

**DRESS AND GROOMING STANDARDS:
HOW LEGAL ARE THEY?**

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ABSTRACT

Many employers and researchers believe that even-handed dress and grooming standards are legal. However, in certain situations there can be serious legal pitfalls for those who adhere to this practice. Exceptions to dress and grooming standards may be required based on religion, freedom of expression, collective bargaining rights, and more recently, on sex. In an evolving part of the case law, dress and grooming standards based on sex-role stereotypes even-handedly applied are more often being ruled illegal by the courts. Moreover, many states protect dress as it relates to sexual preference. The relevant legal case history is reviewed and guiding principles provided.

The manner in which people dress goes to the heart and soul of who and what they are in terms of personality, identity, gender, attitudes, and abilities [1]. Attire affects one's image and how s/he is perceived by managers, other employees, and customers [1]. Mindful that a person's appearance is a reflection of the company's image and often has a direct impact on the firm's bottom line, many organizations construct and implement dress and grooming standards to ensure that the organization is portrayed in a positive and professional manner. Sometimes dress

codes are specifically designed to address legitimate safety, health, morale, and harassment issues.

Until recently, even-handed dress and grooming standards were generally thought to be in legal compliance [2]. However, the most recent evolving case law has called into question the legality of dress and grooming expectations as they relate to perpetuating sexual stereotypes [3-5].

While a number of articles over the years have addressed the legal issues that affect such policies [2, 6, 7], comparatively little research has comprehensively reviewed the related case law. Moreover, current research has not really addressed the latest legal trends that may affect dress and grooming policies. To that end, a Lexis-Nexus keyword search yielded more than seventy dress- and grooming-related cases. Our article focuses on these cases.

LEGAL BACKGROUND

No specific federal law prohibits an organization from establishing dress or grooming standards. However, there are situations where dress and grooming practices may violate the Constitution (public sector) or various federal laws such as the National Labor Relations Act, the Fair Labor Standards Act, and the Civil Rights Act. Some anti-discrimination state laws, particularly those prohibiting sexual orientation discrimination, may also affect dress and grooming standards.

PUBLIC SECTOR

Public sector workers have added protections guaranteed under the Constitution, such as the right to freedom of expression and individual liberty as protected by the First and Fourteenth amendments. Nevertheless, the Supreme Court has determined that, at least as it relates to dress, infringement of individual liberty can be justified to promote a legitimate state interest [8]. In *Kelly v. Johnson*, a police department promulgated a regulation that

established hair-grooming standards applicable to male members of the police force . . . was directed at the style and length of hair, sideburns, and mustaches, beards, and goatees were prohibited, except for medical reasons; wigs conforming to the regulation could be worn for cosmetic reasons [8, at 241].

The plaintiff argued that the grooming styles allowed did not conform to those accepted in the local community and hence were an undue restriction on his liberty and right to freedom of expression. The county maintained that to ensure public safety it needed to have police officers who were readily recognizable to the public and to promote an *esprit de corps*. The court noted that proper grooming is an ingredient of the *esprit de corps* of good law enforcement organizations and that uniformity in appearance allows for easier identification by the public [8]. In ruling for the state, the Supreme Court concluded that the government has wide

latitude to conduct its own internal affairs [8]. To prevail, it would be up to the respondent to demonstrate that no rational connection exists between the regulation and the protection of persons and property [8].

The Supreme Court has even gone so far as to uphold an Air Force regulation that prohibits its members from wearing headgear indoors even if it infringes on religious expression [9]. In *Golman v. Weinberger*, an Orthodox Jew and ordained rabbi had been wearing a yarmulke (skullcap) while he was indoors (outdoors the yarmulke was covered by his service cap) and was eventually warned that such violations were subject to court martial [9].

In ruling for the Air Force, the Supreme Court said that great deference must be provided to the judgment of military authorities when it comes to restricting dress requirements in the military. Furthermore, there is no constitutional mandate to abandon their professional judgment as to the desirability of dress regulations for military personnel, nor does the First Amendment require the military to accommodate religious practices that would detract from the uniformity sought by dress regulations [9].

Religious expression protected by the First and Fourteenth Amendments can be denied for other job-related reasons. For example, women whose faith requires them to wear skirts can be forced to wear pants if the job demands it, as it did for corrections officers working in New York City prisons [10]. Similarly, requiring a worker to wear a hard hat in dangerous work areas, despite his Sikh religion, which mandated the wearing of a turban, was found to be job-related and, hence, not religious discrimination [11].

State and Local

In another religious-related case won by the state, a police officer filed a complaint that the department's hair regulation did not permit him to wear his hair in accordance with his religion's dictates [12]. However, the city argued that a uniform appearance was necessary to ensure the officer's own safety and promote discipline and *esprit de corps*. The city was able to show that prior to the regulation, relaxed grooming standards had resulted in a clear deterioration of the police officers' appearance [12].

The state has a right to promote a disciplined, identifiable, and impartial police force by maintaining its police uniform as a symbol of neutral government authority, free from expressions of personal bent or bias [13]. For example, five police officers who wore web tattoos and refused to keep them covered while on duty were disciplined. In this case, the court determined that the tattoos were of an offensive, racist nature and could have affected the department's legitimate interest in fostering race relations within the police force and the community [13]. Similarly, requiring an outdoor police officer to wear long sleeve shirts during the summer to cover a tattoo related to his Celtic origins was also sustained by the courts on the grounds that the tattoo would detract from a professional and uniform

appearance [14]. In another case, denying the wearing of a religious crucifix pin on a police uniform was upheld by the courts because it would imply that the state endorsed a particular religion [15].

Permissible Exceptions

Some exceptions to dress codes in the public sector, however, have been granted by the courts. For example, forbidding the use of short hair wigs that conform to military regulations has been struck down. Such wigs are within military standards that are designed to achieve uniformity and discipline, and as such there is no rational connection between these objectives and denying personnel to wear a wig [16, 17].

In a public junior college case, *Handler v. San Jacinto Jr. College*, the administration sought to impose grooming standards on its faculty [18]. One faculty member refused to shave his beard to conform to the new grooming policy and was fired. The school defended its actions on the grounds that “regulation of faculty members’ appearance is significant to the maintenance of high educational standards” [18, at 275]. The school also contended that wearing a beard diminished the respect of the students for the teacher and would affect teaching effectiveness. However, the Fifth Circuit Court of Appeals in ruling for the plaintiff stated that

Teachers . . . simply do not have the exposure or community-wide impact of policemen and other employees who deal directly with the public. Nor is the need for “discipline” as acute in the educational environment as in other types of public service. . . . School authorities may regulate teachers’ appearance and activities only when the regulation has some relevance to legitimate administrative or educational functions [18, at 276].

The court added that the school administration must have evidence (it did not) to support its subjective belief that wearing beards adversely affected respect for instructors in order to intrude on the liberties guaranteed under the First and Fourteenth Amendments [18].

COLLECTIVE BARGAINING ISSUES

A number of cases are also filed under the National Labor Relations Act (NLRA). These suits primarily revolve around union organizing activities that are protected under the act.

Union Insignia

In 1945, the Supreme Court addressed the issue of dress codes under the NLRA after a manufacturing company terminated several shop stewards for wearing union buttons. The company defended itself by stating that if it had allowed the

union representatives to wear union buttons denoting a particular union, it would mean the company endorsed that union. The supreme Court disagreed, stating, “We do not believe that the wearing of a steward button is a representation that the employer either approves or disapproves or recognizes the union in question” [19, at 799]. The court also found that wearing of union insignia was part of the workers’ right to organize under the NLRA and stated that “the right of employees to wear union insignia at work has been long recognized as a reasonable and legitimate form of union activity, and the respondent’s curtailment of that right is clearly violative of the Act” [19, at 799]. In general, the court found that employees have the presumptive right to wear union insignia absent special circumstances [19].

Special circumstances may limit union expression in terms of dress. In 1965, the Eighth Circuit overturned an NLRB ruling against a company that had terminated a number of workers who wore large pro-union buttons during a union organizing campaign, and a lady who had stenciled in large lettering on the back of her blouse the words, “VOTE I.B.W.” [20]. The company maintained that such large buttons, etc. were a significant distraction and would likely affect the delicate production process. The appeals court agreed, noting that

banning the wearing of unusual union insignia or usual union insignia in an unusual way is not a violation of the employees’ rights under the Act because of the special considerations and circumstances present in this case, i.e., the importance of eliminating distractions to employees, which distractions could lead to a substantial increase in poorly produced memory devices [20, at 583].

Likewise, in *Davison-Paxton Co. v. NLRB*, the Fifth Circuit permitted an employer to deny its employees the right to wear large and conspicuous buttons on the sales floor where the employer, a fashionable retail store, was justifiably worried that the animosity between union and anti-union workers would manifest itself on the sales floor [21].

Similarly, in *Caterpillar Tractor Co. v. NLRB*, the Seventh Circuit Court of Appeals refused to enforce an NLRB order to allow employees to wear buttons with the slogan, “Don’t Be a Scab” [22, at 359]. The court found that the company “was under no compulsion to wait until resentment piled up and the storm broke before it could suppress the threat of disruption by exercising its right to enforce employee discipline” [22, at 359].

When special circumstances are not present, companies must allow exceptions to dress codes and permit workers to wear union-related insignias [23]. In *Meijer v. NLRB*, the company had a strict dress code for employees in customer-contact positions [23]. All employees wore company uniforms, and any pins or buttons required prior management approval. Management did not approve the wearing of any union insignia because its workers were in customer-contact positions. The company felt that fact in and of itself was sufficient to justify the

special-circumstances exception. The Sixth Circuit disagreed, citing *Republic Aviation v. NLRB*, saying “that employers bear the affirmative burden of demonstrating special circumstances” [23, at 1215]. Merely stating that workers are in customer-contact positions is not enough to justify the special-circumstances exception [23].

Nevertheless, in another case, Burger King successfully argued that its workers in customer-contact jobs should not be allowed to wear union insignia in violation of its uniform/dress code [24]. Burger King demonstrated that its fast-food workers were in constant public contact and that much of a fast-food chain’s brand identity, and hence business, is derived from its uniform public image [24].

Enforcing grooming standards at times can result in other unfair labor practice rulings [25]. In *NLRB v. Inland Meat Company*, one worker actively involved in union organizing activities was terminated for wearing long hair and a beard in violation of the company grooming standards [25]. However, court documents revealed that other workers not involved in union activities were not disciplined for violation of company grooming standards [25]. As a result, the Ninth Circuit found in favor of the plaintiff.

FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act (FLSA) establishes minimum wage and overtime pay obligations [26]. This act affects dress and grooming standards from the standpoint of an employer requiring employees to pay for any uniform that they are expected to wear. If paying for the uniform lowers their weekly wage below that of the minimum hourly wage, the employer must make up the difference or be in violation of the FLSA.

CIVIL RIGHTS ACT

The Civil Rights Act (Title VII) is the federal statute under which plaintiffs overwhelmingly file for protection (applies to both public and private sectors). This act prohibits discrimination based on religion, race, national origin, color, and gender. While equal treatment under the Civil Rights Act (as amended) generally protects employers from claims of intentional discrimination, the act also mandates that neutral or so-called even-handed policies such as dress and grooming standards that have an adverse impact on protected classes must be shown to be job-related; otherwise those policies are illegal [27].

RELIGION

The Civil Rights Act not only prohibits religious discrimination but also requires that religious beliefs be accommodated unless there is an undue hardship [28]. Dress and grooming codes must allow exceptions based on religion

unless an organization can demonstrate a sound business reason to the contrary or show that it at least offered a reasonable accommodation (employers choose the accommodation—not the employee) [28].

In one case (also a public sector case), two Sunni Muslim police officers refused to shave their beards for religious reasons under a new departmental policy that authorities argued was necessary to convey the image of a highly disciplined and easily identifiable police force as well as to maintain force morale [29]. The Third Circuit Court of Appeals rejected this defense on the grounds that the police authorities had allowed other officers to wear beards and mustaches for medical reasons [29]. Moreover, the police department had not even attempted to accommodate their religious needs [29]. Thus, because the department allowed one exception to the dress code, it lost the right to prohibit a similar one that had a religious basis [29].

In a related case (also a public sector case), correctional officers at a state prison facility were forced to cut the dreadlocks worn as part of their religion in order to keep their jobs [30]. Once again, officials did not attempt to accommodate their religious beliefs, claiming the need to maintain safety, discipline and morale. However, the court noted that dreadlocks had been allowed for at least a year until the policy had been changed, with no discernible impact on safety, discipline, and morale. As a consequence, the district court did not find this defense adequate to support a summary judgment [30].

Accommodating Religious Dress

Those organizations that accommodate religion fare far better in court. In *Cloutier v. Costco* a female employee in a customer-contact position was terminated for refusing to comply with the company's no-facial-jewelry standard [31]. She provided evidence that wearing facial jewelry was a religious practice required of members of the church of Body Modification. The company defended its policy by stating that it wanted its employees to present a professional appearance to customers. The company had also offered several accommodations, such as covering her eyebrow piercing with a flesh-colored Band Aid or allowing use of clear plastic retainers over the piercing, but she had refused these accommodations. In ruling for the employer, the First Circuit found that not only had the worker been offered a reasonable accommodation, it also agreed that organizations "have a legitimate interest in presenting a workforce that is, at least in the organization's eyes, reasonably professional in appearance" [31, at 13].

As a general rule, employees who refuse the organization's reasonable accommodation have no legal recourse. In *Wilson v. U.S. Communication*, a worker who wore an anti-abortion button with a picture depicting an unborn fetus being aborted was offered three alternative accommodations after complaints were filed due to the offensive, harassing nature of the picture [28, 32]. These accommodations included wearing a less-offensive button, covering the button, or

wearing the button just in her office cubicle. She refused all of these requests and subsequently lost a religious discrimination case in court, since she had been offered at least one reasonable accommodation [28].

In *Zeinab Ali v. Alamo Rent-A-Car*, a management trainee wore a head scarf in addition to the company uniform in accordance with her Islamic beliefs [33]. Management told her to remove the head scarf or be transferred, since she was in a customer-contact position and her attire was not part of the image that the company wanted to portray. She refused to remove the head scarf and was transferred to a noncustomer-contact position with no loss in compensation. The Fourth Circuit of Appeals denied her claim of religious discrimination, because her beliefs had been accommodated through transfer [33, 34 *cert. denied*]. Similarly, the Seventh Circuit remanded a case where UPS had a no-beard rule for public contact positions [35]. The appeals court left it to the district court to determine whether a reasonable accommodation had been offered to a worker who claimed that his beard was religious expression. The court felt that an exception must be granted for his religious beliefs of wearing a beard unless it would cause an undue hardship [35]. This had not been determined at the district level [35].

Job-Related/Undue Hardship Protections

A number of situations have been identified in the case law where allowing or accommodating religious dress and grooming practices would be an undue hardship on the organization. Most recently, in *Swartzentruber v. Gunite Corporation*, an assembly worker who was a self-professed member of the Church of the American Knights of the Ku Klux Klan, obtained a tattoo on his forearm that showed a hooded figure standing in front of a burning cross [36]. Because of many complaints from employees who found the tattoo offensive and threatening, he was required to keep the tattoo covered at work but was allowed to wash his arm periodically to prevent dermatitis problems. In the subsequent lawsuit, the worker claimed his religious belief of openly displaying the tattoo was being violated (he wanted the tattoo to remain uncovered) [36].

In denying his claim, the district court noted that his beliefs had been accommodated. The company was under no obligation to choose the accommodation that he preferred. Besides, given the graphic nature of the tattoo and its “unmistakable symbol of hatred and violence based on the virulent notions of racial supremacy [36, at 979], any greater accommodation would cause an undue hardship in terms of the severe morale problems and hostility it would ignite [36].

Religious preferences related to dress and grooming standards often raise serious safety and health concerns. For example, in those organizations where use of a respirator requires a gas-tight face seal, companies are not expected to permit

religious exceptions to clean-shaven policies [37]. In food preparation, eating establishments can demand that workers be clean shaven because of health regulations [38].

In general, organizations are permitted to require employees to dress in a professional manner and maintain health and safety in its workplace. However, for those workers not in customer-contact positions or not in jobs where safety and health can become a serious concern, religious preferences based on dress must be allowed or be reasonably accommodated.

RACE

Grooming cases have also been filed under Title VII's anti-discrimination race provisions. In *Hollins v. Atlantic Company*, a black female was disciplined for not wearing her hair in accordance with company policy [39]. She first wore her hair in finger waves. After being counseled that it was too "eye-catching," she generally wore her hair in styles similar to other women. However, she was again told that she was violating the grooming policy and she was threatened with termination. The appeals court reversed a summary judgment for the employer after determining that the nonminority women were never disciplined for wearing the same hair styles as the African-American women and that the additional requirement of not wearing hair style that was "eye-catching" had never been written into the policy [39].

In another case involving hair standards, a Native American was hired as a shift manager in a video store and then terminated a few weeks later for failing to meet grooming standards related to his long hair [40]. Court documents, furthermore, provide evidence to support the assertion that the owners had also made derogatory remarks about his race. The court concluded that this action could have been discriminatory [40].

No-Beard Policies

In a disparate impact case, an African-American claimed that Domino's Pizza's no-beard policy had an adverse affect on black males due to a facial skin problem endemic to black males [41]. The only defense provided by Domino's vice president for operations was that "it was 'common sense' that "the better our people look, the better our sales will be." He further speculated that Domino's would "encounter difficulty enforcing any exceptions to their dress and grooming standard . . . and that monitoring the hair length and mustaches of employees at five thousand Domino locations is difficult" [41, at 798]. This lack of supporting empirical evidence to Domino's defense was found to be an inadequate defense, and it lost the case [41].

There are viable defenses to disparate impact claims related to no-beard policies. For example, in many hazardous industries respirator masks must be worn for protection to safely carry out one's job duties. However, hair growth such as a beard cannot guarantee an air tight seal. As a result, organizations in those situations can require workers to be clean shaven [42].

And sometimes the employment statistics affect the case. In *EEOC v. Greyhound Lines*, despite a no-beard policy, the company actually employed a greater percentage of blacks than were the norm in the relevant population from which it recruited [43]. Consequently, even though some blacks were disciplined and denied jobs, there was no disparate impact in the overall employment of blacks, since their employment numbers were greater than those employed in the area. Hence, the employees lost the race-discrimination case [43].

Also, courts have ruled that organizations that discipline or terminate workers failing to conform to a facial hair policy on the basis of promoting "black pride" have not committed racial discrimination [44, 45]. Any displays of facial hair/beards to promote "black pride" are viewed by the courts as a personal choice and not one of racial heritage [44]. Similarly, race discrimination charges involving clean-shaven policies based on the argument that it is "an extreme and gross suppression of them as black men and a badge of slavery" [44, at 132] have also been denied.

SEX

Most of the cases based on dress/appearance or grooming standards are complaints involving sex discrimination. However, cases filed against organizations for hiring based on attractiveness are not generally sheltered by Title VII [46]. "Staffing decisions based on such subjective qualities demonstrate a rather atavistic approach on the part of the employer; however, when such criteria are applied to different classes of people, the practice is not actionable" [46, at 912]. Sex discrimination cases related to dress and grooming policies are further complicated by the biological differences between men and women. As a consequence, the courts generally permit organizations to require sex-differentiated attire as long as the policy is even-handedly applied. For example, men can be barred from wearing earrings and women can be expected to wear makeup as long as there are similar sex-differentiated demands placed on each gender [47, 48].

In one case, males were not allowed to wear facial jewelry on the job but women could, and one of the males sued on grounds of sex-discrimination [49]. However, the company did not allow females to wear jewelry that was unusual or overly large. In granting summary judgment for the defendant, the court stated, "The federal statute was never intended to prohibit sex-based distinctions inherent in a private employer's personal grooming code for employees which do not have a

significant effect on employment and which can be changed easily by the employee” [49, at 595].

Hair Standards

There is a long-established body of law regarding hair standards for men and women. Basically, organizations can stipulate that males wear their hair short and not have a similar requirement for women [50-54]. “Grooming codes or length of hair is related more closely to the employer’s choice of how to run a business than to equality of employment opportunity or that such employment opportunities have only a de minimis effect” [55, at 1337]. “Title VII was never intended to encompass sexual classifications having only an insignificant effect on employment opportunities” [50, at 908].

Relatedly, as long as an organization is not using dress or grooming standards to discriminate against one sex, it can have different standards for the sexes if there is not a significant impact on their employment. For example, males were required to wear ties at a grocery store, but there was no comparable sex-differentiated standard for women. No violation was found because it was not used to discriminate against males, and it was a rule that could be easily met [56]. Similarly, in *Lanigan v. Barrett and Company Grain*, female employees were required to wear skirts or dresses as opposed to pantsuits when working in the executive-office areas, and one female filed a discrimination charge because there were not comparable requirements of men [57]. However, the court in ruling for the defendant stated that “an employer is simply not required to account for personal preferences with respect to dress and grooming standards,” unless it can be demonstrated that the “defendant’s dress code policies impermissibly restrict equal employment opportunity” [57, at 1391]. In this case, the plaintiff could not show how her employment had been significantly affected in complying with the dress standard [57].

Equal Burdens

Any appearance standard that imposes different but essentially equal burdens on men and women does not constitute disparate treatment [58]. One such case was *Wislocki v. Mears*, in which a juvenile detention center expected its staff to dress conservatively (unwritten standard), but a female member of the staff insisted on wearing her hair down and using excessive makeup [59]. She was counseled several times and then reprimanded for failure to comply with the appearance standard. She was eventually terminated for a variety of problems and sued for sex discrimination. She claimed that men were not held to the same dress standard. However, there was evidence that men had been counseled when they had not complied with the conservative dress code. Moreover, the court found that given the nature of their business, the conservative grooming requirements were reasonably related to the juvenile detention center’s business needs [59].

Unequal Burdens

However, standards that create unequal burdens that significantly affect one's employment are illegal unless the organization can demonstrate a bona fide occupational qualification (BFOQ) [59].

There have been several situations where sex-based attire has placed an unequal burden on one of the sexes. In *Frank v. United Airlines*, weight restrictions had been imposed for all flight attendants; however, the weight tables used for each sex were substantially different [58]. The airline used weight tables for large-boned men, but the weight tables for women were for medium body frames. As a result, the court ruled for the women when a BFOQ justification was not provided [58]. In *Gerdom v. Continental Airlines*, the company set weight standards only for women flight attendants but not for men [60]. This practice was also found to be an unjustifiable, unequal burden and ruled illegal [60]. Similarly, forbidding female but not male flight attendants to wear eye glasses during flights is a violation as well [61].

In another case, a bank demanded that its female tellers wear a uniform (color-coordinated skirt or slacks with choice of jacket, tunic, or vest) but only expected males to wear traditional business attire [62]. The adverse affect on the women's employment came in several forms. The bank treated the uniforms as compensation, withheld income tax as a result, and expected the women to pay for cleaning and maintenance, as well as to replace the uniform at their own expense if it was lost or damaged [62]. The difference was also found to be discriminatory and unequally burdensome because customers might assume that uniformed women have less professional status than men in normal business attire [62].

Harassment

While employers have wide latitude in what they may expect in terms of grooming and dress, they are not allowed to have standards that in effect cause the employee to be sexually harassed [63]. In *EEOC v. Sage Realty*, the realty company directed its lobby attendants to wear various uniforms; many worn by females were sexually revealing [63]. One of the females complained several times about the revealing nature of the uniforms and how embarrassed and humiliated they made her feel, but management took no corrective action. She subsequently filed a sex discrimination charge with the EEOC. The company claimed she was free to refuse to wear the provocative outfits, but the record suggested otherwise, and since it was not a BFOQ (wearing sexually revealing attire was not related to the essence of its business—that of selling real estate), the practice was deemed illegal by the court [63]. Also, imposing appearance codes that require women to wear dresses or skirts along with nylons and heels that expose their legs so that a supervisor can admire them has been found to be sexual harassment [64].

Conversely, counseling an employee when she came to work in sexually provocative attire and then terminating that employee when she did not respond to counseling is not harassment [65]. Similarly, counseling a female employee who was not neat or tidy (hair not combed, clothing not neat or coordinated) is not illegal and can also be used as evidence to prevent such an individual from being promoted into a public-contact position [66]. In these situations, the requirement for a professional appearance was job-related. In public-contact positions, not being appropriately dressed can send the wrong message to customers and even hurt business.

Sex Role Stereotypes

Once the sex-differentiated, attire standard—evenly applied—seemed to be a well-settled and understandable part of the law. But after the supreme Court’s 1989 ruling in *Price Waterhouse v. Hopkins* against a company for failing to promote a woman based on sexual stereotypes, the legal landscape related to sex-differentiated standards has become a bit murky [3]. In *Price Waterhouse v. Hopkins*, a senior female manager was denied a partnership in the firm, in part because she dressed and acted too masculine [3, 67]. In effect, the Court found that she was discriminated against because she failed to act and dress like a woman, in that management believed that she needed to walk, talk, and dress in a more feminine manner, wear more jewelry, and be less aggressive [3, 67]. The Court emphasized that “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group” [3, at 250].

Since that landmark ruling in *Price Waterhouse v. Hopkins*, other courts and plaintiffs have been seizing the sex-role stereotype legal theory and applying it to appearance standards. In 2004, a transsexual won just such a claim [4]. The transsexual had been exhibiting more feminine conduct and appearance in his fireman’s job, and co-workers were commenting that he did not look “masculine enough” [4, 67]. Soon after that, he disclosed his condition and his medial treatment to supervision, whereupon management fabricated a scheme to terminate him even though he had worked for the city for seven years without any problems. In ruling for the plaintiff, the sixth Circuit stated:

Title VII’s prohibition of discrimination because of sex protects men as well as women. After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup is engaging in sex discrimination because the discrimination would not occur but for the victim’s sex. It follows that employers who discriminate against men because they **do** wear dresses and makeup, or otherwise act femininely; are also engaging in sex discrimination, because the discrimination would not occur but for the victim’s sex claim [4, at 572].

In a related case involving demotion of a police sergeant who was a transsexual and dressed as a woman off-duty but often came to work with a French manicure, arched eyebrows, makeup, and lipstick, the Sixth Circuit again ruled in favor of the plaintiff [68]. In this case, the police department argued the transsexual did not have a command presence that was expected of a police sergeant and that his/her work was substandard [68]. However, court documents reveal that there was no agreed-upon definition of “command presence,” and that s/he was far more closely monitored by supervision than any other probationary sergeant, including a special six-page form created just to evaluate him/her, despite the fact s/he had generally received good ratings. The sergeant was also told that s/he did not look masculine enough and to stop wearing makeup. In upholding the district court’s decision, the appeals court noted that the probationary sergeant had been singled out for retribution because s/he failed to conform to sex stereotypes [68]. The Fifth Circuit has addressed this issue in a related consumerism case [69]. The appeals court held, “that a biological man who was denied a loan application because he was dressed in traditionally female clothing had established a *prima facie* case of sex discrimination” [69, at 217].

However, other courts remain unpersuaded by the sex-stereotype argument, particularly as it applies to hair standards. For example, in *Wisely v. Harrah’s Entertainment*, a male refused to cut his long hair to conform to the company’s hair regulation [70]. He contended that such a requirement was nothing more than expecting him to conform to the male role stereotype [70]. The court disagreed, stating that in *Price Waterhouse* the management had expected the plaintiff to conform to the employer’s stereotypical standard for femininity, but in this case there was no question of his “maleness” but rather a failure to conform to a grooming standard that did not involve an immutable characteristic [70].

In *Nichols v. Azteca*, even though the Ninth Circuit found that a male waiter who did not conform to traditional male stereotypes (carried his serving tray like a female, had female mannerisms, and didn’t date female co-workers) was illegally sexually harassed, it would not extend the same arguments to dress and grooming standards [71]. The court said that “our decision does not imply that there is any violation of Title VII by reasonable regulations that require male and female employees to conform to different dress and grooming standards [71, at 900].

STATE LAWS

In a number of states, laws that govern dress and grooming standards often go beyond the coverages of Title VII. Only the District of Columbia specifically protects personal appearance, but at least thirteen states and the District of Columbia directly prohibit discrimination based on sexual orientation [67, 72]. These include California, Connecticut, Hawaii, Kentucky, Massachusetts (except for pedophiles), New Hampshire, New Jersey, New Mexico, New York, Oregon,

Rhode Island, Vermont, and Wisconsin (these laws apply to both the public and private sector) [67]. A number of states actually outlaw gender stereotype discrimination in the workplace, including California, Kentucky, Minnesota, Pennsylvania, Rhode Island, and New Mexico [67, 73]. Connecticut, New Jersey, and Massachusetts have court and administrative rulings offering similar protections [67].

Under these statutes, states such as California even go as far as to allow employees to dress consistently with their chosen “gender identity” [72]. In one such case the Superior Court of Massachusetts allowed a case to go to trial where a “transgendered” person that was biologically male started wearing traditional female clothing to work [74]. The company eventually terminated the person for failing to conform to the male dress standards. The court found that this action could be a violation of the state’s prohibition against sexual orientation discrimination [74].

SUMMARY

In summary, case law shows that a number of exceptions must be allowed to even-handedly applied dress and grooming standards under both federal and state law. These include: the right to wear union insignia, religious expression, allowing facial hair when non-job related no-beard policies adversely affect African-Americans, unequal dress standards between the sexes, standards that harass, dressing that does not conform to traditional sex-role stereotypes, and dress based on sexual preference (covered under a number of state laws). However, exceptions to dress and grooming standards promulgated for job-related reasons in both the public and private sectors may be denied.

CONCLUSIONS

In general, even-handed dress and grooming policies are usually legal. However, there are a number of legal pitfalls that may ensnare unsuspecting employers. Therefore, employers should keep appearance standards job-related and when faced with a request for an exception based on race, sex, religion, or some other protected class, seek human resource and/or legal counsel.

The federal law surrounding dress and sex-role stereotypes is still in a state of flux, and ultimately the Supreme Court will need to clarify and settle the issue. Until this matter is resolved, employers, when enforcing dress codes, should not refer to gender-based stereotypes but rather address the general need to comply with the dress code. Nevertheless, the trend is toward allowing employees to dress in nonstereotypical attire, both at a federal and state level. Many states have, or are adopting, laws that would in effect prohibit sex-based appearance standards. Consequently, employers should consider relaxing those requirements, unless they have a sound, job-related reason for not doing so.

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