ARTICLES

THE LEGALITY OF USING EMPLOYEE APPEARANCE POLICIES TO PROMOTE ORGANIZATIONAL CULTURE

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INTRODUCTION

An organizational culture is a learned body of tradition consisting of the beliefs, norms, values, and premises that are held by the members of an organization, and provides the basis for behavior that satisfies the standards of group membership. Since organizational culture influences employee attitudes on commitment, motivation, morale, and satisfaction, effective management requires attempts to shape the culture in the company's best interest. Critically important in the development of culture is an inclusionary dimension. Morality and legality require that organizations exercise special care to accommodate gender and diversity needs to help assure equality in the workplace. Therefore, the shaping of organizational culture through company policies provides an important

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opportunity to recognize the legitimate needs of all employees.

Since it is also essential to balance the interests of the organization with those of the employees, laws have been established to curtail the judgment and discretion of employers in their development and protection of an organizational culture. This article discusses legal challenges that have been mounted against some of these policies. The success or failure of these challenges – which deal specifically with the appearance of employees – provides employees with safeguards for their individual and collective rights. Court rulings on these challenges also provide managers with safeguards for the discretion that is warranted in the development of policies designed to create and sustain a legal, and inclusive, organizational culture.

I. ORGANIZATIONAL CULTURE

Employee interactions over time, coupled with management policies and practices, create a value system that influences how members of a company behave. The common perception that develops regarding "the way things get done around here," is known as a company's organizational culture.[1] It helps to determine how employees interact with each other, managers, customers and other company stakeholders, and how they identify problems, analyze information, and make decisions.

An organizational culture is, thus, a learned body of tradition consisting of the beliefs, norms, values, and premises that are held by the members of an organization, providing the basis for behavior that satisfies the standards of group membership.[2] Since the organizational culture influences employee attitudes on commitment, motivation,

1. ROB GOFFEE & GARETH JONES, THE CHARACTER OF A CORPORATION: HOW YOUR COMPANY'S CULTURE CAN MAKE OR BREAK YOUR BUSINESS 9 (1998). *See generally* Harrison M. Trice & Janice M. Beyer, *Cultural Leadership in Organizations*, 2 ORG. SCI. 149 (1991) (discussing the impact of leadership on the culture of organizations); Geert Hofstede et al., *Measuring Organizational Cultures: A Qualitative and Quantitative Study across Twenty Cases*, 35 ADMIN. SCI. Q. 286 (1990) (taking a qualitative and quantitative approach to the study of organizational cultures).

2. *See* James R. Detert, Roger G. Schroeder & John J. Mauriel, *A Framework for Linking Culture and Improvement Initiatives in Organizations*, 25 ACAD. MGMT. REV. 850, 851-52 (2000). *See generally* Geert Hofstede, Michael Harris Bond & Chung-leung Luk, *Individual Perceptions of Organizational Cultures: A Methodological Treatise on Levels of Analysis*, 14 ORG. STUD. 483 (1993) (suggesting a methodology for studying organizational cultures from the individual perspective).

morale, and satisfaction,[3] effective management requires attempts to shape the organizational culture in the company's best interests.[4]

II. THE NEED FOR LIMITS ON POLICIES THAT PRESCRIBE ORGANIZATIONAL CULTURE

To help refine and defend their organizational culture, managers establish formal and informal expectations for their employees, including policies that seek to delimit employee conduct. Policies are directives designed to standardize many routine decisions and to clarify the discretion that employees can exercise on-the-job.[5] Creating policies that guide and "preauthorize" the thinking, decisions, and actions of employees is an essential task for executives in establishing and controlling the ongoing processes of a firm in a manner consistent with a company's organizational culture.[6]

Policies that promote the improvement and perpetuation of an organizational culture also provide important safeguards for employees. They guarantee a "comfort zone" for employees, within which they can freely express their preferences, without endangering their standing in their company. Further, policies promote consistency and predictability in managerial action, which enable employees to anticipate correct behavior that will be supported and rewarded.

As will be discussed in Part III of this article, company policies that are designed to control employee appearance are particularly important to a business, especially when employees have contact with the public. Employee appearances that are outside the norms of public expectation may lead customers to turn elsewhere. In addition, a non-conforming

3. *See* Randall Y. Odom, W. Randy Boxx & Mark G. Dunn, *Organizational Cultures, Commitment, Satisfaction, and Cohesion*, 14 PUB. PRODUCTIVITY & MGMT. REV. 157, 166 (1990) (arguing that innovative and supportive cultures positively correlate with employee commitment, satisfaction, and cohesion); Stanley G. Harris & Kevin W. Mossholder, *The Affective Implications of Perceived Congruence with Culture Dimensions During Organizational Transformation*, 22 J. MGMT. 527, 527 (1996) ("[T]he discrepancy between individuals' assessments of the current culture and their ideal culture explained significant variance in . . . organizational commitment and optimism about the organization's future.").

4. *See* GOFFEE & JONES, *supra* note 1, at 6-8; Geert Hofstede, *Attitudes, Values and Organizational Culture: Disentangling the Concepts*, 19 ORG. STUD. 477, 491 (1998); Geert Hofstede, *Identifying Organizational Subcultures: An Empirical Approach*, 35 J. MGMT. STUD. 1, 10-11 (1998); Andrew H. Gold, Arvind Malhotra & Albert H. Segars, *Knowledge Management: An Organizational Capabilities Perspective*, 18 J. MGMT. INFO. SYS. 185, 189-90 (2001).

5. JOHN A. PEARCE II & RICHARD B. ROBINSON JR., STRATEGIC MANAGEMENT: FORMULATION, IMPLEMENTATION, AND CONTROL 303-04 (10th ed. 2007).

6. *See id.* at 303-06.

employee may create tensions and distractions for other employees, which can disrupt their interactions with one another and adversely affect the productivity of a business.

The desire of managers to minimize threats to an organizational culture, posed by the discordant appearance of employees, is understandable. It raises the issue as to whether the standards set by an employer in making hiring, retention and promotional decisions have more to do with the ability of the individual or with stereotypical thinking. To balance the interests of an organization with those of an employee or job applicant, federal, state, and local governments have established laws aimed at curtailing the judgment and discretion of employers in their development and protection of an organizational culture.[7]

Several federal laws have been enacted that affect the creation of appearance policies. In particular, Title VII of the Civil Rights Act of 1964 limits an employer's appearance standards if the standards discriminate against individuals because of race, sex, religion, natural origin, or color.[8] The Americans with Disabilities Act prohibits policies that cause discrimination against employees, who possess a physical or mental disability, where the individual is qualified for a position with or without a reasonable accommodation from the employer.[9] Finally, the Age Discrimination in Employment Act bars employers from creating standards that affect employment opportunities for individuals based upon such individual's age.[10]

Claims under these statutes proceed under the theories of disparate treatment and/or disparate impact.[11] Under disparate treatment, a plaintiff contends that an employer's standards are treating him or her less favorably than others because of his or her membership in a class protected by statute.[12] This "intentional discrimination" by the employer can be established through circumstantial evidence.[13] The employer can defend its position by demonstrating that there was a legitimate,

7. *See, e.g.*, 42 U.S.C. § 2000e-2(a) (2000).

8. *Id.*

9. 42 U.S.C. §§ 12112-12113 (2000).

10. 20 U.S.C. § 623(a) (2000).

11. *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) ("[G]ood intent or absence of discriminatory intent does not redeem employment procedures . . . [that] are unrelated to measuring job capability."). *See generally* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (establishing the elements and defenses in disparate treatment cases).

12. *See McDonnell Douglas*, 411 U.S. at 802.

13. *See id.* at 804-05.

nondiscriminatory reason for the decision.[14] The plaintiff is entitled to rebut the stated reason by showing it is a pretext and that the real reason is tied to an intention to discriminate.[15]

With disparate impact, a plaintiff contends that while the standard an employer is using appears neutral on its face, it has a discriminatory impact on individuals in a protected group.[16] For example, a minimum height standard, while appearing neutral, could have an adverse effect on an individual because of gender or national origin. In these cases, an employer can defend the policy by showing that the standard is needed because of the necessities of their business.[17] The plaintiff can rebut this justification by showing that there is a different standard that the employer could use which would have a less adverse impact on the protected group, while still meeting the employer's objectives.[18]

The sections that follow discuss legal challenges that have been mounted against company policies that were established to build and protect organizational culture. The success or failure of these challenges – which deal specifically with the appearance of employees – provides employees with safeguards for their individual and collective rights, and managers with safeguards for the discretion that is warranted in the development of policies designed to create, and sustain, an organizational culture.

III. POLICIES ON APPEARANCE

When employees have contact with the public, the employer may believe it is particularly important that the employees project an image that is consistent with the company's organizational culture. Consequently, managers frequently consider an array of policies aimed at controlling employee appearance including: restrictions on hair length or hairstyle, the presence of facial hair, the style or type of clothing worn on-the-job, jewelry or cosmetics that can be worn, and the body weight of employees. While the courts have given employers considerable latitude in creating these policies, federal, state and local law do place some important limitations on their content.

14. *Id.* at 802.

15. *Id.* at 804.

16. Int'l Bd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); Eatman v. UPS, 194 F. Supp. 2d 256, 266 (S.D.N.Y. 2002) (citing Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988)).

17. *See id.* at 267 (citing Smith v. Xerox Corp, 196 F.3d 358, 365 (2d Cir. 1999)).

18. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

A. Regulation of hair length

Employees contesting employer policies that seek to control hair length have mounted a number of challenges.[19] Typically, these claims have revolved around assertions of gender, race, or religious discrimination.[20] For instance, men who claim sex discrimination, because the employer limits the length of hair for male employees but does not apply the same standards to women, have brought a number of such suits.[21]

Such was the case in *Willingham v. Macon Telegraph Publishing Co.*, where a man was denied employment because of his shoulder length hair.[22] The company's grooming code required employees to be neatly dressed and groomed in accordance with the standards of the business community.[23] The company interpreted this as excluding men, but not women, from having long hair.[24]

The lower court found that the Macon Telegraph Publishing Co. standard did not violate Title VII.[25] However, a divided panel of the Fifth Circuit reversed and remanded the lower court's ruling.[26] Essentially, the panel found that the Supreme Court's decision in *Phillips v. Martin Marietta Corp.*[27] should control.[28] In *Phillips*, the Supreme Court found that Title VII not only covered cases where the employer discriminated by denying employment opportunities based on gender, but also where the employer added a requirement that applied to one gender but not the other.[29]

On rehearing, the full Fifth Circuit vacated the panel's decision and

19. *E.g.*, Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1088 (5th Cir. 1975); Aros v. McDonnell Douglas Corp., 348 F. Supp. 661, 662 (D.C. Cal. 1972); Donohue v. Shoe Corp. of Am., 337 F. Supp. 1357, 1358 (D.C. Cal. 1972).

20. *E.g.*, *Willingham*, 507 F.2d at 1088; Vargas v. Sears, Roebuck & Co., No. 97-CV-75020-DT, 1998 U.S. Dist. LEXIS 21148, at *9 (E.D. Mich. Dec. 28, 1998); Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 231 (S.D.N.Y. 1981).

21. *E.g.*, *Willingham*, 507 F.2d at 1088; *Aros*, 348 F. Supp. at 662; *Donohue*, 337 F. Supp. at 1358.

22. *Willingham*, 507 F.2d at 1087.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. 400 U.S. 542 (1971).

28. *Willingham*, 507 F.2d at 1089 (citing *Phillips*, 400 U.S. at 545).

29. *Phillips*, 400 U.S. at 543-44. In *Phillips*, the employer disqualified women who had preschool children from employment. *Id.* at 543. However, men with preschool children were not disqualified. *Id.*

affirmed the lower court's decision.[30] It found that Title VII was aimed at prohibiting discrimination because of certain immutable characteristics, or because it interfered with a fundamental right of the individual.[31] Immutable characteristics relate to issues that include gender, race, color, or national origin.[32] A person's hair length is not immutable because it is something a person can choose to alter or not. A fundamental right involves the right to marry, have children, or practice religion, but does not include the right to have long hair, even where the individual claims it is a form of self-expression.[33]

The court believed that the *Willingham* case related more to how a company decided to run its business than to sexual discrimination.[34] If Willingham had been hired, he would have been in a position which would require contact with potential customers of the business.[35] The court accepted the employer's contention that, in the community where the employer operated, people did not have a positive opinion of men with long hair.[36] Thus, Willingham's appearance could have a detrimental impact on their business.[37]

The lower court in *Willingham* pointed out that if the plaintiff's argument was accepted, it would mean that if an employer allowed female employees to wear dresses, lipstick, eye shadow, and earrings to work, then the employer would have to allow men the same privilege.[38] The court stated that to argue Congress intended such a result when it passed Title VII would be "ridiculous."[39] The court further stated that employers should not be forced to accept behavior that is out of the norm for customary grooming, and not related to a fundamental right, where it could have adverse implications for a business.[40]

Some lower federal courts have been willing to consider the possibility that hair length policies that discriminate between men and women could be a basis for a discrimination claim.[41] However, the

30. *Willingham*, 507 F.2d at 1087.
31. *Id.* at 1092.
32. *Id.* at 1091.
33. *Id.*
34. *Id.*
35. *Id.* at 1087.
36. *Id.*
37. *Id.*
38. Willingham v. Macon Tel. Publ'g Co., 352 F. Supp. 1018, 1020 (M.D. Ga. 1972).
39. *Id.*
40. *See id.* at 1021-22.
41. *E.g.*, Donohue v. Shoe Corp. of Am., 337 F. Supp. 1357, 1359 (D.C. Cal. 1972); Roberts v. Gen. Mills, Inc., 337 F. Supp. 1055, 1056-57 (N.D. Ohio 1971).

circuit courts that have reviewed this issue have supported the Fifth Circuit's position in *Willingham.*[42]

Claims of religious discrimination under Title VII have also arisen regarding employer regulations on hair.[43] Unlike contentions of race, gender, color, or national origin discrimination, Title VII requires that an employer must offer a reasonable accommodation to an employee when an employment policy conflicts with an employee's religious beliefs or practices, unless it would create an undue hardship for the employer.[44]

The Supreme Court has set a low threshold for an employer to meet in order to satisfy the reasonable accommodation requirement.[45] In *TWA v. Hardison*, the Court determined that if the available accommodations create more than a *de minimis* burden, the employer is not required to offer it.[46] The Court refined this requirement in *Ansonia Board of Education v. Philbrook*,[47] where it concluded that once an employer offered a reasonable accommodation it met its obligation even if the employee offered, and preferred, a reasonable alternative.[48]

In *Vargas v. Sears, Roebuck & Co.*, a district court dealt with a policy that required employees to maintain hair in a neat and trimmed manner.[49] When Vargas was hired, he was in compliance with the policy.[50] Shortly thereafter, his hair reached ponytail length.[51] He was then advised that his hair was not acceptable, but the company took no other formal action.[52] Subsequently, after a change in supervisors, he was told to bring his hair into compliance.[53] At that point, he informed

42. *E.g.*, Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1388 (11th Cir. 1998); Tavora v. N.Y. Mercantile Exch., 101 F.3d 907, 908 (2d Cir. 1996); Barker v. Taft Broad. Co., 549 F.2d 400, 401 (6th Cir. 1977); Earwood v. Cont'l Se. Lines, Inc., 539 F.2d 1349, 1351 (4th Cir. 1976); Knott v. Mo. Pac. R.R. Co., 527 F.2d 1249, 1252 (8th Cir. 1975); Baker v. Cal. Land Title Co., 507 F.2d 895, 896 (9th Cir. 1974); Fagan v. Nat'l Cash Register Co., 481 F.2d 1115, 1124 (D.C. Cir. 1973).

43. *E.g.*, Vargas v. Sears, Roebuck & Co., No. 97-CV-75020-DT, 1998 U.S. Dist LEXIS 21148, at *9 (E.D. Mich. Dec. 28, 1998).

44. 42 U.S.C. § 2000e(j) (2000).

45. *See generally* TWA, Inc. v. Hardison, 432 U.S. 63 (1977) (holding that if an accommodation would create more than a de minimis burden, the employer is not required to offer the accommodation).

46. *Id.* at 84-85.

47. 479 U.S. 60 (1986).

48. *Id.* at 68.

49. Vargas v. Sears, Roebuck & Co., No. 97-CV-75020-DT, 1998 U.S. Dist. LEXIS 21148, at *4 (E.D. Mich. Dec. 28, 1998).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at *4-5.

the company that the length of his hair was due to his religious beliefs as a follower of traditional Native American religion.[54]

With this new information, the company attempted to provide an accommodation by telling him to tuck his hair underneath his shirt or jacket.[55] Vargas rejected the direction.[56] During his deposition, Vargas testified that tucking his hair underneath a garment would violate his religious conviction.[57] He never offered an alternative and demanded he be allowed to wear his hair as he wanted.[58]

In granting the employer's motion for summary judgment, the court concluded that Vargas had a duty to cooperate with the employer's efforts to offer a reasonable accommodation.[59] Vargas' conduct did not meet that obligation.[60] As a result, the court found that he could not raise the question of whether the company's accommodation was reasonable.[61]

B. Policies affecting hairstyles

Related to the issue of hair length are employer efforts to regulate the hairstyles of employees. Employee challenges to this type of policy have been raised in cases where the employees contended that the employer discriminated against them on the basis of race or religion.[62]

In *Eatman v. UPS*, an African-American male driver who had been employed for six years began to wear his hair in tight, hand-rolled spirals commonly referred to as "dreadlocks."[63] His supervisors informed him that the style was in conflict with the employer's appearance policy that required hair be worn in a "business-like manner."[64] Eatman claimed that the locks were a reflection of his commitment to his Protestant faith.[65] Initially, he complied with the

54. *Id.* at *5.
55. *Id.* at *5-6.
56. *Id.* at *6.
57. *Id.* at *8.
58. *Id.* at *9.
59. *Id.* at *14, *19.
60. *Id.* at *16-18.
61. *Id.* at *19.
62. *E.g.*, Eatman v. UPS, 194 F. Supp. 2d 256 (S.D.N.Y. 2002) (involving an African-American former employee with dreadlocks who brought suit against his former employer, claiming that the employer discriminated against him based upon his race and religion).
63. *Id.* at 258, 260.
64. *Id.* at 259-60.
65. *Id.* at 259.

company's willingness to allow any employee that was not in compliance with the policy to wear a hat.[66] Due to the nature of his hairstyle, the only type of hat that Eastman decided he was eligible to wear was made of wool.[67] After wearing the hat for a period of time, he objected claiming that it made him feel faint, gave him headaches, and destroyed some of his locks.[68] Ultimately, Eatman refused to wear the hat and was subsequently terminated.[69]

In considering Eatman's claim that the employer had engaged in religious discrimination, because of its failure to offer him a reasonable accommodation, the court recited the requirements that a plaintiff first needed to prove.[70] Requirements included that:

(1) He have a bona fide religious belief that conflicted with the employer's policy;

(2) He informed the employer of the belief; and

(3) He was disciplined because he did not comply.[71]

The court concluded that Eatman failed to meet these requirements for two reasons.[72] First, he failed to show that his conduct was prompted by a religious belief.[73] There was no evidence that the locks were a mandate of his religion.[74] Rather, it appeared to the court that the style was a matter of his "personal choice."[75] Secondly, Eatman failed to prove that he informed the employer that the hat requirement conflicted with his religious beliefs.[76]

Eatman also raised the claim that the application of the company's appearance policy was a form of racial discrimination.[77] His contention was that locked hair was a unique hairstyle worn by African-Americans

66. *Id.* at 260.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 268.
71. *Id.*
72. *Id.* at 269.
73. *Id.* at 268.
74. *Id.* at 268-69.
75. *Id.*
76. *Id.* at 269.
77. *Id.* at 262.

and, thus, only this racial group was affected by the policy.[78] Additionally, he claimed that the application of the policy was having a greater impact on African-Americans than on any other group.[79]

The court rejected both Eatman's disparate treatment and disparate impact claims.[80] As to disparate treatment, the court found that Eatman had failed to show that the policy was facially discriminatory.[81] Eatman's own expert had testified that locked hair was not unique to African-Americans, as other racial groups in other parts of the world also wore dreadlocks.[82] In addition, the court found that Eatman failed to prove an intent to discriminate because there was no evidence that the standards were applied differently to employees of other races.[83] The court concluded that creating reasonable appearance standards for employees who have contact with customers was a legitimate responsibility of management.[84]

In reaching its conclusion, the court cited *Rogers v. American Airlines, Inc.*[85] In *Rogers*, the employer established a policy that barred braided hairstyles.[86] Rogers was an African-American woman who held a position that required contact with the public.[87] She objected to the policy because it barred her from wearing her hair in "corn row" style.[88] She claimed that the policy constituted racial discrimination in violation of the Thirteenth Amendment's prohibition against involuntary servitude, Title VII, and 42 U.S.C. section 1981.[89] In addition, Rogers also alleged that the policy discriminated against her as a woman.[90]

The court rejected the argument that the policy violated the Thirteenth Amendment, since the plaintiff had the freedom to leave her job.[91] The court likewise rejected the argument that the policy was a

78. *Id.*
79. *Id.* at 266.
80. *Id.* at 264-67.
81. *Id.* at 262.
82. *Id.*
83. *Id.*
84. *Id.* at 264 (citing Fagan v. Nat'l Cash Register Co., 481 F.2d 1115, 1125 (D.C. Cir. 1973)). The court similarly rejected the disparate impact claim because the plaintiff failed to introduce satisfactory statistical proof that the regulation had a greater impact on black employees. *Id.* at 267.
85. 527 F. Supp. 229 (S.D.N.Y. 1981).
86. *Id.* at 231.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*

form of racial discrimination under Title VII or section 1981.[92] Rogers had contended that the "corn row" style had special significance to African-American women and reflected their "cultural, historical essence."[93] However, the court pointed out that she had not alleged that only African-Americans wore the hairstyle.[94] In fact, the employer had stated that Rogers only started wearing the hairstyle after the movie "*10*," where a white actress wore a braided hairstyle, had been released.[95]

The court also commented on Eatman's contention that if an employer banned the "Afro/bush" style, it would violate Title VII and section 1981.[96] The court recognized this argument as a different issue because the style is a natural one, and particular to African-Americans.[97] Banning it could be viewed as a regulation of an "immutable characteristic[]."[98] However, braided hair is not natural. The style can be changed easily, and there was nothing to prevent Rogers from wearing it when she was off duty.[99]

The court similarly rejected the claim that the policy was a form of sexual discrimination.[100] The policy applied equally to men and women.[101] The court reasoned that it is possible for male employees to have longer hair than women and that these men may prefer to put their hair in braids.[102] The court referred to *Willingham* and similar cases dealing with policies on hair length.[103] It stated that even a difference in how the standards applied to men and women would not necessarily mean that the law had been violated, since this type of policy has a small impact on the basic concept of equal opportunity.[104]

In *Hollins v. Atlantic Co.*,[105] the Sixth Circuit dealt with an employee's claim that the application of a grooming policy to her hairstyle constituted racial discrimination.[106] The policy stated that

92. *Id.*
93. *Id.* at 231-32.
94. *Id.* at 232.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 232-33.
100. *Id.* at 231.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. 188 F.3d 652 (6th Cir. 1999).
106. *Id.* at 655.

women's hair needed to be neat and well groomed.[107] The trouble started when Hollins, who was African-American, began to wear her hair in "finger waves."[108] She was told by her foreman that it was too different and not in compliance with the company's policy.[109] Others in management echoed those comments stating that the style was "eye catching" and called attention to her.[110] Hollins was told that if she wanted to change her hairstyle she should first submit a picture of it and get approval from her manager.[111]

More than a year later, Hollins started wearing a ponytail that management contended was in conflict with the company's standards.[112] Even a hairstyle that had been previously approved by a manager became a point of contention between the company and Hollins.[113] These disputes led her to file a claim of racial discrimination.[114]

The lower court granted the employer's motion for summary judgment, finding that Hollins had failed to establish a *prima facie* case of disparate treatment.[115] The Court of Appeals reversed, finding that affidavits submitted by Hollins and another female African-American employee gave rise to a factual dispute as to whether the company's standards were being applied differently to African-American women as compared to white female employees.[116] In particular, Hollins contended that her ponytail was the same as that worn by a number of white women, who had not been reprimanded, and that only she had been required to submit pictures of the style in advance of wearing it.[117] This factual dispute raised the question of whether Hollins had been subjected to disparate treatment because of race.[118]

Hollins stands in contrast to *Ali v. Mount Sinai Hospital.*[119] In *Ali*, the court also dealt with a racial discrimination claim by an African-American woman who challenged her employer's appearance policy as

107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 656.
112. *Id.*
113. *Id.* at 656-57.
114. *Id.*
115. *Id.* at 657.
116. *Id.* at 660-61.
117. *Id.* at 660.
118. *Id.* at 661.
119. No. 92 Civ. 6129 (JGK) (NG), 1996 U.S. Dist. LEXIS 8079, at *1 (S.D.N.Y. June 12, 1996).

disparate treatment discrimination.[120] While the employer's policy emphasized the need to present a conservative appearance, the plaintiff's (Ali's) loud attire and unconventional hair called attention to her.[121] In Ali's words, her hair was in a "punk" style that she described as an "Afro hairstyle."[122] Her supervisor objected to her appearance, contending it was not in conformance with the company's appearance policy.[123] While Ali claimed the policy was being enforced against her but not against white female employees, the court here, in contrast to the court in *Hollins*, found no evidence to support the claim of unequal treatment and, thus, granted the employer's motion for summary judgment.[124]

C. Restrictions on facial hair

Employers frequently include restrictions on facial hair in their grooming and appearance policies.[125] The policies may be motivated by what the company managers see as "the needs of the business." A restaurant chain may perceive a need to make certain that the hair of a food preparer does not find its way into the "house special." In other cases, it may need to assure that employees working around dangerous substances have masks that properly fit and protect them. Some policies may be created to reinforce an image the company wants its workers to project to the public.

A number of challenges have been mounted against facial hair restrictions based on claims of religious discrimination.[126] In these cases, the plaintiffs have alleged that having a beard is part of their religious beliefs, and that the employer is refusing to provide a reasonable accommodation.[127] In *EEOC v. Sambo's of Georgia, Inc*., a man applied for a position as a restaurant manager.[128] His application was rejected solely because he indicated that, because of the teachings of his religion (Sikhism), he could not comply with a grooming standard that barred managers, and other restaurant employees, from having facial hair other

120. *Id.*
121. *See id.* at *3-5.
122. *Id.* at *4.
123. *Id.* at *6.
124. *Id.* at *18-19, *23.
125. *E.g.*, EEOC v. Sambo's of Ga., Inc., 530 F. Supp. 86, 89 (N.D. Ga. 1981).
126. *E.g.*, *id.* at 88.
127. *E.g.*, *id.*
128. *Id.*

than a neatly trimmed mustache.[129] The EEOC contended that the employer had failed to provide him with a reasonable accommodation.[130]

The court rejected the Commission's argument.[131] It found that "no beard" policies were common in the restaurant industry and that the employer had not granted exceptions in the past.[132] The employer's experience indicated that customers prefer restaurants where managers are clean-shaven.[133] The presence of beards raises customer concerns regarding sanitary conditions within the restaurant.[134] The court also noted that the guidelines established by the state indicated that excessive facial hair could be considered a violation of state regulations.[135] Given the low threshold established in *Hardison*, granting an accommodation to the claimant would involve significant cost to the employer and, thus, would constitute an undue hardship.[136]

In *Bhatia v. Chevron U.S.A., Inc.*,[137] the Ninth Circuit heard from another follower of the Sikh religion.[138] There, the employer established a policy requiring that all employees who could potentially be exposed to toxic gases be clean-shaven, so that the masks used to protect them from possible gas leaks would be tight fitting.[139] The policy had been created to comply with a state safety regulation.[140] Employees who refused to comply with the company's policy were fired.[141]

When the plaintiff (Bhatia) told the company he could not comply with the policy because of his religious beliefs, he was suspended without pay.[142] The company then processed an application for transfer to a similar position where Bhatia would not be required to wear a mask.[143] After a fruitless search, the company offered Bhatia other positions, at a lower pay rate, and promised he would be allowed to return to his old position if new safety equipment was developed that

129. *Id.* at 88-89.
130. *Id.* at 90.
131. *Id.*
132. *Id.* at 89.
133. *Id.*
134. *Id.*
135. *Id.* at 90.
136. *Id.* at 90-91 (citing TWA v. Hardison, 432 U.S. 63 (1977)).
137. 734 F.2d 1382 (9th Cir. 1984).
138. *Id.* at 1383.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*

would both cover his beard and protect him from gas leaks.[144] Initially Bhatia refused the offers, but ultimately took a janitorial job with a pay rate below what he had been paid in his original position.[145]

The court recognized that Bhatia's religious beliefs had caused his removal and that, as a result, he had established a *prima facie* case of religious discrimination.[146] However, the employer was able to mount a successful defense by showing that allowing Bhatia to stay in his original machinist job would create an undue hardship given that the company would be in violation of state safety regulations.[147] The company's willingness to look for other jobs for Bhatia, and its promise to return him to his job if appropriate protective gear was later created, demonstrated the employer's accommodation efforts.[148] This was something the company had not done for other employees whose refusal to shave was not motivated by a religious belief.[149]

In other cases, plaintiffs have enjoyed some measure of success in challenging company policies on beards that create conflict with religious beliefs.[150] In *Carter v. Bruce Oakley, Inc*., the plaintiff (Carter) was constructively discharged because of his refusal to comply with the requirement that his beard be kept trim.[151] Carter claimed that his religious beliefs (Judaism) prohibited him from complying.[152] The employer contended that wearing a beard was not required by Carter's religion.[153] While the court conceded that Carter's beliefs did not fit neatly into Judaism, they were based on scripture and were beliefs that he sincerely held.[154] Thus, Carter met the first requirement for establishing a *prima facie* case of religious discrimination.[155] The second and third requirements were met as well, when Carter showed that he had informed the employer of the conflict between his beliefs and the

144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *See, e.g.*, Carter v. Bruce Oakley, Inc., 849 F. Supp. 673, 673 (E.D. Ark. 1993).
151. *Id.* at 676. Due to a shortage of workers with the plaintiff's skills, the employer indicated that it would waive its no-beard policy for him if he returned to work. Shortly after his return, the company demanded that he trim the beard in a manner that the plaintiff claimed was contrary to his religious beliefs. *Id.* at 674.
152. *Id.* at 673.
153. *Id.* at 674.
154. *Id.* at 674-75.
155. *Id.* at 675.

policy, and that the conflict ultimately resulted in his dismissal.[156]

The court examined whether an undue hardship would be created for the employer if a reasonable accommodation were offered to the plaintiff.[157] Compelling to the court was the fact that the employer had difficulty articulating reasons why Carter should be denied the right to wear a beard.[158] The company's contention that it was unsafe, because workers sometimes had to wear protective masks, was rebutted by Carter's testimony that his beard actually helped the mask fit better.[159] Nor did the court find that Carter's appearance was "unprofessional."[160] Rather, the beard was short to moderate in length.[161] Thus, the court concluded that allowing Carter to wear a beard would not create an undue hardship for the employer and that Carter should have been offered a reasonable accommodation.[162]

In *EEOC v. UPS*,[163] the employer's policy barred employees in public contact positions from having a beard.[164] Aiyub Patel was a part-time employee with a beard that was permitted because his position did not require public contact.[165] However, when he had enough seniority, under the company's bargaining agreement with the union, he applied for a public contact position as a delivery-driver.[166] However, as a follower of Islam, Patel refused to comply with the no beard policy and, consequently, the company denied him the new position.[167] The employer was willing to allow him to be considered for full-time positions that did not require public contact, but contended that Patel was not interested in these accommodations.[168]

The EEOC challenged the company's decision, arguing that the employer had not offered Patel a reasonable accommodation.[169] While the trial court granted the employer summary judgment, concluding that the offer of a non-contact position provided a reasonable

156. *Id.*
157. *Id.* at 675-76.
158. *Id.*
159. *Id.* at 676.
160. *Id.*
161. *Id.*
162. *Id.*
163. 94 F.3d 314 (7th Cir. 1996).
164. *Id.* at 315.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*

accommodation, the Seventh Circuit reversed.[170] It found that summary judgment was not appropriate because a conflict existed between the parties as to the material facts of the case.[171] Further, it rejected the employer's contention that the offer, of a substitute full-time position where there was no public contact, was a reasonable accommodation.[172] The court rejected the employer's contention that an acceptable accommodation had been offered because management admitted that, at the time, there was no such position available to Patel because of his lack of seniority, and that it was possible that he would not become eligible for such a position for two years or longer.[173] In light of the fact that the non-public contact position was currently unavailable, the proposed accommodation hardly seemed reasonable.[174]

"No beard" policies have also been challenged as being a form of racial discrimination.[175] Many African-American men suffer from *pseudofolliculitis barbae* (PFB), which is a painful skin condition that almost exclusively affects this group.[176] For those afflicted, it is difficult, or even impossible, to shave.[177] If an employer strictly enforces a "no beard" policy, it may effectively deny these men the chance for employment.

In *Woods v. Safeway Stores, Inc.*, an African-American employee was terminated by a retail grocery store when he grew a beard in violation of a policy that barred facial hair, except for short mustaches.[178] The plaintiff (Woods) had grown the beard on the advice of his dermatologist who felt it might help treat his PFB.[179] Woods claimed that since the condition almost exclusively affected African-American men, the policy was based on racially tainted criteria.[180]

The *Woods* court recognized that a neutral policy, that significantly and adversely affects one racial group, could be the basis of a racial discrimination claim.[181] However, it also indicated that the employer

170. *Id.* at 320-21.
171. *Id.*
172. *Id.* at 320.
173. *Id.* at 319-20.
174. *Id.*
175. *E.g.*, EEOC v. UPS, 860 F.2d 372, 373 (10th Cir. 1988).
176. Woods v. Safeway Stores, Inc., 420 F. Supp. 35, 37 (E.D. Va. 1976), *aff'd*, 579 F.2d 43 (4th Cir. 1978).
177. *UPS*, 860 F.2d at 373.
178. *Woods*, 420 F. Supp. at 37 & n.2.
179. *Id.* at 37.
180. *Id.* at 41.
181. *Id.* at 42.

could defend itself by showing the policy is based on a legitimate business purpose.[182] The court ultimately accepted the employer's contention that in the very competitive retail grocery business, it is important that the store, and its employees, convey an image of cleanliness in order to attract customers, and that some people hold the view that beards are unclean.[183] In upholding the right of the employer to establish this policy, the court found that the impact in this case had been slight, since it appeared that only the plaintiff had been adversely affected.[184] Additionally, there was no evidence that the standard was created with the intent to discriminate, and the employer had no history of practicing discrimination.[185]

While the court in *Woods* showed a willingness to defer to the judgment of the employer, as it related to an understanding of customer preferences, the Eighth Circuit was not willing to defer in *Bradley v. Pizzaco of Nebraska, Inc.*[186] In this case, the plaintiff, who suffered from PFB, was fired as a delivery man for a franchisor of Domino's Pizza because he violated the ban on beards that had been established nationwide by Domino's.[187] A vice president of Domino's testified that it was common sense that the better Domino's employees looked, the better sales would be.[188] In addition, the vice president cited a public opinion survey that showed that twenty percent of those surveyed would react negatively to a bearded deliveryman.[189]

The court looked with skepticism on using customer preference as a basis for arguing business necessity absent evidence that customers would actually order less pizza because of bearded deliverymen.[190] It pointed out that its decision did not bar Domino's from enforcing its no beard policy for those who did not suffer from the skin condition.[191] It also affirmed the company's right to require those who had to grow beards because of the condition to keep them neatly trimmed, not exceeding a specified length.[192]

182. *Id.*
183. *Id.* at 43.
184. *Id.*
185. *Id.*
186. 7 F.3d 795, 799 (8th Cir. 1993).
187. *Id.* at 796.
188. *Id.* at 798.
189. *Id.*
190. *Id.* at 799.
191. *Id.*
192. *Id.*

In *EEOC v. Trailways, Inc.*,[193] a district court also rejected an employer's "no beard" policy that applied to drivers and other workers in public contact positions.[194] The policy caused a number of African-American men who suffered from PFB to lose their jobs.[195] The difference between this case and *Bradley* was that the employer offered no argument of business necessity to rebut the disparate impact claim.[196] Instead, the employer relied on *EEOC v. Greyhound Lines, Inc.*,[197] which held that a "no beard" policy did not violate Title VII.[198]

However, the judge in *Trailways* concluded that the defendant had misread the scope of the Third Circuit's decision in *Greyhound*.[199] There, the court was dealing with circumstances where the EEOC had failed to introduce evidence to show the disparate impact of the policy on African-Americans.[200] In *Trailways*, the court pointed out that there was no such failure.[201] Evidence from the Commission demonstrated that PFB almost exclusively affected African-American men and that the employer's policy would exclude roughly a quarter of them from being employed in public contact positions.[202]

In *Trailways*, the court found no justification for the disparate impact claim since the employer had failed to show any business need for the rule.[203] However, as in *Bradley*, the court indicated that its finding did not prevent the employer from establishing a general no beard policy, so long as an exception was permitted for those suffering from PFB.[204] Those with the condition could be required to have neat and trim beards.[205]

D. Policies Regulating Dress

Employers regulate the clothing of employees for a number of reasons. If an employee has contact with the public, an employer may

193. 530 F. Supp. 54 (D. Colo. 1981).
194. *Id.* at 55, 59 (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971)).
195. *Id.* at 56.
196. *Id.* at 57.
197. 635 F.2d 188 (3d Cir. 1980).
198. *Trailways*, 530 F. Supp. at 57.
199. *Id.* (quoting *Greyhound Lines*, 635 F.2d at 190 n.3).
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.* at 55, 59 (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971)).
204. *Id.* at 59.
205. *Id.*

want to make certain that the employee's attire projects a certain image for the business. A financial institution or an office of professionals may want to create a conservative image. On the other hand, a clothing store that targets teenaged customers may want employees to dress in a manner that reflects current trends. In other instances, uniforms bring a standardization that allows customers and supervisors to identify employees.

Even if an employee is not in contact with the public, an employer may want to regulate dress to discourage attire that it considers overly provocative, or otherwise disruptive of the performance of other workers. Dress deemed inappropriate may, in the judgment of managers, be too sexually revealing or too reflective of the wearer's political or religious beliefs. If an employee challenges clothing regulations, the employer typically confronts issues relating to discrimination due to gender, race, or religion.[206]

In *Carroll v. Talman Federal Savings & Loan Ass'n*, a female employee brought an action challenging a dress code that she claimed discriminated against women.[207] In particular, she objected to a policy requiring female employees to wear uniforms, while male employees performing the same jobs were allowed to wear customary business clothing.[208] The lower court granted the employer's motion for summary judgment, finding that the employer's policy did not prevent equal employment opportunity for women.[209]

The Seventh Circuit reversed, finding that under section 703(a)(1) the employer had discriminated as to compensation, terms, conditions or privileges of employment because of such individual's sex.[210] The court stated that there had been discrimination in compensation because the uniforms given to the female employees were considered income, which required the employer to withhold income tax from their pay which, of course, was not done for the men.[211] In addition, if the uniform was

206. *E.g.*, Carroll v. Talman Fed. Sav. & Loan Ass'n of Chi., 604 F.2d 1028, 1029 (7th Cir. 1979); Davis v. Mothers Work, Inc., CIV. A. No. 04-3943, 2005 U.S. Dist. LEXIS 15890, at *1 (E.D. Penn. Aug. 4, 2005).

207. *Carroll*, 604 F.2d at 1029.

208. *Id.*

209. *Id.*

210. *Id.* at 1033. Section 703(a)(1) provides that it is an unlawful employment practice for an employer "to fail or refuse to hire or to discharge . . . or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (2000).

211. *Carroll*, 604 F.2d at 1030.

damaged, the female employee had to pay for a replacement uniform.[212]

A second finding in the court's decision was that requiring only women to wear uniforms was demeaning to the women.[213] The court stated that it is assumed that those wearing uniforms are of a lower professional status than those who are not, and found that the employer's policy was based on offensive stereotyping.[214]

In *Fountain v. Safeway Stores, Inc.*,[215] a male employee claimed sexual discrimination after he was terminated for not complying with a rule requiring that he wear a tie on the job, something not required of female employees.[216] He claimed discrimination because when female employees had earlier violated a policy requiring them to wear skirts, not only were they not disciplined, but the company also changed its policy to allow women to wear slacks.[217] To the plaintiff, these events represented unequal treatment based on sex.[218]

The court rejected both arguments.[219] First, the court found that there was substantial precedent for allowing an employer to establish different dress standards for men and women.[220] Second, it found that an employer had the right to amend the dress code over time to reflect changes in the image that the company wanted to project.[221] The fact that the company had failed to discipline the female employees for their violations and had also amended the policy to meet the women's objections, was interpreted by the court as a reflection that the company's judgment about acceptable attire for female employees had changed.[222] The right to amend the regulations for one gender, and not the other, flows from the right an employer has to create separate

212. *Id.* The dissent found the majority's position to be nit-picking, given that male employees had to pay the full price when they bought clothing for work and did not receive a tax deduction. *Id.* at 1038. In addition, if a male employee's clothing was damaged, he had to pay for that loss just as a female employee would. *Id.*

213. *Id.* at 1032-33.

214. *Id.* at 1033; *see also* O'Donnell v. Burlington Coat Factory Warehouse, Inc., 656 F. Supp. 263, 266 (S.D. Ohio 1987) (relying on *Carroll* to find discrimination because of a requirement that female employees wear a smock over their clothing, while male employees performing the same job were allowed to wear a shirt and tie).

215. 555 F.2d 753 (9th Cir. 1977).

216. *Id.* at 754-55.

217. *Id.* at 755.

218. *Id.* at 756.

219. *Id.*

220. *Id.* at 755-56.

221. *Id.* at 756.

222. *Id.*

appearance regulations for men and women.[223]

What happens when an employer has no written policy governing particular clothing that an employee must wear that differentiates between male and female employees? In *Craft v. Metromedia, Inc.*,[224] a television station demoted a female news anchor after receiving results from focus groups and a telephone survey of the station's target audience.[225] The survey attempted to measure the audience's view of the plaintiff (Craft) versus other female news anchors working for competing stations.[226] It showed that Craft was trailing the other female anchors in almost every category.[227] Four of the categories related to "good looks," clothing, and image of a female anchor.[228] According to Craft, part of the evidence of discrimination included surveys regarding male on-air personalities that were different from the female surveys in that the male surveys did not attempt to measure "appearance" in the same way as for the female employees.[229]

Part of Craft's sexual discrimination claim related to what she argued was the more stringent appearance standards that the company applied to female on-air personnel.[230] The evidence showed that soon after Craft was hired the station began to have concerns about her clothing and makeup.[231] The news director began to make suggestions and criticisms regarding her clothing.[232] Eventually, the station arranged with Macy's to provide a fashion consultant and clothing for Craft.[233]

In addition, the plaintiff introduced the testimony of other female employees who opined that the employer placed more emphasis on the appearance of female employees.[234] The record reflected that the station had hired Craft to try to soften the image of its news presentation that, in part, was to be accomplished through a wardrobe that emphasized a feminine touch replete with "bows and ruffles."[235] She was also

223. *Id.*
224. 766 F.2d 1205 (8th Cir. 1985).
225. *Id.* at 1209.
226. *Id.*
227. *Id.*
228. *Id.*
229. *See id.* at 1214.
230. *Id.* at 1210.
231. *Id.* at 1208.
232. *Id.*
233. *Id.* at 1208-09.
234. *Id.* at 1213.
235. *Id.* at 1214.

cautioned against wearing clothes that were too tight fitting or "sexy."[236] Craft was told to wait at least three weeks before wearing the same outfit on camera again, while the men were allowed to wear the same suit twice in one week so long as it was with a different tie.[237]

The trial court rejected Craft's claim of sex discrimination.[238] It found that the television station required both men and women in on-air roles to maintain a professional appearance, and that the enforcement of this objective was done in a nondiscriminatory manner.[239] In contradiction to the evidence introduced by Craft, the Eighth Circuit pointed out that the lower court had evidence before it that indicated the men were also subjected to scrutiny of their appearance.[240] One man was told to get better fitting clothing, to refrain from wearing sweaters under jackets, and to tie neckties in a certain manner.[241] Other men had been told to lose weight, to get a hairpiece, and to start wearing contact lenses.[242]

The Court of Appeals found that there was no evidence in the record that the trial court had acted in a clearly erroneous fashion.[243] While the appellate court felt that the station had overemphasized the issue of appearance, it held that the station had not done so in a discriminatory manner.[244] It accepted the lower court's conclusion that "appearance" is critical to a business whose economic success is so tied to a visual medium.[245]

In *Schmitz v. ING Securities, Futures & Options, Inc.*,[246] the plaintiff (Schmitz) brought a sexual harassment suit after she had been terminated for poor work performance.[247] She claimed the real reason behind her termination was that she had complained about sexually harassing behavior.[248] The behavior under critique related to repeated criticisms made by a manager about the inappropriateness of the clothing

236. *See id.* at 1215.
237. *Id.* at 1214.
238. *Id.* at 1207-08.
239. *Id.* at 1209-10.
240. *See id.* at 1213.
241. *Id.*
242. *Id.*
243. *Id.* at 1216.
244. *Id.* at 1215-16.
245. *Id.* at 1215.
246. No. 98-3007, 1999 U.S. App. LEXIS 16942, at *1 (7th Cir. July 20, 1999).
247. *Id.* at *4.
248. *Id.*

she wore.[249] He criticized Schmitz for having skirts or blouses that were too tight or too revealing.[250] Schmitz acknowledged that she wore skirts that were five or six inches above her knees.[251] The manager complained to her that her clothing left little to the imagination and was so provocative that any "hot-blooded male" would be aroused by her appearance.[252] He claimed that this type of attire was disrupting office productivity.[253] Female supervisors who worked for the company agreed with the thrust of his criticisms.[254]

While the court did not specifically deal with the issue of the employer's right to have managers regulate the dress of subordinates, it found that Schmitz had failed to make a case for sexual harassment that was attributable to a hostile work environment.[255] In particular, she had the duty to show that she was subject to unwelcome sexual advances or requests for sexual favors or other verbal or physical conduct of a sexual nature.[256] According to the court, Schmitz was unconvincing on this point.[257] There was no evidence of improper sexual advances.[258] The court stated that harassment is not proven just because words have a sexual connotation.[259]

On the other hand, employers can be liable for requiring female employees to wear clothing that subjects them to sexual harassment.[260] In *EEOC v. Sage Realty Corp*., a woman had been required to wear a uniform that she claimed was too revealing and led to her being subjected to lewd remarks and sexual propositions.[261] The court's review of photographs of the employee in her uniform led to a finding that the uniform was "short, revealing and sexually provocative."[262] The court concluded that a *prima facie* case had been established that she was subjected to sexual harassment because of her employer's

249. *Id.* at *2.
250. *Id.*
251. *Id.*
252. *Id.* at *3.
253. *Id.*
254. *Id.* at *9.
255. *See id.* at *12-13.
256. *Id.* at *6 (citing Parkins v. Civil Constructors of Ill., Inc., 163 F.3d 1027, 1032 (7th Cir. 1998)).
257. *Id.* at *7.
258. *Id.*
259. *Id.* (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998); Shepherd v. Slater Steels Corp., 168 F.3d 998, 1009 (7th Cir. 1999)).
260. *See, e.g.*, EEOC v. Sage Realty Corp., 507 F. Supp. 599, 610-11 (S.D.N.Y. 1981).
261. *Id.* at 605.
262. *Id.* at 607.

requirement.[263] Since her employer failed to introduce any legitimate, nondiscriminatory reason for the requirement, it violated Title VII.[264]

In *Davis v. Mothers Work, Inc.*, an African-American plaintiff (Davis) contended that her employer's enforcement of its dress code constituted both racial and religious discrimination.[265] The store's policy required employees to wear "clothing that reflects the current in-store seasonal fashions."[266] While exactly what transpired between Davis and the company's district manager was in dispute, what was clear was that the district manager did not approve of the full-length robe and headscarf that Davis wore as part of her Muslim religion.[267] According to Davis, this led the manager to tell her to leave work and go home.[268]

Although the manager relented and allowed Davis to return to work with her over-garment, Davis contended that the manager demonstrated an unwillingness to accept her appearance.[269] Davis charged that the manager monitored her work more closely than before, and that she was subject to rude comments and "nasty looks" from the manager.[270] In addition, her work schedule was changed, creating a conflict with the second job she held.[271] Finally, the reason the company used to terminate Davis was that she did not show up for a scheduled day of work.[272] In her defense, Davis claimed that it was a day when she was not originally scheduled to work and that the scheduling change was never communicated to her.[273]

The court allowed Davis' claims to survive the defendant's motion for summary judgment.[274] As to the charge of racial discrimination, the court concluded that Davis had established a *prima facie* case because she contended that a white employee, who did not conform to the company's dress code, had not been subject to the same treatment.[275] Davis argued that the reason given for her termination was a pretext, and

263. *Id.* at 607-08.
264. *Id.* at 608, 613.
265. Davis v. Mothers Work, Inc., CIV. A. No. 04-3943, 2005 U.S. Dist. LEXIS 15890, at *1-5 (E.D. Penn. Aug. 4, 2005).
266. *Id.* at *4.
267. *See id.* at *4-5.
268. *Id.* at *5.
269. *See id.* at *6.
270. *Id.*
271. *Id.* at *6-7.
272. *Id.* at *8.
273. *Id.* at *21-22.
274. *Id.* at *41.
275. *Id.* at *15-17.

that the dismissal was really attributable to her race.[276]

Similarly, Davis introduced sufficient evidence on her religious discrimination case to survive the motion for summary judgment.[277] She argued that she was treated differently than other employees because she wore religious attire.[278]

In other claims of religious discrimination, it has not been the clothing worn, but symbols or words adorning the dress of an employee that have raised controversy.[279] In *Wilson v. U.S. West Communications*, an employee (Wilson) wore an anti-abortion button on her clothing that depicted a fetus.[280] The graphic nature of the pin led to controversy with other workers who objected to it and complained to management.[281] While the company did not have a dress policy, it informed Wilson that because the pin was upsetting other workers and affecting their productivity, she would not be allowed to wear it outside of her work cubicle.[282] The company tried to offer her a number of accommodations, each of which she refused because she claimed that they would require her to ignore her religious beliefs.[283] The Eighth Circuit upheld Wilson's termination, finding that her religious beliefs did not require that she wear that particular pin, and that the employer had extended her a number of reasonable accommodations.[284]

A similar issue arose in *Rivera v. Choice Courier Systems, Inc.*[285] In that case, an employee (Rivera) delivered mail and answered phones at clients' businesses.[286] The employer had a dress code that it considered important in projecting the professional image of its employees.[287] Rivera attached badges to his work clothes that reflected his religious beliefs.[288] One of the clients contacted the employer to express "concern" about the badges.[289] Subsequently, Rivera was told not to wear them.[290] Rivera indicated he could not comply with this direction

276. *Id.* at *21-23.
277. *Id.* at *25, *41.
278. *Id.* at *25.
279. *See, e.g.*, Wilson v. U.S. W. Commc'ns., 58 F.3d 1337, 1338 (8th Cir. 1995).
280. *Id.* at 1339.
281. *Id.*
282. *Id.*
283. *Id.*
284. *Id.* at 1341-42.
285. No. 01 Civ. 2096 (CBM), 2004 U.S. Dist. LEXIS 11758, at *1 (S.D.N.Y. June 24, 2004).
286. *Id.* at *1-2.
287. *Id.* at *2.
288. *Id.* at *4.
289. *Id.*
290. *Id.* at *5.

because of his religious beliefs and he was subsequently terminated.[291] Due to a conflict in the contentions of the parties, as to whether he had been offered a reasonable accommodation and whether such was even possible given his intransigence, the court did not grant summary judgment.[292]

E. Jewelry and Cosmetic Appearance

Companies have also sought to regulate the wearing of jewelry and cosmetics by their employees while on the job. Such policies are usually motivated by managers' desire to make certain that the appearance of an employee is acceptable to the public. As suggested in *Schmitz,* the appearance of an employee may be seen as affecting the performance of other workers.[293]

In *Cloutier v. Costco Wholesale Corp.*,[294] an employer instituted a dress code barring employees from wearing facial jewelry, with the exception of earrings.[295] Cloutier wore a ring in her pierced eyebrow.[296] When she was approached about violating the policy, she refused to comply indicating that the ring was worn as a reflection of her religious beliefs.[297] The employer offered her the accommodations of either wearing a plastic retainer or a band-aid over the jewelry.[298] Cloutier rejected both offers, claiming that her religious beliefs required that her facial piercing be on display at all times.[299]

When the employer terminated Cloutier's employment, she filed suit, claiming that the company failed to meet its obligation to reasonably accommodate her religious beliefs.[300] After bringing suit in federal court, under both Title VII and state law, the employer filed a motion for summary judgment, which the lower court granted, finding that the employer had offered Cloutier a reasonable accommodation.[301]

In affirming the lower court's decision, the First Circuit based its

291. *Id.* at *6.
292. *Id.* at *31.
293. *See* Schmitz v. ING Secs., Futures & Options, Inc., No. 98-3007, 1999 U.S. App. LEXIS 16942, at *3 (7th Cir. July 20, 1999).
294. 390 F.3d 126 (1st Cir. 2004).
295. *Id.* at 129.
296. *Id.*
297. *Id.*
298. *Id.* at 130.
299. *Id.*
300. *Id.* at 128, 130.
301. *Id.* at 130-32.

decision on the finding that the employer could not accommodate Cloutier, in a way she found reasonable, without undue hardship.[302] In particular, the court pointed out that the appearance of employees reflects on their employers.[303] This is especially true of employees who, like Cloutier, were in public contact positions.[304] The employer successfully argued that Cloutier's facial jewelry detracted from the image it wanted to project to its customers, and that requiring it to grant an exemption from the policy, which was essentially all that Cloutier would accept, would adversely affect that image.[305]

Beyond employee claims that policies governing appearance may violate Title VII, employers must also be concerned with state or local laws that provide employees with broader protections.[306] Such was the case in *Sam's Club, Inc. v. Madison Equal Opportunities Commission.*[307] There, the state court had to interpret a city ordinance that, in part, prohibited discrimination in employment based on "physical appearance."[308] The ordinance included policies that pertained to hairstyles, beards, dress, weight, facial features, and other aspects of appearance.[309] The ordinance contained an exception when the employer's regulations were based on cleanliness, uniforms, or prescribed attire, so long as the standards were uniformly applied and were for a reasonable business purpose.[310]

In this case, as in *Costco*, the employee had a loop through her eyebrow that violated the company's policy barring facial jewelry.[311] The employer argued that the policy was motivated by its desire to promote a "traditional" or "conservative" style of appearance, and that it did not want employees to have a "flashy" appearance that would be distracting to customers.[312] The company's expert testified that the wearing of facial jewelry was not consistent with the conservative image that the employer wanted to convey to its customers.[313]

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302. *Id.* at 132.
303. *Id.* at 135.
304. *Id.*
305. *Id.*
306. *See, e.g.*, Sam's Club, Inc. v. Madison Equal Opportunities Comm'n, No. 02-2024, 2003 WL 21707207, at *1 (Wisc. Ct. App. July 24, 2003).
307. *Id.*
308. *Id.*
309. *Id.* (quoting MADISON, WISC., MADISON GENERAL ORDINANCE, § 3.23(2)(bb) (1998)).
310. *Id.* (quoting MADISON, WISC., MADISON GENERAL ORDINANCE, § 3.23(2)(bb) (1998)).
311. *Id.*
312. *Id.*
313. *Id.* at *2.

The city's commission adopted the hearing examiner's findings that the policy, designed to promote a conservative image, was not based on a reasonable business purpose and that the employee's discharge violated the city's ordinance.[314] The lower court reversed the commission's finding.[315]

The appellate court affirmed the lower court.[316] It found that one business might have a very different idea than another, in terms of the image that it wants its employees to convey to the public.[317] One business may want to appear as "trendy," allowing employees freedom in terms of appearance.[318] However, Sam's Club wanted to project a "no frills, no flash" look for its employees.[319] Prohibiting facial jewelry was consistent with that objective and, thus, the regulation was for a "reasonable business purpose."[320]

In *DeSantis v. Pacific Telephone & Telegraph Co.*,[321] the Ninth Circuit consolidated three district court decisions, all of which related to the question of whether homosexuals were protected under Title VII.[322] In one of the cases, a male employee had been terminated from his position in a nursery school because he wore a small ear-loop.[323] He contended that he was terminated because the school relied on a stereotype that dictated that men must have a virile appearance, and that the school viewed the earring as effeminate.[324] The lower court's dismissal of his Title VII claim, holding that protection from sexual discrimination applied only to an individual's gender and should not be extended to include sexual preference, was affirmed by the appellate court.[325]

This case did not raise the traditional claim of unequal treatment because of gender. In addition, social norms have changed regarding men wearing earrings since the time when the case was decided.[326]

314. *Id.*
315. *Id.* at *3.
316. *Id.* at *16.
317. *Id.* at *14.
318. *Id.*
319. *Id.* at *15.
320. *Id.* at *15-16.
321. 608 F.2d 327 (9th Cir. 1979).
322. *Id.* at 328.
323. *Id.*
324. *Id.* at 331.
325. *Id.* at 331-32.
326. *See generally* Michael Winerip, *Our Towns; New Male Rite of Passage: Getting an Ear Pierced*, N.Y. TIMES, Mar. 16, 1986, §1, at 148 (discussing society's growing acceptance of men wearing earrings).

However, given the latitude that the courts have given to employers in creating distinctions in appearance policies for men and women, it seems likely that in a case where conservative appearance is considered an important aspect of a position, an employer can make a valid argument that it should have a right to allow women but not men to wear earrings.

A controversy arose in *Jespersen v. Harrah's Operating Co.*,[327] regarding the right of a business to establish different cosmetic standards for men and women.[328] A casino had established appearance standards for its bartenders that distinguished on the basis of gender in several ways.[329] For example, the length of male employees' hair was regulated and, while the women's was not, women were required to have hair that was teased, curled or styled, and worn down.[330] Men had to have clean and neatly trimmed nails, with no colored polish, while women were told that their nails could only be covered by certain colors, and could not contain either exotic art or be of exotic length.[331]

Jespersen had been employed with the company for twenty years and objected to the appearance standard that required female employees to wear make-up, claiming that it conflicted with her self-image, and was demeaning and degrading to women.[332] She further argued that it imposed a greater burden on women.[333] Jespersen contended that the policy violated Title VII because men were not subject to the same terms and conditions of employment that were imposed on women.[334] Her second argument was that, under the rationale used by the Supreme Court in *Price Waterhouse v. Hopkins*,[335] the employer was engaged in impermissible sexual stereotyping.[336]

The Ninth Circuit affirmed the lower court's grant of summary judgment to the employer.[337] As to Jespersen's claim that the requirement placed a time and expense burden on women that was not

327. 444 F.3d 1104 (9th Cir. 2006).

328. *Id.* at 1105-06.

329. *Id.* at 1107.

330. *Id.*

331. *Id.*

332. *Id.* at 1106-08.

333. *See id.* at 1110.

334. *Id.* at 1108.

335. 490 U.S. 228 (1989). In *Hopkins*, the employer did not promote a female employee, Hopkins, to partner, at least in part, because her aggressive behavior marked her as not being feminine enough. *See id.* at 233-35. Yet, the firm recognized that her aggressive behavior (stereotypical of men) was important to her success. *See id.* at 234. The Court found that this could create a Catch-22 for Hopkins. *Id.* at 251.

336. *See Jespersen*, 444 F.3d at 1108, 1111.

337. *Id.* at 1106.

placed on men, the court held that not every difference in grooming policies constitutes illegal sex discrimination.[338] In addition, the court determined that Jespersen had failed to introduce evidence that the standards were more burdensome on women.[339]

The court also rejected Jespersen's contention that the employer's conduct constituted illegal stereotyping under *Price Waterhouse*.[340] In *Price Waterhouse*, the plaintiff (Hopkins) had essentially been told that to achieve a promotion she needed to tone down characteristics that seemed more masculine and to act more femininely.[341] In *Jespersen*, the court did not believe that Harrah's standards interfered with the plaintiff's ability to do her job in the way that Price Waterhouse's standards interfered with Hopkin's ability to do her job.[342] The court went on to say that while it was possible that a grooming standard could constitute sexual stereotyping, most of the standards there were applied equally to men and women, did not appear to be motivated by stereotypical thinking, and were reasonable.[343]

In another case, a public employer was sued when an employee was terminated, in part, because of her failure to conform to her supervisor's expectations as to what constituted an appropriate appearance.[344] In particular, she had been reprimanded, and later terminated, for wearing excessive makeup and wearing her hair down.[345] In that case, *Wislocki-Goin v. Mears*, there was no written dress or appearance policy.[346] However, the employer-judge, who was responsible for overseeing the performance of employees, expected her subordinates to maintain an appearance that would conform to a "Brooks Brothers look."[347] The Seventh Circuit affirmed the lower court's rejection of the plaintiff's disparate treatment claim because she failed to show that the supervisor treated male employees more leniently.[348] She also failed to show that the stated reason for her discharge was a pretext for discrimination.[349]

338. *See id.* at 1109-10.
339. *Id.* at 1111.
340. *Id.* at 1113.
341. Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989).
342. *Jespersen*, 444 F.2d at 1113.
343. *Id.*
344. Wislocki-Goin v. Mears, 831 F.2d 1374, 1376-77 (7th Cir. 1987).
345. *Id.* at 1377.
346. *Id.* at 1376.
347. *Id.*
348. *Id.* at 1378, 1382.
349. *Id.* at 1379.

The plaintiff's disparate impact claim was also rejected.[350] She failed to show that the supervisor's desire to have the staff maintain a professional appearance in their dealings with the public was not a legitimate interest.[351] In addition, there was no evidence that the application of the appearance policies created a greater hardship for female employees.[352]

F. Policies Controlling Weight

Some businesses have created policies to regulate the weight of their employees; their reasons vary. One reason may be that if an employee exceeds certain weight limits, he or she will not be able to perform one of the functions of the position. For example, the airlines have established weight limitations for flight attendants, at least in part, because occasionally the attendant must be able to access, in very limited space, a passenger suffering from some type of physical distress.[353] In other instances, employers may want weight limitations because of the high correlation between weight, medical costs, and absenteeism.[354]

Employers may also be interested in regulating the appearance of employees who are dealing with the public.[355] When weight restrictions lead to employer actions that adversely affect employees, challenges have been mounted under a variety of statutes, including Title VII,[356] the Americans with Disabilities Act (ADA),[357] the Rehabilitation Act of 1973,[358] and the Age Discrimination in Employment Act (ADEA),[359] as

350. *Id.* at 1382.

351. *Id.* at 1380 (citing Dothard v. Rawlinson, 433 U.S. 321, 329 (1977)).

352. *Id.*

353. *See* Leonard v. Nat'l Airlines, Inc., 434 F. Supp. 269, 274-75 (S.D. Fla. 1977) (holding that the airline's weight policy reached the twin objectives of safety and service); *see also* Dennis M. Lynch, *The Heavy Issue: Weight-Based Discrimination in the Airline Industry*, 62 J. AIR L. & COM. 203, 212 (1996) (discussing the airlines justification of height and weight requirements on the basis of safety).

354. *Employee Obesity Costs Company, Other Workers Money*, SMALL BUSINESS ADVANTAGE, September 2005, http://www.sbtimes.com/articles/05/09/6.shtml.

355. Lynch, *supra* note 353, at 212 (citing Toni S. Reed, Comment, *Flight Attendant Furies: Is Title VII Really the Solution to Hiring Policy Problems*, 58 J. AIR L. & COM. 267, 290 (1992); Pamela Whitesides, *Flight Attendant Weight Policies: A Title VII Wrong Without a Remedy*, 64 S. CAL. L. REV. 175, 198 (1990)).

356. 42 U.S.C. § 2000e-2(a) (2000).

357. 42 U.S.C. § 12112(a) (2000).

358. 29 U.S.C §§ 701-796*l* (2000). Like the ADA, the Rehabilitation Act was designed to protect those that meet the definition of being disabled; however, the reach of the law is not as broad, as it applies only to those who receive federal funds or are government contractors, federal

well as various state or local laws.[360]

Those disciplined or denied employment because of weight have frequently invoked the ADA and the Rehabilitation Act of 1973.[361] To proceed to the question of whether a person has been a victim of discrimination, under either statute, the employee must first establish that he qualifies as "disabled."[362] The ADA provides the claimant with three possible ways of satisfying this requirement.[363] The individual can either show that he has a physical or mental impairment that substantially affects one or more major life activities, that he has had a history of an impairment that affects major life activities, or that the employer regarded him as disabled.[364]

In *Coleman v. Georgia Power Co.*,[365] the plaintiff (Coleman) was discharged because of his failure to meet weight limitations that applied to his position.[366] The requirement was established because the position could require the operation of a lift device that had an operator weight limit attached to it by its manufacturer.[367]

The court concluded that Coleman was not disabled under any of the definitions included under the ADA.[368] The court relied on EEOC regulations stating that only in rare cases would obesity be considered a disability.[369] While there was evidence that he qualified as being morbidly obese, there was no evidence that tied his condition to a physiological disorder or condition, as required under EEOC regulations.[370]

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executive agencies or the U.S. Postal Service. *See id.* § 701(b), (c); *see also* U.S. Dep't of Labor, Section 503 of the Rehabilitation Act of 1973, http://www.dol.gov/esa/regs/compliance/ofccp/fs503.htm (last visited May 16, 2007) (explaining the basic provisions and scope of the Act).

359. 29 U.S.C. § 623(a) (2000).

360. *E.g.*, N.Y. HUMAN RIGHTS LAW § 291 (2003).

361. *E.g.*, Frank v. United Airlines, Inc., 216 F.3d 845, 847 (9th Cir. 2000) (claiming a violation of the ADA when an employer rejected an applicant because of his weight); Tudyman v. United Airlines, 608 F. Supp. 739, 740 (C.D. Cal. 1984) (claiming that the employer airline violated the Rehabilitation Act of 1973 when the employer rejected an applicant because of their weight).

362. *See* Francis v. City of Meriden, 129 F.3d 281, 283 (2d Cir. 1997).

363. 42 U.S.C. § 12102(2) (2000).

364. *Id.*

365. 81 F. Supp. 2d 1365 (N.D. Ga. 2000).

366. *Id.* at 1367.

367. *Id.* at 1366.

368. *Id.* at 1370.

369. *Id.* at 1368 (citing 29 C.F.R. pt. 1630, app. § 1630.2(j) (1997)).

370. *Id.* (citing 29 C.F.R. pt. 1630, app. § 1630.2(h) (1991)). Under EEOC regulations, a physical impairment includes "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular,

The court also found that Coleman did not qualify under the second prong of the definition because he failed to show that he had a history demonstrating that his obese condition substantially limited major life activities.[371] Nor did he qualify under the third criterion since the record did not include evidence that his employer regarded him as having a substantial impairment of a major life activity.[372]

However, the First Circuit, in *Cook v. Rhode Island Department of Mental Health, Retardation, & Hospitals*,[373] found that the plaintiff's (Cook's) morbid obesity qualified her as being disabled under the Rehabilitation Act.[374] Unlike in *Coleman*, the court concluded that the jury, which had found for Cook, could conclude, based on the evidence, that her condition met the EEOC's definition of disability.[375] In particular, the jury could conclude that Cook's condition was attributable to a "metabolic dysfunction" that was tied to a "physiological disorder."[376]

In *Cook*, the nurse who conducted the pre-hire physical had found that Cook was morbidly obese but had not concluded that her weight would affect her ability to do the job.[377] However, the employer rejected Cook because it believed her condition would prevent her from doing some of the tasks included in the job.[378] The employer's supervisor also believed that the condition would lead to a higher rate of absenteeism and a greater risk that she would file workers compensation claims.[379]

Cook prevailed, not based on the theory that she suffered from a disability that substantially affected major life activities, but on her contention that the employer perceived her as disabled.[380] The evidence before the jury allowed it to conclude that the employer believed she was disabled.[381] The court stated that the fact that the employer's belief may have been formed in "good faith" was no defense.[382] In addition, even if

reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine." 29. C.F.R. § 1630.2(h)(1) (2006).

371. *Coleman*, 81 F. Supp. 2d at 1371.

372. *Id.* (citing Standard v. A.B.E.L. Servs., Inc., 161 F.3d 1318, 1327 n.2 (11th Cir. 1998)).

373. 10 F.3d 17 (1st Cir. 1993).

374. *Id.* at 28.

375. *Id.* at 23.

376. *Id.* at 24.

377. *Id.* at 20-21.

378. *Id.* at 21.

379. *Id.*

380. *Id.* at 23.

381. *Id.*

382. *Id.* at 26-27 (citing Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372 (10th Cir. 1981); Carter v. Casa Cent., 849 F.2d 1048, 1056 (7th Cir. 1998)).

the employer was correct in thinking that Cook would miss more work than the average employee due to her condition, or that she was more likely to file workers compensation claims, those reasons provided no defense.[383] The "reasonable accommodation" duty of the statute required the employer to accept such a burden when dealing with a disabled employee.[384]

Another challenge to weight standards was mounted by female flight attendants in *Frank v. United Airlines, Inc.*[385] This suit involved claims under Title VII, the ADEA and the ADA.[386] The evidence showed that women had to weigh 14 to 25 pounds less than male attendants of the same height and age.[387] The reason for the difference was that the airline used weight tables that distinguished between the weights expected for those with large frames as opposed to medium frames.[388] For women, the medium frame standards from the weight tables were used, while for men the large frame criteria were applied.[389] Failure of the women to meet the standards led to either discipline or termination.[390]

The Ninth Circuit based its conclusion, that the different standards violated Title VII, on the Supreme Court's decision in *UAW v. Johnson Controls, Inc.*[391] In that case, the employer had refused to allow potentially fertile women to work in positions where there was the possibility of lead exposure which, in the employer's mind, could be harmful to a fetus.[392] However, men capable of fathering children were not excluded.[393] The court found that there was no *bona fide* occupational qualification that justified the apparently discriminatory policy.[394] In *Frank*, the Ninth Circuit found that the employer had failed to introduce evidence demonstrating that the essentials of the job required that women be thinner than male flight attendants.[395] Thus,

383. *Id.* at 27.
384. *Id.*
385. 216 F.3d 845, 847 (9th Cir. 2000).
386. *Id.*
387. *Id.* at 848.
388. *Id.*
389. *Id.*
390. *Id.* at 847.
391. *Id.* at 854 (citing UAW v. Johnson Controls, Inc., 499 U.S. 187 (1990)).
392. *UAW*, 499 U.S. at 192.
393. *Id.* at 199.
394. *Id.* at 206.
395. *Frank*, 216 F.3d at 855.

there was no defense for the disparate treatment of the women.[396]

On the ADEA claim, the court rejected the plaintiffs' argument that the weight standards constituted disparate treatment.[397] The weight standards applied to employees equally, regardless of age.[398] However, the court reversed the lower court's grant of summary judgment to the defendant on the disparate impact claim.[399] It found that the lower court erred in determining that the Supreme Court's decision in *Hazen Paper Co. v. Biggins*[400] barred disparate impact claims under the ADEA.[401]

As to the disability claim in *Frank*, the court upheld the grant of summary judgment for the airline.[402] The court found that while eating disorders, which the plaintiffs claimed they suffered from because of the employer's weight policies, can qualify as a disability under the ADA, none of the plaintiffs had introduced evidence showing that eating disorders substantially limited major life activities.[403]

While employers have to be aware that there are limitations posed by federal civil rights laws on their ability to establish weight standards, it is also clear that employers have some discretion regarding this subject. It could be because the job requires such limitations. However, it could also be because the employer has a legitimate concern regarding the impression that an employee may create in the mind of the public.[404]

In *Marks v. National Communications Ass'n*, a woman challenged her employer's decision to deny her a promotion because she was overweight.[405] The promotion would have created face-to-face contact with customers, and the employer had informed her that an employee's "presentation" (appearance) was important to succeed in the position.[406] She was told if she lost weight, she would get the promotion.[407]

The plaintiff claimed that the conduct violated both Title VII and state law barring discrimination based on gender.[408] In particular, she

396. *Id.*
397. *Id.* at 856.
398. *Id.*
399. *Id.*
400. 507 U.S. 604 (1993).
401. *Frank*, 216 F.3d at 856 (citing Arnett v. Cal. Pub. Employees Ret. Sys., 179 F.3d 690, 696 (9th Cir. 1999), *vacated and remanded on other grounds*, 528 U.S. 1111 (2000)).
402. *Id.*
403. *Id.* at 857.
404. *See* Marks v. Nat'l Commc'ns Ass'n., 72 F. Supp. 2d 322, 331 (S.D.N.Y 1999).
405. *See id.* at 325.
406. *Id.* at 331.
407. *Id.* at 326.
408. *Id.* at 325.

claimed that, for the position, the employer was applying different weight standards for men and women.[409] Her problem was that the employer presented a legitimate, nondiscriminatory reason for its decision.[410] The employer contended that appearance was important to the position, and also introduced testimony that it did not have overweight men in the position.[411] The court found in favor of the employer because the plaintiff was unable to provide any specific evidence of the identity of the men in the position who were overweight.[412]

409. *Id.* at 327.
410. *Id.* at 331 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).
411. *Id.*
412. *Id.* at 334.

V. CONCLUSIONS

Table 1 briefly summarizes the major conclusions of this article on the current rights of employers in designing appearance policies for their employees. While no set of implied recommendations is a guarantee against legal action, the table contains guidelines that follow legal precedent.

TABLE 1:
EMPLOYER RIGHTS IN DESIGNING APPEARANCE POLICIES

Employer Right	**Limitation**	**Example**
To design appearance policies in general.	The policy must not discriminate based on employees' immutable characteristics or differentially impact members of a protected class. **("Basic Requirement")**	Immutable characteristics include gender, race, color, or national origin.
To design appearance policies that promote an employer's relationships with customers and the public.	Basic Requirement.	At-work restrictions on hair length or hairstyle, facial hair, clothing worn, jewelry or cosmetics, and body weight.
To design policies to ensure that an employee's appearance does not compromise the well-being or performance of that employee or others.	Basic Requirement.	Sexually suggestive clothing.
To design appearance policies that restrict employees from engaging in religious practices on-the-job.	Basic Requirement + the employer must offer a reasonable accommodation, but is not required to provide one that would cause the employer to suffer an undue hardship	Men wearing beards or ponytail length hair.
To design appearance policies that restrict opportunities for "disabled" applicants.	Basic Requirement + the restrictions must be legitimately tied to essential requirements of the job.	Weight limitations for employees assigned to work in a confined area.
To change an appearance policy.	Sufficient grounds include changes in the employer's perceptions of social conditions.	Men wearing earrings.

Appearance policies that help to define an organizational culture provide important safeguards for the company and its employees. Employees like the predictability, consistency, and dependability that are provided by policies on personal appearance. Managers like the policies because they provide the authority to enforce rules on appropriateness. However, because policies delimit employee behavior, it is imperative that they are legal and non-discriminatory impositions on individual freedom.

The legislation and case law reviewed in this article suggests that the courts have granted managers considerable latitude in developing company policies that require employees to maintain an image that is consistent with the business' organizational culture.[413] Managers may therefore set policies designed to control employee appearance including restrictions on hair length or hairstyle, presence of a beard, clothing style or type, jewelry worn on-the-job, and weight.[414]

However, the courts have been clear in their intent to allow restrictive policies only when they promote the general wellbeing of the company, which associatively promotes the wellbeing of the employees affected by the policies.[415] Additionally, the courts have shown considerable sensitivity to community standards in determining when a policy excessively impinges on individual employee behavior.[416]

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413. *See, e.g.*, Wislocki- Goin v. Mears, 831 F.2d 1374, 1379 (7th Cir. 1987).

414. *See, e.g.*, Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 134-37 (1st Cir. 2004) (noting that Costco's facial piercing policy did not amount to discrimination); *Wislocki- Goin*, 831 F.2d at 1379 (holding that the plaintiff was discharged for failing to follow her employer's legitimate business concerns regarding hair and makeup grooming policies); Fountain v. Safeway Stores, Inc., 555 F.2d 753, 756 (9th Cir. 1977) (holding that Safeway's dress and grooming regulations were not discriminatory in light of their good faith belief that their business required them); *Marks*, 72 F. Supp. 2d. at 336 (holding that the employer's policy on weight was non-discriminatory); EEOC v. Sambo's of Ga., 530 F. Supp. 86, 91 (N.D. Ga. 1981) (holding that being clean shaven is a bona fide occupational requirement for the manager of a restaurant).

415. *See, e.g.*, Craft v. Metromedia, Inc., 766 F.2d 1205, 1215 (8th Cir. 1985) ("[T]he appearance of a company's employees may contribute greatly to the company's image and success with the public and thus that a reasonable dress or grooming code is a proper management prerogative." (citing Fagan v. Nat'l Cash Register Co., 481 F.2d 1115, 1124-25 (D.C. Cir. 1973); La Von Lanigan v. Bartlett & Co. Grain, 466 F. Supp. 1388, 1392 (W.D. Mo. 1979))); Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1091 (5th Cir. 1975) ("Similarly, an employer cannot have one hiring policy for men and another for women if the distinction is based on some fundamental right. But a hiring policy that distinguishes on some other ground . . . is related more closely to the employer's choice of how to run his business . . . .").

416. *See, e.g.*, O'Donnell v. Burlington Coat Factory Warehouse, Inc., 656 F. Supp. 263, 266 (S.D. Ohio 1987) ("Even though defendants have expressed no discriminatory motive for the 'smock' rule, we find that the blatant effect of such a rule is to perpetuate sexual stereotypes . . . . In contrast to the 'hair length' standards for male employees, the smock requirement finds no justification in accepted social norms."); *Willingham*, 507 F.2d at 1087 (accepting the employer's

Thus, business policies designed to promote a community-relevant organizational culture that are respectful of legal rights can serve as constructive safeguards for individual, company, and collective welfare.

contention that, in the community where the employer operated, people did not have a positive opinion of men with long hair).