

LEAVING NOTHING TO CHANCE: EMPLOYMENT PRACTICE LIABILITY IN THE GAMING INDUSTRY

By David M. Finz

There is no question that the gaming industry has been a catalyst for economic development in many areas. By bringing jobs to the building trades and hospitality sectors, casinos have often provided greater employment opportunities in communities where they are desperately needed. Nevertheless, the gaming industry does not exist in a vacuum; it is part of the society in which it operates, one where economic and educational disparities have yet to disappear. And certain aspects of the industry itself, such as the need to project an affluent, even glamorous image in order to keep guests of the casinos entertained, sometimes can trigger charges of discrimination.

In recent years, the Equal Employment Opportunity Commission (“EEOC”) has brought and settled several lawsuits against casinos on behalf of aggrieved employees and applicants. In one well-publicized case, a casino company agreed to pay \$1.5 million to settle charges of national origin bias. Hispanic employees had charged that they had been verbally harassed and improperly subjected to “English-only” rules in the workplace.¹ In another case, a Las Vegas hotel and casino paid \$1.1 million

to settle a lawsuit brought by the EEOC on behalf of African-American and Hispanic job applicants who charged the hotel with discrimination in hiring over a seventeen month period.² While these particular actions were brought by the EEOC, other employees and applicants have initiated private civil actions against the gaming industry as well.



The Cards are Stacked Against Some Casinos: When it comes to employment discrimination, the “Rules of the House” (and Senate) don’t always apply to Indian-owned entities.

At the macro-level, the gaming sector looks like a pinnacle of diversity. According to the EEOC, in 2003 (the last year for which information is available) there were over 200,000 employees working in the 130 casino hotels nationwide. Slightly less than half were women and better than half were people of color. However, people

¹ Source: www.eeoc.gov/press/7-18-03a.html

² Source: www.eeoc.gov/press/11-27-02.html

of color were heavily concentrated in sales, office/clerical, craft and operator positions, and under-represented in managerial and professional titles. Only 8.7% of all “minorities” employed in the gaming industry occupied positions as officers, managers or professionals, compared with 17.8% of all whites working in this industry.³

Corporations operating casinos face another disadvantage somewhat unique to their industry: Title VII does not permit private litigants to sue Indian nations or economic entities owned by such nations, because these entities are excluded from the definition of an employer under the Civil Rights Act.⁴ What this means in practical terms is that such corporations do not have a level playing field on which to compete with their Indian neighbors, due to the significant transactional costs of employment litigation.

Staffing for Diversity

Although there is no way to insulate a gaming operation from employment practice liability claims, there are some measures that can be taken to minimize exposure and position a casino to rebut charges of discrimination when they do occur. Diversity is not about quotas and set-asides; it’s a matter of recognizing and developing the talent that already exists within under-represented communities.

³ For a copy of the report, visit the EEOC at this link: www.eeoc.gov/stats/jobpat/2003/naics5/72112.html

⁴ 42 U.S.C. s. 2000e(b). This exemption, however, does not apply to a private management company that enters into a contract with an Indian nation for the purpose of operating a casino. See Hines v. Grand Casinos of Louisiana, LLC, 140 F.Supp.2d 701 (W.D.La. 2001); *aff’d* 2002 WL 180364 (5th Cir. 2002).

The following are some suggestions to help casinos recruit and retain a diverse workforce:

- *Break out of the mainstream.* Gaming companies can utilize the newspapers, radio stations and Internet sites frequented by the communities of color they wish to reach with “help wanted” advertising;
- *Back to school.* It is important for Human Resources to contact career offices at “historically Black colleges,” as well as public and private universities with high concentrations of students of color. Be aware, however, that some campuses may have prohibitions on recruitment by the gaming industry for religious or other reasons;
- *Fair thee well.* Job search boards such as monster.com and careerbuilder.com frequently host “diversity fairs” to match employers and candidates. Companies can conduct interviews and hire qualified applicants on the spot;
- *Love thy neighbor.* All the hiring in the world does not guarantee employee retention or assure morale, so companies need to foster a corporate culture that honors diversity. Examples of such activities include:
 - Celebrating Black History Month, Women’s History Month, Hispanic Heritage Month, and Asian-Pacific Heritage Month;

- Contacting the Small Business Administration for the names of Minority Business Enterprises and Women's Business Enterprises the casino can use as vendors (these businesses are also a good source of candidate leads for hiring);
- Supporting community programs with money, volunteers and in-kind donations (this is especially critical in light of the devastation many Gulf Coast communities with casinos are now facing as a result of Hurricane Katrina);
- Instituting a zero-tolerance policy for harassment, including diversity training for managers and a reporting system for complaints that does not require employees to go to their first-level supervisor if he or she is the one being accused of wrongdoing;
- Conducting prompt, fair, internal investigations of discrimination complaints when they do occur (note: some employers have taken to outsourcing these investigations to ensure impartiality);
- Offering employees tuition reimbursement,

one-on-one mentoring, and management training programs to promote qualified personnel of all races and ethnicities;

- Reviewing the casino's Employment Practice Liability insurance policy to determine whether coverage is adequate in light of today's litigious environment. Retention of greater risk through higher deductibles or the use of coinsurance may allow the casino to obtain higher coverage limits without having to bear substantial increases in premiums.

Conclusion

Staffing for diversity can do more than reduce employment discrimination claims; it can help a company draw upon the growing purchasing power and cultural influence of communities of color in our society. A company improves its odds of success when the image it projects in the workplace reflects the marketplace in which it operates. That's more than good employment practice; it's a good bet.

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