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Case weighs heavy on 'scales' of justice

ELCRA

By Carol Lundberg

As soon as the news broke that Cassandra Smith was suing her former employer, the Hooters restaurant in Roseville, the phones started ringing at The Law Offices of Sam Bernstein.

Like Smith, employees and former employees at Hooters locations around the country were saying that they, too, faced — or are still facing — weight discrimination and pressure to either maintain what some workers call an undefined weight standard, or lose their jobs.

It's possible that the standard is enforceable at Hooters restaurants outside of Michigan, unless they're in one of a handful of communities that prohibit weight discrimination.

In Michigan, the Elliott-Larsen Civil Rights Act (ELCRA) protects workers against height and weight discrimination. Though weight has been a protected class in Michigan since 1976, weight discrimination is still fairly untested. There have been no cases in Michigan courts that present the exact circumstances and type of discrimination alleged in the suit.

The company has released statements saying that it does not discriminate based on weight, but if servers don't fit the image — and the restaurant's signature tank top and tight orange shorts — they are given a so-called 30-day challenge to improve.

Smith, who had worked at Hooters for two years, and who had been promoted to a shift leader position, left her position after being admonished and offered a gym membership.

> "None of the people we interviewed have ever heard of a 30-day challenge. But they've all heard of weight probation."
>
> — Michael Gatti, Dawid & Gatti PLLC

So the Bernstein lawyers, as well as a team of lawyers from two Ann Arbor law offices, started interviewing current and former waitresses, known as "Hooters Girls."

"None of the people we interviewed have ever heard of a 30-day challenge," said Michael Gatti of Dawid & Gatti PLLC in

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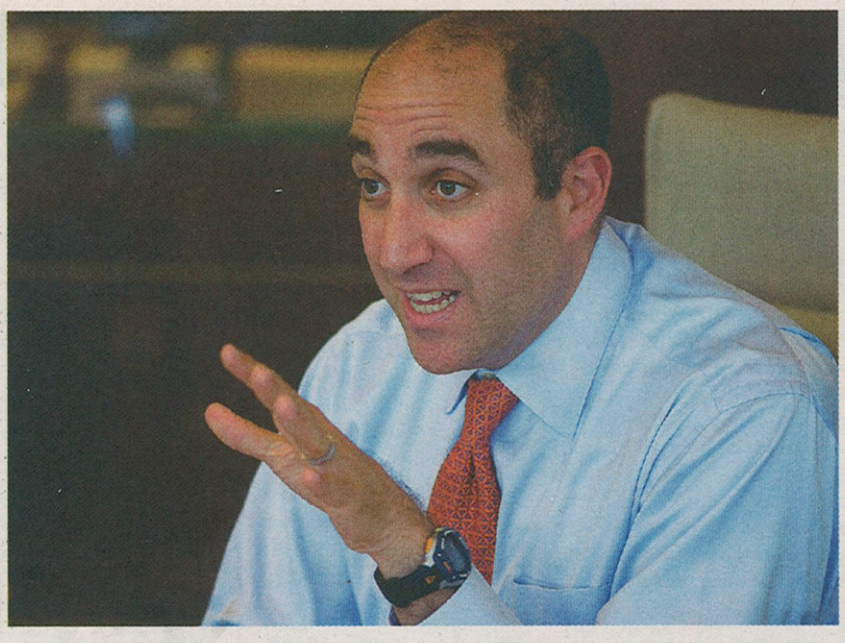
LW photo by Mark Bialek

Laurence H. Margolis, Mark J. Bernstein, Robert A. Dawid and Michael J. Gatti are representing two former Hooters waitresses who claim the restaurant discriminated against them, based on their weight.

"Hooters seems to want to compare their waitresses to the Radio City Rockettes and the Dallas Cowboy cheerleaders."

— Mark A. Bernstein, The Law Offices of Sam Bernstein



LW photo by Mark Bialek

Scales

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Ann Arbor. "But they've all heard of weight probation."

Gatti, along with colleague Robert A. Dawid, Ann Arbor attorney Laurence H. Margolis, and Farmington Hills-based Mark A. Bernstein, are representing the plaintiffs.

From his office in Atlanta, Clay C. Mingus, general counsel for Hooters of America Inc., said that he still has no idea what Smith and Leanne Convery, the second woman to file suit against Hooters, weighed during their tenure at the Roseville store. He doesn't really care, he said, because even though the two women are claiming weight discrimination, being a Hooters Girl has nothing to do with a number on a scale.

It's about image, he said, and everyone understands it.

"Most of America, and certainly the great majority of our employees, understand the concept of Hooters," Mingus said.

"The question will be: Are aesthetics essential to their business model?"

— Philip B. Phillips, Foley & Lardner LLP

The Hooters Girls aren't just waitresses, he added.

"They're fulfilling the role of entertainers. They all agree to that upon hire. That's why we've gone so long without a challenge," Mingus said.

As for ELCRA, he said, "I don't think it's challengeable in Michigan because we don't have a weight standard."

Hooters' replies to the suits are due to the Macomb County Circuit Court later this month.

The cases will to boil down to Hooters' ability to prove that Hooters Girls are not waitresses, but rather are entertainers, said Philip B. Phillips, employment lawyer at Foley & Lardner LLP in Detroit.

"The question will be: Are aesthetics essential to their business model?" he said. "This isn't Applebee's. It's not an average restaurant. When an Applebee's opens up, you don't have people showing up at city hall questioning whether or not the planned location is right for the community, and people don't go into Applebee's and ask to have their pictures taken with the waitresses."

If Smith and Convery are entertainers, the restaurant can discriminate based on weight because appearance is a bona fide occupational qualification, said employment lawyer William B. Forrest III, of Birmingham-based Kienbaum, Opperwall, Hardy & Pelton PLC.

But that's going to be tough, he added.

Forrest recalled one of the best-known bona fide occupational qualification exception cases, *Wilson v. Southwest Airlines Co.*, in which the airline defended its policy of hiring only attractive female flight attendants.

Such hiring practices were part of its brand, said the airline, which had invested in its "In Flight Love" advertising campaign, which featured a woman's voice promising love to passengers while beautiful flight attendants, some clad in hot pants, served passengers "love bites" (almonds) and "love potions" (cocktails).

"The question the court asked was, 'What is your product?'" Forrest said. "The courts said Southwest was in the business of flight, not sexual entertainment, so being a sexy female was not essential to performing the job.

"Hooters can expect a similar question of the courts, and the answer might be, 'You're in the business of selling food and beer.'"

A Hooters Girl's job description bolsters the argument that servers, which Hooters representatives have stated are crucial to the company's image, are waitresses, and are not entertainers.

"Hooters seems to want to compare their waitresses to the Radio City Rockettes and the Dallas Cowboy cheerleaders," said Bernstein, before turning his attention to a printed list of job duties for Hooters Girls.

"But here are some things the Rockettes are not required to do," he said, rattling off a list of typical food server tasks, including stapling cash receipts, clearing tables and filling bus tubs, filling sugar packets, sweeping floors and carrying trash bags.

"I don't think that Hooters makes the distinction other than when pressed," Gatti said. "They only call them entertainers when they're being sued."

Bernstein said that if Hooters prevails, the impact on civil rights law in Michigan will be significant.

"It would fundamentally alter the concept in Michigan ... such that it's no longer a Hooters. It would erode the cornerstone of our brand."

— Clay C. Mingus, general counsel for Hooters of America Inc.

"You could say that you don't have a receptionist," he said. "You have a client entertainer, and that client entertainer must be a white male under the age of 18."

But Phillips said that's grossly exaggerated.

"I doubt that anyone is coming to your firm to be photographed with your receptionist," he said.

Still, the stakes are high, Bernstein said.

It's a relatively untested area of Michigan law, noted Margolis, adding that it's a case the restaurant will feel it must win.

On that point, Mingus agreed.

"If we do not prevail, and I feel very strongly that we will, it would fundamentally alter the concept in Michigan ... such that it's no longer a Hooters," Mingus said. "It would erode the cornerstone of our brand.

"We are prepared to fight until we win."

If you would like to comment on this story, please contact Carol Lundberg at (248) 865-3105 or carol.lundberg@mi.lawyersweekly.com.