

Tattoos and Piercings In the Workplace

by Louis Pechman *

It is generally recognized that employers are free to set reasonable dress codes and grooming standards that are business justified and applied in a nondiscriminatory manner. In the case of individuals with tattoos and piercings, there is no federal or state law that affords them explicit protection from employment discrimination on the basis of their appearance. Employees in such cases have met with limited success in trying to establish a connection between their body art and a protected class such as religion, gender, or national origin.

Piercings

In *Cloutier v. Costco Wholesale*¹, Kimberly Cloutier, a Costco cashier who was terminated after refusing to remove her eyebrow piercing, alleged that she was discriminated against based on her religion. Ms. Cloutier refused to comply with Costco's dress code prohibiting facial or tongue jewelry, citing her membership in the Church of Body Modification which practices piercing, tattooing, branding, transdermal or subcutaneous implants, and body manipulation such as flesh hook suspensions and pulling. The Church proclaims that it is aimed at achieving acceptance in society so that its members may "celebrate their bodies with modification." Ms. Cloutier rejected Costco's proposed accommodation to cover her eyebrow piercing with a flesh-colored band-aid, insisting that she be exempted from the dress code because her religion required her to display her facial jewelry at all times.

The First Circuit found that Costco had no duty to agree to Ms. Cloutier's request that she be exempted from the dress code. In the court's view, such an accommodation would pose an undue hardship because it would have an adverse effect on Costco's legitimate business interest in maintaining a "neat, clean and professional image." The court held that a religious accommodation constitutes an undue hardship when it would impose upon an employer more than a de minimus cost, including lost business or non-economic costs. The court recognized that "Costco is far from unique in adopting personal appearance standards to promote and protect its image" and observed that "courts have long recognized the importance of personal appearance regulations." Such dress codes, it added, which are designed to appeal to customer preference or promote a professional public image, have been upheld.

A dress code policy is permissible under federal and state discrimination laws as long as it is enforced on an equal basis. In *Kleinsorge v. Eyeland Corp*², Frank Kleinsorge, an optometrist, was terminated "for cause" for wearing an earring to work in violation of a workplace rule prohibiting men from wearing jewelry. He sued, claiming that the company's policy was discriminatory

because women were permitted to wear earrings while men were not. The District Court, Eastern District of Pennsylvania dismissed the claim because Mr. Kleinsorge did not allege that the company's grooming policies were unevenly enforced as between male and female employees.

The Kleinsorge court relied heavily on a decision by the Eastern District of New York, *Capaldo v. Pan American Federal Credit Union* ³, in which Judge Platt upheld a company policy prohibiting male employees from wearing earrings. Robert Capaldo, a loan counselor, was informed by the company's President that he did not present an appropriate professional image and was terminated for failing to remove his earring. The Court, describing the company's policy as a "minor sex-based distinction in dress and grooming codes," dismissed the claim because there was no allegation that the company's policy was unevenly applied. Specifically, Mr. Capaldo did not assert that female employees at the company were free from all grooming standards or that the company unevenly applied its grooming policies as among male and female employees. Because the company did not impose special appearance rules on one sex and not the other, no inference of sex discrimination arose.

More recently, the Supreme Court of Iowa agreed that a company's grooming code which forbade male employees from wearing earrings at work did not constitute sex-based discrimination. In *Pecenka v. Fareway Stores* ⁴, Inc., Michael Pecenka, a Fareway Stores employee was terminated for refusing to remove his ear stud while he worked. The court rejected Mr. Pecenka's claim of disparate treatment, noting that the discrimination laws "were not meant to prohibit employers from instituting personal grooming codes which have a de minimus affect on employment." Because the court concluded that the earring policy did not rise to the level of sex-based discrimination, the company did not need a business justification for it. The court also dismissed the claim of "sex-plus" discrimination, because wearing an earring is not an "immutable characteristic," does not involve a "fundamental right" such as the right to marry or bear children, and the company's earring policy was not alleged to perpetuate a sexist or chauvinistic attitude in employment that significantly affected employment opportunities.

Tattoos

The unequal application of employment policies is always a source of potential liability for employers. In *Hub Folding Box Company, Inc. v. Massachusetts Commission Against Discrimination* ⁵, Deborah Connor, a clerk at the Hub Folding Box Company, sued her employer for gender discrimination and retaliation. Although a male employee was not required to cover his Navy tattoo, Ms. Connor was told to cover a heart-shaped tattoo on her forearm or be terminated. The company was concerned that customers who saw Ms. Connor's tattoo would have a negative reaction because a tattoo on a woman

"symbolized that she was either a prostitute, on drugs, or from a broken home." In the employer's view, women with tattoos were ne'er-do-wells, whereas men with tattoos were heroes. The employer's reasoning, according to the court, was based on outdated gender stereotypes and constituted an unlawful basis for treating men and women differently in the workplace.

Disparate treatment was also the basis of a discrimination claim in *Riggs v. City of Forth Worth* ⁶. Michael Riggs, a police officer, sued the Forth Worth, Texas police department for discrimination because of his Celtic national origin, race, and fundamental right of free expression. While other officers in the bike unit with tattoos were allowed to wear shorts and short sleeves, the department claimed that Mr. Riggs' tattoos were excessive to the point of being unprofessional. Mr. Riggs' tattoos included a Celtic tribal band, a Celtic design that included his wife's name, a mermaid, a family crest, the cartoon character Jessica Rabbit, and a two-foot by two-foot full color rendering on his back of St. Michael spearing Satan. The court found that Mr. Riggs failed to provide any evidence that the department's reasons for requiring him to wear long sleeves and pants or for transferring him out of his unit were discriminatory.

The nature of the images depicted by tattoos weighs in the balance where claims of religious discrimination are made. In *Swartzentruber v. Gunite Corporation* ⁷, Sheldon Swartzentruber, a member of the Church of the American Knights of the Klu Klux Klan, sued his employer for religious discrimination after being terminated because of his tattoo, which extended from his elbow to his wrist, depicting a hooded figure standing in front of a burning cross. The court held that the company reasonably accommodated Mr. Swartzentruber's asserted religious beliefs by allowing him to continue working so long as he covered his tattoo. Any alternative accommodation, the court suggested, would have imposed an undue hardship on both the company and Mr. Swartzentruber because the tattoo offended his co-workers and made them uncomfortable. Moreover, the court held that a claim for hostile environment harassment could not succeed because any harassment was a result of self-identification as a Klu Klux Klan member, not because of religious beliefs.

Constitutional Issues

Prohibitions against tattoos in the workplace have also been challenged on First Amendment grounds. Courts which have considered the issue have found that tattoos are not protected speech under the First Amendment. For example, the Eighth Circuit concluded that, "the tattoo is nothing more than 'self expression,' unlike other forms of expression or conduct which receive First Amendment protection." ⁸ Because tattoos are not protected expression, an employer must show merely that the challenged classification is rationally related to a legitimate state interest, rather than having to meet the more

stringent strict scrutiny standard.

Even when a tattoo is deemed speech on a matter of public concern, the public interest at issue has been found to outweigh the employee's interest in displaying their tattoo. For example, in *Baldetta v. Harborview Medical Center*⁹, John Baldetta, an HIV positive hospital employee, was terminated after refusing to cover a tattoo saying "HIV- positive." In finding that the hospital's interest in facilitating patients' recovery outweighed Mr. Baldetta's interest in "speaking" on a matter of public concern, the court relied on the opinion of doctors who concluded that display of the tattoo could cause stress in patients and hinder their recovery.

Employees have also failed to establish that the right to display tattoos is protected by the First Amendment right to free association and privacy. In *Montoya v. Giusto*¹⁰, a group of corrections deputies alleged that their First Amendment rights were violated after they were terminated for displaying tattoos which read "Brotherhood of Strong." The District Court for the District of Oregon found that the decision to wear the tattoos did not enjoy constitutional protection because the tattoos, which signified "a loosely knit friendship of weight lifters," was not the kind of political, social, economic, educational, religious, or cultural association protected by the First Amendment.

Statutory Protection

A few local jurisdictions have enacted legislation prohibiting discrimination on the basis of appearance. The District of Columbia has prohibited discrimination on the basis of "personal appearance."¹¹ Similarly, the City of Santa Cruz, Calif., has a statute barring discrimination on the basis of "physical characteristics." A unique statute in Madison, Wisconsin classifies "physical appearance" as a protected class, defining it in terms of immutable characteristics, such as height, weight, and facial features, but also includes mutable characteristics like hairstyle, beards, and manner of dress.

Although Wisconsin's statute protects appearance, employer requirements which are uniformly applied "in a business establishment for a reasonable business purpose" are exempted. The breadth of protection afforded by this statute was tested in *Sam's Club Inc. v. Madison Equal Opportunities Comm'n*, wherein the Madison Equal Opportunities Commission ("MECO") decided that Sam's Club had violated the ordinance by terminating an employee who wore an eyebrow ring in violation of company dress code. The Wisconsin Court of Appeals reversed, stating "Sam's Club attempts to project ... a conservative, no frills, no flash image for its business; it does so because Sam's Club wants to convey to customers that they are getting the best value for their money." The court noted it was undisputed that facial jewelry and

eyebrow rings in particular do not convey a conservative image. Inasmuch as Sam's Club's prohibition came within that exception of a "reasonable business purpose," its decision to terminate was held to be legal.

Conclusion

In sum, individuals with piercings or tattoos have limited rights in the workplace. It is the rare case where a protected characteristic of an employee is so inextricably linked with a piercing or tattoo that it implicates legal interest. Underlying this lack of protection is that tattoos and piercings are neither explicitly protected by statute nor immutable characteristics. Rather, tattoos and piercings are voluntary body art which an employer may choose to exclude from the workplace.

Endnotes

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1. 390 F.3d 126 (1st Cir. 2004).
2. No. Civ. A. 99-5025, 2000 WL 124559 (E.D.PA. Jan. 31, 2000).
- 3.No. 86 Civ. 1944, 1987 WL 9687 (E.D.N.Y. Mar. 30, 1987).
4. 672 N.W. 2d 800 (2003).
5. 750 N.E.2d 523 (Mass. App. Ct. 2001).
6. 229 F. Supp.2d 572 (N.D. Tex. 2002).
7. 99 F. Supp.2d 976 (N.D. Ind. 2000).
8. Stephenson v. Davenport Comm. Sch. Dist., 110 F.3d 1303 (8th Cir. 1997).
9. 116 F.3d 482 (9th Cir. 1997).
10. Civ. No. 02-446-JE, 2004 WL 3030104 (D. Or. Nov. 24, 2004).

11. D.C. Human Rights Act, Sections 1-2512 (1981).
12. Santa Cruz, California, Ordinance 92-11 (April 28, 1992).
13. Madison General Ordinance, § 3.23(2)(bb).
14. 266 Wis.2d 1060, 668 N.W.2d 562 (Wis. Ct. App. 2003).