What An Interesting Nose Ring – Now Take It Out

Insights
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Many retailers consider the professional appearance of their staff to be a significant aspect of their customers' shopping experience. Unkempt, unclean, and unfriendly employees create negative impressions that injure the brand. For many years, courts have recognized that the image presented to customers by a retailer's employees is a critical aspect of the business. Appearance policies prohibiting visual tattoos, nose piercings, and long hair were repeatedly held to comply with the requirements of various employment laws.

But recent court decisions reflect a trend away from the deference courts previously paid to retailers' decisions as to the appearance of their workforce. In light of these decisions, retailers may need to reassess how they train their managers to handle discipline issues surrounding dress codes and appearance policies.

The General Rule
The general rule is that employers have great leeway in establishing how they expect their employees to appear at work. Perhaps because of this, retailers' policies differ greatly in the level of detail they provide. Some will be as simple as "employees must have a neat and clean appearance when they are at work." A less-detailed policy such as this provides individual managers with more discretion in how their staff appears and allows for regional tastes.

Others will dictate everything from the shirt to be worn to an acceptable length for fingernails. This form of policy lends itself to easily identifying and correcting violators. But both types of policies have shortcomings. A simpler policy presents opportunities for disagreements with its interpretation and inconsistent performance. Stricter policies do not allow for variations that might be required by discrimination laws. In both cases, overcoming the faults requires training managers who must police the policies on a daily basis in implementation consistent with current laws.

The Traps
Recent court decisions limiting employers' rights to require compliance have revolved around two protected classes: religion and race. Each has been cited in cases involving virtually every aspect of grooming policies from hair to dress to tattoos.

Religion is becoming the most cited reason in cases involving a refusal to comply with an employer's dress and grooming policy. Employees suing for religious discrimination have been highly successful. For example, a restaurant employee was told that he had to cover tattoos that were

around his wrists while at work. He refused on the grounds that covering the tattoos, which were themselves religious, would violate his religious beliefs. The EEOC brought suit on behalf of the employee and after losing summary judgment, the restaurant settled the matter for $150,000.

In another case, an employee refused to cover her nose ring on grounds that doing so would violate her religious beliefs. The court held that allowing her to wear the nose ring in violation of the company's dress code was a reasonable accommodation. But not every one of these cases is successful. The U.S. Court of Appeals for the 3rd Circuit rejected a claim by a member of the Church of Body Modification that her employer had unlawfully fired her for refusing to cover her numerous facial piercings.

Claims of religious discrimination related to clothing have also recently been upheld. The Equal Employment Opportunity Commission (EEOC) obtained summary judgment against a retailer in California who terminated a Muslim employee for wearing a head scarf at work that was required by her religion. In another case, a retailer discharged a cashier because her religion, Christian Pentecostal, forbids her from wearing slacks. The applicant allegedly informed the restaurant of her need for religious accommodation and offered to wear a skirt instead of the uniform pants. In finding against the employer, the court accepted the EEOC's claims that allowing the applicant to wear a skirt would not have cost anything and thus was not an undue hardship.

Religious discrimination claims are also being brought to challenge employers' no-beard policies. In the 1970s and 80s, courts held that an employer did not have to allow an employee to violate a no-beard policy as a reasonable accommodation. However, the EEOC recently settled a lawsuit against a car dealership that refused to hire a member of the Sikh faith due to his religious beliefs requiring him to wear a beard. The EEOC filed suit against the dealership, alleging that it discriminated against the applicant on the basis of his religion and by failing to consider possible religious accommodations to its "no-beard" policy.

In November 2013, the dealership agreed to pay $50,000 and amend its dress-code policy to settle the claim. As part of the agreement, the dealership was also required to implement written policies providing for reasonable accommodation based on religion, including dress-code provisions; state the methods for requesting religious accommodations; and grant reasonable religious accommodations that eliminate conflict between an employee's religious beliefs and the company's other policies, unless the accommodation presents an undue burden to the dealership.

Race discrimination claims have most often arisen in policies related to hair. The problem appears to be not that wearing certain hairstyles is the equivalent of race, but rather that hairstyle policies are being inconsistently applied among members of different races. At one resort, the employer's policy required hair be in a conservative style and not falling into the face. Testimony established that the policy was interpreted by the employer to prohibit cornrow hairstyles that showed the scalp, but not braids. The employee, an African-American, was terminated for her "braids."

At trial, she presented evidence that white employees were not terminated or disciplined for wearing their hair in braids. The court held that the disparate treatment was because of race and found the employer discriminated.

Another court reached a different result when it assessed an employer's policy against "extreme" hair colors. An African-American applicant with dyed blonde hair was asked if she would change her hair color to comply with the company's policy. She refused and was not hired. The court held that the employer's subjective view as to what constituted "extreme" hair colors was a business judgment and its refusal to hire the applicant was lawful.

A more subtle aspect of how hair policies can become relevant to race discrimination matters involved comments that managers made related to an employee's dreadlocks. While the employee did not claim that the policy was itself discriminatory, he contended that comments made about his hair evidenced racial bias.

No-beard policies have also been challenged on the basis of having a disparate impact on African-American males, who often suffer from a condition known as pseudofolliculitis barbae. This condition makes shaving extremely painful. Generally, these cases have been unsuccessful in the courts primarily based on the failure of the employees to prove that the no-beard policy actually causes a disparate impact. Nevertheless, many employers provide an exception to their no-beard policy for individuals who submit medical certification of the condition.

Gender discrimination in dress and grooming policies has often been litigated, but the rule has developed over the years that these policies may treat men and women differently based on gender norms as long as they do not pose unequal burdens in compliance. In a recent case, a bartender sued her casino employer because its policies required women to wear makeup and prohibited men from doing so. The court concluded that the dress code did not place a heavier burden on women than men or stereotype women, as the dress code required both men and women to maintain a similar professional appearance. The more interesting aspect of this case was that it drew a strong dissent. One of the judges felt any requirement that women wear makeup was inappropriate gender stereotyping. It shows that changing social mores could lead to changes in this law.

What Now?

The importance of appearance being what it is in the retail setting, employers cannot and should not diminish their standards. The vast majority of dress and grooming violations will never call into question discrimination laws. Being out of uniform, wearing inappropriate shoes, or looking like a slob can be safely addressed.

But the nuances of the laws make these decisions beyond the knowledge and abilities of most operational supervisors. Managers have been trained for years, "Don't make exceptions to our policies," so items such as religious accommodation directly contradict their instincts. Avoiding the problem areas requires training of managers to recognize those rare occurrences when an

employee's response to being disciplined for a violation suggests a potential discrimination claim. Having managers who know when to seek assistance with issues is the critical piece.

Managers also need to understand the safety aspects of these policies. When dress and grooming policies relate to safety, such as no long hair or loose clothing around machinery, courts have uniformly upheld the rights of employers to demand compliance. Retailers need to identify those areas in their policies, such as no open-toed shoes, and emphasize those aspects. Managers should be empowered to at least suspend an employee with pay if they refuse to comply with the safety aspect of a dress and grooming policy.

Managers also need to understand that clothing and tattoos might violate other employer policies and need to be addressed. An employee's tattoo of a confederate flag with a skull and cross bones was used as evidence in another employee's racial-harassment case. Clothing with vulgar language also has been raised in sexual-harassment cases. Failing to address these issues can lead to liability, so managers need to be able to recognize the applicability of harassment and discrimination policies in this area.

The Bottom Line

No matter how retail employers choose to deal with the dress-code issue, expectations should be clearly stated in writing and readily available to employees. While employers still retain wide latitude, practical, social, and legal factors require careful preparation of policies related to dress and appearance, as well as consideration of such requests for accommodation that might have been readily (and safely) dismissed several years ago.

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