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EMPLOYEE APPEARANCE POLICIES AND TITLE VII: NEW CHALLENGES FOR SEX DIFFERENTIATED STANDARDS

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ABSTRACT

This article examines federal court rulings that may limit an employer's ability to impose organizational appearance policies/dress codes. We focus on allegations that such policies unlawfully discriminate against individual employees on the basis of their race, religion, sex, or national origin (ethnicity). The newest tactic involves the use of sex stereotyping to challenge employment policies differentiating "male" behavior and "female" behavior in the workplace. A Ninth Circuit Court of Appeals ruling, *Jespersen v. Harrah's Operating Company, Inc.*, suggests that federal courts may still permit employers to set standards for their employees, even if those standards differ for male and female employees, provided that certain conditions have first been met.

Organizations generally have a legitimate interest in presenting a workforce to their customers that is, at least in their eyes, reasonably professional in appearance [1]. An employer is permitted to exercise its legitimate concern for the business

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image created by the appearance of its employees [2]. For many organizations, both private and public, there is no more important aspect than the organization's place in public estimation.

As a consequence, many employers believe it is their prerogative to require their employees to meet minimum grooming standards, especially those employees who have direct contact with customers and the general public. In truth, people do judge a book by its cover, a point not lost on employers. It surprises no one that when customers come in contact with employees who appear slovenly or whose personal hygiene is questionable, the organization's image is diminished. Consequently, it is hardly unreasonable that organizations want their employees who deal with the public (especially potential customers) to create as positive an impression as possible. If anyone doubts that favorable customer impressions affect business outcomes, that doubter must ignore common knowledge in the field of marketing [3, 4, 5]. It is, therefore, reasonable to conclude that requiring employees to conform to accepted societal expectations of dress and behavior serves the legitimate business purposes of promoting an orderly workplace and making customers comfortable.

The fact that the image created by company employees when dealing with the public affects the company's relationships is so well-known that courts have taken judicial notice of an employer's desire to achieve favorable acceptance [6]. Acknowledging the importance of employee appearance to overall image of an organization, one federal jurist wrote:

> Perhaps no facet of business is more important than a company's place in public estimation. That the image created by its employees dealing with the public when on company assignment affects its relations is so well known that we may take judicial notice of an employer's proper desire to achieve favorable acceptance [6, at 1124-1125].

There are some minor exceptions to this general opinion. In California, it is an unlawful employment practice for an employer to refuse to permit a female employee to wear pants on the job [7]. In essence, an employer there may not limit female employees to dresses or skirts as a condition of employment. However, state regulation of an employer's appearance and dress policies are rare.

This article examines potential Title VII challenges to organizational dress and appearance policies. Specifically, it examines how allegations are initiated on the grounds that they unlawfully discriminate against employees on the basis of their race/ethnicity, religion, or sex. With regard to sex, the article presents a detailed discussion of sex stereotyping as a means of undermining dress codes. The *Jespersen* ruling is discussed, as well as the general guidelines for developing appearance and dress standards likely to conform with federal equal employment opportunity (EEO) laws, particularly Title VII.

THE *JESPERSEN* CASE

When the *Jespersen* case was initiated, it brought to the forefront an innovative way of challenging sex-differentiated dress and appearance codes under Title VII [8]. The complaining party, Darlene Jespersen, was a beverage department employee of Harrah's, a casino in Reno, where she had worked for twenty years. Jespersen's termination arose from her refusal to comply with a new personal appearance policy initiated by her employer in February 2000. The standards, known as "Personal Best Image," were established specifically for employees having contact with customers. This policy not only created behavioral expectations for beverage department employees (i.e., being friendly, responsive, and polite toward customers), but it also imposed appearance standards for male and female bartenders and barbacks (see Table 1). Prior to 2000, Harrah's had merely *encouraged* female beverage servers to wear makeup. However, with the implementation of the Personal Best Image policy, it became a mandatory work rule that makeup be worn by female beverage servers. Noncompliance could result in disciplinary action [8].

Table 1. Harrah's "Personal Best Image" Appearance & Grooming Policy

All Beverage Service Personnel, in addition to being friendly, polite, courteous, and responsive to our customers' needs, must possess the ability to physically perform the essential factors of the job as set forth in the standard job descriptions. They must be well-groomed, appealing to the eye, be firm and body-toned, and be comfortable with maintaining this look while wearing the specified uniform. Additional factors to be considered include, but are not limited to: hair styles, overall body contour, and degree of comfort the employee projects while wearing the uniform. Beverage Bartenders and Barbacks will adhere to these additional guidelines:

Overall Guidelines (applied equally to male/females):

- Appearance: Must maintain Personal Best Image at all times.
- Jewelry, if issued, must be worn. Otherwise, tasteful and simple jewelry is permitted; no large chokers, chains, or bracelets.
- No faddish hairstyles or unnatural colors are permitted.

Males:

- Hair must not extend below top of shirt collar. Ponytails are prohibited.
- Hands and fingernails must be clean and nails neatly trimmed at all times. No colored polish is permitted.
- Eye and facial makeup is not permitted.
- Shoes will be solid black leather or leather type with rubber (nonskid) soles.

Table 1. Cont'd.

Females:

- Hair must be teased, curled, or styled every day you work. Hair must be worn down at all times, no exceptions.
- Stockings are to be of nude or natural color consistent with employee's skin tone. No runs.
- Nail polish can be clear, white, pink or red color only. No exotic nail art or length.
- Shoes will be solid black leather or leather type with rubber (nonskid) soles.
- Makeup (foundation/concealer and/or face powder, as well as blush and mascara) must be worn and applied neatly in complementary colors; lip color must be worn at all times.

Harrah's disseminated the new appearance/grooming policy to its employees. The appearance policy applied only to jobs that required an employee to regularly interface with customers. All covered employees were instructed as to what constituted adherence to this new policy. In March 2000, Jespersen acknowledged receipt of the policy and her obligation to adhere to its behavioral and appearance standards. Initially, she abided by the new grooming standards and wore makeup. Later, on the grounds that wearing makeup made her feel "uncomfortable" and "violated," Jespersen refused to continue following the policy. Although she had openly refused to comply with the policy, her employer did not immediately terminate her employment. Instead, Harrah's gave Jespersen the option of applying for other jobs within the organization that were not subject to the Personal Best Image standards, those that did not require contact with customers. After thirty days had elapsed and Jespersen had neither complied with the policy nor applied for other jobs, she was terminated [8].

Upon the termination of her employment, Jespersen filed a sex discrimination complaint with the Equal Employment Opportunity Commission (EEOC) on the grounds that the appearance/grooming policy violated Title VII of the Civil Rights Act of 1964. After obtaining a right-to-sue notification from the EEOC, she filed a lawsuit claiming that the company's dress code/appearance standards imposed a greater burden on female employees than they did on males. In October 2002, Jespersen's case was heard by the U.S. Court for the District of Nevada [8].

In the initial trial, Jespersen's legal counsel argued that Harrah's Personal Best Image standard placed an undue burden on female employees. This has been the traditional challenge to dress and appearance codes. Jespersen presented evidence on how the policy had affected her job performance. The judge applied the

traditional "unequal burden standard," in which the court analyzes whether a sex-differentiated appearance/grooming policy burdens one gender more than the other. The district court ruled that although Harrah's sex-differentiated appearance standards did impose separate grooming standards on men and women, these standards placed an "equal burden" on each sex and did not violate Title VII [8, at 1194]. In arriving at this conclusion, Judge Edward C. Reed relied on a body of judicial precedent that permits different requirements for men and women, provided that they are essentially equivalent in the burden they place on the sexes [8, at 1192].

Furthermore, Judge Reed concluded that "employer's sex-differentiated regulation of dress, cosmetic or grooming practices, which do not discriminate on the basis of immutable characteristics or intrude upon a person's fundamental rights, do not fall within the purview of Title VII" [8, at 1192]. Jespersen appealed the district court decision to the Ninth Circuit, which heard arguments on December 3, 2004 [9]. The appeal hinged on the contention that the district court should have reviewed the policy from the standpoint that it was sex stereotyping. On December 28, 2004, however, the Ninth Circuit also concluded that the employer's appearance policy did not violate Title VII [9].

In *Jespersen*, Harrah's Personal Best policy clearly conformed to the standards for judicial analysis established by the unequal burden test. However, the complaining party argued that a 1989 Supreme Court decision, *Price Waterhouse v. Hopkins*, held that an employer may not force his or her employees to conform to gender-based sex stereotypes as a condition of employment [10, at 250-251]. In *Price Waterhouse*, a female employee was not promoted because some decision makers found her demeanor and conduct in the workplace unlady-like. The Court concluded that if the decision not to promote her was contingent on her failure to conform to these sex stereotypes, she was entitled to protection under Title VII [10].

In *Jespersen*, the Ninth Circuit chose not to expand *Price Waterhouse* by extending gender-stereotyping to an employee's failure to comply with dress codes based on societal expectations of appropriate gender attire [9, at 19]. In fact, the Ninth Circuit specifically held that *Price Waterhouse* did not address the specific question of whether an employer can impose separate but equal sex-differentiated appearance and grooming standards on its male and female employees [9, at 19]. The court chose not to address the "new" standard (sex stereotyping). Instead, it opted to analyze the issue under the precedent of the unequal burden standard. The Ninth Circuit further concluded that an appearance policy amounted to unlawful sex-stereotyping only if the policy amounted to sexual harassment, "which would require a showing that the employee suffered harassment for failure to conform to commonly accepted gender stereotypes" [11, at 1113-1114]. There was nothing to indicate that the employer's policy singled out a particular individual employee, but applied to all employees in that job category. Additionally, there was no evidence that the employer's appearance

standards would inhibit a woman's ability to perform the job in question, nor was it found to degrade women [11, at 1112].

Not all judges on the Ninth Circuit panel agreed with the majority opinion. Judge Harry Pergeson wrote the dissent in which Judges Alex Kozinski, Susan Graber, and William Fletcher joined. Judge Pergeson contended that a reasonable factfinder would have determined that Harrah's action *was* impermissibly based on Jespersen's sex under not just one theory of law, but two. According to Pergeson:

> The majority contends that it is bound to reject Jespersen's sex stereotyping claim because she presented too little evidence—only her "own subjective reaction to the makeup requirement." [citation omitted]. I disagree. Jespersen's evidence showed that Harrah's fired her because she did not comply with a grooming policy that imposed a facial uniform (full makeup) on only female bartenders. Harrah's stringent "Personal Best" policy required female beverage servers to wear foundation, blush, mascara, and lip color, and to ensure that lip color was on at all times. Jespersen and her female colleagues were required to meet with professional image consultants who in turn created a facial template for each woman. Jespersen was required not simply to wear makeup; in addition, the consultants dictated where and how the makeup had to be applied. Quite simply, her termination for failing to comply with a grooming policy that imposed a facial uniform on only female bartenders is discrimination "because of" sex. Such discrimination is clearly and unambiguously impermissible under Title VII, which requires that "gender must be irrelevant to employment decisions" [11, at 1115].

It is highly probable that this is not the last that employers have seen of this case. It, or one addressing the same issue, will eventually be heard before the Supreme Court. In the event that this does occur, the ultimate decision by the Supreme Court will have profound effects on an employer's prerogative to establish grooming standards for its employees and may even affect how far employers are expected to accommodate alternative life styles. Depending on the final outcome, employer grooming and appearance policies across the nation could be called into question.

UNDERSTANDING TITLE VII PROHIBITIONS

When an appearance policy is challenged under Title VII, it is always important to have an understanding of what the statute actually prohibits. Title VII is the part of the Civil Rights Act of 1964 that deals with employment and employment relationships. Specifically, this title makes it unlawful for a covered employer to discriminate against any individual in his or her terms and conditions of employment on the basis of that individual's race, color, religion, sex, or national origin [12, § 2000e-2]. It is important to remember that what Title VII prohibits is not necessarily undesirable treatment or adverse treatment, but rather it prohibits

different treatment [13, p. 54]. Dress and appearance standards are usually challenged based on the premise that they violate this prohibition because they may subject one protected class to a standard not imposed on any other. This was the most common discrimination challenge levied against sex-differentiated dress codes.

Because of the potential for challenges arising from the different treatment prohibitions under Title VII, it is important to ensure that any appearance standard is sufficiently flexible to accommodate *legitimate* conflicts based on the employee's race, ethnicity, religion, or sex.

Ethnicity

The first basis for challenging a dress code to be examined is ethnicity (also called national origin). The legal standard is that a dress code must not treat some employees less favorably because of their national origin. A dress code, for example, that prohibits certain kinds of ethnic dress, such as traditional African or Indian attire, but otherwise permits casual dress would treat some employees less favorably because of their national origin. If employees are given the option of dressing casually while at work and elect to dress casually in ethnic garb (e.g., a dashiki instead of a knit shirt), the employer may run afoul of Title VII by then banning certain casual dress identified with specific ethnic groups.

One option available to employers to reduce the likelihood of such challenges is to require employees to conform to a uniform policy. An employer may require all workers to follow a uniform dress code even if the dress code conflicts with some workers' ethnic beliefs or practices [14, at 578-579], provided that it is consistently enforced.

Religious Discrimination and Religious Accommodation

Another conventional Title VII challenge comes from allegations that an employer's appearance policy or dress code discriminates on the basis of religion. These claims are initiated when an employer refuses or fails to modify the policy to accommodate employees' religious beliefs [1, 15, 16].

Before an employee can initiate a religious accommodation challenge, the employee must meet three criteria. First, the employee must establish that he or she has a sincere religious belief that conflicts with the employer's appearance policy [17, at 481; 18, at 1026]. Once this has been accomplished, it is then the responsibility of the employee to inform the employer of this conflict [19, at 13]. The third requirement for a religious accommodation challenge is that the employee was disciplined for failing to comply with the conflicting employment policy [18, at 1026].

Under Title VII, employers must reasonably accommodate an employee's sincere religious belief unless doing so would impose an undue hardship on the employer. Note that the accommodation process, when involving dress codes,

would begin with an employee either notifying the employer of his or her religious beliefs requiring certain dress, or that he or she was required to refrain from dressing in a particular manner that is contrary to the employer's policy (see Table 1). For example, a Moslem female may request to wear a geles (headwrap) as part of her religious practice [20]. Further, she must inform the employer that her religious beliefs preclude her from dressing like a man (wearing pants) or wearing clothing that reveals her female figure [21]. Similarly, an American Indian male may request an exception to a hair-length policy as a result of his religious practice [19]. At the time of initial notification, organizations should meet with the employee to discuss a reasonable accommodation [22, at 1440].

By considering options with the employee, the employer demonstrates a good faith effort to accommodate the employee's beliefs [23, at 77]. A reasonable accommodation offered by the employer cannot be rejected out of hand merely because the employee desires an alternative [24]. An employee cannot insist that the employer implement his or her proffered accommodation when the employer has proposed a reasonable solution [25, at 67]. As stated, the employer is usually expected to attempt to make an accommodation unless the employer can demonstrate that any attempt at accommodation would create an undue hardship on the business. [26, at 221-222; 27, at 1088; 28, at 1512; 29, at 995].

If the employee makes proper prior notification and is subsequently disciplined or terminated for failure to comply with the employer's dress policy, the burden shifts to the employer to prove that any possible accommodation would create an undue hardship on the business. As an example, a Sikh employee was not exempted from the requirement that all machinists be clean-shaven, since the policy was based on employees being able to wear a respirator with a gas-tight face seal to avoid potential exposure to toxic gases [30]. Generally, employers are not required to accommodate religion (or ethnicity, for that matter) if such accommodation creates a safety risk for the employee or a legal risk for the employer [31, at 521]. However, the issue in *Jespersen* was not religious accommodation, so our discussion focuses on sex discrimination.

Sex Discrimination

Grooming/appearance policies create an inherent dilemma under a statute like Title VII, which demands equal treatment for both sexes [32]. Specifically, Title VII makes any employment practice (including appearance standards) unlawful when that practice discriminates against employees on the basis of race, color, religion, sex, or national origin [12, § 2000e-2]. The current challenges to appearance policies generally claim that such policies are a form of sex discrimination.

If, in terms of sex discrimination, both sexes are treated equally well, there is no Title VII violation. Similarly, if both sexes are treated equally poorly, there again

is no Title VII violation. It is only when one sex is treated *differently* in the workplace than the other that an actionable Title VII violation occurs.

Some would contend that all distinctions on that basis, including sex-differentiated dress policies, are a Title VII violation *per se* [33, at 700-701]. Under this view, the complaining party would establish a claim of sex discrimination by showing that he or she was treated differently because of his or her sex. If ever adopted, all appearance policies would be unlawful. This view has not been embraced by the federal judiciary.

Instead, the federal courts have generally acknowledged that societal perceptions of appropriate male and appropriate female appearance do indeed differ along gender lines. The method by which most federal courts resolve this apparent inconsistency between dress codes and the basic tenets of EEO law is the "unequal burden standard" or the "unequal burden test" [34]. However, before examining this standard, we look at some of the most-common sex discrimination challenges to appearance policies.

Sex Discrimination and Mutable Characteristics

One means adopted by federal courts for assessing a sex discrimination allegation is whether grooming/dress codes regulate characteristics that are mutable [35, at 897]. Several federal courts have concluded that Title VII is intended to protect individuals against discrimination based on *immutable* characteristics (i.e., race, color, sex, or national origin), not mutable ones such as hair styles, modes of dress, etc. [6, at 1125; 36, at 1091]. Consequently, dress/attire is a mutable characteristic, in that each employee is able to conform to the policy. If an appearance policy requires all employees to wear a necktie, for example, nothing unique to an individual's race, color, sex, or ethnicity makes the individual physically incapable of wearing a tie.

Nowhere is this concept of mutability better demonstrated than in the early challenges to appearance policies involving hair lengths. Initially, male employees who preferred longer hair-length styles, particularly popular in the 1970s, challenged employer appearance policies requiring men to maintain shorter hair styles than their female counterparts. The federal courts have a well-established precedent of concluding that such policies do not violate Title VII [37, 38, 39, 40]. Summing up the general consensus, the United States Court of Appeals for the District of Columbia Circuit concluded that Title VII prohibited:

> . . . only those classifications or discriminations which afford significant employment opportunities to one sex in favor of the other . . . Since hair length is not an immutable characteristic but one which is easily altered, the *Fagan* court concluded that the sexual distinction embodied in the hair-length regulations does not significantly affect employment opportunities and thus does not violate the statute [41, at 1335-1336].

A NEW TWIST: SEX-STEREOTYPING

The only case involving employee gender-based appearance is *Price Waterhouse v. Hopkins* [10]. This 1989 Supreme Court decision held that an employer may not force employees to conform to gender-based sex stereotypes as a condition of employment. A female employee had not been promoted because some decision makers found her demeanor and conduct in the workplace to be too aggressive for a woman. Under this approach to Title VII, an employer's sex-specific trait discrimination can constitute actionable sex discrimination if the gender norms driving the discrimination are ones that society has an equality-based interest in eliminating [42]. In *Price Waterhouse*, it was the gender norm that aggressive women seem unlady-like [10]. The employer had no objection to promoting women in general, but some of the decision makers had qualms about promoting an aggressive woman. They had not given any indication of having similar qualms against promoting aggressive men; hence, the aggressive female candidate was treated differently because she was female.

The advocates of the sex-stereotyping challenges would eliminate all dress and appearance standards based on social expectations of gender behavior, regardless of what gender behavior the job requires [33, at 699]. Since they oppose the view that employers' appearance policies may be tied to the interest of running the business, advocates of the sex-stereotyping approach place greater importance on employees' right to dress as they wish [33].

With respect to sex stereotyping, the Ninth Circuit held in 2006 that appearance standards, including makeup requirements, *may* well be the subject of a Title VII claim for sex-stereotyping, but sex-stereotyping may be invoked only where the required dress or appearance is intended to be sexually provocative and to stereotype women as sex objects [11]. Dress requirements which imply that females have a lesser professional status, create demeaning stereotypes of female characteristics and abilities, or use female sexuality to attract business generally violate Title VII because of sex [43]. Requiring all female employees to wear miniskirts would be one example and requiring a female lobby attendant, as a condition of employment, to wear a revealing and provocative uniform that subjected her to sexual harassment is another.

To explain how sex stereotyping challenges to dress codes are evolving in the federal judiciary, we examine the *Jespersen* case decision in detail. In this ruling, the Ninth Circuit concluded that even though the employer's policy had imposed different grooming standards for men and women, it did not violate Title VII because it did not place a greater burden on women than it did on men [11]. Although the court ultimately found in favor of the employer, the court battle on the issue is far from over. It should be further noted that of the eleven judges who heard this case *en banc*, four dissented and concluded that Jespersen had effectively made a case for sex stereotyping [11, at 1114-1117]. In fact, all four judges joined in Judge Harry Pregerson's dissent when he unequivocally

stated, "I believe that the fact that Harrah's designed and promoted a policy that required women to conform to a sex stereotype by wearing full makeup is sufficient 'direct evidence' of discrimination" [11, at 1115]. According to this logic, all sex-differentiated appearance standards are in and of themselves Title VII violations.

Privacy Concerns

Finally, although this article focuses strictly on Title VII challenges to appearance and dress codes, some observers conclude that such polices might be challenged under state statutes on the basis of invasion of privacy [44]. This flows from the premise that "[w]hat ever someone's choice [in terms of personal appearance], to require him or her to act in a way that is fundamentally contrary to his or her preferences is to ask him or her to project an inauthentic self" [44, at 1146]. The prevailing view to date, at least at the federal level, is that of the unequal burden standard which favors the employer's right to project a proper business image over the employees' desire for self-definition.

The Unequal Burden Test

The widespread standard for analyzing Title VII challenges to dress codes remains the unequal burden test. Even though standards may be different for the sexes, Title VII is not violated when appearance standards are enforced even-handedly for both male and female employees [2, at 181]. In essence, a dress code violates Title VII only when it imposes an unequal burden on one sex and not the other. This would be particularly true if employees performing the same job functions were covered by two different appearance standards. For example, women must purchase uniforms while men are permitted to wear "professional" attire of their own choosing [45, at 1033]. To survive such challenges, it is incumbent on an employer to demonstrate that the policy did not place a *significantly different* burden on one of the sexes.

Potential Legal Challenges as an Unequal Burden

When is an appearance policy most likely to be successfully challenged as sex discrimination under Title VII? Answer: when the standards are substantially different for male and female employees.

For example, it was determined that Title VII was violated when an employer imposed weight requirements for its female flight attendants to ensure slenderness, but promulgated no such policies for male flight attendants [34, at 608-609].

In another case involving flight attendants, Title VII was held to be violated when an employer's policy imposed weight requirements on both male and female flight attendants but held female flight attendants to more strict weight limitations than males [46]. Although both male and female flight attendants were subject

to company weight requirements, the standards set for women were more burdensome than those set for men [46]. In another airline industry case, female flight attendants were forbidden to wear eyeglasses while on duty; however, their male counterparts were not [47, at 439]. In each instance, the appearance standard imposed on one sex was noticeably different from the one imposed on the other sex.

Following this rationale, another federal court ruled that an employer's dress code imposed more burdensome standards on female employees when they were required to wear uniforms, while similarly situated male employees were permitted to wear "appropriate business attire" of their own choosing [45, at 1032]. However, a policy requiring *all* employees to wear a uniform would not violate Title VII [46, at 855]. As a consequence, employers should be alert to policies that facially impose an appearance requirement on one sex but not the other, since such policies are likely to satisfy the unequal burden test.

The murky area for employers to navigate is in determining whether grooming standards, though different for men and women, are applied evenhandedly to both sexes. This makes the fine line between equal and unequal burden more difficult to discern. However, rigid sex neutrality is neither required by Title VII nor socially desirable, thus permitting employers some latitude to mandate different appearance expectations [42].

As a means of illustration, hair-length standards can differ for the sexes. But, to reduce the accusation that one sex is being treated favorably, some grooming standard should be imposed on each sex. Sufficient federal precedents hold that differentiating grooming and appearance standards between women and men does not constitute Title VII discrimination on the basis of sex of and by itself [35; 48, at 755]. Only when an employer places more stringent appearance standards on one sex than the other does the policy constitute actionable sex discrimination—the unequal burden standard.

In *Nichols v. Azteca Restaurant*, the Ninth Circuit ruled that all gender-based distinctions, by themselves, are not necessarily actionable under Title VII [49, at 875]. Rather, *reasonable* regulations that require male and female employees to conform to different dress and grooming standards would not violate federal EEO laws [49]. The problem that too often confronts employers when courts use terms like *reasonable* is that the court's idea of a reasonable policy may differ from that of the employer [50]. Usually, when such a disconnect occurs, it is the court's standard that prevails.

IMPLICATIONS FOR EMPLOYERS

Employers are aware of the importance employee appearance has on the image of their respective businesses and organizations [4]. As there is an increasing likelihood of having appearance policies or dress codes challenged as sex stereotyping, it is important for employers to take precautions.

First, such appearance policies and standards should be justified. If a court challenge is initiated, could the company explain why employee grooming and appearance policies are important to the business? Once an appearance policy has been articulated, disseminate the policy to all employees with an explanation of the business rationale behind the policy. Compliance is more likely if employees understand the need for the policy.

Second, the appearance standard should not impose greater requirements on one sex than on the other. Are men held to a higher grooming or dress code than women or vice versa? Are body piercings, certain hair styles, or tattoos prohibited for one sex, but not the other? Are the requirements so blatant along sexual lines that a reasonable person could readily detect the more arduous expectations being placed on one sex over the other? The employer should also be careful that the appearance standards do not encourage sexual harassment by employees, clients, and customers.

Third, once implemented, is the policy enforced consistently? Selective or haphazard enforcement invariably leads to complaints, especially if enforcement affects one sex more than the other. An employer should also be candid with potential job candidates about the policies. In addition, if changes are made to a dress code policy, it is important that the employer communicate those changes to the employees.

Fourth, is the policy flexible enough to reasonably accommodate an employee's religious beliefs? It is recommended that employees seeking an exemption from an employer's appearance policy on religious grounds do so in writing and that all discussion about reasonable accommodation be documented.

Because of the risk of potential litigation, if an appearance policy is not clearly a component in the performance of the job, perhaps it should be avoided. To illustrate, there is hardly any need for employee appearance standards in a sheet-metal shop beyond basic safety considerations. On the other hand, it can be convincingly argued that in instances where corporate image is a concern, as in sales, an employer has the right to expect employees to project a professional image. Therefore, appearance and grooming standards should be justified and this justification communicated to all affected employees, especially employees whose duties entail regular contact with customers. Since appearance expectations may be as important in portraying the company to outside constituencies as polite and professional behavior, employees should be informed that appearance will be treated like any other performance dimension for evaluation purposes. Such behavioral and appearance standards should be incorporated into the employee's job description and be part of his or her performance standards.

When such policies are developed, it is important to ensure that neither sex is held to a higher standard than the other. One sex cannot be given the freedom to wear "business casual" in work settings while the other is required to wear "business formal." When grooming policies are formulated, you should ask: Would this policy pass the scrutiny of the unequal burden test?

In anticipation of potential legal challenges, employers should audit current appearance standards and policies to ensure that 1) they are justified by a sound nondiscriminatory rationale; 2) they are not inflexible and can make accommodations for *bona fide* religious beliefs; 3) the consequences of noncompliance are clearly communicated in the policy; 4) documentation is maintained to establish that the policy was disseminated to all employees; and 5) the policies are consistently enforced for both sexes.

Ultimately, employers must base the policy on business-related reasons and explain those reasons in the policy so employees understand the rationale. Common business-related reasons include maintaining the organization's public image, promoting a productive work environment, and complying with health and safety standards.

Require employees to have an appropriate, well-groomed appearance. Even casual dress policies should specify what clothing is inappropriate (such as sweat suits, shorts, and jeans) and any special requirements for employees who deal with the public.

Communicate the policy. Use employee handbooks, memos, and intranets to alert employees to the new policy, any revisions, and the penalties for noncompliance. In addition, explain the policy to job candidates.

Finally, consistent enforcement is essential. Apply the dress code policy uniformly to all employees. This can prevent claims that the policy is directed toward women or minorities, and adversely affects only them. Still, exceptions may have to be made, if required by law.

From risk management and human resource management perspectives, the key consideration appears to be an issue of applying dress code and appearance standards that can be different, but are deemed to be equally rigorous. While *Jespersen* continues to be challenged in the courts, current rulings represent a glimmer of hope that federal courts will still permit employers to set standards for their employees, even if those standards are different for male and female employees.

ENDNOTES

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