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EMPLOYMENT & IMMIGRATION LAW

Dress Codes And Personal Appearance Standards

How they are enforced by employers can be key to discrimination claims

By PETER J. MURPHY

"You never get a second chance to make a first impression." Everyone reading this article undoubtedly heard this statement countless times from their parents or grandparents when growing up. In law school and early in our legal careers, we received similar advice from professors and mentors, as initial impressions matter with courts, clients, and opposing counsel.

Because initial impressions also matter to the business community, many companies have adopted dress codes and personal appearance standards: A clothing store requires employees to wear certain clothes from that store. The New York Yankees limit facial hair on the players. A retail store may require its employees to wear a certain uniform; who can think of Best Buy without picturing the ubiquitous blue shirts and tan pants worn by that company's employees? These dress codes or appearance standards benefit the employer's business. As recent cases demonstrate, however, no matter how well intentioned, an employer's desire to regulate the look of its employees can also lead to discrimination claims if handled inappropriately.

Are Accommodations Necessary?

One area where dress codes frequently are challenged is when employers enforce them without exception. For example, in September the Equal Employment Opportunity Commission filed a federal lawsuit against the owner of a KFC franchise in North Carolina, claiming that the franchise discriminated against an employee on the basis of religion.

In that case, the female employee had worn a skirt to work at KFC for several years in accordance with her Pentecostal faith. After a new company purchased that franchise, however, it determined that her skirts were not in accordance with its dress code. When the female employee refused to wear pants to work, her employment was terminated. Based on the allegations in the complaint, it appears that the employer did not have interactive discussions with the employee to determine whether her religious beliefs could be accommodated under its dress policy.

In another recent EEOC lawsuit, a race discrimination claim was made on behalf of an applicant whose job offer was rescinded when she refused to cut her dreadlocks. The company claimed that her dreadlocks violated its policy against "excessive hairstyles," and it rescinded her offer without any further discussion of her hair and the company's policy. The employers' quick judgments may prove problematic as those cases progress, as both state and federal laws require employers to have interactive, good-faith communications with their employees over potential accommodations.

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Discussing Accommodations

An October 2013 opinion from the U.S. Court of Appeals for the Tenth Circuit demonstrates, however, that not all potential conflicts with a dress code require an interactive process and assessment of possible accommodations for the employee. Employment lawyers have repeatedly told employers that during the hiring process they generally should not ask job applicants for information on several topics, including age, disability, or religious affiliations.

In that recent Tenth Circuit case, a female wearing a hijab applied for a sales position with an Abercrombie & Fitch store and interviewed with the assistant manager of that store. The assistant manager discussed some of the store's personal appearance requirements for sales associates, but he did not mention how the store's "Look Policy" prohibited associates from wearing "caps," nor did he ask the applicant if there was any reason she could not comply with the "Look Policy."

Before the interview the applicant knew the store had some personal appearance standards, yet during the interview, according to the Tenth Circuit, she "never informed [the assistant manager] that she was Muslim, never brought up the subject of her headscarf, and never indicated that she wore the headscarf for religious reasons and that she felt obliged to do so, and thus would need an accommodation to address the conflict between her religious practice and Abercrombie's clothing policy. Indeed, the topic of her headscarf never came up one way or the other."

After speaking with several levels of supervisors, the assistant manager did not offer the applicant a position based in part on a determination that the hijab would violate the "Look Policy." After learning from a friend of the reason why she did not get the position, the applicant sued. Analyzing the applicant's failure to accommodate claim, the court noted that the employer was in the difficult position of not being able to ask about the applicant's religion or even to make assumptions about her religion during the interview, yet also needing information about her religion and any related obligation concerning the hijab to discuss possible accommodations to the dress policy.

The parties "vigorously" debated the level of knowledge required by employer to support a failure to accommodate claim. Ultimately, the court agreed with the store's position, concluding that in order to state a prima facie case of failure to accommodate, a plaintiff must establish that she initially informed the employer that she adheres to a particular practice for religious reasons, and that she needs an accommodation for that practice due to a conflict between the practice and the employer's neutral work rule.

Although the Tenth Circuit's majority opinion is a positive case for employers facing similar claims, there also was a well-reasoned dissent. As noted by the dissenting judge, the employer in that case was in the superior position in regard to knowledge, as the applicant did not know about the specific provisions of the dress code and the potential conflict with her hijab. Therefore, the applicant's failure to accommodate claim should have survived the store's motion for summary judgment. This is an interesting case with a difficult set of facts, and it is unclear whether the Tenth Circuit's majority opinion will be followed by other circuits. Until further guidance is issued on this topic, employers should carefully review how their policies address apparent, yet unspoken conflicts between an applicant or employee and a dress code or personal appearance policy.

Scope And Enforcement

Employees' beliefs that personal appearance standards and dress codes are being applied in an unequal manner also can lead to lawsuits against employers. For example, a July 2013 opinion from New Jersey addressed claims made against a casino by female employees called "Borgata Babes," who were "part fashion model, part beverage server, part charming host and hostess."

The female plaintiffs first claimed that the casino's personal appearance policy was unfavorable to them when compared to their male colleagues, as it allegedly forced them to wear outfits that required them to adhere to overt stereotypes of female sexuality. The court rejected this argument, finding that dress requirements were reasonable under New Jersey law and that the female employees had clear notice at the time they started their employment about the clothing requirements and appearance standards for "Borgata Babes." The female plaintiffs also challenged the casino's policy that limited both male and female employee's weight to a maximum of 7 percent over the initial hire weight. The court rejected that claim, too, finding that there was no evidence this policy was applied differently to male employees.

As these cases demonstrate, employers remain free to establish dress codes or appearance standards that are appropriate for the nature of their business — whether chinos and golf shirts at Best Buy or more risqué selections at casinos. Once dress codes or personal appearance policies are adopted, however, employers should enforce them in an even manner. In addition, employers should be prepared to have good-faith discussions with employees who raise the need for accommodations to these policies.