulness" under the Family and Medical Leave Act of 1993 (FMLA) and illustrates the importance of timely action by employee claimants, the Second Circuit (which covers New York, among other states) upheld the dismissal of an employee's FMLA claim that was filed almost three years after his termination. In *Porter v. NYU School of Law*, Carlton Porter, a security guard at NYU, was terminated for abuse of sick leave and poor attendance. Porter sued, claiming he was entitled to medical leave under the FMLA and that NYU had willfully violated the law in terminating him. The district court granted NYU's motion for summary judgment, finding that, even assuming NYU violated the FMLA in terminating Porter, the violation was not willful such that Porter's claim was not timely filed within the two-year statute of limitation for non-willful FMLA claims. Had NYU's conduct been willful, though, the longer three-year statute of limitations would have applied and his lawsuit would have been timely.

On appeal, the Second Circuit noted that the FMLA does not specifically define "willful." Borrowing from the U.S. Supreme Court's definition of "willful" under the Fair Labor Standards Act, the court found that conduct is not willful if an employer "acts reasonably in determining its legal obligation," or if the employer acts "unreasonably, but not recklessly, in determining its legal obligation." Here, the court found that NYU reasonably requested additional information from Porter substantiating his alleged inability to work, which Porter did not provide. In addition, NYU reasonably relied upon the second opinion offered by a physician it paid for, who determined Porter was fit to return to work.

Although navigating the procedural requirements of the FMLA can present a challenge to even experienced HR professionals, this case demonstrates that a reasonable attempt to comply with the law can preclude an employee for successfully claiming willful violations of the law.

IMPORTANT REMINDER: Sexual Harassment Training Now Mandatory For Many California Supervisory Employees

Employers are reminded of a new law that went into effect January 1, 2005, requiring California employers with 50 or more employees to provide two hours of sexual harassment training to all supervisory employees in California. Supervisors employed as of July 1, 2005, must receive the training by January 1, 2006. All other new supervisory employees must receive the training within six months of their assumption of a supervisory position. Supervisors who previously received this sexual harassment training in 2003 or 2004 are not subject to the January 1, 2006 deadline. After January 1, 2006, supervisory employees must receive the training once every two years.

The training must be classroom training or other effective "interactive" training (*i.e.*, video- or audio-recorded presentations alone are not enough) and must be conducted by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation. Please feel free to contact a Fenwick & West employment attorney if you are interested in discussing our tailored management training programs to meet the requirements of this law.