SUPERIOR COURT OF NEW JERSEY

NELSON C. JOHNSON, J.S.C.

1201 Bacharach Boulevard
Atlantic City, NJ 08401-4527
(609) 594-3384

MEMORANDUM OF DECISION ON MOTION
Pursuant to Rule 1:6-2(f)

TO: Deborah L. Mains, Esquire
Costello & Mains
18000 Horizon Way, Suite 800
Mt. Laurel, New Jersey 08054
Attorney for Plaintiffs

Susan Schleck Kleiner, Esquire
272 Main Street, Second Floor
Metuchen, New Jersey 08840
Attorney for Plaintiff, Latesha Stewart [SETTLED]

René M. Johnson, Esquire
Michelle Seldin Silverman, Esquire
Morgan, Lewis & Bockius
502 Carnegie Center
Princeton, New Jersey 08540
Attorneys for Defendant

Jeffrey R. Lindsay, Esquire
Russell Lichtenstein, Esquire
Cooper, Levenson
1125 Atlantic Avenue
Atlantic City, New Jersey 08401
Attorneys for Defendant

RE: Schiavo, et al. vs. Marina District Development Company, LLC

DOCKET NO. ATL-L-2833-08 [consolidated matters]

NATURE OF MOTION(S): Defendant's Summary Judgment as to each Plaintiff

HAVING CAREFULLY REVIEWED THE MOVING PAPERS AND ANY RESPONSE FILED, I HAVE RULED ON THE ABOVE CAPTIONED MOTION(S) AS FOLLOWS:

This matter comes before the Court on the petition of the Defendant, Marina District Development, LLC (hereinafter "Borgata") seeking Summary Judgment dismissing the Complaints of twenty-two Plaintiffs. Borgata is represented by the law firm of Morgan, Lewis & Bockius, Michelle Seldin Silverman, Esquire, and René M. Johnson, Esquire, appearing; and the

law firm of Cooper, Levenson, Russell Lichtenstein, Esquire and Jeffrey R. Lindsay, Esquire, appearing. All of the Plaintiffs with the exception of Latesha Stewart are represented by the law firm of Costello & Mains, Deborah L. Mains, Esquire appearing. The Plaintiff, Latesha Stewart is represented by Susan Schleck-Kleiner, Esquire. Prior to the initial oral argument on May 30, 2013, the Court was advised that Ms. Stewart's claim was resolved via a Voluntary Stipulation of Dismissal.

The Court has had the benefit of the Legal Briefs, Certifications, Deposition Transcripts and Exhibits provided by counsel in connection with their petition to the Court. Additionally, the Court conducted oral argument on these Motions at a hearing on May 30, 2013. Thereafter, the Court had the benefit of supplemental legal briefs on issues discussed at oral argument. Finally, a second hearing on oral argument occurred on June 28, 2013, at which time the Court rendered its decision from the Bench to be supplemented by this Memorandum of Decision.

[NOTE: As confirmed by correspondence of Deborah L. Mains, Esquire, dated May 24, 2013, counsel requested the Court to proceed at oral argument only on the "omnibus motion issues" and requested that there not be oral argument as to the individual motions for the Plaintiffs represented by Costello & Mains, P.C. Said request was based upon both counsels' concern that the Court's ruling on the "omnibus" issues had the potential to moot some or all of the issues raised by the individual claims.]

Based upon the foregoing, the Court makes the following Findings of Fact:

Omnibus Findings of Fact

Preliminary to a recitation of the Court's Findings of Fact, the Court notes that there are multiple instances where Plaintiffs' counsel replied to Defendant's Statement of Undisputed Facts by countering "Denied as Immaterial". Frequently, it was necessary to review a particular deposition and/or document to learn there was no factual basis for the "Denial". What follows hereinafter are Findings of Fact as to those facts garnered during pre-trial discovery which the Court believes are supported by the record and not reasonably in dispute regarding the employment relationship between the Plaintiffs and Borgata.

1. When Borgata Hotel-Casino entered the Atlantic City casino market it was apparent that it was determined to distinguish itself from its competitors. To that end, Borgata presented itself to the public as a "Las Vegas Style" hotel-casino, fostering the image of the place to go for a naughty but classy good time in elegant surroundings.

2. As an integral part of its hotel-casino experience, Borgata instituted a Costumed Beverage Server ("CBS") program – at the time, unique in the Atlantic City Market.

3. The CBS program, also known as the "Borgata Babes" program, was intended to include servers who are "[p]art fashion model, part beverage server," "impossibly lovely," "sensational" "ambassadors of hospitality" with "warm, inviting upbeat personalities." It's apparent that the Borgata was looking to hire people expected to provide services beyond that of a cocktail server.

4. Borgata hired men and women of various ages, sizes, national origins, and body types to be "Borgata Babes." Borgata claims it received more than 4,000 applicants. Those applicants were required to first complete two rigorous interviews. Those who successfully completed the interview phase were invited to appear for a live, in-costume audition. It's apparent that the selection process was highly competitive.

5. Individuals selected were sent an Audition Invitation Letter ("Invitation") explaining the process and criteria by which Borgata would select its CBSs. The Invitation explained that the CBSs would be known as "Borgata Babes," and would function as "entertainers who serve complimentary beverages to [the] casino customers."

6. The Invitation informed those persons invited to audition that they would be evaluated based upon their appearance – including how they looked in the costume. Candidates were asked to arrive at the audition with styled hair an hour before their scheduled time to "select [their] costume, change and touch up hair if needed."

7. The Invitation stated that successful candidates must be "physically fit, weight proportional to height" with a "clean healthy smile and attention to personal grooming."

8. Additionally, the Invitation explained that, while the "[s]tandards and expectations for the Borgata Babes program are extremely high ... [Borgata is], in return, giving a lot back to the Borgata Babe program." Specifically, the Invitation stated that the scheduled CBS shift would be only six (6) hours, that the CBSs would be paid for an extra hour to allow for dressing room time and pre-shift, and that CBSs would be given spa treatment, photo opportunities, and free access to the fitness center.

9. At their audition, candidates were provided with a brochure that further described the Borgata Babes program. The brochure said:

> They're beautiful. They're charming. And they're bringing drinks.

She moves toward you like a movie star, her smile melting the ice in your bourbon and water. His ice blue eyes set the olive in your friend's martini spinning. You forget your own name. She kindly remembers it for you. You become the most important person in the room. And relax in the knowledge that there are no calories in eye candy.

"Part fashion model, part beverage server, part charming host and hostess. All impossibly lovely. The sensational Borgata Babes are the new ambassadors of hospitality representing our beautiful hotel casino and spa in Atlantic City. On a scale of 1 to 10, elevens all.

Eyes, hair, smile, costumes so close to absolute perfection as perfection gets, Borgata Babes do look fabulous, no question. But once you can breathe again, prepare to be taken to another level by the Borgata Babe attitude. The memory of their warm, inviting, upbeat personalities will remain with you long after the vision has faded from your dreams.

"Are you a Babe?"

10. The Brochure included photos of several attractive men and women, sending the message that personal appearance, i.e., good looks were important to the hiring process.

11. At the first paragraph, second sentence, the Invitation stated, "What is a 'Borgata Babe' you ask? Borgata Babes are entertainers; entertainers who serve complimentary beverages to our casino customers."

12. At the audition, prospective CBSs were told that that, if successful, they would be expected to maintain the appearance for which they were hired. That was likewise confirmed in an Offer Letter.

13. In the "Original Offer Letter" sent to prospective hirees on April 14, 2003, the identical question and answer language, *Borgata Babes are entertainers* as set forth in Finding of Fact #11 hereinabove was repeated.

14. The Offer Letter informed candidates that the 2003 PAS would require all CBSs – both male and female – to appear "physically fit, weight proportional to height, clean healthy smile" and "attention to personal grooming." It also specified that CBSs – both male and female – "must maintain approximately the same physical appearance in the assigned costume," and "must appear to be comfortable while wearing [their] assigned costume."

15. What follows is a portion of the testimony of Ms. Latoya Wilson at her deposition on July 20, 2012.

Q. Was your understanding that Borgata was looking for people who were – who looked good in the uniform?
MR. SILVERMAN: Same Objection.
You can answer.
A. Definitely.
Q. Why did you think that?
A. Because, one, the name. Like, we were called "Borgata Babes," you know? So that's like just saying that they're looking for someone who could, you know, basically play that, you know, sexual role as a server.
Q. You said "one". I wasn't sure – do you have more of an answer?
A. That's pretty much.
Q. Okay. When you say somebody who can play that "sexual role," can you tell me what you mean by that?
A. By just the word "Babe," you know?
Q. Did it imply to you that they were looking for people who were attractive?
A. Yes.
Q. Did it imply anything else to you about what Borgata was looking for?
A. Yea, I thought that they were looking for, you know, attractive girls that could wear that, you know, sexual uniform and play that – like, that Babe role, you know?
Q. So there was a look that Borgata was going for?
A. Uh-huh. Yes.
Q. And it was that people would be sexy?
A. Yes.
Q. Is that correct?
Is that what you mean by saying it was a sexual uniform?
A. Yes.

As illustrated by the testimony of Latoya Wilson, it strains credulity for any of the Plaintiffs to claim they did not understand the program they would be working in and the role they were expected to play as a "Borgata Babe". Ms. Wilson and the other applicants knew the position they were seeking was something much more than a "cocktail waitress position."

16. To help the Borgata Babes maintain their appearance, Borgata offered them free access to the "Pump Room," a high-end fitness center otherwise reserved for guests. Additionally, since early 2004 Borgata has reimbursed CBSs for the cost of gym memberships, nutritionists, and personal trainers.

17. The Offer Letter also explained that the 2003 PAS would require all CBSs – male and female – to have "neat, clean, attractively styled and sprayed hair" in a fashion that is "flattering with a natural color and/or natural color highlights and look." It also stated that "[e]xtreme hairstyles with excessive use of mousse, gel, and/or other hair products" would not be acceptable. Likewise, all female CBSs are to wear tasteful, professional makeup.

18. Further, the Offer Letter stated that the 2003 PAS would require all male CBSs to be "clean shaven on a daily basis," or – to the extent they had facial hair – to keep mustaches and goatees trimmed and sculpted "at all times."

19. Special clothing apparel was designed and fabricated for the CBSs. The female CBSs costume – which was described to candidates in the Offer Letter – included a custom fit black skirt, a bustier top, a title, small jacket (worn at the CBSs' discretion), briefs, two pairs of pantyhose and black shoes provided by Borgata.

20. The Borgata Babe costumes were designed by Zac Posen. The Court takes notice of the media record which reveals that Mr. Posen is a highly acclaimed fashion designer. He is in the public eye as a judge on "Project Runway" and is generally considered in the fashion world as a "high-end designer". His couture is known for being stream-lined and very tailored.

21. Borgata Babes are predominantly female by a large margin. Between February, 2005 and December 6, 2010, there were 686 female and 46 male Costumed Associates. At any given time, there are approximately 23 Borgata Babes working on the Borgata's casino floor, of which only 2-3 are male.

22. About a year after Borgata opened, it decided that the "weight proportional to height" standard of the PSA was difficult to enforce. In or around mid-2004, Borgata determined that it should issue a clarification to the PAS to provide more specificity to the "weight proportional to height" requirement.

23. On or about February 18, 2005, Borgata issued a letter announcing a clarification to the policy (the "2005 clarified PAS") that established a "hire weight" and provided that, absent a *bona fide* medical condition, all male and female Costumed Beverage Servers and Costumed Bartenders would be required to maintain a maximum weight of 7% over their personal hire weight.

24. In the Defendant's letter of February 18, 2005, Plaintiffs' status as Borgata Babes was equated with entertaining the public. Continuing, Bob Boughner, the CEO of Borgata stated, "with this in mind, Borgata feels that this standard [7% weight gain] is not only legal and non-discriminatory, but also fair."

25. It was determined that all CBSs hired after February 18, 2005 would be notified of the 7% standard at the time of the audition and would be weighed only after being hired.

26. The permissible weight range of a CBS was determined by his or her own weight at the time he or she was hired or first weighed under the policy. Borgata determined that in its opinion, 7% was a reasonable range of fluctuation that ought to be sustainable for its CBSs.

27. The Court learned from defense counsel at the time of oral argument that the 7% is purportedly the weight gain at which a person can normally expect there to be an increase of one clothing size of a person's apparel. Defense counsel's representation of weight gain translating into clothing size was not challenged by the Plaintiff's. Indeed, a review of the discovery materials submitted by both sides in connection with this Motion reveals that for some of the Plaintiffs, the first time they were required to be weighed was when they requested a new costume one size larger.

28. Based upon the written submissions of counsel, together with comments made at oral argument, the Court concludes that the "7% weight gain" standard is reasonable. [The term "reasonable" is discussed as part of the Court's analysis.]

29. The CBSs who already worked in the position at the time of the February 2005 clarification – 20 of the 22 Plaintiffs – were weighed shortly after the PAS was clarified, and their "hire weight" was set to be whatever they weighed on that day.

30. The PAS was signed by each of the Plaintiffs and a representative of Borgata. Said document is incorporated herein by reference. Pertinent terms of the PAS read as follows:

> The costume is designed to be flattering to various body types so correct sizing is imperative. ... Borgata reserves the right to change any element of the costume at its discretion.
>
> It will be a condition of his/her employment and continued employment that he/she maintain no more than the weight he/she has at the time of hire, plus up to a maximum of seven (7%) percent weight gain, during the length of his/her employment.
>
> The weight registered on that date will be considered his/her hire weight, plus up to a maximum of 7% weight gain, during the length of their employment.
>
> If a Costumed Beverage Server gains in excess of seven (7%) percent more than his/her hire weight and a bona fide medical condition which prevents the ability to meet the weight standard portion of the personal appearance standard has not been established, he/she will be immediately suspended without pay.
>
> I READ AND FULLY UNDERSTAND THAT COSTUME REQUIREMENTS, PERSONAL APPEARANCE AND WEIGHT STANDARDS AND THE PERSONAL GROOMING STANDARDS, AS SET FORTH HEREIN, ARE EXPECTATIONS AND ONGOING REQUIREMENTS FOR ALL COSTUMED BEVERAGE SERVERS. [Capital letters are used in original document.]

31. Despite the language of the PAS providing for strict enforcement, i.e., *immediately suspended without pay*, no CBS found to be out-of-compliance – for the first time – was automatically suspended or terminated.

32. It is apparent that Borgata anticipated that there would be periods of time when, for medical reasons, a CBS may not be able to maintain his or her hire appearance. To that end, the 2005 clarified PAS stated that reasonable accommodations would be available for employees who have a *bona fide* medical condition which prevents him or her from staying in compliance with the 7% weight standard.

33. Under the clarified PAS, a reasonable accommodation may include adjustment of the CBS's "hire weight," additional time to return to compliance, temporarily wearing a transitional costume, or a medical leave of absence. For pregnant CBSs the "transitional" costume is a designer, maternity-cut costume.

34. The clarified PAS states that an associate returning from medical leave with a *bona fide* medical condition will be granted 90 days to comply with the weight standard while working and participating in a fitness program at the Borgata's expense.

35. Those employees returning from pregnancy are automatically granted a 90-day period. The net effect is that following a maternity leave – which typically ranges from 3 to 6 months – female CBSs have between 6 and 9 months to return to compliance after childbirth.

36. The clarified PAS provides that a CBS who does not present a *bona fide* medical condition preventing them from complying with the weight standard may be suspended. This suspension could last up to 90 days, during which time the CBS is expected to participate in a weight reduction program provided at Borgata's expense.

37. The weight reduction program includes gym membership, personal training sessions, membership to Weight Watchers (or an equivalent program), and nutritional counseling at Borgata's expense.

38. As provided for by the clarified PAS, at the end of this period, a Costumed Associate who cannot return to compliance is offered the opportunity to transfer to a non-PAS position prior to termination.

39. In 2009, after the weight standard of the PAS had been in effect for several years, Borgata decided to modify its enforcement as follows:

    (a) It instituted a 90-day notice period during which any CBS found to be out-of-compliance (regardless of whether he or she had demonstrated a *bona fide* medical condition) would be allowed to work while participating in the fitness reimbursement program.

(b) All female CBSs returning from pregnancy were granted one full year following the birth of their baby to return to compliance with the weight standard.

40. Between February 2005 and December 6, 2010, there was an aggregate of 686 female and 46 male CBSs who worked at Borgata for various lengths of time.

41. The records presented to the Court demonstrates that between February 2005 and December 6, 2012, Borgata granted 48 separate accommodations for various *bona fide* medical conditions – all to females.

42. The accommodations made for female Costumed Associates included additional time to return to compliance; upward adjustment of the CBSs' baseline weight ranges; and in some instances complete suspension of the Costumed Associates' weigh-ins.

43. Borgata's expert, Dr. Christopher Erath reviewed the data relating to enforcement of the 7% weight standard of the PAS and enforcement of the same between February, 2005 and December 6, 2012. He made the following conclusions:

(a) There were a total of 29 disciplines for violating the weight standard which were issued to 25 different women.

(b) During this time period, there were a total of 686 female Costumed Associates, which means that 661 female Costumed Associates, or 96%, had never been disciplined for violating the weight standard.

(c) The data showed that, during the relevant time period, there had been a total of 46 male Costumed Associates, none of whom had been disciplined for violating the weight standard.

(d) In conducting his analysis, Dr. Erath assumed that all Costumed Associates were equally likely to be disciplined over time and equally likely to stay out-of-compliance over time.

44. Plaintiff's responsive pleadings do not address Dr. Erath's conclusions.

45. No male Borgata Babe or male costumed associate has been disciplined pursuant to the clarified PAS. Plaintiffs have not presented the Court with evidence admissible at trial under our Rules of Evidence which would support a finding that any of the male employees warranted being disciplined.

46. The competing lexicons of the parties' pleadings are striking. The differences between the parties' positions and the language incorporated into their narratives are illustrated as follows:

(a) Borgata repeatedly uses of the term "costume" versus the Plaintiff's use of the term "uniform."

(b) Plaintiffs refer to their position as a "cocktail server," while Borgata refers to Plaintiffs as "costumed beverage servers".

(c) While Borgata requests the CBSs to wear their hair and makeup comparable to a "fashion model," or "entertainer," Plaintiffs believe they are required to look like "prostitutes."

(d) What Borgata views as periodic weigh-ins for enforcement of the PAS to insure its employees stay within 7% of their "hire weight," Plaintiffs view the weigh-ins as "constantly being harassed."

(e) With regards to the maintenance of a CBS's weight, Plaintiffs speak in terms of "starving," "bulimia" and prescriptions for "ant-anxiety medication" whereas Borgata references "gym memberships," "nutritionists," and "personal trainers."

(f) Finally, whereas Borgata speaks of the CBSs as "beautiful," "charming" and "impossibly lovely," Plaintiffs view the Borgata Babes program as "gender stereo typing" and "sexual objectification."

Contentions of Defendant Borgata

Borgata's multiple contentions have a common theme; namely, that its unique position in the Atlantic City casino-hotel market and the image it has created from its inception necessitates that it must be permitted to require its CBS's to comply with reasonable standards regarding their appearance and weight. Defendant claims by way of defense that the type of appearance, grooming and clothing requirements expected of the Plaintiffs is common in the casino-hotel workplace and that nothing demanded of their employees is unreasonable.

Borgata asserts that its PAS is neither discriminatory on its face nor has there been any discrimination in its enforcement. Essentially, Borgata asserts that the PAS is gender neutral both as to its terms and its enforcement. Additionally, the PAS and its terms and conditions were made known to Plaintiffs well in advance of their accepting a position as a Borgata Babe and the Plaintiffs cannot now refuse to hold up "their end of the bargain" at the time they were hired.

Further, Borgata argues that the 7% weight range standard for allowable weight gain is reasonable because it is linked to a gain which normally entails an increase in clothing size. Additionally, there is no disparate impact upon female versus male employees both with regard

to that standard and its enforcement. Finally, Plaintiffs have proffered no more than unspecific, anecdotal hearsay to support their allegations of discriminatory enforcement of the PAS.

Plaintiffs' Contentions

Plaintiffs contend that they have been forced to work in an atmosphere of sexual objectification and that they have endured humiliating treatment through the enforcement of discriminatory standards based upon sexual and/or gender stereotypes.

Plaintiffs contend that the PAS is not gender neutral. The standards of the PAS and the workplace demands of the Borgata require these female employees to wear a "sexually provocative, skimpy costume whereas the men are required to wear slacks, a club-style t-shirt and black shoes." Continuing, Plaintiffs assert that "the women are required to have a natural hour-glass shape while the men must have a V-shape." According to Plaintiffs, "the reality is that the Borgata Babes are used as nothing more than sex objects by the casino, required to adhere to a stereotype of overt and aggressive feminine sexuality."

Even assuming that the PAS is deemed by this Court to be gender neutral, Plaintiffs contend that the weight restrictions have not been enforced fairly and that the male employees have been let off easier than the female employees regarding maintenance of their weight. To that end, Plaintiffs argue that there are male CBSs known by the Plaintiffs who do not wear the required costumes and who have gained excessive weight and not been forced to endure suspensions or humiliating weigh-ins, but, rather, have been ignored and permitted to go about their work routine with no harassment by Borgata.

Standard for Review of Summary Judgment

Rule 4:46-2 provides that Summary Judgment is appropriate where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." All inferences of doubt are drawn against the movant in favor of the opponent of the motion. See Brill vs. Guardian Life Ins. Co., 142 N.J. 520 (1985).

In deciding a summary judgment motion, the trial court's "function is not . . . to weigh the evidence and determine the truth . . . but to determine whether there is a genuine issue for trial." Brill, supra, 142 N.J. at 540. To determine that, the trial judge must consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Ibid. If there is "a single, unavoidable resolution of the alleged disputed issue of fact," then the issue is not "genuine." Ibid. The thrust of Brill is that "when the evidence 'is so one-sided that one party must prevail as a matter of law,' . . . the trial court should not hesitate to grant summary judgment." Ibid.

In addition to Brill, the Court receives guidance from Anderson vs. Liberty Lobby, Inc., 477 U.S. 242 (1986) and Celotex Corp. vs. Catrett, 477 U.S. 317 (1986), both of which cite Improvement Co. vs. Munson, 14 Wall 442, 448 (1872). In Anderson, 477 U.S. at 451, our Supreme Court quoted Munson and admonished trial judges that,

> ...before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon which the onus of proof is imposed.

The Court in Anderson also stated,

> In sum, we conclude that the determination whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case ... The trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant. Anderson, 477 U.S. at 255.

The Court's Conclusions On The Issues Raised By The Pending Motions

New Jersey's Law Against Discrimination, N.J.S.A. 10:5-1 to -49 (the "LAD"), predates our State Constitution and was originally adopted in April of 1945. It has been amended on multiple occasions during the past 68 years. This Court holds to the belief that freedom from discrimination is one of the fundamental tenets of a just society and that discrimination based on gender is "peculiarly repugnant in a society which prides itself on judging each individual by his or her merits." Peper v Princeton University 77 N.J.55, 80 (1978). Additionally as our Supreme

Court has long recognized, New Jersey has a strong interest in maintaining "discrimination-free workplace[s]" for all employees. Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 600 (1993). By enacting the LAD the Legislature's "...overarching goal ...is nothing less than the eradication of the cancer of discrimination." Fuchilla v. Layman, 109 N.J. 319, 334 (1969). Gender discrimination effectively relegates one-half of society to a second-place status and is one of the cancers that must be eradicated.

The findings and declarations serving as the foundation of the LAD (N.J.S.A. 10:5-3) have evolved with society and today New Jersey prohibits discrimination because of a person's *race, creed, color, national origin, ancestry, age, sex, gender identity or expression, affectional or sexual orientation, marital status, familial status, liability for service in the Armed Forces... disability or nationality.*

Section 27 of the LAD (N.J.S.A. 10:5-27) requires, "The provisions of this act shall be construed fairly and justly with due regard to the interests of all parties." Section 12 of the LAD (N.J.S.A. 10:5-12) is the primary provision which addresses discrimination in the workplace. It is entitled, "Unlawful employment practice or unlawful discrimination." Section 12 is the longest section of the LAD and contains seventeen subsections and thirty-two subparts. Those sections and subparts are preceded by a statement which declares, "It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination." That prefatory statement is then followed by the recitation of innumerable instances of conduct, transactions and practices which the Legislature has deemed unlawful.

In every subsection of Section 12, except two, the language used by the Legislature is proscriptive, expressly *prohibiting* specified conduct by employers, labor organizations, employment agencies, real estate brokers, financial institutions, commercial enterprises generally, and all persons engaged in business in New Jersey. As correctly noted by Plaintiff's counsel, the first subsection of Section 12, namely "a" lists permissive exceptions to what is otherwise proscriptive language with regards to prohibited discriminatory hiring practices by employers. Subsection "a" and its language are not relevant to our discussion.

The other subsection containing language with generally permissive language and which expressly authorizes conduct by an employer is subsection "p" which reads in its entirety.

> p. Nothing in the provisions of this section shall affect the ability of an employer to require employees to adhere to reasonable workplace appearance, grooming

> and dress standards not precluded by other provisions of State or federal law, except that an employer shall allow an employee to appear, groom and dress consistent with the employee's gender identity or expression.

This Court's research – as well as that solicited from the parties' legal counsel – has failed to yield any decisions issued by a New Jersey or Federal Court construing and/or applying the terms of N.J.S.A. 10:5-12 p. The legislative intent of subsection "p" is apparent: employers are free to set standards for their employees' appearance, grooming and dress while they are at work, limited only by "other provisions of State or federal law" one of which is the LAD, including State and Federal decisions enforcing its provisions.

The terms "appearance, grooming and dress" are general, but they are not vague. This court views the discretion granted to employers as sufficiently broad to permit a business the freedom necessary to establish its *brand* or *presence* in the marketplace so as to distinguish itself from its competitors. While mandatory dress codes and uniforms are common for the staff in sundry businesses - everything from convenience stores, restaurants and gasoline stations, to factories, airlines and professional athletic arenas - employers in New Jersey are granted the discretion to set standards for more than dress; they may require their staff to comply with appearance and grooming standards.

There can be little dispute that employers have the right to impose reasonable standards regulating employee appearance through the enforcement of grooming standards, including those that regulate weight. See *Craft vs. Metromedia, Inc.*, 766 F.2d 1205, 1215 (8th Cir. 1985) {a female television news anchor claiming discrimination based on sex because she had been told her general appearance was unacceptable} wherein the Court expressed the general view that "the appearance of a company's employees may contribute greatly to the company's image and success with the public and thus that a reasonable dress or grooming code is a proper management prerogative." at 1215. See also, *Wiseley v. Harrah's Entm't, Inc., 94 Fair Empl. Prac. Cas. (BNA) 402(2004)* {i.e., prohibition of men wearing their hair in a ponytail}where the Court found that grooming policies, even if they include sex-specific language, fall outside the scope of Title VII, and by extension, the NJLAD. Likewise see, *Rivera vs. Trump Plaza Hotel & Casino*, 305 N.J. Super. 596 (1997) wherein our Appellate Division sustained a grant of Summary Judgment by the trial court on the claim of a male employee who had been terminated for refusing to cut his hair.

The Court recognizes that "appearance" and "grooming" are oftentimes subjective, and because of that any such standards established by an employer must be scrutinized under the provisions of the LAD and relevant Court decisions to insure that the employer's appearance and grooming standards are not "precluded." Additionally, in order to insure that "the provisions of this act shall be construed fairly and justly with due regard to the interests of all parties" the court's scrutiny of the facts and law must be in the context of the marketplace in which the employer is competing, the industry's mores and practices, and expectations of the employer's patrons.

Thus, the question before the Court is: *Query,* are the terms and conditions of the Plaintiffs' employment as expressed in the Offer Letter and the PAS "reasonable [*read, lawful*] workplace appearance, grooming and dress standards"?

This Court concludes that the terms and conditions of the Plaintiffs' employment are lawful for the following reasons.

A. THE OFFER LETTER AND THE TERMS OF THE PAS FULLY DISCLOSE BORGATA'S EXPECTATIONS OF THE PLAINTIFFS AND THOSE TERMS AND CONDITIONS WERE VOLUNTARILY ACCEPTED BY PLAINTIFFS

Upon making preparations to begin hiring staff for its new hotel casino property, Borgata made it known that it intended to distinguish itself from its competitors in Atlantic City. In addition to its architecture, furnishings and amenities, Borgata committed to providing its patrons with an experience not found in other local casinos.

A portion of the staff which interacted with patrons on the casino floor – particularly the service of beverages – was to play a role more vital to Borgata's public image than merely bringing a beverage to the customer. They were to be "ambassadors of hospitality" and were to function as "entertainers who serve complimentary beverages to the casino customers."

Approximately four thousand applications were submitted for the position of Borgata Babe and many applicants were subjected to two rigorous interviews. Those applicants who successfully completed the interview phase were invited to appear for a live, in-costume audition. An "Audition Invitation Letter" was sent to all those applicants who survived the second interview. That letter stated that successful candidates must be "physically fit, weight

proportional to height" with a "clean health smile and attention to personal grooming." The letter explained that, the "standards and expectations for the Borgata Babes program are extremely high and that in return, Borgata was giving a lot back to the Borgata Babe program." The scheduled shift for the "Babes" would be only six hours; they would be paid for an extra hour to allow for dressing room time and pre-shift; and they would be given spa treatment, photo opportunities, and free access to the hotel's fitness center.

As the process went forward and applicants were offered positions, each candidate received documents entitled Original Offer Letter ("Offer") and Personal Appearance Standards ("PAS"). In February of 2005, the PAS was clarified to add language regarding standards for allowable weight of employees in the Borgata Babes program. These two documents are discussed at Findings of Fact #s 13, 14, 17, 18, 19, 23, 24 and 29. Each document, i.e. the Offer and the clarified PAS was prepared in a form permitting signatures by both the employee and a representative of the Borgata. It's unclear from the submissions as to which of the Plaintiffs signed the Offer. As noted in the Court's Findings of Facts, every one of the Plaintiffs signed the clarified PAS.

There is nothing before the Court demonstrating that any of the Plaintiffs are legally incompetent, illiterate, were defrauded, subjected to duress or coerced by the Borgata to execute the clarified PAS. Further, it cannot be credibly asserted that Plaintiffs were ignorant of the position for which they had applied. See Findings of Fact #s 5 thru 15. Despite protests to the contrary in Plaintiffs' pleadings, the position applied for was much more than that of a cocktail server. What's more, it was disclosed that applicants should be "physically fit, weight proportional to height" and have a "clean healthy smile and attention to personal grooming." Applicants likewise were told that the position was in which they would function as "entertainers who serve complimentary beverages to casino customers." Additionally, prior to being hired, applicants were required to "audition", i.e. participate in a trial performance during which they interacted with faux patrons, while attired in revealing clothing apparel. Finally, the persons hired were told they were to be known as "Borgata Babes."

Words matter. Whether used to describe a woman or a man (admittedly less often) the use of the term *babe* oozes sexual objectification. From the Court's perspective, the term *babe* is at best undignified and at worst degrading. Regardless, there are people in our society who view

babe as playful flattery: generally complimentary. To the chagrin of those in our society hoping to leave sexual stereotypes behind, some of those people are female. And some of those people may be among the Plaintiffs.

We live in what may be the most intensely commercial society in world history. We live in an era in which the average person is bombarded continually with visual images intended to sell products. We live in a nation that many people believe is excessively preoccupied with personal appearances, particularly the beauty and physique of women. We live in an economy that routinely exploits the female body to market products and connotes the use of a wide array of products with sexual gratification: all calculated to lure customers.

Unspoken in such advertising is the risk to our culture, namely, that through the use of sexual stereotypes in the marketing of products, women as a group can – in the minds of unsophisticated people - be dehumanized: reduced to the status of mere tools for sales pitches. Nonetheless, when parties feel aggrieved by what they believe to be sexual objectification in the workplace the Court's role in such matters is guided by the law: not taste, philosophy or personal notions of morality.

The Court recognizes that not everyone views the Plaintiffs' participation as "voluntary." There are respected legal scholars who view American society as sexist and burdensomely "patriarchal." From their perspective, women in Plaintiffs' status aren't granting *true* consent when they sign a document such as the PAS. To such thinking, women who seek the demanding and potentially demeaning position of serving drinks to casino patrons (some of whom may lack restraint and are deficient in courtesy) do so out of economic necessity, *thus* – given existing conditions of gender inequality – any consent to be used as a sex object can never be genuinely voluntary. The employment market and a woman's need to support herself financially provide the cover for the objectification and exploitation of women: money is the means of coercion. Yet history teaches us that most times our Courts follow society; far less frequently, the Courts drive the public agenda and may do so only when a fundamental tenet of the law has been violated. To do otherwise fosters an appearance that can undermine the Court's credibility.

As concluded by the Court during oral argument, the Borgata Babe program has a sufficient level of trappings and adornments to render its participants akin to "sex objects" to the Borgata's patrons. Nevertheless, for the individual labeled a *babe* to become a sex object

requires that person's participation and nothing before the Court supports a finding of fraud, duress or coercion in connection with the Plaintiffs' hiring.

Plaintiffs cannot shed the label *babe;* they embraced it when they went to work for the Borgata. The occasion of their signature, to wit, the weighing in, together with the bold capital letter print of the clarified PAS directly above their signature line – see Finding of Fact #30 – made it clear that the execution this document was a serious business matter having consequences to their continued employment.

Because the Court has determined that the terms of the Offer and the clarified PAS were voluntarily accepted by the Plaintiffs, the next issue to be addressed is whether or not Borgata's appearance, grooming and dress standards impose a gender stereotype which is unlawful in the workplace under the LAD.

B. BORGATA'S WORKPLACE APPEARANCE, GROOMING AND DRESS STANDARDS ARE NOT UNLAWFUL GENDER STEREOTYPING

In essence, Plaintiffs contend that they "are used as nothing more than sex objects by the casino, required to adhere to a stereotype of overt and aggressive feminine sexuality."

Plaintiffs' gender-stereotyping claim relies upon a different understanding of the law than that of the Court. Plaintiffs' Counsel prefers a more colloquial meaning than what the Court understands the legal definition of "gender stereotyping" to be. As expressed in her pleadings and at oral argument, according to Plaintiffs' Counsel unlawful gender stereotyping occurs whenever an employer requires females to appear attractive in a manner that they deem to be "stereotypical" – even if an equally burdensome request is made of males. Nonetheless, that is not the law.

Employers are permitted to ask employees to be [remain] attractive, especially, as here, when the employee was hired – in substantial part - because of their pleasing appearance. Borgata is also permitted – as it did here - to show a preference for employees who possess a *sexually* attractive appearance. See *Jespersen vs. Harrah's* 392 F. 3d 1076 at 1081-1082 (9th Cir. 2004) (upholding requirement that female employees wear makeup). In truth, courts have explicitly held that employers are allowed to rely upon "*stereotypical* notions of how men and

women should appear" when expressing these preferences. See *Craft v. Metromedia,* supra at 1214-15 (upholding appearance standard even though based on "the feminine stereotype of 'softness'" "bows and ruffles," and "fashionableness"); *Jespersen vs. Harrah's Operating Co.*, 444 F. 3d 1104 at 1112 (rejecting gender challenge to requirement that women wear makeup).

What employers cannot do is use stereotypes to impose a professional disadvantage on one sex or the other, nor can they punish one sex for having a personal or physical trait that is praised in the other. See *Carter vs. Town of Benton*, 827 F. Supp. 2d 700, 709 (W.D. La. 2010) (citing *Schroer v. Billington*, 424 F. Supp. 2d 203, at 208); *Zalewski vs. Overlook Hospital*, 300 N.J. Super. 202, 203 n.1 (Law Div. 1996) (sexual stereotyping is "the assigning of certain behavior characteristics as appropriate for women and for men but not for the other sex").

Thus, for example, in the seminal case of *Price Waterhouse vs. Hopkins*, 490 U.S. 228, 234-35 (1989), the company was held liable for sex discrimination because it denied partnership to a female accountant because she was too aggressive – the very same stereotypically masculine trait that was both necessary for her job, and which was routinely praised in her male colleagues. *Price Waterhouse*, 490 U.S. at 251. Here, Plaintiffs do not allege that male CBSs were praised for becoming overweight or for being unattractive. In fact, Plaintiffs have never even suggested that they were professionally disadvantaged because of the PAS as compared with men. Instead, they base their entire claim upon the fact that they do not like how the weight standard, the female CBS costume, and the hair/makeup requirements make them *feel*, and would *prefer* not to work with them. As confirmed by the above decisions, this doesn't suffice under the law.

The record before the Court reveals that Borgata established its weight standard in an attempt to objectively regulate appearance and applied it evenly to both sexes. While the policy may advance a societal perception that fit people are more attractive than those who are overweight, that purported stereotype impacts both males and females and is not actionable under the LAD. See *Visick vs. Fowler Equip. Co.*, 173 N.J. 1, 15 (2002) (weight is not protected under the LAD unless it constitutes obesity that "fit[s] the statutory definition of 'handicapped.'"). Indeed, weight is not a protected category unless a person's obesity renders him/her disabled: something none of the Plaintiffs have alleged. What's more, despite having amended the LAD to expand the scope of its protections multiple occasions, the Legislature has not seen fit to address weight-based employment regulations.

Because the Court has determined that Borgata's appearance, grooming and dress standards do not impose an unlawful gender stereotype, the next issue to be addressed is whether or not Borgata's appearance, grooming and dress standards are "reasonable" for a workplace in New Jersey as contemplated by the Legislature in adopting N.J.S.A. 10:5-12 p., or stated more simply, whether or not Borgata may lawfully "require" its employees to "adhere" to those standards.

C. THE APPEARANCE, GROOMING AND DRESS STANDARDS OF BORGATA'S PAS ARE "REASONABLE"

Context matters. Standards established by an employer requiring certain conduct with regards to appearance, grooming and dress in the workplace must be scrutinized in the context of: (1) the industry's mores and practices, (2) the marketplace in which the employer is competing, (3) the duties to be performed by staff, and (4) the expectations of the employer's patrons. The Court cannot ignore the realities of the world in which both the Defendant and the Plaintiffs have chosen to do business.

Casino gaming is *sui generis* in the business world. The reason is obvious; what once was unlawful in most societies throughout history, i.e. private businesses owning casinos reaping revenue from the spendthrift entertainment of gambling, is now lawful in twenty jurisdictions in America. Making it even more unique is the fact that the primary "product" which a casino has to offer is a fun time and the opportunity to make a cash wager in the hopes of beating the house.

Casinos contrive an environment of high energy, show-biz and licentiousness; all calculated towards getting patrons to part with some of their personal assets while making them happy – happy enough that they will want to return despite having lost money gambling. What Borgata knows and Plaintiffs ignore, is that a gambling-resort-entertainment business cannot survive without repeat customers. Ultimately, it is the patron who determines what type of entertainment is offered by a hotel-casino property.

Atlantic City is unique in our nation's history in that it was the first city in America founded for the singular purpose of being a leisure-time destination. While there are other American "resort towns" which pre-date Atlantic City – Cape May comes to mind – all of them started out as something else. Atlantic City was founded exclusively to be a resort; the town has

no other reason to exist. Like all resorts, the key to success is for guests to leave happy and this is especially true for Atlantic City. There are few "resorts" –if any - in environs as far North as Atlantic City which depend upon luring visitors twelve months per year.

Most Northern resorts close –or severely curtail their activities - at the end of the "season." While that may have been partially true of "old Atlantic City" namely, the pre-casino gaming era, that is not the situation today. With the adoption of the 1976 constitutional referendum, Atlantic City and New Jersey launched an experiment that remains a work in progress. Hundreds of thousands of senior citizens, tens of thousands employees and hundreds of area businesses depend upon the revenue generated from a year-'round resort economy. Borgata, and none of its competitors could survive as seasonal businesses, and it's unlikely its employees could survive as well with only a seasonal income consigned to several months of warm weather.

In an effort to distinguish itself in the Atlantic City gaming market, Borgata decided to present itself to prospective patrons as a "Las Vegas style" hotel-casino. From all reports, its efforts have been successful. While no one aspect of any business enterprise as large as Borgata is indispensable to excelling in the marketplace, few business people are willing to part with any one ingredient to the formula which they believe has worked for them. Borgata has crafted its own formula to make its business flourish, and absent conduct which clearly violates the public policy of New Jersey, i.e., *unreasonable* workplace standards for appearance, grooming and dress, this Court is hesitant to meddle in its affairs by rebuking their business model.

Plaintiffs argue that the PAS is unlawful in its entirety because it sexualizes them by requiring Plaintiffs to adhere to an unarticulated stereotype of feminine beauty. The aspect of the clarified PAS which appears most worrisome to the Plaintiffs is the requirement of maintaining "a maximum weight of 7% over their personal hire weight." Plaintiffs assert that the mere requirement of being weighed amounts to an unlawful discipline.

The defects in that argument are threefold: (1) Plaintiffs signed the PAS and acknowledged that maintenance of their weight within the permitted range was a "condition of [their] continued employment"; (2) there is nothing in the law, nor the facts of this case as determined by the Court, which makes the required weigh-ins punitive, tantamount to a discipline; (3) gaining 7% of a person's weight should be a concern for people interested in their

health. When a person can no longer fit into their clothes, their body is talking to them – they should listen.

Plaintiffs likewise complain of the costumes (uniforms), make-up, hair and general appearance standards expected of them. Plaintiffs complain of sexual objectification, forced to be a mere sex object in marketing the Borgata. Whether they are referred to as "Babes" or as "ambassadors" the duties Plaintiffs signed onto at the time of being hired very much involved them making use of their attractive appearance. Nonetheless, the Plaintiffs ask the Court to stretch far beyond existing jurisprudence to find that – despite being attractive females who accepted a position in which their good looks and physique were key to their hiring –they have been exploited via unlawful stereotyping by being asked to put on makeup, wear Zac Posen apparel and remain physically fit.

Plaintiffs' oblique reference to dicta in *Jespersen v. Harrah's* 444F.3d 1104 cannot win the day. In truth, the decision(s) in *Jespersen* is instructive here in defeating Plaintiffs' claim. There, the casino employer Harrah's, was permitted to require its female bartenders to wear makeup despite claimant's belief that the requirement exploited her and cast her as a "sex object." As the Ninth Circuit explained, personal objections aren't sufficient to challenge an appearance standard because, if they were, "we would come perilously close to holding that every grooming, apparel, or appearance requirement that an individual finds personally offensive, or in conflict with his or her own self-image, [could] create a triable issue of sex discrimination." see *Jespersen* at 1112. There is nothing before the Court beyond Plaintiffs' self-serving declarations that the standards of the PAS are subjecting them to an "atmosphere of sexual objectification."

Finally, Plaintiffs assertion (at p.35 of their Opp.Br.) that "a reasonable jury could find that the PAS is discriminatory" misunderstands this Court's responsibility to apply the law. Section 12 of the LAD (N.J.S.A. 10:5-12) reads as it does. The legislature has granted employers the discretion to establish "*reasonable* workplace appearance, grooming and dress standards" and to *require* employees to *adhere* to them. A common sense definition of "reasonable" contemplates that which is *sensible, appropriate, to be expected, justifiable, ordinary or usual in a given set of circumstances.* Based upon the "context" of Borgata's business and the case law

discussed herein, the Court finds that Borgata has exercised its discretion and that the provisions of its PAS are lawful.

D. THERE ARE NO DISPUTED FACTS TO SUPPORT A FINDING THAT THERE WAS DISPARATE TREATMENT IN THE ENFORCEMENT OF THE PAS

Citing lack of any of the male CBSs having been disciplined under the weight standards of the PAS, Plaintiffs aver that several of the gentlemen should have been disciplined and that the failure of the Borgata to do so presents a disputed question of fact on their allegations of disparate treatment, entitling Plaintiffs to a trial.

In their Counterstatement of Facts and in the deposition testimony of several of the Plaintiffs, they mention various gentleman's names as either having: (a) gained more weight than permitted without being disciplined; (b) were never weighed during their employment; or (c) that they were wearing clothes at work other than the required uniform. As best the court can discern from a careful review of the submissions, Messrs. Jake Munoz, Bobby Thomas, Donald Moore, and Paul Gustee are the gentlemen in question. Nonetheless, there is nothing beyond Plaintiffs' uncorroborated, self-serving statements to support such claims regarding these gentlemen. Plaintiffs' legal counsels are learned, resourceful and persistent advocates. When the Court questioned Plaintiffs' counsel at oral argument as to whether or not any of the male CBSs had been deposed during pre-trial discovery, the answer was NO. Additionally, when Plaintiffs' legal counsel was substituted into this litigation, it quickly became apparent that additional depositions would be necessary. All requests for expanding the discovery period to permit depositions were granted. The Court was not informed of difficulty in securing anyone's deposition testimony.

Finally with regard to male CBSs dodging the appearance standards, this is a world in which most cellular telephones are equipped with a camera able to capture both still and moving images. It's a fairly simple procedure: even the undersigned has taken a picture with a cellular telephone. What's more, Borgata is a commercial establishment in which surveillance cameras are continually in operation. The Court has not been informed that a request by Plaintiffs' counsel for video of any male CBS at work was denied by Borgata. One would think that if there

were males CBSs coming to work in something other than their required uniform, the Court would have been presented with a photograph of at least one overweight male CBS.

As remarked by the Court in *Marks v. National Communs. Ass'n*, 72 F. Supp. 2d 322 (1999), "A 'genuine' dispute over a material fact only arises if the evidence would allow a reasonable jury to return a verdict for the nonmoving party. *Dister,* 859 F. 2d at 1112 (quoting Anderson, 477 U.S. at 248). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).* "Mere speculation or conjecture" will not suffice, see *Western World Ins. Co. v. Stack Oil Co., 922 F.2d 118, 121 (2d Cir. 1990)*, nor will "reliance on unsupported assertions," *Goenaga, 51 F.3d at 18.* Rather, the nonmoving party must provide "concrete evidence from which a reasonable juror could return a verdict in [her] favor." *Anderson, 477 U.S. at 256.* As concluded by the Court at Finding of Fact #45, Plaintiffs have not presented the Court with evidence admissible at trial under our Rules of Evidence which would support a finding that any of the male employees warranted being disciplined.

An appropriate Order has been entered. Conformed copies accompany this Memorandum of Decision. Finally, as discussed with counsel at the second oral argument on June 28, 2013, the appeal period shall run from the date of this Memorandum of Decision.

NELSON C. JOHNSON, J.S.C.

Date of Memorandum: 7/18/13