

## COURT UPHOLDS UNEQUAL WAGE SUIT BASED UPON UNFAIR AND UNEQUAL SHIFT ASSIGNMENTS BROUGHT BY FEMALE SERVER AT MANHATTAN RESTAURANT

On July 21, 2008, Justice Carol Robinson Edmead of the New York County Supreme Court denied a motion to dismiss a claim for unequal compensation brought against the owners, operators and several individual employees of Cipriani restaurant in Manhattan by a female server. *Torres v. Vittoria Corp.*, 114667-07 (N.Y. Sup., July 21, 2008). The *Torres* decision is particularly notable because the basis for plaintiff's unequal compensation claim was that she and other female servers were consistently assigned to the breakfast shift, which generated lower tips, while male servers were given the more lucrative lunch and dinner shifts.

The plaintiff in *Torres* claimed that, from February 2000 through October 2007, she experienced a hostile work environment, disparate treatment, unequal compensation based on gender, unlawful discrimination based on her sex and retaliation from male employees and supervisors. Plaintiff alleged that male employees and supervisors subjected her to continual verbal abuse and intimidation based upon her gender. In addition to the disparaging comments and conduct, plaintiff alleged that the managers at Cipriani favored male over female employees with regard to shift assignments. Specifically, she asserted that, even though male and female workers who worked the same shift received equal wages, there was a marked tip earning differential among the breakfast, lunch and dinner shifts and that she and other female servers were consistently assigned to the lower paying breakfast shift.

Plaintiff claimed that the unfair and unequal shift assignments violated New York Labor Law § 194, which states that: "No employee shall be paid a wage at a rate less than the rate at which an employee of the opposite sex in the same establishment is paid for equal work on a job the performance of which requires equal skill, effort and responsibility, and which is performed under similar conditions...." In their motion to dismiss, the defendants argued that plaintiff's unequal wage claim was insufficient to state a claim because she failed to allege that men and women working the same shifts were paid at different wage rates. In other words, defendants argued that, "[e]ven assuming that plaintiff was assigned to the less favorable breakfast shift because of her gender, the proper inquiry in an unequal wage claim is not whether male employees were assigned to higher paying shifts, but rather, whether female and male employees working the same shifts were paid equally by the employer."

Justice Edmead rejected defendants' argument holding that "allegations that male employees were paid at higher wage rates compared with females due to job assignments based on gender, that plaintiff received lower wages, i.e. gratuities, as a result of her assignment to the breakfast shift, and that such assignments were based on gender, sufficiently state a claim under New York State Labor Law." Significantly, the Court also found that certain corporate officers and restaurant employees, including the President of Cipriani and plaintiff's immediate supervisors, could be sued individually for violation of the New York Labor Law.

This case demonstrates that, in order to avoid liability under the equal pay provision of the New York Labor law, restaurants and other employers must be careful to ensure that shift assignments are not based upon gender, or other discriminatory criteria, where there is a differential in earnings among shifts. It also demonstrates the importance of taking proactive measures to avoid discrimination claims, such as conducting management training on how to create and maintain a respectful workplace environment.

If you would like to further discuss the issues presented by the *Torres* decision, or to discuss other labor and employment matters facing your organization, please contact:

Jonathan Stoler  
+1 (212) 332-3857  
jstoler@sheppardmullin.com