Opinion No. 60-176

September 29, 1960

BY: OPINION of HILTON A. DICKSON, JR., Attorney General

TO: Mr. Don L. Coppock State Labor Commissioner State Labor and Industrial Commission Santa Fe, New Mexico

QUESTION

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Is a woman who is employed as **manager** of a hotel motel. or restaurant exempt from the provisions of our statutes regulating the maximum hours that women may work?

CONCLUSION

No.

OPINION

*{*570}* **ANALYSIS**

Our statute prescribing the maximum hours that females may be employed is N.M.S.A., 1953 Comp., § 59-5-1, which reads:

"No female shall be employed in any industrial or mercantile establishment, hotel, restaurant, cafe or eating house; or in any laundry, or in any office as a stenographer, clerk, bookkeeper or in any other clerical position; or in any place of amusement; or in any telephone or telegraph office, within the state more than eight (8) hours in any one (1) day of twenty-four (24) hours, nor more than forty-eight (48) hours in any one (1) week of seven (7) days. The provisions of this act shall not apply to hospitals or sanitariums, or to registered or practical nurses wherever employed; or to midwives while engaged in their duties as such." (Emphasis supplied.)

Prior opinions of this office have dealt with this statute, though not with your specific question. In Opinion of the Attorney General No. 6025, October 19, 1954, this statement was made with reference to § 59-5-1:

"The above language is mandatory. The intention of the Legislature is clear that female employees are to get one day of rest, at least, every week, not every two weeks, or whenever it suits the employers or is convenient to the employee. These sections, above quoted, specifically prohibit **female employees other than those specifically exempted therein,** from working more than eight hours in any twenty-four hour period, and more than forty-eight hours in any one week of seven days." (Emphasis supplied.)

Exemptions from the operation of the statute are provided for registered nurses, practical nurses, and midwives, but there is no specific exemption for females employed in a managerial capacity. It might be worth mentioning that exemptions for managerial and executive employees are not uncommon; the Fair Labor Standards Act, U.S.C.A., Title 29, §§ 201 et seq., provides in § 213 thereof for the exemption of "bona fide executive employees." The failure of our statute to exempt executive and managerial employees from its operation indicates that no such exemption was intended. It remains to be seen whether the words of the statute impliedly exclude managerial employees from their operation.

As a general rule the word "employee" is held not to apply to persons occupying positions of authority, or to officers or officials. See 56 C.J.S., Master and Servant, § 1 (b). If our statute read: "No female employee shall," etc., we would feel constrained to read into the use of the word "employee" all the limitations that have been placed on that word in judicial reasoning. But our statute does not use the word "employee"; it says: "No female shall be **employed. . ."** We must construe the effect of the word "employed."

In your opinion request you state that the female manager in question is **employed,** which we take to be the fact. In **Board of Commissioners of Colfax County v. Department of Public Health,** 44 N.M. 189, 100 P. 2d 222 (1940), the court gave what it called the "generally accepted meaning" of the word "employ":

"To entrust with some duty or behest, as to employ a workman, to employ an envoy. **Synonymous with 'Hire'."** (Emphasis supplied.)

Webster's New International Dictionary, Second Edition, defines "employ" as:

"To make use of the services of; to give employment to; to entrust with some duty or behest; *{*571}* as to employ an envoy . . ."

and defines "employed" as:

"Engaged by an employer."

While a female manager of a hotel, motel, or restaurant might not be included in the word "employee," if that word had been used in our statute, it seems indisputable that a woman manager is "employed", for she is hired to perform services, and is engaged by an employer. That being so, she is subject to the maximum hours regulations prescribed by § 59-5-1, for there is no exemption for females employed in hotels, restaurants, cafes, eating houses, industrial or mercantile establishments, regardless of the capacity in which they are employed.

We are also of the opinion that employment in a "motel" must be taken as equivalent to employment in a "hotel." In **Weiser v. Albuquerque Oil and Gasoline Company,** 64 N.M. 137, 325 P. 2d 720 (1958), the court was dealing with the liability of a **motel** owner

for the loss of a guest's property, and held that a motel was a hotel within the meaning of a statute defining the liability of a **hotel** keeper. It was there pointed out that neither the physical plant nor the name by which the establishment is known controls its status, but that the services offered and the facilities available are determinative. See, also, **Schermer v. Fremar Corporation,** 36 N.J. Super. 46, 114 A. 2d 757, holding that a motel may be deemed equivalent to a hotel.

It might be thought that a woman employed as manager in the office, rather than the public business portion, of a hotel, motel, or cafe, and not employed as a stenographer, bookkeeper, clerk, or other clerical position, would come under the second clause of § 59-5-1, and be exempt from the provisions of the statute. But we are not impressed with this distinction. We are of the opinion that the offices covered by the second clause of § 59-5-1 are offices other than the offices of industrial or merchantile establishments, hotels, restaurants, cafes, or eating houses. A woman employed as manager in the office of a travel agency, church, or Y.W.C.A. club, for instance, might be exempt from the statute, assuming she performed no stenographic, bookkeeping, or clerical work. We do not express our opinion on that matter, since the question is not before us; we mention it only to show that there are abundant offices other than those of industrial or mercantile establishments, hotels, restaurants, cafes, and eating houses. We are of the opinion that when our statute listed industrial or mercantile establishments, hotels, restaurants, cafes, and eating houses, it meant that no female could be employed in those places, even in the capacity of manager of the office, or manager of the entire operation, except as prescribed by law. It takes but a little reading of our social and economic history to learn that the establishments listed were prime offenders of female labor, and our legislature could reasonably select them for special legislation.

We hold, therefore, that a woman employed as manager of a hotel, motel, or restaurant is not exempt from the maximum hour regulations of our statutes.

By: Norman S. Thaver

Assistant Attorney General