Ninth Circuit Rejects Challenge to "Bikini Baristas" Dress Code Ordinance

By Kristel Tupja

In a ruling parsing when conduct becomes sufficiently expressive to warrant First Amendment protection, the Ninth Circuit found that a lack of clothing at "bikini barista" coffee shops alone did not implicate speech rights and vacated a preliminary injunction against enforcement of a local dress code ordinance. The appellate court also rejected a due process challenge to the ordinance. Edge v. City of Everett, 2019 WL 2864410 (9th Cir. July 3, 2019).

A federal district court in Washington had held that the plaintiffs demonstrated a likelihood of success on the merits of their First Amendment challenge to the Dress Code Ordinance because their "choice to wear provocative attire … constituted sufficiently expressive conduct to warrant First Amendment protection." The District Court also held that the plaintiffs demonstrated a likelihood of success on their void-for-vagueness argument, citing the term "anal cleft" in the definition of "lewd act" as vague, and a term that a person of reasonable intelligence would not readily understand.

In vacating that ruling, the Court of Appeals concluded that lack of clothing in this context fails the second prong of the test for expression conduct in *Texas v. Johnson*, 491 U.S. 397 (1989)—*i.e.*, that the message is likely to be understood. The Court also found that terms available in a common dictionary, and that are used in connection with other similar terms, are not ambiguous and cannot be considered void for vagueness.

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"Bikini Baristas"

The phenomenon of coffee shops and drive-through stands employing scantily clad staff apparently dates back at least a decade in Washington State. The City of Everett, however, was concerned that although ostensibly wearing "bikinis," such baristas were actually borderline nude employees, often wearing pasties and a thong—or nothing at all. After receiving "upwards of forty complaints," the City enlisted the help of the local police department in investigating potential crimes resulting from the fact that women were serving coffee in bikinis.

Over the course of five years, police uncovered several criminal offenses. For example, a bikini stand owner employed a 16-year-old minor, and was convicted of sexual exploitation; another bikini stand served as a front for a prostitution ring. Undercover officers documented a wide variety of "customer-barista physical contact" and cited "pressure to engage in lewd acts" for tips, and several bikini baristas were survivors of sexual violence that occurred at or near their place of employment. The police department concluded at the end of their five-year

investigation that individual monitoring and enforcement was ineffective in stopping the illegal conduct. As a result, the City enacted a new Dress Code Ordinance, broadened the definition of "lewd act" to include the exposure of certain body parts, and created a new crime of Facilitating Lewd Conduct; all to prevent crimes connected to, or prompted by, bikini baristas.

City of Everett Dress Code Ordinance

Under the Dress Code Ordinance, all employees, owners, and operators of "Quick Service Facilities" are required to comply with a "dress requirement" mandating coverage of "minimum body areas." "Minimum body areas" is defined in the law as "the upper and lower body (breast/pectorals, stomach, back below the shoulder blades, buttocks, top three inches of legs below the buttocks, pubic area, and genitals)." Quick Service Facilities are defined as "coffee stands, fast food restaurants, delis, food trucks, coffee shops, and all other drive-through restaurants." Everett Municipal Code ("EMC") § 5.132.020(A-C).

The City also expanded the definition of "lewd act" to include: "[A]n exposure or display of one's genitals, anus, bottom one-half of the anal cleft, or any portion of the areola or nipple of the female breast[] or [a]n exposure of more than one-half of the part of the female breast located below the top of the areola; provided that the covered area shall be covered by opaque material and coverage shall be contiguous to the areola." EMC § 10.24.010(A)(1)-(2).

The City created a new misdemeanor offense of "Facilitating Lewd Conduct" in which an owner, lessee, lessor, manager, operator, or other person in charge of a public place commits the offense if that person "knowingly permits, encourages, or causes to be committed lewd conduct" as defined in the ordinance. *Id*. § 10.24.025(A).

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The Challenge and Ninth Circuit Decision

Jovanna Edge, a bikini stand owner, and several baristas challenged the expanded Lewd Act Ordinance as void-for-vagueness, and the Dress Code Ordinance as violating their First Amendment right to freedom of expression.

The Ninth Circuit emphasized that the plaintiffs "deny that they engage in nude dancing and erotic performances, thereby disavowing the First Amendment protections available for that conduct." That litigation strategy may have been adopted to avoid regulations on such establishments. Regardless, the First Amendment challenge here was based solely on the expressive aspects of the barista's "bikinis." The plaintiffs argued that their uniforms "convey messages such as female empowerment, confidence, and fearless body acceptance," and the new Dress Code Ordinance infringed on their right to this freedom of expression. In a signal of its analysis, the Ninth Circuit nevertheless noted that plaintiffs offered "diverse" messages, and that "each individual barista's intended message is likely somewhat unique."

The Court relied on the test set forth in *Texas v. Johnson* to determine if wearing a bikini at work is expressive conduct. Under *Johnson*, conduct is considered expressive if there is: (1) "an intent to convey a particularized message" and (2) a "great likelihood…that the message would be understood by those who viewed it."

The Court held that "even if the plaintiffs could show that their intent is to convey a particularized message…[their] First Amendment claim falters" under the second prong of *Johnson* for "failure to show a great likelihood that their intended message will be understood by those who receive it"

Although the Court took into account the plaintiffs' intended message of body positivity, it found that because the bikini baristas were "in close proximity to paying customers," there was a "high likelihood that the message sent by the baristas' nearly nonexistent outfits vastly diverges from those described in plaintiffs' declarations." In essence, because the baristas are in a commercial atmosphere where they interact with customers for tips, the Court found that they do not demonstrate a likelihood that the intended messages related to body positivity would be understood as the expressive message by those who encounter the baristas. Instead, the Court found that their choice of clothing (or lack thereof) is done with the intent of "undisputedly" soliciting tips. Therefore, without an additional expressive element, the lack of clothing alone in such a commercial setting is not subject to First Amendment protection.

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As such, the Court concluded that intermediate scrutiny was inappropriately applied to the present case. Rather, the case warranted a rational basis review. The Court remanded the case, stating that the City only needs to demonstrate that the Dress Code Ordinance "… promotes a substantial government interest that would be achieved less effectively absent the regulation."

On the due process challenge, the Court was similarly not swayed by the plaintiffs' argument that the term "anal cleft" in the expanded definition for lewd act was "impermissibly vague." Under the vagueness doctrine, "laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." The Court rejected the conclusion of the District Court, stating that both terms "anal" and "cleft" are clearly defined and accessible in a common dictionary. Additionally, the Court pointed out that "anal cleft" was listed in close proximity to other "intimate body parts," and such context would also assist a reader in discerning which body parts could not be publicly displayed.

The vagueness doctrine also requires that there is no "arbitrary and discriminatory enforcement" of laws, and that those applying that laws receive explicit standards of how to apply the laws. Given that the first requirement of the vagueness doctrine was met, the Court held that enforcement would be based on an objective standard, and would not rely on the

"subjective assessment of an enforcing officer." Even if there are some "close calls" involving subjectivity of law enforcement, the Court stated that the expanded ordinance established "with specificity" what the fact finder is required to decide. The Court pointed out that the potential for close calls does not render otherwise permissible statutes unconstitutionally vague. Instead, instances of close calls in the criminal context are addressed by leaving it up to the fact finder to decide if the government has met its burden.

Implications for Similar Establishments

A variety of establishments across the United States are not considered "adult night clubs" or "strip clubs," but nevertheless employ women dressed in minimal clothing. For example, Hooters was founded in 1983 in Clearwater, Florida. "Hooters Girls" typically wear extremely tight, low cut tops, and "short shorts" that may not extend past the "top three inches of legs below the buttocks." Similarly, Tao, a pool club in Nevada, hosts "Playboy Fridays," where guests receive drink services "enhanced with their own Playboy Bunny cocktail staff." The cocktail staff sport bikinis.

The *Edge* decision could have implications for such establishments. The decision clearly emerged from a specific factual context. Nevertheless, if a lack of clothing in a commercial setting does not, by itself, represent expressive conduct, then local governments may be able to enact enforceable ordinances dictating the clothing employees wear simply because a monetary transaction exists in close proximity to the scant clothing.

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Of course, establishments could embrace the performance expression that the baristas disavowed. Or, they might seek to make uniforms *more expressive*—which begs a number of questions. If bikinis say, "My Body, My Choice," would they be considered sufficiently likely to convey a message? Or will this holding prevent any sort of minimal clothing in a commercial setting from ever being considered expressive conduct in the future? Given that the present case did not involve any explicit words or signs in connection with the bikinis, it is possible that future plaintiffs may be able to argue there is expressive conduct if their otherwise revealing clothing contains actual messages of body positivity.

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