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# Designing a Dress Code

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*Designing a dress code is essential for creating and maintaining your company's image and fostering a positive work environment. Dress codes, however, are often subject to legal challenges. Discrimination lawsuits based on gender, racial, or religious discrimination can lead to lengthy litigation. Other challenges arising from an employee's right to free speech or issues surrounding casual day attire can also spark debate over a company's dress code. Carefully designing, implementing, explaining and enforcing the dress code can help avoid litigation.*

Designing a dress code for the office can be an employer's most difficult challenge. Dress codes can create, establish, or maintain an appropriate image for a company. However, application and enforcement of dress codes can lead to employee friction. Improperly designed dress codes can also create legal challenges for the company. While a dress code may foster a positive work environment, maintain a company's image, or protect its workers, dress codes may become subject to lawsuits. To avoid allegations of discrimination, dress codes must be carefully designed.

## DRESS CODES SUBJECT TO REVIEW AND CHALLENGES

Dress codes can be subject to review or litigation under both state and federal law. They can be challenged under the 1964 Civil Rights Act, and the First and Fourteenth Amendment allowing freedom of expression and right to due process.

Title VII of the Civil Rights Act of 1964 makes it unlawful to discriminate against individuals regarding compensation, terms, conditions, or privileges of employment based on an individual's race, color, religion, sex or national origin.<sup>1</sup> Title VII imposes a burden on employers to reasonably accommodate its employees, unless the employer can show it is unable to do so without hardship.<sup>2</sup>

Dress codes are most commonly challenged when the code violates a person's civil rights, whether the rights include freedom of expression or freedom of religion. Challenges raising freedom of expression or freedom of religion are tested under the standards of the First and Fourteenth Amendments, particularly when government employees are subjected to dress codes. Section One of the 14th Amendment provides that states shall not "deprive any person of life, liberty, or property,

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without due process of law." If a due process challenge is made to a dress code, the court will engage in analysis whereby it will review the dress code and determine if there is a sufficient reason or purpose to justify the code. Courts will often look to see whether the challenged policy is facially neutral. Concerns regarding safety or an employee's well-being will typically trump any challenge to a dress code.

Another major area of litigation centers on sexual discrimination. In discrimination cases, the Supreme Court has found that certain groups or classes of people enjoy a protected status. These classes include: gender, race, and religious affiliation.

For an employee to show a case of discrimination, the employee must show that he or she:

- Is a member of a protected group (gender, race, religion);
- Was subject to an adverse employment decision;
- Was qualified for the position; and
- Was treated differently from similarly situated members of the unprotected class.<sup>3</sup>

To prevail on a discrimination claim, a party must prove all four elements. Once all four elements are proven, the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for taking the challenged action.

If an employee challenges a dress code, the employee must show that he or she is a member of a protected class and that based on the application or enforcement of the dress code, that he or she was subject to an adverse employment discrimination. Most challenges surface after an employee is written up, reprimanded, or asked to leave work without pay. There are some cases where an employee is fired or quits the company, alleging that the decision was based on non-compliance with the company's dress code. To maintain a successful suit, the employee must also show he or she was treated differently from similarly situated employees.

A lawsuit based on a dress code will not automatically void the dress code. Rather, an employer then has the ability to provide or explain the company's dress code. The employer also has the ability to explain why any challenged action was taken. An employer may present evidence regarding equal application of the dress code or provide nondiscriminatory reasons, including safety.

The typical dress code challenge involves allegations of discrimination. Unfair application of the dress code to men and women, and failure to offer accommodations to those practicing their religion present the majority of challenges, while other allegations center on racial or political discrimination or discrimination against those with a disability.

## GENDER DISCRIMINATION

While many dress codes will have different implications for men and women, the perfect dress code can be equally applied to both sexes. A dress code should not differentiate or impose different standards on either male or female employees.

Uniforms can present a major challenge. A dress code requirement or uniform cannot require that women only wear skirts or dresses. The definition of a uniform is not limited to actual "uniforms," but also prescriptions regarding the type of clothing that an employee is required to wear. Dress codes cannot require that female workers wear uniforms, while male workers are permitted to wear business dress. Some federal courts have found that employers who require women to wear revealing clothing, when there is no reasoning for it, can also be subject to a discrimination claim. One case challenged the Hooter's Restaurant requirement that its waitresses wear revealing uniforms. A court can look at whether the job description involves the serving of food or the entertainment of patrons. Understanding the job descriptions of employees is essential to developing an adequate dress code.

The Ninth Circuit Court of Appeals recently upheld a requirement that female employees wear make-up. Harrah's Casino instituted a dress code policy that detailed that all employees wear black pants, white shirts, and sensible black shoes. The objection to the policy arose from the requirement that female employees wear some make-up, while male employees were not allowed to wear any make-up.<sup>4</sup> The dress code, as detailed in the court's opinion, included the following requirements:

### ***Males:***

- Hair must not extend below top of shirt collar. Ponytails are prohibited.
- Hands and fingernails must be clean and nails neatly trimmed at all times. No colored polish is permitted.
- Eye and facial makeup is not permitted.
- Shoes will be solid black leather or leather type with rubber (non skid) soles

### ***Females:***

- Hair must be teased, curled, or styled every day you work. Hair must be worn down at all times, no exceptions.
- Stockings are to be of nude or natural color consistent with employee's skin tone. No runs.

- Nail polish can be clear, white, pink, or red color only. No exotic nail art or length.
- Shoes will be solid black leather or leather type with rubber (non skid) soles.
- Make up (face powder, blush, and mascara) must be worn and applied neatly in complimentary colors. Lip color must be worn at all times<sup>5</sup>

Jespersion opposed the makeup requirement, as she felt degraded and demeaned. Represented by the Lambda Legal Defense and Education Fund, the veteran bartender challenged the Harrah's policy, citing that it created a greater burden on women than men.

A panel of 11 judges found that the policy did not impose an unequal burden on females. "Our settled law in this circuit, however, does not support Jespersen's position that a sex-based difference in appearance standards alone, without any further showing of disparate effects, creates a prima facie case."

In ruling that the make-up requirement did not create an unequal burden, the court reconciled its decision with prior decisions. In the case *Gerdom v. Cont'l Airlines, Inc.*,<sup>6</sup> the same court found that a weight requirement imposed on female flight attendants created a burden that was not similarly placed on male flight attendants. Continental did not regulate the weight of its male flight attendants, drawing a challenge from its female employees. Unlike Harrah's, which stated that it had similar requirements for men and women employees to create a similar professional image, Continental in its case argued that its policy was "justified by its 'desire to compete [with other airlines] by featuring attractive female cabin attendants[,] a justification which this court recognized as 'discriminatory on its face.'" The court found that Continental wanted to create a sexy image for the airline, while Harrah's did not offer up a similar justification.

Regulating hair lengths and jewelry can present a problem when there are different standards for male and female employees. Some courts have upheld different standards for men and women, regarding differing hair lengths,<sup>7</sup> while other courts have overturned a dress code policy when freedom of expression was raised.

In the case of *Coia v USAir, Inc.*, a male employee sued the airline alleging that the company's dress code policy allowing female employees to wear ponytails and earrings, while forbidding male employees to do the same, was discriminatory. The court did a survey of all seven United States Courts of Appeals that had considered the issue of different grooming requirements for male and females, and the court found that an employer has the right to establish and enforce different grooming requirements, so long as they are equally enforced. The court cited

the Court of Appeals for the Third Circuit finding that "dress codes are permissible under Title VII as long as they, like other work rules, are enforced even-handedly between men and women, even though the specific requirements may differ."<sup>8</sup>

One Ohio court, in the 1970s, did find that an employee has the right to wear his hair long.<sup>9</sup> The employee claimed that the dress code, which restricted his length of hair, violated his right of free speech. The court found that matters of personal grooming, if representative of a philosophy, idealism, or a point of view, are protected.

## RELIGIOUS DISCRIMINATION

Employers must be cognizant that their dress code does not create any racial or religious discrimination. Accommodations must be made within dress codes for employees who want to follow or practice religious tenants.

An employee's right to practice their religious beliefs is established under Title VII of the Civil Rights Act of 1964, and the First and Fourteenth Amendments. Title VII provides:

all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.<sup>10</sup>

The Supreme Court has found that Title VII imposes a duty on employers to provide reasonable accommodations for employee's religious beliefs and observances, unless the employer can show that it is unable to do so without hardship to the business or safety of the employee.<sup>11</sup>

In 2004, an employee at Walt Disney World sued Disney regarding their dress code. The lawsuit was Disney's first-ever challenge to the employee dress code, which designates the uniforms all employees must wear to maintain the Disney image.

The Disney employee wanted to wear a hijab, or headscarf, as a sign of modesty. She was employed within the Caribbean Beach Resort as a bellhop and sales clerk. Disney did not allow wearing any items on the head, other than Disney-issued hats or visors.

The employee had worked at Disney for nearly five years and did not wear the hijab. After returning from maternity leave, she began wearing the hijab. The employee refused Disney's offer to accommodate her preference to wear religious clothing including giving her a "backstage" job at the resort and transferring her to an off-property location, where the dress code does not apply, to continue her sales clerk position. The off-property location resulted in a drop in her sales commission, and she

quit. The employee was fired for failure to remove her headscarf while working on the resort property. The employee then filed suit against Disney alleging religious discrimination.

Other less obvious claims of religious discrimination have occurred in factories and workplaces across America. "Pants-only" policies have spawned numerous lawsuits, including one in Indiana. A female worker, during an interview, informed the company that she could not comply with the company's "pants-only" policy, as her religion required that women wear modest skirts and dresses. The Southern District of Indiana found that the employer established a sufficient safety reason for its policy and allowed the pants-only policy to remain.<sup>12</sup>

Other claims that may be made regard religious freedoms, include body piercings or tattoos. Some employees may claim that tattoos and body piercings are expressions of religious beliefs. However, a survey of case law shows that they have not been claimed or recognized as indications of racial or religious expression. Like all dress code requirements, rules regarding tattoos and body piercings must be applied equally to all employees.

If an employee challenges a dress code based on religious freedom, the employer must show a legitimate reason for the requirement, or that the employer's failure to accommodate is justified by an undue hardship or concern for safety.

## **RACIAL DISCRIMINATION**

Dress codes constitute the least number of complaints in racial discrimination cases. However, dress codes can still present problems when accommodations are not made. No-beard policies often draw racial discrimination challenges, as a number of federal courts have recognized its disparate treatment to African American men. Up to 20 percent of African-American men suffer from PFB (pseudofolliculitis barbae), a skin disease that prevents them from shaving. Courts have found that it may be racial discrimination to not hire or to terminate a male employee if he cannot shave due to PFB. Even if the policy is neutrally applied, accommodations must be made to individuals who demonstrate that they have PFB.

## **DISABILITIES**

While dress codes must be applied to all similarly situated employees, accommodations must be made for employees with disabilities. Courts have addressed cases of temporary and permanent disabilities.

Under the Americans with Disabilities Act, in order to establish a claim of discrimination based on a disability, an employee must show that he or she has a disability, that he or she is a qualified individual, and that he or she was subject to unlawful discrimination as a result

of the disability. If the elements are met, then the employer must provide reasonable accommodation for known disabilities, unless doing so would result in undue hardship to the employer.

One case in Georgia illustrates the problems with employee dress codes and the need to accommodate for a disability. The company had a dress code that did not allow the wearing of tennis shoes or other casual clothing. After undergoing two knee surgeries, an employee came to work wearing shorts, athletic wear, and short skirts that the company found violated the dress code. The employee also wore tennis shoes to work. For failing to comply with the company's dress code, the employee was sent home. She eventually filed suit against the company, claiming that the dress code was discriminating to those with a disability.

The court found that the employer had made reasonable accommodations immediately following the surgery, and for several months thereafter. The court also found that the company tried to discuss the dress code issue with the employee and find alternate means to helping the employee comply with the dress code.<sup>13</sup>

If a company maintains a dress code, considerations must be given to employees who have disabilities. Discussions with affected employees can help avoid legal challenges. However, if a dress code is based on legitimate, non-discriminatory reasons, a dress code requirement can still be upheld.

## **POLITICAL MESSAGES**

Employees may not abandon their political convictions when they enter the workplace. Dress codes that attempt to govern an employee's right to free speech may draw challenges. While the right to free speech is protected, courts have repeatedly found that an employer may restrict an employee's speech within the work environment.

In one case, a court found that an employer was not required to make any reasonable accommodations to an employee who wore an anti-abortion pin. The employee had made a promise to God that she would wear an anti-abortion button. The button measured two inches in diameter and had a color photograph of an 18-20 week old fetus. The photograph was surrounded by a black background with the words "Stop Abortion." The employee did not find the picture or button offensive or grotesque.

The button caused commotion within the work place, including several employees threatening to walk off the job. Another employee at the same facility also wore an anti-abortion button depicting small feet, but the button did not garner any protest or discussion. In response to decreased productivity and employee upset, supervisors offered three alternatives including: (1) wearing the button in the employee's cubicle, but removing the button when the employee moved around the office; (2) covering the button in some manner; or (3) wearing a different anti-

abortion button with a similar message, but without the photograph of the fetus.

The employee filed suit against the company, and an investigation by the Nebraska Equal Employment Opportunity Commission began. The investigation found that although the employee's religious beliefs were sincerely held, the employer had made reasonable attempts to accommodate the employee's religious belief. The employee was instructed to remove the button or leave her employment. The employee did not return to work, and litigation continued.

The District Court of Nebraska found that the employer did not discriminate against the employee, and her message was not protected.<sup>14</sup> The court found that cooperation of both the employee and the employer is required in finding a reasonable accommodation in balancing an employee's beliefs with the needs of an employer's business.

Employees may also wish to wear other political messages, promoting their favorite candidate, speaking out against a war, or espousing a cause. An employer, within reason, can regulate such messages. So long as the employer tries to accommodate reasonable beliefs, a dress code limiting political messages should be upheld. Particularly when dealing with religious or political messages, the dress code prohibitions or restrictions must be enforced equally to all employees. Additionally, if the employer can show that political messages create a disruption in the workplace or dissension among the workforce, the dress code should be able to beat any challenge.

## UNIFORMS AND CASUAL DAY

Several employers attempt to avoid any challenges by establishing a uniform for their employees. While this may create a more neutral environment, it may also cause problems. In addition to considerations for gender, religious or disability considerations, uniforms may also place a burden on employees.

In 2003, Abercrombie & Fitch agreed to pay \$2.2 million to settle a suit regarding the buying and wearing of Abercrombie clothes. Employees were encouraged to purchase and wear the clothing, while working for the retailer. In total, nearly 11,000 employees who worked at Abercrombie & Fitch and Hollister stores in California from 1999 through 2002 were affected.

Abercrombie, like many retailers, had a policy that required store employees to purchase the company's clothes. The California Labor Commission attorney cited the fact that the majority of the workers were making little more than minimum wage. The company later revised its policy, but denied any wrongdoing.

Uniforms cannot place a greater burden on employees than regular day-to-day clothing. Additionally, considerations for cost to employees versus profit to the company must be considered. As with all challenges,



a legitimate safety concern, such as uniforms for factory workers, will balance any other concern.

On the opposite spectrum, casual days, where employees can wear any clothing can also create major legal challenges. Employers must specifically define appropriate casual clothing for its employees. Assuming that the company and the employee have a similar outlook on casual clothing is dangerous. Reprimanding employees for violating a company's dress code policy, particularly on casual day, can lead to legal challenges. Inform employees, in advance of casual days, the requirements under the company's dress code policy.

### **TO ENSURE A LEGAL DRESS CODE, CONSIDER THE FOLLOWING**

#### ***Explain Reasoning***

Dress codes must be based on the work environment. Courts have upheld dress codes that incorporate business-related reasons. Legitimate business reasons that can be integrated into dress codes include safety, maintaining a public image, and promoting a positive work environment. These reasons should be explained to all employees at the time of hiring. Distribute a written policy of the dress code to all new employees, and allow time for questions, comments or further explanation, particularly if the dress code is specific. If dress codes are revised, changed, or modified, re-distribute a copy of the modified dress code to all employees, and allow a forum for questions or concerns.

#### ***Be Specific***

When developing a dress code, avoid using generic terms. Terms such as "business casual" or "business dress" or "casual" can have varied meanings. What may be casual to one employee may be offensive to other employees. Specify exactly what types of clothing are inappropriate or appropriate, and periodically review and revise dress codes to address any problems or concerns experienced. Also review and revise to include new "trends" in your employees' dress. If your business expands to new locations, review the dress code to meet the environment of new locations. If business purposes change, or a new group of employees is added to the business, review and revise the dress code.

#### ***Apply Equally***

Make sure that the dress code is applied equally to all similarly situated employees. Employees often voice concerns that supervisors and managers violate the dress code themselves, while penalizing others for

their failure to follow the code. Have a procedure in place for addressing dress code violations, and regularly enforce all violations.

### ***Accommodate***

Make reasonable accommodations when appropriate. Specifically be prepared to make accommodations regarding religious requests, or modifications for those with any disability

### **NOTES**

1. *See* 42 U.S.C. § 2000e-2.
2. *Ansonia Bd. of Educ. v. Philbrook* (1986), 479 U.S. 60, 68-69, 93 L. Ed. 2d 305, 107 S. Ct. 367.
3. *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817; *Kline v. TVA* (6th Cir. 1997), 128 F.3d 337, 349.
4. *Jespersen v. Harrah's Operation Company* (9th Cir. 2006), 2006 U.S. App. LEXIS 9307.
5. *Id.*
6. *Gerdom v. Cont'l Airlines, Inc.* 692 F.2d 602 (9th Cir. 1982)
7. *Harper v. Blockbuster Entertainment Corp.* (11th Cir. 1998), 139 F.3d 1385; *Coia v. USAIR, Inc.* (E.D. Penn. 1995) 1995 US Dist. LEXIS 2509, 66 Empl. Prac. Dec. P43,462.
8. *Bellissimo v. Westinghouse Electric Corp.* (1985), 764 F.2d 175, 181.
9. *Schneider v. Ohio Youth Comm.* (1972), 31 Ohio App. 2d 225.
10. 42 U.S.C. § 2000e.
11. *Ansonia Bd. of Educ. v. Philbrook* (1986), 479 U.S. 60, 68-69, 93 L. Ed. 2d 305, 107 S. Ct. 367.
12. *See EEOC v. Oak-Rite Mfg. Corp.* (D. Ind. 2001), 2001 U.S. Dist. LEXIS 15621.
13. *Alpert v. Dekalb Office Env'ts, Inc.* (D. Ga. 2001), 206 F. Supp. 2d 1280.
14. *Wilson v. US W. Communications* (D. Neb. 1994), 860 F. Supp. 665, 672.