

Appearance Policies and Sex Discrimination: More Than Meets the Eye?

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Employers are entitled to enforce grooming policies and dress codes designed to meet legitimate business interests. Care must be taken, however, to avoid claims that the policies are discriminatory.

Employers should take extra precautions where restrictions on personal appearance impact protected categories such as race, sex, color, national origin, age, and religion. Generally, appearance policies should be reasonable, applied uniformly, and grounded in a nondiscriminatory business related concern. Potential policies are as varied as the industries they seek to regulate, and the nondiscriminatory reasons underlying those policies may include safety concerns, company image, enhancing employee productivity, boosting employee morale, preventing conflicts, and/or preventing workplace harassment or distractions.

Policies Upheld

Appearance policies are evaluated in the context of the business to which they apply. When evaluating dress code and grooming policies, think carefully about the legitimate business interests sought to be protected.

In some industries, policies have been found enforceable and nondiscriminatory even though the policies do not apply equally to men and women. For example, employers have been permitted to require only their male employees to be clean shaven with short hair, and federal appellate courts have ruled that hair length restrictions for men, but not for women, do not constitute sex discrimination under Title VII of the Civil Rights Act of 1964 (Title VII). Title VII's prohibition against sex discrimination was designed primarily to discard outdated sex stereotypes which posed employment disadvantages for one sex. Because hair restrictions for men were part of a comprehensive personal grooming code applicable to all employees, courts have found that any differences in the appearance requirements for males and females were permissible because they had a negligible effect on employment opportunities.

Further, in other industries, employers may be able to require female employees to wear skirts or dresses and sometimes high heels and makeup depending on the legitimate interests of the business. For example, courts have held that a casino can require its female employees to wear makeup, stockings, colored nail polish, or certain hair styles because the business interests of the casino include customer expectations that casino employees will project an image of glamour and style, and requiring women to wear cosmetics is based on societal norms in terms of dress in the casino industry. As long as a restriction is tailored to an employer's legitimate business interests, does not impose a greater burden on one sex over the other, and is not based on a demeaning or offensive stereotype, it will likely be upheld.

Disfavored Policies

The following represents examples of policies deemed problematic and should be avoided by most employers. When an appearance policy places a greater burden on one sex unsupported by a legitimate business need, or when the rules are founded in stereotypes, courts have found discrimination. For example, courts have held that employers cannot require only women to wear contact lenses, prohibit tattoos on women but not men, or have different weight requirements for men and women, with one being more burdensome than the other.

Further, when women are required to wear uniforms but men are not, the dress code perpetuates the stereotype that women are of a lesser rank than their male counterparts, and the justification that women cannot be expected to exercise discretion in choosing attire is sufficient to form the basis for a sex discrimination claim under Title VII. In the frequently cited case, *Carroll v. Talman Federal Savings & Loan Ass'n*, the employer's dress code permitted males to wear "customary business attire" but required women to wear uniforms. The court found disparate treatment because there was a "natural tendency to assume that the uniformed women have a lesser professional status than their male colleagues attired in normal business clothes." 604 F. 2d 1028, 1032-33 (7th Cir. 1979).

These examples are a representative sampling only. Depending upon the industry in which an employer operates, there may be additional inadvisable restrictions. When in doubt, employers should seek legal advice tailored to their specific needs and circumstances.

Advice for Employers

No matter how an employer chooses to deal with dress codes, grooming policies, or any other restriction on employee appearances, it is important to have an established set of rules and procedures for determining whether an employee's appearance violates those rules. If restrictions are not applied consistently, are not founded upon legitimate business concerns, are based on stereotypes, or disproportionately burden men or women, an employer may find itself on the wrong end of a discrimination or sexual harassment claim. Employers should consider the following guidelines in evaluating, adopting, or changing their appearance policies:

- ***Put it in Writing***
Memorializing the policy clarifies the boundaries for employees, makes it easier to enforce, and, if properly drafted, will serve as a strong defense to legal claims.

- ***Be Specific***
It is much easier to enforce a policy with clearly defined prohibitions.

- ***Explain the Business Concerns Behind the Policies***
Employees will be more likely to follow a policy they understand, and explanations may assist an employer if litigation ensues.

- ***Document Complaints and Violations***
As with all disciplinary matters, an employer should take care to document each complaint related to an employee's appearance and each dress code violation.

- ***Be Consistent***
Employers should make sure their human resources department, supervisors, and managers are aware of the company policies and their boundaries in identifying and dealing with infractions of appearance policies.

- ***Seek Legal Advice Tailored to the Industry and Geographic Area***
What is permissible and what constitutes actionable discrimination depends on the appearance policies themselves, the industry in which the employer operates, the manner of enforcement, and the geographic area in which the employer operates.