



THE WORKPLACE WORD

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Piercings and Tattoos – What Can Employers Regulate?

Most employers believe that their employees are a direct reflection of the company. Thus, they want their employees to look and dress in a certain manner, usually because they are attempting to appeal to their customers or clients. To achieve this look, many employers establish dress and grooming standards for their employees to follow. Some of these policies are written and some are general practice.

Often employers use generic dress code policies stating that “employees must wear clothing appropriate for the nature of the company’s business and the type of work performed.” Other employers create specific policies detailing the types of clothing allowed and prohibited.

They may also include provisions prohibiting employees from displaying tattoos and/or piercings. Employers, however, risk violating federal and state laws by enforcing their tattoo and piercing policies.

Religious Discrimination and Accommodation

With the increasing number of employees getting tattoos and piercings, employers are faced with the challenge of how to regulate the public image of the company. Generally, an employer merely has to inform an employee that their visible tattoo or piercing violates the company dress and grooming standards. If the employee refuses to cover it up or remove it, the employer has the right to take adverse action, up to and including termination. Sometimes, however, when employers ask their employees to remove or cover their piercings or tattoos, employ-



ees claim that their religion prohibits or forbids complying with this request.

Under Title VII of the Civil Rights Act of 1964, employers cannot discriminate against employees on the basis of their religion. "Religion" includes "all aspects of religious observances and practice, as well as belief." 42 U.S.C. 2000e(j). Many states also have anti-discrimination laws that are similar or parallel to Title VII.

When an employer takes an adverse action against an employee (e.g., demotion or termination) for failing to cover or remove his tattoo or piercing, the employee may make a claim for religious discrimination, asserting that:

- He holds a bona fide religious belief that conflicts with an employment duty;
- He informed the employer of the belief and the conflict with his particular job duties;
- The employer took adverse action because of the employee's inability to perform the job requirement (i.e., remove or cover pursuant to company policy).

If an employee proves these elements, the employer must rebut the claim by showing that the employer offered a reasonable accommodation or that they could not reasonably accommodate the employee's religious practice without undue burden. Undue burden might be shown through evidence that the dress code requirement – that employees wear long sleeve shirts, for example, which only incidentally might cover tattoos, or that employees must remove their piercings and

jewelry – implicates safety issues. Courts and administrative agencies routinely enforce these policies to the extent they are designed for the safety of the employee.

When courts have been faced with claims of religious discrimination because of employers' policies requiring the covering or removal of piercings or tattoos, the results have been mixed. For instance, a Costco employee refused to cover her facial piercings because she claimed she was member of the Church of Body Modification, which required her to display her facial piercings at all times. The court held her request to show her facial piercings was not a reasonable accommodation that could be accomplished without being an undue burden on Costco because the company had a legitimate interest in its grooming standards and public image. Conversely, when a Red Robin® employee refused to cover his wrist tattoos because he practiced Kemetecism (an ancient Egyptian religion), the court found it was not an undue burden to accommodate his request and allow him to show the tattoos. Similarly, when a Subway® sandwich-artist refused to remove her nose ring claiming that her practice of Nuwaubianism prohibited covering or removing the ring, a court again found that it was not an undue burden to accommodate her request.

Although each situation requires careful analysis, enforcement of a seemingly neutral grooming and dress code can result in claims of religious discrimination. Additionally, claims of religious discrimination are frequently accompanied with claims of racial or national origin discrimination be-



cause the particular jewelry or tattoo is related to the employee's cultural beliefs.

Finally, many states and cities have passed laws prohibiting discrimination on the basis of sexual orientation and/or gender identity. Thus, employer dress policies that prohibit men from wearing earrings or other jewelry could be challenged as discriminatory if the individual dresses as or purports to be a woman.

What Can Employers Do?

First, employers should reevaluate their current dress and grooming policies to ensure that they are neutral and designed to meet the legitimate interests of the company.

Second, employers should enforce their dress and grooming standards policies equally and evenhandedly. Exceptions to these policies

are scrutinized by the court and can cause unnecessary employee dissension.

Third, if an employee claims that a particular policy violates his religious beliefs, the employer should carefully examine whether there is a reasonable accommodation. This examination should be done with the assistance of legal counsel.

Lastly, employers should train their supervisors who interview individuals for open positions to be careful when interviewing candidates displaying tattoos and/or piercings, as these religious discrimination laws apply equally to applicants.

For questions regarding the content of this newsletter, please contact the authors or any other Snell & Wilmer attorney.

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