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present sticky issues for employers.

Richard D. Alaniz, JD • Nov. 11, 2014



Tattoos, piercings, suggestive clothing, and other employee wardrobe choices can present sticky issues for employers. While companies generally have wide latitude to create and enforce their own dress codes within the workplace, they may face

unexpected landmines if they don't plan ahead and consider the implications of their

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head scarf, or "hijab," clashed with the corporate dress code. This is not the first such case the company has faced because of its dress code, and it has changed its policy regarding head scarves. Nonetheless, the litigation continues to play itself out.

In that case, *U.S. Equal Employment Opportunity Commission, v. Abercrombie & Fitch Stores, Inc.*, an Oklahoma job applicant, Samantha Elauf, wore a head scarf to an interview as a sales associate but never explicitly said she wore it for religious reasons. Head coverings violated the company's "look" policy against headgear, and she was not hired.

"The EEOC is committed to eliminating religious discrimination in the workplace," said Webster Smith, acting director of the EEOC's St. Louis District Office, which is responsible for the agency's litigation in Oklahoma. "As religious diversity increases in the workplace, companies need to be more vigilant in respecting and balancing employees' needs to practice their religion, including engaging in religious expression."

When establishing dress codes, employers must carefully consider the goals they wish to achieve, how to achieve those goals through a formal policy, and how to enforce those standards in a way that minimizes legal risk.

Legal Standards for Dress Codes

There are no national laws that govern dress code policies, but employers must abide by federal anti-discrimination laws, such as the Title VII of the Civil Rights Act. Many states have similar laws which could also affect such policies. When employees or government agencies sue over dress codes, courts have generally found that employers can set their own policies, as long as those codes have a business justification, are applied fairly, do not discriminate, and do not impact one particular group of employees over another.

Although that may sound straightforward, for many employers, dress codes have

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- **Gender Discrimination**

Generally speaking, employers can create separate dress codes and grooming requirements for men and women, although these standards shouldn't vary greatly.

In one case, *Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104 (9th Cir. 2006):

Darlene Jespersen was fired from her job as a bartender at Harrah's Casino after 20 years of "exemplary" service for refusing to wear makeup. The casino had a dress and grooming policy that required women to wear makeup and prohibited men from wearing it, among other things. However, the policy was rarely enforced until the company rolled out a "Beverage Department Image Transformation" program. Jespersen, who never wore makeup at work or at home, objected to the policy and eventually ended up leaving the company. She sued, claiming that the grooming policy was discriminatory. Surprisingly, the Ninth Circuit Court of Appeals disagreed and found that Harrah's makeup policy neither placed a more difficult burden on women nor stereotyped them.

- **Religious Discrimination**

As the Abercrombie case shows, corporate dress codes may not conflict with the religious expectations and demands of employees and potential employees.

In another case, Red Robin Gourmet Burgers, Inc., agreed to pay \$150,000 and make substantial policy and procedural changes to settle a religious discrimination lawsuit based on an employee's tattoos, according to the EEOC. The EEOC alleged that Red Robin refused to offer server Edward Rangel any accommodation for his Kemetic religion. As part of his faith, Rangel went through a rite of passage where he received religious inscriptions in the form of tattoos on his wrists. Although Rangel had the tattoos when he was hired at the Bellevue, Washington restaurant, Red Robin's dress

code prohibited visible tattoos. He had worked at the restaurant for six months

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accommodation to the dress code because of his disability, the employer must modify the dress code or permit an exception to the dress code, unless doing so would result in undue hardship.”

- **Sexual Harassment**

Sexual harassment is another area where employee clothing choices and dress codes can lead to potential pitfalls for employers. When employees wear tight or revealing clothing at work, in defiance of a dress code or in the absence of one, it can draw real or perceived unwanted attention or lead others to claim their work environment is uncomfortable.

Creating a Company's Dress Code

Unfortunately for employers, there is no one-size-fits-all dress code. Each organization must carefully consider its particular situation when creating or reviewing the corporate dress code. Here are some steps to consider:

- **Know Your Organization and Industry**

The definition of “professional” dress code can vary widely by industry and job. What may be perfectly acceptable in a small Silicon Valley high-tech startup could be inappropriate and perhaps even unsafe on a Midwest shop floor. Some businesses and employees may constantly be meeting with customers, while others may never interact with anyone but their officemates.

Employers should consider safety issues when creating the dress code. That being said, dress codes can also vary within a company. For example, a company may want to require warehouse workers to wear closed-toed shoes, but allow front-office staff to wear sandals.

The company should also think about how a dress code could impact employee

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long as piercing or spraying, tattooing, earlobe expansion and stretching, and implants. Tattoos must be discreetly and completely covered at all times. Jewelry, spacers, retainers, or plugs are not permitted in any body piercing, including non-visible piercings, while working.”

Any decisions made should not be arbitrary, but should instead be rooted in common sense and should have a business justification.

- **Talk to the Experts**

Companies should consult with HR, in-house attorneys, and outside counsel when new or revised policies are still in the planning stages. These experts can help ensure that the policies are legal, thorough, enforceable, and realistic.

- **Enforce the Policy Consistently**

Whatever policy the company chooses, employees should receive training on it. It must be applied fairly at all times. Companies can face legal and morale issues when policies are unevenly or inconsistently enforced. Supervisors and managers should receive specific training and guidance so they can respond appropriately as soon as problems or questions arise. This can help to minimize many issues before they escalate.

- **Develop a Process for Discipline and Appeals**

If employees have questions or problems with the dress code, direct managers and supervisors should generally be the first point of contact. If an employee violates the dress code, there should be clear steps in place to deal with infractions. Employees who seek an accommodation to the dress code should also know who to talk with about their concerns.

If problems or concerns continue, the company should document every step it took

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