

# Dress Codes and Appearance Policies: What Not to Wear at Work

by Laura Hazen and Jenna Syrdahl

*Whether and to what extent an employer can or should regulate an employee's appearance is increasingly under fire. Dress codes are becoming important pieces of evidence in discrimination and harassment claims. This article provides an overview of the roles that dress codes play in litigation and the theories of liability that implicate dress codes. The article addresses legal issues related to the enforcement of personal expression or appearance policies, particularly as applied to attractiveness, weight, makeup, piercings, and tattoos.*

Because entities act through the people who represent them—their employees—the regulation of employee appearance typically is a matter of business necessity. Traditionally, employers have regulated employee appearance through required uniforms and dress code policies. Dress codes provided a laundry list of items of clothing considered appropriate in the workplace, as well as those that were not. Tube tops and spaghetti straps were relegated to the fashion “don’t” category, while suits were elevated to the “do” category.

The new concepts of “casual Friday” and “business casual” brought with them dress code confusion. The increased popularity of piercings, tattoos, colorful hair dye, and diverse cultural dress has made traditional ideas about appropriate dress and, in some instances, dress codes themselves, all but obsolete. Employers now are faced with appearance issues not previously contemplated, and have taken their dress code policies back to the drawing board.

As recent case law demonstrates, the desire of employees to engage in individual expression in the workplace coupled with the desire of employers to regulate such individual expression have led to countless conflicts and created a conundrum for some employers in implementing appropriate policies that do not run afoul of Title VII. Simply put, employers must be cognizant of the risks and legal theories involved in developing policies designed to limit personal expression at work.

## Brief Summary of Legal Theories

Dress codes can become compelling evidence in discrimination and harassment claims. Employees can use various legal theories

in support of their claims against employers based on dress code policies. Below is a brief summary of those legal theories.

### EEO Concerns

In the Title VII context, courts apply the three-part burden-shifting framework established in *McDonnell Douglas Corp. v. Green*.<sup>1</sup> When evaluating an appearance policy under the rigors of Title VII, the first inquiry is whether the policy is discriminatory on its face or whether it has a discriminatory effect.<sup>2</sup> When discrimination is proven, an employer must provide a legitimate, nondiscriminatory reason for its policy.<sup>3</sup> The burden then shifts back to the plaintiff to prove that the employer’s stated reason for the appearance policy is a pretext for discrimination.<sup>4</sup> In these instances, for example, dress codes could be offered as evidence: (1) that policies were enforced disparately (disparate treatment); (2) of a biased environment (harassment); or (3) as proof that religious or racial differences were not tolerated (discrimination and/or reasonable accommodation).

### Stereotype Claims

Dress codes also appear in stereotype claims. Sex stereotype claims stem from the argument that employees are entitled to protection under Title VII if they are discriminated against for failing to conform to sex stereotypes. These cases arise when an employer takes an adverse employment action against an employee for failing to conform to social expectations of how a man or a woman should look and behave. Plaintiffs relying on sex stereotype claims argue that Title VII’s use of the term “sex” encompasses discrimination

### Coordinating Editor

John M. Husband, Denver,  
of Holland & Hart LLP—  
(303) 295-8228, [jhusband@hollandhart.com](mailto:jhusband@hollandhart.com)



### About the Authors

Laura Hazen is a director with Ireland Stapleton Pryor & Pascoe, PC. Her practice focuses on employment issues and civil litigation, including construction disputes—(303) 628-3618, [lhazen@irelandstapleton.com](mailto:lhazen@irelandstapleton.com). She thanks Emily Powell and Michelle Ferguson for their helpful insights and suggestions. Jenna Syrdahl is an associate with the law firm of Hensley Kim & Holzer, LLC—(720) 377-0770, [jsyrdahl@hkh-law.com](mailto:jsyrdahl@hkh-law.com).

Labor and Employment Law articles are sponsored by the CBA Labor and Employment Law Section to present current issues and topics of interest to attorneys, judges, and legal and judicial administrators on all aspects of labor and employment law in Colorado.

based on the biological differences between a male and a female, as well as discrimination based on failure to conform to a stereotypical gender norm.<sup>5</sup>

### *Disparate Impact Claims*

Complaints about dress codes also may manifest themselves as disparate impact claims. To establish a disparate impact claim under Title VII, employees do not need to show intentional discrimination; rather, they only need to show that the dress code has a disparate impact on one protected class.<sup>6</sup> In *Dothard v. Rawlinson*, the U.S. Supreme Court set forth the steps for proving disparate impact. The Court explained:

[O]nce it is shown that the employment standards are discriminatory in effect, the employer must meet “the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question.” If the employer proves that the challenged requirements are job related, the plaintiff may then show that other selection devices without a similar discriminatory effect would also “serve the employer’s legitimate interest in ‘efficient’ and trustworthy workmanship.”<sup>7</sup>

### *Personal Expression or Dress Code Claims*

Employee dress code claims tend to come in one basic fact pattern: an employee arrives at work inappropriately attired (according to his or her supervisor), suffers an adverse employment action, and then files a complaint. In most of the cases cited in this article, the employer’s dress code is one of many factors supporting a claim of hostile work environment, wrongful discharge, or discrimination. Employers and counsel must be mindful of the relevant case law and prepare policies that do not discriminate or have a disparate impact on a protected group. A survey of the reported cases that address these issues is provided below.

### *Religious Discrimination: Tattoos and Piercings*

Disparate impact claims are particularly relevant where dress codes and religious beliefs intersect. Religious beliefs are entitled to protection under Title VII.<sup>8</sup> The term “religion” includes all aspects of religious observance and practice, as well as belief. The definition of a “sincerely held belief” includes atheists.<sup>9</sup> Interestingly, a judge in the United Kingdom recently held that an employee’s sincere beliefs and devotion to climate changes and other environmental concerns—that the employee claimed was the basis for his termination—were akin to a religious belief and should be protected.<sup>10</sup> Thus, the concept of “sincerely held belief” can be broadly applied.

Under Title VII, an employer must offer a reasonable accommodation to resolve a conflict between an employee’s sincerely held belief and a condition of employment—including a dress code—unless the accommodation would create an undue hardship for the employer.<sup>11</sup> Whether a belief is sincerely held determines whether that belief is entitled to the protections of Title VII, and making that determination is “more often than not a difficult and delicate task.”<sup>12</sup>

Perhaps the most well-known piercing case in recent years is a decision in which the First Circuit acknowledged that an employee’s membership in the Internet-based Church of Body Modification might be a sincerely held belief and therefore trigger the religious protections of Title VII.<sup>13</sup> Without addressing the question

of whether it was a sincerely held belief, the First Circuit held that it would pose an undue hardship to require Costco to grant an exemption to a female employee who had facial piercings “because it would adversely affect the employer’s public image,” given Costco’s stated “family friendly” image and its determination that facial piercings “detract from the ‘neat, clean and professional image’ that it aim[ed] to cultivate.”<sup>14</sup>

With respect to tattoos and piercings, however, a family-friendly business justification will not always protect an employer with an aggressive personal appearance policy. In Washington state, the Equal Employment Opportunity Commission (EEOC) filed suit against Red Robin restaurants for firing a server who refused to cover tattoos on his wrists that he claimed represented his devotion to Ra, the Egyptian sun god.<sup>15</sup> Red Robin argued that its policy forbidding visible tattoos was essential to its family-friendly image. The court disagreed with the employer, finding that Red Robin failed to demonstrate that allowing an employee to have visible religious tattoos was inconsistent with its goals. The court denied the employer’s motion for summary judgment, and instructed the employer to provide evidence of actual imposition on co-workers or disruption of work routine to demonstrate undue hardship.<sup>16</sup>

However, all tattoos are not created equal in the eyes of the courts. In a 2000 ruling, the U.S. District Court for the Northern District of Indiana ruled that an employer was reasonable and within its right to ask an employee, who was a member of the Ku Klux Klan, to cover a tattoo of a hooded figure in front of a burning cross, notwithstanding the employee’s claim that the tattoo represented a sacred symbol of his religion.<sup>17</sup> Thus, there appears to be a line between the right of religious expression and offensiveness that employers must address in applying appearance policies.

### *Religious Headdress Claims*

Restrictions on employees wearing hats or headdresses have a disparate impact on employees who hold certain sincerely held beliefs and observe those beliefs through their attire. If employers take adverse employment actions against employees because of their religious headdress, or unreasonably fail to accommodate an employee’s religious observance or practice without undue hardships on the conduct of the employer’s business,<sup>18</sup> liability could result. Courts remain willing to engage in the exercise of confirming that an employee has a religious or sincerely held belief, and that the headdress is protected religious expression under Title VII. For example, in *McGlothlin v. Jackson Municipal Separate School District*, the court held that the discharged employee failed to establish that she wore African-style head wraps based on her religious beliefs, and therefore failed to prove a violation of Title VII.<sup>19</sup> The court found that the employee’s beliefs were “cultural.”<sup>20</sup>

By contrast, a Washington state court held that it was discriminatory to refuse to promote a server to a more desirable shift because she wore a Muslim headdress.<sup>21</sup> In addition, an Ohio state court held that the Catholic Church discriminated against an employee by firing him for wearing a monk’s hood without formal recognition from the church. The court held that the church failed to prove that allowing the plaintiff to wear the hood presented an undue hardship.<sup>22</sup>

Even if appearance issues are directly tied to an employee’s religion, an employer can regulate headdresses to a certain extent. Safety concerns provide a good example of this exception. A New

York court held that an employer may require all employees to wear hard hats, even if doing so interferes with an employee's religious expression or belief that requires wearing a headdress or other covering.<sup>23</sup>

A recent religious expression dress code case was brought by the U.S. EEOC against Texas-based Alliance Rental Center, L.P. (Alliance), which operates several Aaron Rents franchises in North Texas. In March 2010, the employer agreed to pay the former employee \$21,500 and furnish other relief to settle the claim brought by the EEOC.<sup>24</sup>

In that case, an employee was fired when he declined to participate in the company's "Red Shirt Friday" dress code, a store practice intended to show support for the U.S. military. Alliance required employees to wear red shirts provided by the company on Fridays as a show of support for the armed forces. As a Jehovah's Witness, it was the employee's religious belief that he not express opinions about government matters, including military affairs. The employee informed his supervisors about his religious beliefs and his observance of neutrality on military efforts, but was reprimanded for not complying with the Friday dress code. The company allegedly disregarded the employee's requests to be excused from that portion of the dress code policy and fired him shortly thereafter.

In its press release about the settlement, the EEOC stated:

This is not a case about an employee's patriotism, but rather about the accommodation of an employee's religious freedoms under Title VII. If this franchisee had not been so determined to force its color scheme on [the employee] despite his religious beliefs, it could have very easily avoided a federal law enforcement action.<sup>25</sup>

Indeed, the EEOC's enforcement guidance and compliance manual are replete with statements and examples where an employer may need to modify its dress and grooming policies to accommodate an employee's religious beliefs.<sup>26</sup>

### *Gendered Dress Code Policies*

It is generally accepted that dress codes may differentiate between men and women, as long as they do not impose a heavier burden on one sex than on the other.<sup>27</sup> If the policy imposes a heavier burden or more restrictions on one sex, courts look for additional information supporting a business justification for the policy. For example, courts agree that dress codes cannot generally require females to wear uniforms if males are not required to do so, where the employees are performing the same job.<sup>28</sup>

After analyzing the burden posed by a gendered dress code policy, courts will look to whether the employer can articulate a legitimate business reason to justify the burden. If an employer can articulate a legitimate, nondiscriminatory reason, a dress code that places a higher burden on one sex over the other may be upheld. For example, one state trial court upheld an enhanced dress code for female employees at a male inmate educational campus, due to the legitimate and nondiscriminatory justification that "provocative, revealing and inappropriate attire by females" would create an inherent security risk.<sup>29</sup>

Application of appearance policies with respect to tattoos and piercings also have led to claims of gender discrimination. The Iowa Supreme Court found that an employer's enforcement of an unwritten personal grooming code that forbade male employees from wearing earrings or ear studs during the course of employ-

ment did not constitute discrimination based on sex.<sup>30</sup> In that case, the employer provided the employee with the option of covering his earring with a bandage, as an accommodation during work hours, but the employee refused to do so.<sup>31</sup>

### *Application of Dress Codes to Transgendered Employees*

In August 2007, the state legislature amended the Colorado Anti-Discrimination Act (CADA) to, among other things, add sexual orientation, the definition of which includes transgendered employees, as a protected class.<sup>32</sup> Interestingly, the amendment also addresses dress codes and states that “[n]othing in this section shall preclude an employer from requiring compliance with a reasonable dress code so long as the dress code is applied consistently.”<sup>33</sup> The Colorado Civil Rights Commission issued rules, effective November 2009, specifically addressing dress codes and grooming standards, which state:

[c]overed entities may prescribe standards of dress or grooming that serve a reasonable business or institutional purpose, provided that they shall not require and individual to dress or groom in a manner inconsistent with the individual’s gender identity.<sup>34</sup>

In the past, some employers interpreted the exception provided in the CADA amendment as giving them permission to require transgendered employees to dress according to the employer’s preconceived notions about what was appropriate for that individual. The current rule squarely addresses the issue and indicates that

Colorado employers must allow the employee to choose whether to dress consistent with the employee’s gender or consistent with the gender with which the employee identifies.

### *Weight*

Appearance policies that address an employee’s weight can manifest as disability or gender discrimination claims.<sup>35</sup> For example, a New York court considered discrimination based on an employee’s weight as it relates to a possible disability, rejecting the employee’s claim because the employee’s obesity did not limit a major life activity.<sup>36</sup> However, under the Americans with Disabilities Act Amendments Act of 2008 (ADA Amendments), the definition of a “qualified individual with a disability” was significantly expanded, which could have affected the outcome of this case. The ADA Amendments also expanded the definition of those who are “regarded as” being disabled.<sup>37</sup> These amendments could affect a line of cases in which an appearance policy mandates that employees maintain themselves in a particular physical condition.<sup>38</sup>

Other courts have considered the weight issue as it relates to gender. The Ninth Circuit held that a policy that contained strict weight restrictions on female flight attendants but imposed no similar restrictions on men violated Title VII.<sup>39</sup> The court similarly found that a policy that required women to meet the weight restrictions for a “medium” body frame, while allowing men to satisfy the restrictions for a “large” body frame, violated Title VII.<sup>40</sup>

Unlike any other state, Michigan’s Elliot-Larsen Civil Rights Act specifically prohibits discrimination on the basis of weight.<sup>41</sup>

Recently, two servers from a Michigan Hooters restaurant filed lawsuits claiming discrimination under the Elliot-Larsen Civil Rights Acts on the basis of their weight. According to one of the complaints, the 5'8" 132-pound waitress was counseled by her supervisors to join a gym to lose weight so that she could better fit into her required extra-small uniform, and was placed on a thirty-day "weight probation" as a condition for continued employment.<sup>42</sup> These cases currently are pending before the Macomb County Circuit Court in Michigan.

### *Hair Length, Style, and Color*

Gender-differentiated policies relating to hair length are receiving consistent treatment in the federal courts. Several federal appellate courts have considered Title VII in the context of personal grooming codes regulating hair length, and they universally agree that grooming policies that require men to wear their hair short while allowing women to wear their hair long violate Title VII.

Despite the fact that policies requiring males to have short hair have been upheld, an employee may bring a claim against his employer for same-sex harassment based in part on his failure to conform to sex stereotypes. As the Seventh Circuit found:

[a] man who is harassed because his voice is soft, his physique is slight, *his hair is long*, or because in some other respect he . . . does not meet his coworkers' idea of how men are to appear and behave, is harassed "because of" his sex.<sup>43</sup>

Appearance policies that restrict hairstyles also can trigger claims of discrimination and harassment based on race, national origin, or religion. For example, a plaintiff in Georgia alleged that the employer's policy of disallowing "Afrocentric" hairstyles by specifically prohibiting employees from wearing "dreadlocks, cornrows, beads, and shells" was race discrimination in violation of Title VII.<sup>44</sup> The court upheld the employer's grooming policy, finding that it was not race-specific and therefore did not violate Title VII.<sup>45</sup>

The Sixth Circuit addressed race discrimination as it related to hairstyle appearance policies in *Hollins v. Atlantic Company, Inc.* There, the employee had "finger waves" and was told that her hairstyle did not meet the company policy requiring women to have a neat and well-groomed hair style, because her finger waves were "different" and "eye-catching."<sup>46</sup> Hollins further was told that she should seek advance approval for any hairstyle.<sup>47</sup> She then presented a picture of a braided hairstyle, which was rejected as unacceptable.<sup>48</sup> Later, Hollins arrived at work with a ponytail and was told that her style was too drastic, although five white women on her shift wore the same style on other occasions.<sup>49</sup> Because similar facts existed over a period of years, the Sixth Circuit ultimately found that there was a question of fact as to whether the employer's grooming policy, which allegedly was not applied to white women, was pretext for discrimination.<sup>50</sup>

Recently, in the U.S. District Court for the Southern District of New York, an employee sued Abercrombie & Fitch for race discrimination, retaliation, and hostile work environment based on its hair color policy.<sup>51</sup> Abercrombie's "Look Policy" requires that employees have "a clean, natural, classic hairstyle."<sup>52</sup> The employee, a multiracial woman, dyed her hair black shortly after being hired at Abercrombie. After approximately four months, she added a few blonde highlights and was reprimanded by management because she could not work with "two-toned" hair.<sup>53</sup> She then dyed her hair a color lighter than black, and was again reprimanded because it

appeared that she "had a couple of pieces in her hair that had a lighter color than the rest" and was told she could not return to work until she dyed her hair black again.<sup>54</sup> Summary judgment was entered for Abercrombie, because its policy is neutral on its face, the employee admitted no one ever referenced her race or made derogatory comments to her, and she was unable to present a triable issue of fact that similarly situated employees outside her protected class received better treatment.<sup>55</sup>

### *Makeup Policies*

Courts seem to agree that employers may regulate female employee's makeup use. In *Jespersen v. Harrah's Operating Co.*, the Ninth Circuit heard the complaint of a female bartender who was terminated for refusing to wear makeup.<sup>56</sup> She sued under a theory of disparate treatment and disparate impact sex discrimination under Title VII.<sup>57</sup> The Ninth Circuit found that Harrah's:

required all bartenders, men and women, to wear the same uniform of black pants and white shirt, a bow tie, and comfortable black shoes. The standards also included grooming requirements that differed to some extent for men and women, requiring women to wear some facial makeup and not permitting men to wear any.<sup>58</sup>

Jespersen did not wear makeup on or off the job, and testified in deposition that wearing makeup would conflict with her self-image and interfere with her ability to do her job.<sup>59</sup> However, the Ninth Circuit found that Jespersen had failed to support a disparate impact, harassment, or stereotype claim, explaining that "[g]rooming standards that appropriately differentiate between the genders are

not facially discriminatory.”<sup>60</sup> Conversely, in *Wislocki-Goin v. Mears*, the Seventh Circuit affirmed the termination of an employee for wearing excessive makeup and wearing her hair down in violation of an unwritten “Brooks Brothers look” dress code.<sup>61</sup>

### *Tight or Sloppy Clothing*

The way clothing is worn also can become an issue in litigation. Employers generally want employees to wear neat clothing that fits, but this facially reasonable requirement has drawn several reported claims. In one federal district case, an employee claimed she was told to wear looser pants at work and brought a discrimination claim, alleging different treatment based on sex.<sup>62</sup> Her claim failed because she could not demonstrate disparate treatment, because all employees were instructed that same day to wear different pants that complied with the company dress code.<sup>63</sup>

Similarly, in a case with particularly colorful facts, an employee sued her employer in a Florida court because of the allegedly arbitrary and capricious enforcement of a dress code policy.<sup>64</sup> The employee alleged that the dress code was not similarly enforced against men who wore ill-fitting clothing, and also alleged that she was discriminated against because she had large breasts.<sup>65</sup> In its order granting summary judgment in favor of the employer, the court found no evidence of pretext, and further found that the employee was terminated for violating the dress code and other performance issues.<sup>66</sup>

Despite the claims that can arise from an employer’s enforcement of dress codes, employers may be incentivized to enforce

dress codes to avoid claims for lax enforcement. For example, an employee sued her employer in a New Hampshire court alleging sexual harassment because she was exposed to the provocative clothing of her co-workers.<sup>67</sup> Additionally, the fit of an employee’s clothing may be helpful to the employer in some circumstances. For instance, an employee’s decision to wear skimpy clothing has been used as an affirmative defense if that employee later files suit for a hostile work environment.<sup>68</sup>

### *Attractiveness*

Employers sometimes seek to require employees to be “attractive,” and employees may be able to file a successful suit if they are unable to meet that standard.<sup>69</sup> However, employers must take heed because the EEOC has held that employees with “cosmetic disfigurements” might enjoy some protection under the ADA.<sup>70</sup> In a case involving a McDonald’s cook who allegedly was denied a promotion to manager and constructively discharged due to a medical condition that caused a “port wine stain” to cover much of her face, the EEOC stated that it was committed to enforcing laws “established to prevent disability-based discrimination,” and that it desired to “educate employers that the ADA requires a focus on what people can do, not how they are perceived.”<sup>71</sup>

In *Craft v. Metromedia, Inc.*, the plaintiff was demoted from the position of anchor woman to that of reporter because she performed poorly on a survey in which participants were asked to rank her in comparison with other female co-anchors based on her appearance and the image of a “professional anchor woman.”<sup>72</sup> Based in part on the survey results, the defendant began daily scrutiny of the plaintiff’s appearance, requiring that she change clothes at the station before going on air, and requiring the use of a fashion consultant.<sup>73</sup>

In litigation, the plaintiff attempted to argue that the defendant’s grooming policies and practices were more strictly enforced against women.<sup>74</sup> However, although the court noted that the defendant had an overemphasis on appearance, it found that the defendant’s practices and policies were in line with Title VII, because its policies were generally applied to both sexes: women were to avoid “tight sweaters or overly ‘sexy’ clothing and extreme ‘high fashion’ or ‘sporty’ outfits,” and men were to avoid “frivolous colors and ‘extreme’ textures and styles as damaging to the ‘authority’ of newscasters.”<sup>75</sup>

In 2010, the Eighth Circuit decided *Lewis v. Heartland Inns of America, LLC*, a case involving claims of sex discrimination and retaliation in violation of Title VII and the Iowa Civil Rights Act.<sup>76</sup> The plaintiff, a female employee, is described as slightly more masculine or “tomboyish,” with short hair, wearing looser clothing and no makeup.<sup>77</sup> She initially worked as a night auditor, and then worked various part-time front desk shifts.<sup>78</sup> She subsequently was offered a full-time front desk position based on recommendation from her prior supervisor, for which she was not required to re-interview.<sup>79</sup>

Heartland’s personnel manual mentions that guest service representatives need only create a “warm, inviting atmosphere.” Heartland’s Director of Operations frequently stated that the staff should be “pretty.”<sup>80</sup> The Director stated that the plaintiff lacked the “Midwestern girl look” and had an “Ellen DeGeneres” look, and that the local manager “took two steps back” when the plaintiff was hired as a replacement for a previous employee who was more feminine.<sup>81</sup> Although these comments were not made directly to the

plaintiff, she learned of them through Heartland's local manager. The Director ordered that the manager move the plaintiff back to the night shift. Around this same time, Heartland changed its policy to require a second interview for all front desk positions. In addition, Heartland purchased video equipment specifically so the Director or the human resources manager could see applicants prior to extending an offer of employment.<sup>82</sup>

The plaintiff was required to undergo a second interview, even though she had been in the front desk position for more than a month. The plaintiff was told the interview was necessary to "confirm/endorse" her for the position, but she believed it was because of her appearance. She protested that other employees were not required to submit to a second interview.<sup>83</sup> There were no customer complaints or disciplinary actions against the plaintiff prior to the second interview.<sup>84</sup> After the interview, the plaintiff was terminated because she "thwart[ed] the proposed interview procedure" and exhibited hostility toward the recent policy changes.<sup>85</sup>

The employee filed suit, alleging that Heartland enforced an unwritten policy that female employees conform to gender stereotypes to work the day shift.<sup>86</sup> The Eighth Circuit reversed the district court, holding that she presented a *prima facie* case of sex discrimination and retaliation and that Heartland's reasons for termination were pretext.<sup>87</sup>

The cases cited above focus on an employee's complaints of discrimination for being unattractive; however, the opposite situation also can lead to litigation. In 2009, a female former employee of Citigroup filed a lawsuit for gender discrimination and retaliation because she was too attractive.<sup>88</sup> Citigroup's branch manager and assistant branch manager allegedly informed her that "she must refrain from wearing certain items of clothing, in particular, turtle-neck tops, pencil skirts, fitted business suits, or other properly tailored clothing," despite the fact that her fellow co-workers were permitted to wear these items of clothing.<sup>89</sup> The plaintiff allegedly was further informed that "as a result of the shape of her figure, such clothes were purportedly 'too distracting' for her male colleagues and supervisors to bear." According to the complaint, the plaintiff repeatedly complained of this discriminatory treatment, and was disciplined, transferred, and ultimately terminated in retaliation. Citigroup filed a motion to compel arbitration, which is still pending before the Supreme Court of the State of New York, County of New York.

## Odor

Some cases demonstrate that taking adverse employment action against employees for their odor or personal hygiene may trigger claims of race or national origin discrimination, or for violations of the ADA. In a 2003 case, a Muslim information technology manager offered evidence that he had been approached by a manager about his body odor and personal hygiene as proof of national-origin discrimination. The court refused to find that the comments regarding body odor supported a finding of discrimination, because the comments themselves did not suggest any reference to race or national origin.<sup>90</sup>

Similarly, the Seventh Circuit granted summary judgment against an employee who claimed that she was a victim of race and age discrimination.<sup>91</sup> The employee offered evidence that she was publicly accused of having a foul body odor and was required to attend a meeting to discuss her personal hygiene.<sup>92</sup> The Seventh Circuit found that the employee was not similarly situated to any

other employee treated differently, and affirmed the entry of judgment against the employee.<sup>93</sup>

## Facial Hair

Courts also have considered facial hair in the context of discrimination claims. Requirements that employees be clean-shaven can be justified by a legitimate business reason,<sup>94</sup> but an employer may be required to provide a reasonable accommodation for an employee who wears facial hair by reason of a religious belief. In *Brown v. F.L. Roberts & Co.*, the plaintiff was a Rastafarian and could not cut his hair or shave his facial hair, in direct violation of Jiffy Lube's personal appearance policy that required all personnel with customer contact to be clean shaven.<sup>95</sup> Jiffy Lube made the plaintiff work in the lower bay where he would not have customer contact because he would not comply with the personal appearance policy.<sup>96</sup> The court held that enforcing the personal appearance policy violated the plaintiff's rights based on his religious beliefs, and remanded the case to determine whether assigning the plaintiff to work in the lower bay was a reasonable accommodation.<sup>97</sup>

## Public Employee Cases

Whether and to what extent public employers can manage the personal expression of their employees is more closely governed due to the protection public employees enjoy under the First Amendment.<sup>98</sup> However, these protections are not without limits. If a municipality has expressed a desire to convey a professional

image, it may be allowed to limit whether an employee can expose tattoos.<sup>99</sup> Similarly, one court allowed a police department to require an officer to cover his spider web tattoo, which the employer claimed symbolized “race hatred of non-whites and Jews.”<sup>100</sup> Other courts have upheld public employers’ requirements—over First Amendment objections—that an employee tuck in his shirt,<sup>101</sup> or that he cover or remove his chest hair.<sup>102</sup>

At least one court has found a public employer’s use of a dress code policy and its application to violate Title VII. The plaintiff in *Barnes v. City of Cincinnati* was living as a pre-operative male-to-female transsexual when he failed the required probationary period for becoming a police sergeant in the Cincinnati Police Department and subsequently was demoted.<sup>103</sup> The court upheld a verdict in the plaintiff’s favor on the ground that the Cincinnati Police Department had intentionally discriminated against plaintiff through sex stereotyping because he was not masculine enough.<sup>104</sup>

## Drafting a Dress Code

The case law in this area indicates that employers with clearly written policies and consistent application of those policies likely can demonstrate that the appearance policy is legitimate and a business necessity, and does not violate Title VII. Courts want to see a demonstrated desire (or need) for a uniform appearance and that employers are clear on what is expected.

Dress code policies should address more than apparel. Employers should think about hair (facial hair as well as hair on the head), tattoos, jewelry, and piercings. Employers also must consider whether the dress code policy is applicable to all employees, or only to employees in certain positions. For example, should the company care whether a cook who never interacts with the customer has a tattoo on his arm? Employers also should consider whether there are safety issues involved—perhaps working with a certain piece of manufacturing equipment while having long hair or dangling jewelry presents a safety hazard. Employers should be thoughtful in the creation of the policy and give consideration to whom it should apply. If possible, they might seek input from employees about what should be contained in the policy; employee buy-in generates good morale and better adherence.

Terms like “professional appearance” or “business attire” are subject to individual interpretation and should be avoided in policies. If employers do use such terms, they should provide definitions or

examples of what would be considered appropriate and what would not. Employers also should not assume that statements such as “appropriate length,” when discussing skirts, for example, will be interpreted consistently among employees (or uniformly applied by supervisors).

Once the policy is drafted, employers and counsel would be wise to determine whether it could have a disparate impact on any protected class—for example, a policy prohibiting employees to wear anything on their heads in the workplace clashes with several religious beliefs. Dress code policies also should include a statement that no clothing or tattoos that may be considered offensive may be worn or visible.

## Conclusion

Personal expression in the workplace is a reality for employees and employers. The role played by employer dress codes in employment claims continues to expand. Although this area of law is evolving, the employees’ motivation for bringing suits based on dress codes remains constant: employees generally do not like to be told what to wear, how to wear their hair, or how to express themselves; yet, employers continue to try to manage their employees’ appearance. As the case law demonstrates, poorly crafted dress codes, dress codes that are not applied uniformly, or the employer’s failure to provide reasonable accommodation to such dress codes can give rise to claims of gender, religious, sexual orientation, or disability discrimination. If one trend is identifiable in the cases cited above, it is the desire of courts to hear reasonable business justifications for dress code policies. Therefore, it is important for both plaintiff and defense counsel to recognize these issues and be prepared to address them. As with most employment issues, prevention is the best defense and employers would be wise to craft well-written policies before issues arise.

## Notes

1. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973).
2. *See, e.g., Jespersen v. Harrah’s Operating Co., Inc.*, 444 F.3d 1104, 1108-09 (9th Cir. 2006) (citations omitted); *Hollins v. Atl. Co., Inc.*, 188 F.3d 652, 658 (6th Cir. 1999) (citations omitted); *Pecenka v. Fareway Stores, Inc.*, 672 N.W.2d 800 (Iowa 2003) (citations omitted).
3. *Id.*
4. *Id.*
5. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007), *citing Smith v. City of Salem*, 378 F.3d 566, 574 (6th Cir. 2004).
6. *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977).
7. *Id.* (citations omitted).
8. 42 U.S.C. § 2000e-2(a).
9. *Young v. Southwestern Sav. & Loan Ass’n*, 509 F.2d 140 (5th Cir. 1975).
10. McVeigh, “Judge rules activist’s beliefs on climate change akin to religion,” *guardian.co.uk* (Nov. 3, 2009), available at [www.guardian.co.uk/environment/2009/nov/03/tim-nicholson-climate-change-belief](http://www.guardian.co.uk/environment/2009/nov/03/tim-nicholson-climate-change-belief).
11. 42 U.S.C. § 2000e(j).
12. *Thomas v. Review Bd. of Indep. Employment Sec. Div.*, 450 U.S. 707, 714 (1981).
13. *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2006).
14. *Id.*
15. *E.E.O.C. v. Red Robin Gourmet Burgers, Inc.*, No. C04-1291JLR, 2005 WL 2090677 (W.D.Wash. 2005).
16. *Id.*
17. *Swartzentruber v. Gunite Corp.*, 99 F.Supp.2d 976 (N.D.Ind. 2000).

18. 42 U.S.C. § 2000e(j).
19. *McGlothlin v. Jackson Mun. Separate Sch. Dist.*, 829 F.Supp. 853 (S.D. Miss. 1992).
20. *Id.*
21. *E.E.O.C. v. Starlight, LLC*, No. CV-06-3075-EFS, 2008 WL 3095254 (E.D.Wash. 2008).
22. *Ward v. Hengle*, 706 N.E.2d 392 (Ohio App. 1997).
23. *Kalsi v. N.Y. City Transit Auth.*, 62 F.Supp.2d 745 (E.D.N.Y. 1998).
24. See U.S. Equal Employment Opportunity Commission (EEOC) Press Release, "Alliance Rental Center Settles EEOC Religious Discrimination Lawsuit" (March 25, 2010), available at [www.eeoc.gov/eeoc/newsroom/release/3-25-10.cfm](http://www.eeoc.gov/eeoc/newsroom/release/3-25-10.cfm).
25. *Id.*
26. See, e.g., EEOC Directives Transmittal No. 915.003, Section 13 (Dec. 2, 2002), available at [www.eeoc.gov/policy/docs/national-origin.html](http://www.eeoc.gov/policy/docs/national-origin.html).
27. See, e.g., *Wislocki-Goin v. Mears*, 831 F.2d 1374 (7th Cir. 1987) (finding that plaintiff failed to prove that the dress code had a disparate impact on female employees).
28. *Carroll v. Talman Fed. Sav. & Loan Ass'n of Chicago*, 604 F.2d 1028 (7th Cir. 1979); *O'Donnell v. Burlington Coat Factory Warehouse*, 656 F.Supp. 263 (S.D. Ohio 1987).
29. *Givens v. Douglas Chambers*, 548 F.Supp.2d 1259, 1273-74 (M.D.Ala. 2008).
30. *Pecenka v. Fareway Stores, Inc.*, 672 N.W.2d 800 (Iowa 2003).
31. *Id.* at 802.
32. Colorado Senate Bill 07-25, amending CRS §§ 24-34-401 *et seq.*
33. CRS § 24-34-402(5).
34. Colorado Civil Rights Commission Rule 81.10.
35. See Davis, "Weight Discrimination in the Workplace," *Employment Practice Solutions* (Aug. 2009), available at [www.epspros.com/KNOWL/EDGECENTER/WeightDiscriminationintheWorkplace/tabid/504/Default.aspx](http://www.epspros.com/KNOWL/EDGECENTER/WeightDiscriminationintheWorkplace/tabid/504/Default.aspx) (summary of weight-related discrimination).
36. *Hazeldine v. Beverage Media, Inc.*, 954 F.Supp. 697 (S.D.N.Y. 1997).
37. ADA Amendments Act of 2008, S. 3406, 110th Cong. § 3 (2008).
38. See, e.g., *Clemons v. The Big Ten Conference*, No. 96-C-0124, 1997 WL 89227 (N.D.Ill. 1997).
39. *Gerdom v. Cont'l Airlines, Inc.*, 692 F.2d 602, 610 (9th Cir. 1982).
40. *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2000).
41. Mich. Comp. Laws § 37.2202 (1976).
42. See *Smith v. Hooters of Roseville, Inc.*, Case No. 10-2231-CD (filed May 24, 2010), available at [www.callsam.com/images/stories/news\\_docs\\_pics/Complaint\\_Smith-vs-Hooters.pdf](http://www.callsam.com/images/stories/news_docs_pics/Complaint_Smith-vs-Hooters.pdf).
43. *Doe v. City of Belleview*, 119 F.3d 563, 581 (7th Cir. 1997), *vacated and remanded on other grounds*, 523 U.S. 1001 (1998) (emphasis added).
44. *Pitts v. Wild Adventures, Inc.*, No. 7:06-CV-62-HL, 2008 WL 1899306 (M.D.Ga. 2008).
45. *Id.*
46. *Hollins v. Atl. Co., Inc.*, 188 F.3d 652, 655 (6th Cir. 1999).
47. *Id.* at 656.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Burchette v. Abercrombie & Fitch Stores, Inc.*, 2010 WL 1948322 (S.D.N.Y. 2010).
52. *Id.* at \* 2.
53. *Id.* at \*3.
54. *Id.*
55. *Id.* at \*5-6.
56. *Jespersen, supra* note 2.
57. *Id.*
58. *Id.* at 1107-08.
59. *Id.* at 1108.
60. *Id.* at 1109-10, 1112.
61. *Wislocki-Goin v. Mears*, 831 F.2d 1374, 1379-80 (7th Cir. 1987).
62. *Schemansky v. Calif. Pizza Kitchen*, 122 F.Supp.2d 761 (E.D.Mich. 2000).
63. *Id.*
64. *Pelletier v. Reedy Creek Improvement Dist.*, No. 6:05-cv-637-Orl-18DAB, 2007 WL 1192410 at \*2 (M.D.Fla. 2007).
65. *Id.*
66. *Id.*
67. *McKeown v. Dartmouth Bookstore, Inc.*, 975 F.Supp. 403 (D.N.H. 1997).
68. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).
69. *Talanda v. KFC Nat'l Mgmt. Co.*, 140 F.3d 1090 (7th Cir. 1997).
70. *E.E.O.C. v. R.P.H. Mgmt., Inc., d/b/a McDonald's*, Civil Action No. 03-RRA-502-J (N.D.Ala. 2003).
71. EEOC Press Release, "EEOC Sues McDonald's Restaurant for Disability Bias Against Employee with Facial Disfigurement" (March 3, 2003), available at [www.eeoc.gov/press/3-7-03.html](http://www.eeoc.gov/press/3-7-03.html).
72. *Craft v. Metromedia, Inc.*, 766 F.2d 1205 (8th Cir. 1985).
73. *Id.*
74. *Id.*
75. *Id.*
76. *Lewis v. Heartland Inns of America, LLC*, 591 F.3d 1033 (8th Cir. 2010).
77. *Id.* at 1036.
78. *Id.* at 1035-36.
79. *Id.*
80. *Id.*
81. *Id.* at 1036.
82. *Id.* at 1036-37.
83. *Id.*
84. *Id.* at 1037.
85. *Id.*
86. *Id.*
87. *Id.* at 1042-43.
88. *Lorenzana v. Citigroup, Inc.*, Case No. 116832-2009, available at [iapps.courts.state.ny.us/isroll/SQLData.jsp?IndexNo=116382-2009](http://iapps.courts.state.ny.us/isroll/SQLData.jsp?IndexNo=116382-2009).
89. *Id.* at ¶ 7.
90. *Hannoon v. Fawn Eng'g*, 324 F.3d 1041 (8th Cir. 2003).
91. *Gordon-Phillips v. Ill. State Police*, 246 F.App'x 395 (7th Cir. 2007).
92. *Id.*
93. *Id.*
94. *Hussein v. The Waldorf Astoria*, 134 F.Supp.2d 591 (S.D.N.Y. 2001).
95. *Brown v. F.L. Roberts & Co., Inc.*, 896 N.E.2d 1279 (Mass. 2008).
96. *Id.*
97. *Id.*
98. *Roberts v. Ward*, 468 F.3d 963 (6th Cir. 2006).
99. *Riggs v. City of Fort Worth*, 229 F.Supp.2d 572 (N.D.Tex. 2002).
100. *Inturri v. City of Hartford*, 365 F.Supp.2d 240 (D.Conn. 2005).
101. *Roberts, supra* note 98.
102. *Statler v. City of Montgomery*, 796 F.Supp. 489 (M.D.Ala. 1992).
103. *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005).
104. *Id.* ■