CITY OF MADISON
OFFICE OF THE CITY ATTORNEY
Room 401, CCB
266-4511

Date: August 20, 2012

OPINION # 2012-001

TO: Mayor Paul Soglin

FROM: Michael P. May, City Attorney

RE: Tavern Identification Policies and Claims of Discrimination

You requested my opinion regarding policies adopted by taverns for identifying the age of customers, including whether some policies could be illegally discriminating against customers. In particular, you asked about a tavern that required two pieces of identification (ID) of each customer: one had to be an official government-issued ID or driver's license with a photograph of the patron and showing legal age, and any second form of ID (e.g., charge card, student ID) that confirmed the patron was the person in the first ID.

You also asked for an explanation of the legal standards that would apply to claims of discrimination in the application of ID policies by taverns.

BRIEF ANSWER

A policy of requiring two forms of identification of the types you described, if applied in a consistent manner to all potential patrons, likely falls within the discretion of the tavern under alcohol regulations and does not constitute improper discrimination.

Other ID policies have to be examined on their individual facts. Generally speaking, under the alcohol regulatory scheme, the tavern has broad discretion in establishing policies to assure persons entering the tavern are of legal drinking age. By State law, some forms of ID cannot be refused by the tavern, but nothing prohibits the tavern from requiring additional forms of ID. This is because the tavern owner and operator face civil penalties for allowing under-age consumption of alcohol.

Under applicable laws on discrimination, the tavern must not have a policy that results in disparate treatment of potential patrons based on a protected class of which the patron is a member. This outlaws any policy that in its very nature is discriminatory, or that the tavern applies inconsistently to create a *de facto* discriminatory treatment.

STATUTES AND ORDINANCES

Section 125.085(2), Wis. Stats., reads:

> **(2)** USE. No card other than the identification card authorized under this section may be recognized as an official identification card in this state. Any licensee or permittee under this chapter may require a person to present an official identification card, documentary proof of age, an operator's license issued by another jurisdiction, or any other form of identification or proof of age acceptable to the licensee or permittee before providing alcohol beverages to the person or allowing the person to enter the premises for which the license or permit has been issued. Nothing in this subsection requires a licensee or permittee to accept any form of identification that does not appear to be valid or authentic or appears altered.

Section 125.07, Wis. Stats., prohibits a licensee from selling or giving alcohol to underage persons, and provides both monetary penalties from $500-$10,000, possible jail time, and suspension of licenses for violations.

Chapter 38, MGO, contains the City's alcohol regulatory ordinances. Sec. 38.031, MGO, incorporates all of ch. 125 of the Wisconsin Statutes. Sec. 38.04, MGO, provides penalties for and additional regulation of underage drinking.

Sec. 39.03, MGO, is the City's Equal Opportunities Ordinance.[1] Sec. 39.03(5), MGO, prohibits discrimination in public places of accommodation and reads in part:

> Public Place of Accommodation or Amusement. All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation or amusement, as defined in this ordinance, without discrimination or segregation . . . upon the basis of a person's protected class membership (other than a person's genetic identity). It shall be an unfair discrimination practice and unlawful and hereby prohibited:
>
> (a) For any person to deny to another, or charge another a different price from the rate charged others for the full and equal enjoyment of any public place of accommodation or amusement because of the person's protected class membership . . .

Sec. 39.03(2)(ll), MGO, defines protected class membership as:

> sex, race, religion, color, national origin or ancestry, citizenship status, age, handicap/disability, marital status, source of income, arrest record or conviction record, less than honorable discharge, physical appearance, sexual orientation, gender identity, genetic identity, political beliefs, familial status, student, domestic partner.

1 There are also federal and state laws prohibiting discrimination in public places of accommodation, but for purposes of this analysis, the Madison ordinance is sufficient. Madison's ordinance provides more persons with protected class status than other legislation, but these laws involve essentially the same analysis of discrimination.

DISCUSSION AND ANALYSIS

A. Analysis Under Laws Regulating Alcohol.

The sale of alcohol is one of the most highly regulated business activities. As the Wisconsin Supreme Court observed in the case of *Eichenseer v. Madison-Dane County Tavern League*, 2008 WI 38, 308 Wis. 2d 684, 748 N.W. 2d 154 (2008):

> Chapter 125 of the Wisconsin Statutes regulates "Alcohol Beverages." The chapter's statement of legislative intent "provides this state regulatory authority over the production, storage, distribution, transportation, sale, and consumption of alcohol beverages by and to its citizens, for the benefit of the public health and welfare and this state's economic stability." *Wis. Stat. § 125.01*. Chapter 125 covers approximately 34 pages of the Wisconsin Statutes. This shows that the manufacture and sale of alcohol beverages is one of the most heavily regulated trades in our state.

2008 WI 38 at ¶ 55. The Court went on to note that "some of the state's vast power to regulate alcohol has been delegated to municipalities." *Id.,* at ¶ 58.

Those holding a license from Madison to sell alcohol are prohibited from selling to those under age 21. Section 125.07, Wis. Stats., and Sec. 38.04, MGO. In order to avoid penalties, a licensee may require persons to present proof of age. Section 125.085(2), Wis. Stats., clearly shows the discretion available to the licensee since the licensee:

> . . . may require a person to present an official identification card, documentary proof of age, an operator's license issued by another jurisdiction, or any other form of identification or proof of age acceptable to the licensee or permittee before providing alcohol beverages to the person or allowing the person to enter the premises . . . (Emphasis added).

The statute grants broad discretion to the licensee as to what forms of identification or proof of age are acceptable. Nothing prohibits the licensee from requiring more than one type of ID; the final clause says the licensee may require "any other form of identification or proof of age acceptable to the licensee." Because of the discretion granted by the statute, there is nothing improper under the alcohol regulatory scheme in a licensee demanding multiple forms of identification, such as a government issued photo ID and some other type of ID, in order to be sure the person is of age.

And a licensee has a legitimate reason to ask for a second form of ID. A potential patron may have borrowed a friend's driver's license or photo ID. Requesting the second form of ID will show to the licensee that the patron really is the person shown in the photo ID.

Thus, I conclude that the laws regulating the sale of alcohol give a licensee the discretion to demand two forms of ID prior to admitting a potential patron to the

premises. However, the licensee's discretion may be limited by other laws, such as Madison's Equal Opportunities Ordinance.

B. Analysis Under Laws Forbidding Discrimination.

The Madison Equal Opportunities Ordinance (MEOO) forbids discrimination by places of public accommodation and amusement. Sec. 39.03(5), MGO, *supra.* This includes taverns.

The MEOO is modeled on state and federal laws prohibiting such discrimination; see sec. 106.52, Wis. Stats., and Title II of the Civil Rights Act of 1964, 42 USC sec. 2000a *et seq.* Thus, we may look to those laws for guidance on what constitutes discrimination.

Some situations are clear: if a tavern had a policy of only requesting ID from persons of a certain race, or a policy that all passports were an acceptable form of ID except passports issued by a certain nation, there would be clear evidence of disparate treatment on the basis of race or national origin, and a claim could be made under the MEOO.

In addition, a tavern might have what appears to be a neutral policy (such as the one above requiring two forms of ID), but in fact applies it in a discriminatory manner (such as only requiring African-Americans to submit two forms of ID and allowing all others to only submit one), a claim would also be made for disparate treatment. See, e.g., Judge Reynolds' decision in *Hughes v. Marc's Big Boy,* 479 F. Supp. 834 (E.D. Wis., 1979), in which a single act of discriminatory treatment qualified as a violation of the federal law. The court stated (479 F. Supp at 837-38):

> Plaintiff has alleged that she was denied equal access to a place of public accommodation on account of her race. This allegation is sufficient to vest the court with subject-matter jurisdiction … There is no requirement that plaintiff allege a continuing course of conduct or pattern of discrimination. It is sufficient that she allege that defendant has engaged in any act or practice prohibited by the Act. This she has done. Accordingly, plaintiff has stated a claim upon with relief can be granted …

A more difficult question is what sort of discriminatory intent must be shown in a claim of discrimination in public accommodations: may a claim be based on the disparate ***impacts*** of an otherwise neutral policy (no direct showing of discriminatory intent), or must a claim show direct disparate ***treatment*** (a direct showing of discriminatory intent)? Making out a case of discrimination by proving the disparate impact or effect of what appears to be a neutral policy has been approved in employment law discrimination cases. See, e.g., *Griggs v. Duke Power Co*, 401 U.S. 424 (1971); *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977 (1988). Upon a complainant proving disparate impact, the employer then must come forth with a legitimate business reason for the complained of policy. If the employer does so, the complainant then has the

opportunity to prove that the asserted reason is a pretext. *Watson, supra,* 487 U.S. at 993-1000.[2]

The U.S. Supreme Court has not, however, extended this disparate impact analysis beyond the employment discrimination arena. Although the question is not free from doubt, most courts that have directly addressed the issue have found that the public accommodation language does not allow for a disparate impact analysis. Perhaps the most complete analysis was done by U.S. District Judge Robert S. Lasnik in *Akiyama v. United States Judo Inc.,* 181 F. Supp 2d 1179, 1184-1187 (W.D. Wash., 2002). First examining the few cases that seem to adopt a disparate impact analysis, the Court stated (*Id.,* at 1184):

> Although the courts chose to apply a disparate impact analysis, the facts clearly suggest discriminatory intent.

The Court then went on to examine the language and history of Title II and further stated (*Id.,* at 1185 and 1187):

> The language and history of Title II support the imposition of an intent requirement. . . . Having considered the language of Title II, the relevant case law, and the legislative history, the Court finds that there is no claim under Title II where a proprietor or event organizer has set up facially neutral regulations governing the provision of its services, with no indication of discriminatory motive or intent.

Other courts conducting a full analysis of the law have reached similar results. *LaRoche v. Denny's, Inc.*, 62 F. Supp 2d 1366, 1371 n. 2 (S.D. Fla., 1999); *Monson v. Rochester Athletic Club,* 759 N.W. 2d 60 (Ct. App. Minn.) (applying similar Minnesota law), *review denied by unpublished order*.

Some courts have applied the disparate impact analysis in public accommodation cases, but in each instance, either no party argued it did not apply, *Robinson v. Power Pizza, Inc.,* 993 F. Supp 1462 (M.D. Fla., 1998), or the court assumed for purposes of argument that it applied and still dismissed the claim of discrimination for lack of proof, *Arguello v. Conoco, Inc.,* 201 F. 3d 803 (5th Cir., 2000), *cert denied,* 531 U.S. 874 (2000), or there was clear evidence of discriminatory intent, *Olzman v. Lake Hills Swim Club, Inc.,* 495 F. 2d 1333 (2d Cir. 1974). These cases are examined by Judge Lasnik in *Akiyama, supra.*

The most interesting case for our purposes arose in Wisconsin and involved a claim of discriminatory treatment in the application of a tavern's ID policy, *O'Neill v. Gourmet Systems of Minnesota, Inc.*, 219 F.R.D. 445 (W.D. Wis., March, 2002) (order denying class certification and denying motion to dismiss) and the subsequent ruling *O'Neill v. Gourmet Systems of Minnesota, Inc.*, 213 F. Supp 2d 1012 (W.D. Wis., July, 2002)

2 This disparate impact analysis has now been codified, with some modifications from the Supreme Court's original analysis, by amendments to the Civil Rights Act in 1991. See 42 U.S.C. sec. 2000e-2(k).

(order granting summary judgment for defendant and dismissing complaint). These rulings by Judge Crabb involved a claim of discrimination in the application of an ID policy for alcohol service by an Applebee's restaurant.

Plaintiff O'Neill was a 57-year old member of the Red Lake Band of Chippewa Indians. The Red Lake Band is recognized as a sovereign entity, and O'Neill had a photo ID issued by the Band. He ordered a drink at an Applebee's in Superior, Wisconsin, and was asked for his ID. The server checked with management and told O'Neill they would not accept the ID. Applebee's had a policy of only accepting 4 forms of ID: Valid photo driver's license, passport, military identification, or state-issued ID card. O'Neill alleged that a white male was not asked for his ID, nor was O'Neill's own son when he later went to the Applebee's.

In her first ruling in March, 2002, Judge Crabb rejected class certification. But she also refused to dismiss the claim at that stage simply because it claimed disparate impacts from an allegedly neutral policy. Judge Crabb stated (219 F.R.D. at 455, 456):

> The fact that doubt exists as to the viability of a disparate impact theory under Title II is not a ground for dismissal. "When acting on a motion to dismiss the district court is supposed to indulge in all factual and legal possibilities in plaintiffs' favor." [citation omitted]. It may later become necessary to decide whether a disparate impact claim is cognizable under Title II …
> . . .
> Here, plaintiff has identified a facially neutral policy governing the service of alcohol and has alleged that it has a racially disparate impact on American Indians. Plaintiff is not obligated *at the pleading stage* to provide data showing, for instance, that American Indians are more likely to be affected by defendants' policy . . . Whether plaintiff can actually come up with proof establishing the policy's disparate impact is an entirely different question ….

Some four months later, Judge Crabb dismissed the complaint precisely because plaintiff was not able to produce any evidence to make a disparate impact claim. The Court stated (213 F. Supp 2d at 1022):

> It is unclear whether disparate impact claims are cognizable under Title II. [Citations omitted]. However, because plaintiff has produced no evidence suggesting that defendants' policy has a racially disparate on American Indians, I need not decide whether Title II is amenable to a disparate impact theory.

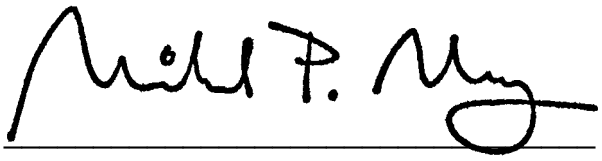
We likely will not get certainty on the issue of disparate impact claims in public accommodation cases until there is a ruling by the U.S. Supreme Court, the Seventh Circuit, or the Wisconsin Supreme Court under the similar state law. But based on the analysis of a number of courts, and particularly those that had to wrestle with the question when it mattered to the outcome of the case, I conclude that those finding that disparate impact analysis does not apply to public accommodations have the better argument. Moreover, even in those cases that purported to apply a disparate impact analysis, either the facts were insufficient to prove a claim under that analysis so the

court did not decide whether disparate impact was applicable, or the facts were sufficient to prove a case of disparate treatment.

CONCLUSION

Under Wisconsin's alcohol regulatory system, tavern operators have broad discretion in asking for proof of age of potential patrons. This is because the operators face significant fines and possible loss of their liquor license for serving to under-age persons. I see nothing in the law that would stop a tavern from requiring two forms of ID.

Under applicable discrimination laws, tavern operators could be liable for adopting or applying policies in a manner that discriminates against protected classes. While not entirely free from doubt, the laws likely require actual disparate treatment of a protected class, not merely disparate impact.



Michael P. May
City Attorney

SYNOPSIS: Under Wisconsin's alcohol regulatory scheme, licensees have broad discretion in determining what types of identification will satisfy proof of age in order to be served alcohol. If such policies result in disparate treatment of a member of protected class, a claim of discrimination may be brought under relevant federal, state or local laws forbidding discrimination in places of public accommodation.

CC: City Clerk