



RIGHTS STUFF

A Publication of The City of Bloomington
Human Rights Commission

City of Bloomington

February 2008

Volume 104

Are Ladies' Nights Legal?

If a bar or restaurant has a "Ladies' Night," during which women customers don't have to pay a cover charge or are charged reduced prices for drinks, is that a violation of laws against discrimination in public accommodations on the basis of sex? We've had several people call the BHRC with that question over the years, but since no one has filed a formal complaint, we've never issued a ruling on the issue.

In 2004, the New Jersey Department of Civil Rights said that such practices are illegal under that state's civil rights law. The governor at the time, James McGeevey, said the decision was an example of "bureaucratic nonsense" and an "overreaction." The state legislature reacted by unanimously passing a law making it legal for bar owners to offer special promotions, such as charging women different prices for drinks.

California has long held that such practices violate that state's civil rights laws as well, although individual bars seem to continue the practice until someone files a formal complaint or a lawsuit.

A sex discrimination lawsuit is pending in New York. The plaintiff in the case, a male New York lawyer, told the New York Times that "I'm tired of having my rights violated and being treated as a second-class citizen." The owner of the bar that the plaintiff is suing called the lawyer "pathetic."

A lawsuit was filed in Denver, where a man said that it was "outright discrimination" for him to have to pay a \$5 entry fee to get into a night club that was allowing women in free. The night club defended its practice, saying it was a common business practice at many nightclubs in Denver.

In Nevada, a man noticed that a gym offered his wife a less expensive sign-up rate than it offered him, and that it had a special workout area for women. He told the New York Times, "Imagine a whites-only country club or a whites-get-in-free deal or something like that."

State courts in California, Colorado, Iowa and Pennsylvania have all found these practices to be illegal. State courts in Illinois and Washington have all concluded that they are a permissible way of attracting customers. To our knowledge, no such case has been filed in Indiana.

Plaintiffs in these cases often compare their situations to African Americans who could not get served at lunch counters in the South. The situations are not completely analogous, of course - Jim Crow laws were designed to keep African Americans out of businesses. Ladies' Night practices are designed to get women into businesses.

If you have a question about your rights and responsibilities under the Bloomington Human Rights Ordinance, please contact the BHRC. ♦

BHRC Staff

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Barbara Toddy,
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Commission Members

Valeri Haughton, Chair

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Secretary

Byron Bangert

Prof. Carolyn Calloway-Thomas

Luis Fuentes-Rohwer

Beth Kreitl

Mayor

Mark Kruzan

Corporation Counsel

Kevin Robling

BHRC
PO BOX 100
Bloomington IN
47402
349-3429
human.rights@
bloomington.in.gov



Music In The Workplace

Music at work can create a pleasant background. But on the flip side, people playing the radio or CDs in the work place can create conflict. Describing types of music in negative ways can lead to inferences of bias. In some cases, music can be an element of a discrimination or harassment complaint. A few examples:

In Cook v. Cub Foods, Inc., 99 F. Supp 2d 945 (N.D. Ill. 2000), an employee said his boss maintained a "religiously hostile work environment." Among other things, the employee, a Lutheran, objected to his boss playing "Satanic death metal" over the loudspeakers.

In Hoffelt v. Illinois Department of Human Rights, 867 NE 2d 14 (Ill. App. 1 Dist. 2006), the Court said that playing Muzak at the workplace could, under some circumstances, be seen as illegal retaliation. The Court, quoting a previous case, said that 'Suppose an employer knows that a particular worker has a nervous condition or hearing problem that makes him miserable when exposed to music for extended periods. Many people find music soothing and welcome its addition to the workplace. But if an employer sought to retaliate for a charge of discrimination by exploiting this vulnerability, moving him from a quiet office to one where Muzak plays constantly, that could be a material change if not, indeed a constructive discharge.'

In Muhammad v. Wisconsin Coach Lines, Inc. 2006 WL 2947325 (E.D. WI 2006), an African American bus driver said that the dispatcher had

made racial comments over the radio. The internal investigation showed that white drivers had been playing Christmas music over the radio. Another white driver said, over the radio, "Stop monkeying around!" In context, this was not found to be a racial comment.

In Dawson v. Monaco Coach Corp., 2005 WL 3005347 (N.D. IN 2005), a devoutly Christian employee liked to listen to Christian radio stations and tapes at work. His co-workers called him names including "f___ - ing Christian" and "Jesus freak" for doing so. Their language offended him. He was asked to lower the volume of his radio because his co-workers objected to hearing sermons. He lowered the volume so much he could no longer hear the sermon himself. At the same time, his co-workers were allowed to keep their radios on at a louder volume. He was subjected to numerous pranks, including someone drawing a five-point star and the numbers "666" on his worktable. When he complained, his supervisor said, "That's just factory. When you work in the factory, you'll have those things." The Court said that Dawson had presented enough evidence for the jury to decide if the religious harassment was severe or pervasive enough to be legally actionable.

In Alexander v. Wisconsin Department of Health and Family Services, 2000 WL 34239243 (W.D. WI 2000), an African American employee complainant alleged that among other things, a white co-worker said, "rap music is jungle bunny music."

In Peters v. Renaissance Hotel Operating Company, 307 F. 3d 535 (7th Cir. 2002), the complainant alleged, that among other things, that a hotel supervisor said he could not wait until the music being played by some African American hotel guests, music he called "wicca wicca woo" music, was turned off.

In Miscellaneous Warehousemen v. Budget Rent A Car Systems, Inc., 2002 WL 31833748 (N.D. Ill. D. Ct. 2002), a union employee brought to work a rap song that he had written. He left the lyrics in an open area where others had access. The employee was a member of a rap group, along with some co-workers. The song he had written contained obscene, misogynist and racist language, violent imagery and a specific reference to the employee's supervisor, by name. When supervisors read the lyrics, the songwriter was fired, and he filed a grievance under the union contract. The arbitrator found that termination was not appropriate in this case, because the employee's conduct was "not willful and was not intended to threaten, harass or . . . make" his co-workers uncomfortable. He had not been disciplined before for harassing other employees. The Court upheld the arbitrator's findings.

If you have rules about playing music in the workplace, make sure you communicate the rules to your employees and that you enforce the rules in a consistent and fair way. If people complain about music, make sure you deal with their complaints in a consistent and fair way as well.



Emotional Damages For ADA Violations

Ahmet Demirelli worked for Covergys as a call representative, answering telephone calls from customers for the company. He has a rare condition called brittle bone disease and uses a wheelchair for mobility.

Covergys wanted to keep its call stations consistently attended, and thus maintained a strict tardy policy. The company penalized employees who were late for work, and those who received 14 or more tardy penalties in a year could be disciplined, up to and including termination.

During Demirelli's first year, he was late reporting to work 37 times and late returning from lunch 65 times. The only two accessible parking spaces were usually occupied when he arrived at work, and he had to wait until a space became vacant or try to find an alternative parking space that could accommodate his van and chair lift. He tried coming to work an hour early, but even so, the accessible spaces were usually occupied. He tried parking at a nearby movie theater, but traveling the distance from the theater to his work site caused him considerable pain. He asked to work second shift, but even then, he could not always find accessible parking. He asked for a grace period to return to work, but this request was denied.

Since the Immigration Reform and Control Act of 1986, all employers have been required to verify the eligibility and identity of employees hired to work in the United States. Employers, by law, must complete a Form I-9 for all employees, including U.S. citizens. Employers

When Demirelli got to work, he sometimes found it difficult to find a vacant cubicle. The call representatives claimed the first vacant cubicle they found. The other representatives could look over the top of the rows of cubicles to find a vacant one, but that option was not available to Demirelli. He had to examine each work station from his wheelchair. The narrow aisles, often clogged by chairs or employees, made this more difficult. One supervisor allowed him to use a workstation reserved for training, but his supervisors expressed their displeasure about Demirelli sitting there.

On June 27, 2007, Covergys terminated Demirelli, and he filed a disability complaint with the EEOC. He sued. The jury awarded him \$14,265.22 in lost wages and \$100,000 in emotional damages. The company appealed, unsuccessfully.

Covergys argued that Demirelli had never requested a specific, reasonable accommodation. The Court of Appeals said that "once the employer is made aware of the legitimate need for an accommodation, the employer must make a reasonable effort to determine the appropriate accommodation." Demirelli had asked for accommodations, even suggesting several potential

alternatives. Covergys did not meet its obligation to engage in the ADA-mandated interactive process with its employee.

The company also argued that it would have been unreasonable to allow Demirelli extra time because punctuality was an essential job requirement for call representatives. The Court said that allowing him an extra 15 minutes to return for lunch would not have been unreasonable.

Finally, the company argued that the emotional distress damages were unwarranted. The Court disagreed, saying there was evidence that the company's actions had caused Demirelli emotional injuries. The Court said that "prudent management decisions and common courtesy among co-workers may well have avoided this claim in its entirety." It said the company offered no convincing evidence that the emotional damages award was shocking to the conscience.

The case is EEOC v. Covergys Customer Management Group, Inc., 491 F.3d 790 (8th Cir. 2007). ♦

New I-9 Form Released

that fail to comply with this legal requirement may incur fines and penalties.

Recently, the U.S. Citizenship and Immigration Services (USCIS) revised the form. The USCIS is urging all employers to start using the new

form as soon as possible. The new form is available online at www.uscis.gov/files/form/I-9.pdf. The new instructional handbook for completing the form is available online at www.uscis.gov/files/nativedocuments/m-274.pdf.



Employment Tests And Selection Procedures

Does your business use tests to screen applicants and internal candidates for promotion? If so, you might want to check out the Equal Employment Opportunity Commission's new fact sheet on testing, available at www.eeoc.gov/policy/docs/factemploymentprocedures.html.

The fact sheet covers civil rights-related issues that tests may raise and how to make sure your tests are not illegally discriminatory. It also covers some recent EEOC litigation and settlements in the area of testing. Two examples:

—EEOC v. Ford Motor Co. and United Automobile Workers of America was a case brought on behalf of a nationwide class of African Americans who were rejected for an apprenticeship program after taking a cognitive test. The test had a statistically significant disparate impact on African American applicants. Ford had access to similar tests with less discriminatory selection procedures, but kept using the one with a disparate impact. As a result of a settlement, Ford agreed to change its tests and paid \$8.55 million in monetary relief.

—EEOC v. Dial Corp. was a case brought on behalf of women who

were disproportionately rejected for entry-level jobs because of a strength test. Before Dial Corp. started using the test, 46% of its new hires were women; after, only 15% were women. The EEOC said the test was considerably more difficult than the job required. Both the Trial Court and the Court of Appeals agreed with the EEOC that Dial's use of the test violated Title VII under the disparate impact theory of discrimination.

Finally, the fact sheet discusses best practices for employers to use when testing and selecting employees. ♦

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PO Box 100
Bloomington IN 47402**