



EEOC Settles Beef With Restaurant

Insights

12.01.09

(Hospitality Labor Letter, No. 4, December 2009)

On November 2, 2009, the Equal Employment Opportunity Commission (EEOC) announced that it settled a class action lawsuit against Lawry's Restaurants Inc. The EEOC reported that the west coast steakhouse chain agreed to settle the lawsuit, alleging gender discrimination, for more than one million dollars.

First filed in March 2006, the lawsuit alleged that for decades that company had intentionally discriminated in its hiring practices. The settlement captured the attention of employers and the media because the class action claimed that the restaurant violated Title VII of the Civil Rights Act of 1964 by discriminating against men. In particular, the lawsuit alleged that Lawry's practice of only hiring females for its server positions constituted gender discrimination.

Sex-Based Selection of Servers

The legal action stemmed from a complaint by one of the restaurant's busboys. The busboy complained that he had been denied a higher-paying server position as a result of his gender. The EEOC investigation determined that Lawry had prohibited men from working as servers since 1938 and based its policy on tradition. Since Lawry's instituted the policy over seventy years ago, female servers had dressed in costumes from the 1930s and 1940s. The EEOC determined that despite the policy's roots in tradition and history, the practice of only hiring women for server positions adversely affected male employees and applicants on the basis of their sex.

The voluntary settlement reached by the parties requires the restaurant to pay \$300,000 for an advertising campaign regarding hiring, \$500,000 to individuals within the class, and \$225,000 for training all of its employees on compliance with federal anti-discrimination laws. According to Lawry's, beginning in 2004, shortly after the initial EEOC charge was filed, the Company began hiring male servers and its hiring practices have complied with the law throughout the litigation. Rich Cope, the director of marketing for Lawry's, was quoted as saying that "[w]hen we were first approached with the charge, we took substantial efforts to work with the EEOC to remedy the situation."

Hairy Hiring Practices

Creating a marketing image and a niche in a competitive hospitality market is essential to a successful business. Employers may seek to further the image by hiring and promoting individuals

who fit the image. Litigation over such efforts dates back to the 1970s when several federal lawsuits alleged that the practice of only hiring female flight attendants was not a legitimate or lawful business practice. In the early 1980s, Southwest Airlines unsuccessfully defended its practice of only hiring female flight attendants and the company's arguments that being female was an essential occupation qualification were rejected.

Only in very narrow circumstances can an employer successfully defend a gender discrimination claim by claiming that its gender-based hiring practices were based on a *bona fide* occupational qualification (BFOQ). The BFOQ defense is very narrowly applied and requires an employer to show that failure to discriminate on the basis of gender would undermine the essence of the business operation.

Hooters of America, Inc., the restaurant chain known well for its orange and white clad "Hooters Girls," has tangled for the last decade and a half with the EEOC over its policy of only hiring females to be servers. At the time this article was drafted, Hooters website explained and justified its policy stating that "[t]he element of female sex appeal is prevalent in the restaurants, and the company believes the Hooters Girl is as socially acceptable as a Dallas Cowboy cheerleader, Sports Illustrated swimsuit model, or a Radio City Rockette."

In the early and mid-1990s, the EEOC alleged that Hooters' hiring practices discriminated against men and the agency conducted an extensive, four-year investigation. Hooters responded by waging a prominent public campaign challenging the EEOC's allegations and centered its campaign on the phrase, "Washington Get a Grip." The EEOC eventually dropped its investigation, but Hooters' challengers were undeterred and a class action lawsuit was brought against the company. In 1997, the company settled the lawsuit for \$3.75million. Under the terms of the settlement, the company allowed males to work as bartenders and hosts, but continued to hire only women for server positions.

Despite the agreement, Hooters still faces legal challenges to its practice. In February 2009, a Texas man filed a gender discrimination lawsuit seeking to enjoin the company from discriminating against men in its hiring practices. The man argued that the primary function of a Hooters Girl was to serve food and drinks and, therefore, the company could not establish the defense of *bona fide* occupational qualification. According to multiple media outlets, a Vice President of Marketing at Hooters stated in response to the lawsuit, "[i]f we lose this go round, you can expect hairy-legged guys in the Rockettes to line up and male models in the *Sports Illustrated* swimsuit issue." The Company reached a confidential settlement of February 2009 lawsuit in April (at the time of publication no reports of "Hooters Boys" or "hairy-legged" male Rockettes were reported as a term or condition of settlement).

Help Wanted

The recent litigation against Lawry's and Hooters is a cautionary tale for employers. Hiring practices which select individuals based on a protected characteristic, such as gender, are closely scrutinized

by the EEOC, the courts, and the public. Only in very limited, narrow circumstances can a company justify a discriminatory hiring practice. The ability to market a company's image through employees' physical appearances is generally not going to satisfy the *bona fide* occupational qualification defense and resulting litigation can tarnish the company's reputation and put a sizable dent in the corporate bank accounts.