

"Borgata Babes" Ruling Provides Guidelines For Employer Regulation Of Employee Appearance

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Travelers to Atlantic City may have heard of the "Borgata Babes." Known for their good looks, these women and men work as costumed beverage servers for the Borgata Casino and Hotel. For over 10 years behind the scene, their employer and a group of female Babes have been embroiled in a lawsuit, arising from allegations by the Babes that the appearance standards to which their employer requires them to adhere are discriminatory. The litigation, which is ongoing, presents important lessons for employers who require employees to follow appearance standards on the job.

Borgata's personal appearance standards ("PAS"), require both male and female Babes be physically fit, and regulates their hair and weight. The Babes must sign contracts that they will abide by these standards, and maintain approximately the same physical appearance as when hired. For instance, Babes cannot increase their baseline weight (weight when hired) by more than 7%.

Recently, New Jersey's Appellate Division held that the weight standard for women did not impose "a stereotype of feminine sexual appeal" on the Babes, because they had a different role than other Borgata employees, including contributing to the Casino's "entertainment setting." The Court further stated that Borgata's PAS was not discriminatory toward women, because it used the baseline weight as of hire of each employee, male or female, as the standard. Borgata's PAS did not use different height and weight ratios for men and men, which have been found to be discriminatory in past cases. The Court found Borgata's 7% variance in weight from the date of hire rule to be gender neutral.

The Court also held that nothing prevents an employer from requiring employees to adhere to "reasonable workplace appearance, grooming and dress standards...except an employer shall allow an employee to groom and dress consistent with the employee's gender identity or expression." Moreover, the Court found "there is no protected class based solely on one's weight." The Court explained a general principle is "When an employer's reasonable workplace appearance, grooming and dress standards comply with anti-discrimination law, even if they contain sex-specific language, the policies do not violate [anti-discrimination] law."

The Court did, however, find that although there can be no claim of discrimination based on weight *per se*, a Babe may have a discrimination claim against Borgata because she was treated differently because of a gender specific characteristic such as pregnancy or a medical condition that causes weight gain (disability discrimination). The Court found that Borgata may have treated those Babes illegally because they created a hostile work environment for them based on gender or disability by subjecting these Babes to discriminatory treatment, including suspensions because of weight gain, repeated weigh-ins, and comments by supervisors (such as "women who have children should not come back to work because they get fat") when they did not conform to the weight standard. Employers who attempt to enforce personal appearance standards, such as a weight standard, must make certain they do not enforce them against a member of a protected group who is gaining weight because of a disability or because of pregnancy. In addition, employers must be make sure supervisors do not create a hostile work environment for those employees by subjecting them to derogatory comments because of their weight gain.

Takeaway: Employee personal appearance standards may be permissible under New Jersey law, but employers must be careful how they are enforced.

If you are an employer with questions about employee appearance standards in New Jersey, contact [Stephanie Gironda](#) or any member of the Wilentz Employment Law Team at 732-352-9858.

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