Hospitality Update

2011, No.3

Fisher & Phillips LLP
ATTORNEYS AT LAW
Solutions at Work®
www.laborlawyers.com

Looking For That "Special Look"?

By Michael S. Mitchell (New Orleans)

Lots of hospitality employers, and a fair number of retail employers as well, spend time, money, and thought creating a brand or "look." They're trying to create something beyond just a logo or store colors; something that stands out just by looking at the very employees who work there. The way they look. The way they dress.

Is this legally safe? The answer is "yes" . . . and "no." Creating "that special look" is fine, but only as long as it doesn't infringe on one of the protected categories under federal or state discrimination laws. And that includes not only race and sex, but – as some recent high profile cases have shown – religion.

"You'll Be Fine If You Lose The Headscarf"

Samantha Elauf, a 19-year-old community college student from Tulsa, wore a black headscarf (called a hijab) to her interview with retail giant Abercrombie & Fitch. She was not hired, and later heard through a friend that it was because of her dress. Ms. Elauf filed a charge with the Equal Employment Opportunity Commission, and in its defense Abercrombie stated that it failed to hire her because she violated the "Look Policy," under which "associates must wear clothing that is consistent with the Abercrombie brand, cannot wear hats or other coverings, and cannot wear clothes that are the color black." Elauf filed a lawsuit and was recently awarded $20,000 by a Tulsa jury.

A second suit against Abercrombie has been filed by the EEOC on behalf of Halla Banafa. In this case, Banafa applied for a job at an Abercrombie & Fitch subsidiary stocking merchandise. According to the woman, she was "into fashion, and wore skinny jeans and imported scarves that matched my outfits." Wearing a colorful headscarf to her interview, she was asked if she was a Muslim and if she had to wear the scarf. Then the interviewer marked "not Abercrombie look" on the interview form and turned her down, according to an EEOC press release. Her case is still pending.

Most recently, Abercrombie has been sued again, this time by Hani Khan, who was in fact hired, at least initially. She was told that she would be fine for work in the company's stock room, so long as her hajib matched company colors of navy blue, gray, or white, according to reports. But her job in the stock room also required her occasionally to be on the sales floor, and when she was spotted by a district manager she was told to remove the scarf. She refused and was fired.

But Don't Employers Have Rights?

Of course they do, and that includes the right to set the tone, style, and yes the "look" of your employees. In fact, employers tend to win dress code lawsuits more often than not. Establishing a corporate image allows employers to set requirements for clothing, makeup, jewelry (or lack of it), and other "mutable" factors, and this right is especially strong when aimed at employees who meet with the public, such as front desk clerks or wait staff. Even such subjective standards as "hip" or "cool looking" have been upheld as legal.

But there are certain "immutable" factors that are off limits because they are protected by federal or state law. These are things such as an applicant's race, sex, ethnic background or national origin, and religion. Refusing to hire minorities because they don't fit a company's corporate image would not get to first base legally, and the vast majority of employers understand this instinctively.

In the area of religion things get a little trickier. Many religions require distinctive garb or appearance and it's certainly not limited to Muslims. Sikhs, Rastafarians, many Jewish groups, and some Pentecostal Christian groups follow similar dress or appearance guidelines. An employer's obligation is to never give an automatic "no" to a religious-based request, even if the request violates longstanding company policy.

The proper response – even if the request sounds farfetched on the surface – is to attempt a reasonable accommodation. That's defined as some accommodation, such as a waiver of policy or slight change in job duties, that does not cost the employer any significant amount of money. (Note, this is *not* the same standard as reasonable accommodation under the Americans with Disabilities Act – the ADA requirement is much stricter.) If you *can* make such an accommodation, then you *must* make it.

The response of asking the employee to wear a headscarf of store colors is likely a reasonable one. In fact, a similar case arose in Britain at an Ikea store. Female Muslim staff members were supplied with headscarves that were not only in the corporate colors of navy blue and yellow, but which actually had the Ikea logo sewn into the back. This approach was applauded by the Muslim Council of Britain. Similar arrangements have been reached by other companies including well-known Domino's Pizza, which agreed to allow employees to wear the signature Domino's baseball cap over a red and blue scarf.

Continued on page 2

Box Score Compiled by the HLL Staff

During May through July, 2011, we were aware of 19 petitions filed against hospitality employers.

Employer	City and State	Union	Date
Majestic Star Casino	Gary, IN	Teamsters	7/21/11
LGA Restaurants	East Elmhurst, NY	United Service Workers Union	7/20/11
GES Exposition Services	Orlando, FL	Carpenters and Lathers	7/14/11
Butte War Bonnet Hotel	Butt, MT	UNITE HERE	7/5/11
Stamford Plaza Hotel and Conference Center	Stamford, CT	United Food and Commercial Workers	7/5/11
GES Exposition Services	Orlando, FL	Carpenters and Lathers	7/1/11
Harrah's Atlantic City	Atlantic City, NJ	Teamsters	6/30/11
SOHOTEL	New York, NY	Consolidated Commercial Workers of America	6/29/11
Greenwich Hyatt	Greenwich, CT	United Food and Commercial Workers	6/15/11
Courtyard Hotel	Schaumburg, IL	UNITE HERE	6/13/11
Hard Rock Café, Yankee Stadium	Bronx, NY	UNITE HERE	6/6/11
Little America	Mount Prospect, IL	UNITE HERE	6/2/11
Presque Isle Downs	Erie, PA	Teamsters	5/26/11
Compass Group USA, Inc. (Canteen)	Charlotte, NC	United Food and Commercial Workers	5/18/11
Wheeling Island Gaming	Wheeling, WV	Steelworkers	5/13/11
Aramark Refreshment Services	Earth City, MO	Teamsters	5/12/11
Sands Casino	Bethlehem, PA	Law Enforcement Employees Benefit Assn.	5/10/11
Anadale Mexican Restaurant	Oakland, CA	UNITE HERE	5/4/11
Aramark Refreshment Services	Earth City, MO	Teamsters	5/2/11

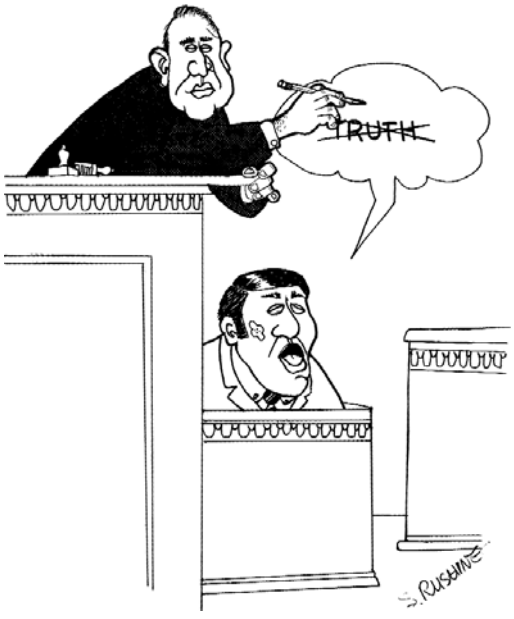
Looking For That "Special Look"?

Continued from page 1

What's Next?

The EEOC reports a 31% rise in claims of religious discrimination claims over the last 10 years. Many of these are settled amicably. Of the ones that aren't, the companies are certainly not always found to be unlawful, especially since many such claims are based on flimsy religious grounds attempting to justify tattoos and piercings. Indeed, as employment defense lawyers know well, things are not always what they seem in EEOC press releases, and the pending cases in Abercrombie may well end up in the company's favor.

But even when an employer wins a discrimination suit, the outcome is often unpleasant, either because of the lost time and money, the investment of energy and emotion, and of course the unfavorable publicity. In the words of Halla Banafa: "To this day, I can't walk into Abercrombie & Fitch stores. They didn't just miss out on a hard worker, they lost a customer."



For more information contact the author at mmitchell@laborlawyers.com or 504.522.3303.

Box Score Compiled by the HLL Staff

In March through June 2011, we were aware of 17 petitions which went all the way to an election. Unions were victorious in 15 of them.

Employer	City and State	Union	Date	Result
Hyatt Regency Maui	Maui, HI	Longshoremen & Warehousemen	6/20/11	Union 29-5
Orchard Lake Country Club	Orchard, MI	UNITE HERE	6/7/11	Union 20-12
Lackmann Culinary Services	Woodbury, NY	Retail, Wholesale and Department Store Union	5/31/11	Union 4-0
Sodexo	Silver Spring, MD	Machinists & Aerospace Workers	5/20/11	Union 19-5
Hilton Vancouver	Vancouver, WA	UNITE HERE	5/20/11	Union 77-33
The Athenian Inn	Seattle, WA	UNITE HERE	5/16/11	Union 14-12
Olive Garden New York	New York, NY	United Service Workers of America	5/16/11	Company 66-130
Jurys Boston Hotel	Boston, MA	UNITE HERE	5/16/11	Union 60-17
Mandalay Bay Resort	Las Vegas NV	Teamsters	5/4/11	Union 36-28
Sodexo	Los Angeles, CA	UNITE HERE	4/28/11	Union 108-18
Lackmann Culinary Services	Woodbury, NY	Retail, Wholesale and Department Store Union	4/28/11	Union 13-9
Sodexo	Owings Mills, MD	UNITE HERE	4/15/11	Union 44-4
Planet Hollywood Hotel & Casino	Las Vegas, NV	Teamsters	4/6/11	Union 27-1
Las Vegas Country Club	Las Vegas, NV	Operating Engineers	4/4/11	Union 2-1
Golden Nugget Hotel and Casino	Las Vegas, NV	Teamsters	3/17/11	Union 26-18
Palmer Foods	Rochester	Teamsters	3/14/11	Union 23-15
MGM Resorts International	Las Vegas, NV	Teamsters	3/2/11	Company 51-365

How Much Is Too Much?

By John McLachlan (San Francisco)

The U.S. Court of Appeals for the 8th Circuit recently issued a decision that has significant ramifications for employers making use of the tip-credit provisions of the Fair Labor Standards Act (FLSA). The decision mandates that employers who use the FLSA tip credit provisions to pay tipped employees should pay close attention to the amount of time those employees spend performing non-tip-producing work. *Fast v. Applebee's International, Inc.*

How It All Began

This case resulted from a lawsuit filed by servers and bartenders against Applebee's claiming that they were not properly paid for all the work they performed. Under the FLSA employers are permitted to pay employees in a tipped occupation a cash wage of $2.13 per hour so long as employees receive tips sufficient to ensure that they receive at least the minimum wage (currently $7.25) for all hours worked in a workweek.

This action was filed because the employees (who admitted they received tips that resulted in their wages at least equaling the federal minimum wage for all hours worked) claimed that Applebee's required them to perform non-tip-producing activities while still paying them only the tip-credit wage of $2.13. They argued they should have been paid the full minimum wage ($7.25 instead of $2.13) when they were engaged in non tip-producing activities.

The bartenders' non-tipped work included wiping down bottles, cleaning blenders, cutting fruit for garnishes, taking inventory, preparing drink mixers and cleaning up after closing. Similarly, the servers in the litigation claimed that duties such as sweeping, cleaning and stocking service areas, general cleaning before and after the restaurant was open, preparing the restaurant to open, etc. were non-tip-producing activities.

Continued on page 4

How Much Is Too Much?

Continued from page 3

These are all duties typically performed by bartenders and servers in almost every bar and restaurant in America. But the bartenders and servers in the Applebee's lawsuit contended they performed *so much* non-tipped work that they should have been paid the full minimum wage of $7.25 instead of at the tip-credit cash wage of $2.13 whenever they were performing duties that did not directly result in a tip. This is clearly a significant issue, and we reported on this case in prior issues of the Hospitality Update. [See, *"Applebee's Automated Timekeeping Leads To Lawsuit,"* in our Oct/Nov., 2007 issue and *"Implications In Applebee's Case Still Worrying The Industry,"* in the Winter, 2008 issue].

U.S. Department of Labor regulations have long recognized that a tipped employee may be engaged in dual jobs, meaning a job for which tips are received and a job which does not generate tips. DOL recordkeeping regulations require you to keep records for your tipped employees' hours worked each workday in any occupation in which the employee does not receive tips, and hours worked each workday in occupations for which the employee does receive tips.

In situations involving dual jobs (tipped and non-tipped classifications), the Labor Department's tip regulations also provide that you may not take the tip credit for hours of work in an occupation not subject to tips. An example of a dual-job situation would be a hotel employee who works both as a bartender and a maintenance employee. In this example no tip credit may be taken for hours of employment when the individual is working in maintenance. All hours worked in a non-tip-producing maintenance position would have to be paid at no less than the rate of $7.25 per hour.

This doesn't mean that you are precluded from taking a tip credit for non-tip-producing activities even if the employee performs only a relatively small amount of that work within the confines of a tipped occupation. DOL regulations permit an employer to take the tip credit for time spent in duties *related to the tipped occupation* even though such duties are not by themselves directed toward producing tips.

The regulations give examples of such work as preparatory and closing activities, cleaning and setting tables, making coffee and occasionally washing dishes or glasses. The DOL has said elsewhere that such duties must be "incidental to the regular duties of the server" and must be "generally assigned to the servers." So the question becomes one of when non-tipped work is and is not merely "incidental" to a tipped occupation.

But the Labor Department's internal interpretation of its own regulations sets a limit on the amount of non-tipped duties which can be performed without eliminating the employer's right to take a tip credit for those duties. "Where the facts indicate that specific employees are routinely assigned to maintenance, or that tipped employees spend a substantial amount of time (in excess of 20%) performing general preparation work or maintenance, no tip credit may be taken for the time spent in such duties." The 8th Circuit decided that the Labor Department's view is a reasonable one and ruled that the lower court should follow it.

What This Means To Employers

Further refinements on this 20% limitation on non-tip-producing work are found in various Department of Labor Opinion Letters, but the upshot of the guidance provides that non-tipped duties incidental to the regular duties of a tipped employee are properly included in hours for which the employer takes a tip credit, so long as the incidental duties are assigned generally to all wait staff and not just to specific employees. Under this interpretation, a waiter assigned to perform opening prep work, where he is the only one so assigned and he spends 30-40% of his shift performing the prep work, is not performing this work within the confines of a single tipped occupation – he works in dual occupations, one of which involves non-tipped work for which no tip credit may be taken.

Thus, if non-tipped duties are performed by only one or two employees among a larger wait staff, the Labor Department's approach would mean that the employer cannot take a tip credit in paying those employees for time spent performing those functions. And under a scenario in which employees do more than incidental non-tipped work – in excess of 20% – the view accepted by the 8th Circuit means that they are due at least the full minimum wage of $7.25 for the time spent performing non-tip-producing activities.

Our Advice

There are several cautions that flow from the Applebee's decision:

1) keep accurate records of hours spent in tip-producing vs. non-tip-producing activities; and

2) ensure that general preparation and maintenance duties related to the tipped work are performed by all tipped employees as opposed to only a few, *and* that the non-tip-producing activities are less than 20% of the employee's total work hours in the workweek; or

3) if you do require certain employees to perform large amounts of non-tip-producing work, such as general prep and maintenance duties, or if you permit tipped employees to spend more than 20% of their time in non-tip-producing work, pay them at least the federal minimum wage for all hours spent in non-tip-producing activities.

For more information contact the author at jmclachlan@laborlawyers.com or 415.490.9000.

Office Locations

Atlanta
phone 404.231.1400

Charlotte
phone 704.334.4565

Chicago
phone 312.346.8061

Cleveland
phone 440.838.8800

Columbia
phone 803.255.0000

Dallas
phone 214.220.9100

Denver
phone 303.218.3650

Fort Lauderdale
phone 954.525.4800

Houston
phone 713.292.0150

Irvine
phone 949.851.2424

Kansas City
phone 816.842.8770

Las Vegas
phone 702.252.3131

Los Angeles
phone 213.330.4500

Louisville
phone 502.561.3990

New England
phone 207.774.6001

New Jersey
phone 908.516.1050

New Orleans
phone 504.522.3303

Orlando
phone 407.541.0888

Philadelphia
phone 610.230.2150

Phoenix
phone 602.281.3400

Portland
phone 503.242.4262

San Diego
phone 858.597.9600

San Francisco
phone 415.490.9000

Tampa
phone 813.769.7500

Washington, DC
phone 202.429.3707

www.laborlawyers.com

Fisher & Phillips LLP represents employers nationally in labor, employment, civil rights, employee benefits, and immigration matters

We're interested in your opinion. If you have any suggestions about how we can improve the *Hospitality Update*, let us know by contacting your Fisher & Phillips attorney or email the editor at mmitchell@laborlawyers.com.