KEEPING UP WITH APPEARANCES

Trends in Appearance-Based Discrimination

Georgia A. Staton, Esq.
Gordon Lewis, Esq.
Lisa Papsin
JONES, SKELTON & HOCHULI, P.L.C.
40 North Central Avenue
Suite 2700
Phoenix, AZ 85004
602-263-1752
GEORGIA STATON

Georgia Staton has practiced law for over 42 years, chiefly as a trial attorney. She has been with JSH since 1984 and is licensed to practice before the United States Supreme Court and all Arizona, Kansas and Illinois courts. She has successfully tried many employment cases in both state and federal courts and has represented counties before personnel or merit system boards. She is a Fellow in the American College of Trial Lawyers, an invitation-only organization whose membership is limited to the top 1% of all trial lawyers. She has published many articles in the area of employment law and trial practice and has been a featured speaker at conferences across the county. She is certified by the Arizona State Bar as a Specialist in Personal Injury and Wrongful Death and is AV rated by Martindale-Hubbell. At least half of her current practice involves personnel/employment matters. Ms. Staton is an experienced teacher of trial litigation skills and has been a faculty member of the National Institute of Trial Tactics and Arizona Trial College since 1991. Additionally, Ms. Staton has been an instructor at Maricopa County and State Bar Continuing Legal Education Seminars and was an adjunct faculty member of the Arizona State University College of Law from 1994-1996.

GORDON LEWIS

Mr. Lewis is a Partner in the firm’s Employment Practice Section. He has 23 years of experience in the area of labor and employment law. In his labor and employment practice, Mr. Lewis has advised public and private employers on employment policies and practices, and has defended public and private employers against claims alleging wrongful discharge, racial discrimination, sexual discrimination and harassment (including same-sex sexual harassment), age discrimination, disability discrimination, civil rights violations, Family and Medical leave Act issues, and wage and hour claims. Mr. Lewis is AV® rated in the Martindale Hubbell Law Directory and is currently listed in The Best Lawyers in America® in the fields of labor and employment law and education law.

LISA PAPSIN

Lisa Papsin is a third year law student at the Sandra Day O’Connor College of Law at ASU. She serves as the president of the ASU Moot Court Board, and recently was recognized as a regional champion in the ABA’s National Appellate Advocacy Competition. Prior to that, she took first place in ASU’s internal Jenckes Closing Argument Competition, second place in the Alan Matheson Client Counseling competition, and first place in the San Diego regional pre-moot in connection with the William C. Vis International Commercial Arbitration Moot competition.
Keeping Up With Appearances: Need-to-Know Trends in Appearance-Based Discrimination

Appearances can be deceiving and so can appearance-based discrimination claims. The decisions that employers and schools make about personal appearance can have less-than-obvious legal implications. To guard against this kind of exposure, employers must understand how personal appearance can play an unsuspected role in a variety of legal claims, including:

- Religious discrimination
- Disability discrimination
- Gender discrimination
- Free Speech concerns, and more.

To help employers and practitioners anticipate the implications of appearance in these issues, the following materials, and accompanying presentation, provide an overview of situations that may give rise to these types of civil rights claims, how courts are handling them, and what can be done to ensure it never happens to you.

Appearance and Religious Discrimination

For many people, expression of their religious faith impacts the way they style themselves. An employee many wish to wear something, like headwear or jewelry, not contemplated by the employer’s dress code. Alternatively, their faith may prevent their ability to wear certain items, such as pants, a clean-shaven face, or a fitted uniform. Across the country, courts are being asked to determine how dress code issues implicate religious discrimination.

One such situation confronted the Supreme Court in 2015 in E.E.O.C. v. Abercrombie & Fitch Stores, Inc. There, a teenage girl applied for a job at the popular, and notoriously stylized, Abercrombie & Fitch retailer. See E.E.O.C. v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 192 L. Ed. 2d 35 (2015). During her interview, the girl wore a headscarf consistent with her faith. She nailed the interview but was denied the job because the headscarf was inconsistent with the store’s “Look Policy,” which prevented the wearing of “caps.” During the interview, the young applicant’s religion was never discussed, nor was it implied. Still, the store’s interviewer admitted that she assumed the headscarf was part of the girl’s religious practice.

In an 8-1 opinion penned by the late Justice Scalia, the Supreme Court made clear that the employer’s lack of actual knowledge of the girl’s faith was not determinative of whether the store could be liable for religious discrimination. Rather, it was the motive to discriminate on the basis of religion that created the store’s liability for disparate-treatment under Title VII. In typical Scalia directness, he wrote, “the rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant’s religious practice, confirmed or otherwise, a factor in employment decisions.”

1 See 12 A.L.R. Fed. 3d Art. 5 (Originally published in 2016)
Alternate accommodations are not always the answers

The potential for discrimination is not limited to hiring practices; employers must be careful about policies they enact, and how they go about enforcing them. For instance, in United States v. New York City Transit Authority, the MTA issued a policy prohibiting the wear of any “hats, caps, etc.” other than the standard-issued MTA logo ball cap. United States v. New York City Transit Auth., 04-CV-4237, 2010 WL 3855191, at *2 (E.D.N.Y. Sept. 28, 2010). This policy did not sit well with the portion of the MTA’s 13,000 employees who had previously enjoyed their ability to wear religious headwear on the job. When a handful of Muslim MTA employees refused to give up their head coverings, they were removed from their line of work and put into allegedly less-advantageous positions.

The union filed a grievance and arbitration ensued. The arbitration found no discrimination on behalf of the MTA. Emboldened, the MTA doubled-down on enforcement of its policy, requiring anyone who insisted upon wearing religious headwear to wear an MTA logo cap on top of it. Those who would not were required “to obtain ‘documentation’ from his or her religious organization attesting to the religious conflict.” If the documentation was deemed satisfactory, the MTA employee would be removed to a different position—if one existed. In response, multiple parties sued the MTA under Title VII on claims of religious discrimination, hostile environment, and gender discrimination (because the policy had allegedly been enforced more strictly against men than women).

Shortly after the suit was filed, the MTA revised its policy to allow turbans that were made of a particular fabric with an MTA logo attached. Nevertheless, the court denied MTA’s Motion for Summary Judgment and allowed the claims to proceed to trial. Contrast that outcome with the one in the 2001 case, Barrett v. Am. Med. Response, where the court found no violation of Title VII’s mandate against disparate impact when a male employee was fired for refusal to comply with “no-beard” rule. Barrett v. Am. Med. Response, N.W., Inc., 230 F. Supp. 2d 1160, 1166 (D. Or. 2001). Notably, the employee did not have religious reasons for wanting to keep his beard.

Appearance and ADA Claims

Another way that appearance-based discrimination arises is when employers assume that an overweight individual is unable to perform the physical tasks required by a job. Because most jurisdictions do not recognize weight as a protected class under anti-discrimination laws, plaintiffs must allege discrimination based on their size under different provisions. For instance, an employer may be found liable under the ADA for discrimination based on a “perceived disability” or under the RHA for discrimination based on a “handicap.” With at least

2 4 A.L.R. Fed. 3d Art. 10 (Originally published in 2015)
one-third of American adults being overweight,\(^3\) it’s important for employers to know how to handle concerns that arise from an employee’s size.

**Looks can be deceiving: obesity as a “perceived disability”**

An early example in the First Circuit comes from *Cook v. State of Rhode Island, Dept. of Mental Health, Retardation, and Hospitals. See Cook v. State of Rhode Island, Dept. of Mental Health, Retardation, and Hospitals*, 10 F.3d 17 (1st Cir.1993). In *Cook*, an employer refused to rehire the plaintiff for a job she had previously worked, even though she had had “a spotless work record” and had left the job voluntarily and on good terms. Although the record does not say how much the plaintiff weighed when she had previously worked for the defendant, upon reapplication the plaintiff was 320 pounds and 5’ 2” tall.

Despite the fact that the plaintiff passed the routine pre-hire physical, the defendant refused to hire her based on the assumption that the plaintiff was now physically incapable of doing the work. As the court noted, “[t]he plaintiff did not go quietly into the night.” Instead, she sued for discrimination based on “perceived disability” under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1993 Supp.). A jury returned a verdict for the plaintiff and the employer appealed. The First Circuit held that it was proper for a jury to consider whether improper discrimination occurred simply based on the employer’s *perception* of disability.

**Disparate treatment: circuits are split about how to treat obesity under the ADA**

Other plaintiffs brought similar claims under the ADA. In 2011, in *E.E.O.C. v. Res. for Human Dev., Inc.*, a children’s daycare employee was 527 pounds at the time she was fired. She brought an ADA claim against the employer, alleging that she was wrongfully fired based on the fact that she was morbidly obese. *E.E.O.C. v. Res. for Human Dev., Inc.*, 827 F. Supp. 2d 688, 692 (E.D. La. 2011). The defendants argued that obesity is not a disability within the meaning of the ADA. The court disagreed. The court said that while physical characteristics are not normally within the definition of impairment under the ADA, that severe obesity was clearly an impairment in and of itself. Moreover, the cause for such impairment had no bearing on the legality of the claim; it did not matter whether the plaintiff’s obesity was caused by an underlying physiological disorder or not. Rather, what mattered was whether the employee suffered an adverse employment decision due to her morbid obesity.

The 6\(^{th}\) circuit took a different position in a similar situation. In *EEOC v. Watkins*, a male freight employee brought a claim against his employer under the ADA, alleging discrimination based on his morbid obesity. *EEOC v. Watkins*, 463 F.3d 436 (6th Cir.2006). The employer had refused to allow the employee to return to work after a medical examination found him to be physically unable to safely perform his job duties, which included heavy lifting and use of ladders. The

court affirmed summary judgment for the employer on the grounds that the employee had failed to show that his obesity was the result of a physiological condition, which it found a necessary requirement for protection under the ADA (unlike the 5th Circuit’s interpretation of the ADA’s requirements).

Some jurisdictions reject the obesity-as-disability theory altogether. See Fredregill v. Nationwide Agribusiness Ins. Co., 992 F. Supp. 1082, 1092 (S.D. Iowa 1997). Employers should be careful nonetheless. The variety in approaches means that it’s very important that employers understand how the law applies in their particular jurisdiction, so they can train their personnel appropriately. Employers should also make sure to remind their staff that claims don’t always need to be as clear-cut as refusing to hire someone. Claims based on a hostile environment, the failure to promote, and harassment on the account of obesity might also be recognized in your jurisdiction.4

**Appearance and Gender Discrimination**

Usually, courts do not interfere with dress codes unless the plaintiff can show that he or she was somehow harmed by it.5 But if a dress code affects genders or classes of people differently, the employer might be liable for discrimination under theories of gender discrimination, disparate treatment, or hostile environment.

For instance, recently in Viscecchia v. Alrose Allegria LLC, a male employee, was fired for refusal to cut his hair, as required by employer policy. Viscecchia v. Alrose Allegria LLC, 117 F. Supp. 3d 243 (E.D.N.Y. 2015). The plaintiff sued under Title VII and state law for gender discrimination on the grounds that the employer’s hairstyle polices were not enforced against female employees. To support this claim, the male plaintiff showed two LinkedIn pictures of female employees who had natural looking streaked hairstyles. The plain language of the hair policy barred “Extreme styles flowers, colored ribbon’s [sic], beaded, braided or streaked hair is not permitted. Color should be maintained at neutral tones.” The court found dismissal of the claims was inappropriate because the plaintiff had put forward evidence that the hair requirements were inconsistently enforced against male and female employees.


---

4 See 4 A.L.R. Fed. 3d Art. 10 (Originally published in 2015)
5 See Pawlow v. Dep’t of Emergency Services & Pub. Prot., 172 F. Supp. 3d 568 (D. Conn. 2016) (A negative performance review based on an employee’s refusal to comply with the anti‐eyeglasses policy was insufficient to carry a discrimination claim without further evidence that the performance review had a negative affect on her); see also Wilson v. New York City, 500 Fed. Appx. 94 (2d Cir. 2012)(where the court found no evidence of discriminatory intent under § 1983 where defendant commented on plaintiff’s decision to wear her hair in dreadlocks but did not discipline her for the same.)
casino’s requirement that employees not gain more than 7% above their baseline weight created a hostile environment based upon gender stereotyping, sexual harassment, disparate treatment, and disparate impact. The court held that the standard, as written, was not discriminatory but that a genuine issue of fact existed as to whether standard was discriminatory, as enforced.

Gender discrimination based on looks can be broader than dress code issues. In Vega v. Chicago Park Dist., a female park employee sued her employer, alleging discrimination based on national origin, gender, and sex stereotyping. Vega v. Chicago Park Dist., 165 F. Supp. 3d 693 (N.D. Ill. 2016). The employee was a Hispanic lesbian woman who wore her hair short. Someone in the company had raised a concern about her time-keeping practices, and the employer had initiated an investigation into the matter. During the investigation, recordings captured employees referring to the plaintiff as a “bitch,” and discussing how she looked like a man because of her short haircut. The court denied summary judgment on the basis that the plaintiff had successfully presented a convincing mosaic of discriminatory intent based on circumstantial evidence.

**Appearance and Free Speech**

Another way that employers and schools can get into trouble is when they create dress codes that infringe on a person’s free speech rights. For instance, in Dariano v. Morgan Hill Unified School District, high school students sued the school after being told they could not wear shirts bearing a picture of the American flag during the school’s Cinco De Mayo celebration. Dariano v. Morgan Hill Unified Sch. Dist., 822 F. Supp. 2d 1037 (N.D. Cal. 2011), aff’d, 745 F.3d 354 (9th Cir. 2014), and aff’d, 767 F.3d 764 (9th Cir. 2014). In its defense, the school claimed that school officials prohibited the shirts—or, alternatively, required the students to turn them inside out—only because they anticipated disruption on campus. The record indicated that a prior similar incident had led to a near-violent altercation and the school was subject to ongoing racial tension. In light of those facts, the court found no first amendment violation.

But in Frudden v. Pilling, the court reached a different conclusion. There, the parents of an elementary school student brought civil rights claim on the basis that the school’s dress code policy, which included written text on the clothing, violated their children’s First Amendment rights. Frudden v. Pilling, 742 F.3d 1199 (9th Cir. 2014). The offending text was the phrase “Tomorrow’s Leaders.” Finding this to be compelled speech thus requiring strict scrutiny, the court reversed and remanded for a determination of the school’s countervailing interests.

Although speech rights are applied for text on clothing, they are not generally recognized for text on a person’s body. Tattoos are not usually considered protected speech. In Riggs v. City of Fort Worth, a police officer brought §1983 claims against his employer and the city when he was required to wear long sleeves to cover his tattoos. Riggs v. City of Fort Worth, 229 F. Supp. 2d 572 (N.D. Tex. 2002). The court dismissed his claims against the city, finding no First Amendment violation and determined that tattoos are not protected speech. Still, employers
should be careful that they are enforcing any such policies consistently so as not to expose themselves to claims of disparate treatment.

What’s the take-away? When it comes to appearance-based discrimination, things are not always as they seem. What may seem like a straightforward, small-potatoes policy may have greater significance to those who are asked to comply with it. Special attention should be paid to employer decisions that are based on personal appearance and the evolving ways in which courts handle these issues.