

Put on a Happy Face

Regulating Facial Appearance in the American Workplace

Appearance based lawsuits are becoming more prevalent in today's workplace. The latest national survey by the Employment Law Alliance reveals a nation deeply divided over regulating appearance in the American workplace—from weight to clothing, hairstyles to body piercing. Even as this debate intensifies, more than half of those employers surveyed by the Alliance indicated that they had no policy governing employee personal appearance.

In this attention-grabbing decision, Jespersen v. Harrah's Operating Company, Inc., the Ninth Circuit Court of Appeals found Harrah's "Personal Best" policy that requires women (and forbids men) to wear makeup did not constitute sex discrimination under federal law. The case was decided by a slim 2-1 vote among a three member panel of judges wherein the Ninth Circuit Court of Appeals held that a casino's rule requiring a female bartender to wear makeup is not sex discrimination. A full review is scheduled before the Ninth Circuit on June 22, 2005.

In Jespersen, the plaintiff was a bartender in the Harrah's Reno, Nevada casino. She had been with the company for almost 20 years and had an outstanding record of service. During her tenure, however, Harrah's initiated in February of 2000 a new employee code of appearance entitled "Beverage Department Image Transformation". Within this new code, women employees were required to wear their hair in a certain fashion and, most germane to this case, were also required to wear makeup at all times. Ms. Jespersen objected to the part of the policy requiring wearing of makeup. She refused to comply and was subsequently fired. She then filed suit against Harrah's arguing that the policy of wearing makeup imposed an unequal burden on women. She also argued that the rule was discriminatory as it cost her more money to comply with the new appearance rule and that the new rule made her conform to gender stereotypes.

It is important to note that the result in Jespersen can, in no way, be considered to be carte blanche for employers to implement wide-reaching gender specific appearance policies. Nevertheless, this case is a win for employers, particularly those in the service industry where appearance and grooming standards are seen as legitimate business interests.

On the other coast, in Cloutier v. Costco Wholesale Corp., the First Circuit Court of Appeals upheld the District Court's granting of summary judgment in favor of Costco finding that "Costco had no duty to accommodate Cloutier because it could not do so without undue hardship." Cloutier involved a case where the petitioner maintained facial piercings.

In Cloutier, Costco had revised its employee appearance policy several times from 1998 to 2001. It was the revision to the policy in 2001 that got the ball rolling toward this lawsuit. In March of 2001, Costco had amended its policy to prohibit all facial jewelry except earrings on a storewide basis. Cloutier continued to wear her facial piercings, claiming that the piercings were part of her new religion known as the "Church of Body Modification". She was later fired for several unexcused absences resulting from non-compliance with the modified company dress code.

After the EEOC ruled in Cloutier's favor, she went into Federal District Court and lost at summary judgment. The Court found that Costco had made a reasonable accommodation to Cloutier during the EEOC proceedings (to allow Cloutier to continue to wear the eye pierce but to cover it with a beige bandage). When the case reached the First Circuit, the Appeals Court sustained Costco's summary judgment victory on a totally different ground; namely, that the only accommodation Cloutier would finally accept (a blanket exemption from the Costco policy) would impose an undue hardship on Costco. A *certiorari* petition has been filed by Cloutier's counsel.

Companies that regulate a worker's appearance from piercing to makeup to tattoos are facing increasing hurdles by employees. What we are seeing is the evolution of appearance based discrimination lawsuits involving everything from sexy clothing to eyebrow rings. A cultural change is beginning in corporate America in which older managers are struggling to control a younger generation of workers who are more culturally and racially diverse than before and more resistant to rules regulating their personal appearance. A survey by Challenger, Gray and Christmas recently concluded that body art, for example, has become main stream, particularly among younger employees and employers are grappling with ways to accept it. Several national polls have found that approximately 36 percent of 25 to 29 year olds have tattoos.

The Courts have long upheld grooming policies as long as they are rationally related to business objectives. Many businesses have dress and grooming codes, particularly for employees who deal directly with customers. These companies strongly believe that the workforce they present to their customers must convey a neat, clean and professional image. Enforcing corporate dress and grooming codes, as any personnel director will tell you, remains a never-ending battle between image conformity and employees' highly individualized style and fashion preferences. Add to this mix employees who seek special exemptions on religious or other grounds, such as in Cloutier, that are covered by Title VII, and embattled personnel directors not become fashion police but also potential defendants in discrimination actions.

Both Jespersen and Cloutier demonstrate the obstacles and burdens employers face in attempting to administer dress and grooming codes in the workplace. Because the "unequal burdens" test is necessarily fact dependent, employers are also likely to achieve mixed results in litigation. As a result, employers should carefully review all dress and grooming policies and protect against potential claims of not only sex discrimination, but also claims of discrimination based on other protected categories, such as race, religion and national origin. Personnel management should closely examine not only the express language and intent of the policies, but the actual impact and burden the policies have on individual employees and specific groups of employees. Employers should also objectively examine the actual business purpose and policies and the legitimate job requirements of the positions. Simply put, under the developing Federal case law, it is not enough for employees to show different standards are applied to men and women; rather, the employee must show that the standards required by the employer are unequally burdensome to one sex. Put another way, it is perfectly acceptable for employers to continue to draft sex-differentiated grooming standards so long as the policy imposes an equal burden on both sexes.

As both Harrah's and Costco have learned, as an employer, you had better be ready "put on your best face" when facing appearance discrimination lawsuits. We will follow both of these matters through to their conclusion and follow up in a subsequent newsletter accordingly.