

Labor Letter

Employers Can Discriminate!

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For some employees who can't figure out why they are not getting that promotion, the answer could be as simple as looking in the mirror. Grooming and personal appearance are playing an ever-increasing role in workplace raise and promotion decisions. A recent *CareerBuilder.com* survey listed the following as the top reasons that would make an employer less likely to offer an employee a promotion:

1. Piercings
2. Bad Breath
3. Visible Tattoo
4. Wrinkled Clothes
5. Messy Hair
6. Casual Dress
7. Too much perfume or cologne
8. Too much makeup
9. Messy office or cubicle
10. Chewed fingernails
11. Too suntanned

Is not giving an employee a promotion because of their bad breath or fingernails illegal? Some employees might think so, but generally speaking, the answer is "no." You are legally free to deny that new corner office to employees because they have bad breath or dress as though they just came from the beach. This is one of those areas where employers actually **can** discriminate, because discrimination based on such characteristics does not violate Title VII – unless issues of race, religion, sex or national origin are intertwined.

Employers do have the option of regulating workplace grooming and appearance. But from our experience many are sometimes reluctant to exercise this right because everyone "knows" that discrimination is unlawful. The truth is you have a lot of control over the dress and appearance of your employees. The key is to carefully draft and consistently enforce a reasonable dress code.

Doing It Right

There is no legal requirement for a dress or appearance policy. Yet, having such a policy in place before a tattoo, nose ring, haircut, or head covering becomes an issue allows you to defend claims of discrimination. More importantly, a well-written policy can help protect a company's public image, promote a productive work environment, comply with health and safety standards, and even prevent claims of unlawful harassment. Having

such policies in place also helps better ensure that highly qualified employees are not overlooked, albeit legally, for a promotion because they are permitted to come to work with messy hair or wrinkled clothes.

A dress and appearance policy based on business needs that is applied uniformly will generally not run afoul of employees' seemingly endless civil rights. Any appearance policy should be based on justifiable business reasons that do not have a disproportionate effect on particular segments of the workforce, particularly those in a protected category. Of course, as with all employment policies, you must ensure that such policies are applied consistently and fairly without regard to an applicant's or employee's race, sex, national origin, religion, color, disability, age, or any other protected status.

Employees are becoming wise to these issues and seeking to challenge grooming- and dress-based decisions by tying them to protected categories such as religion and disability, with some degree of success. As an example, some courts have held that obesity can be considered a disability which calls into question the viability of making employment decisions because of an employee's weight. In fact, Michigan even prohibits discrimination in employment based upon weight by state statute. Other courts have found that no-beard policies discriminate against men who wear beards for religious reasons. It's important to be wise to these risks and be certain to draft their appearance and grooming policies so that they do not encroach upon a protected category.

When faced with grooming- and dress-based cases, courts and arbitrators will balance an employee's desire for self expression with an employer's right to enforce a reasonable dress code necessary to protect the company's image. If done correctly, in most cases the employer's reasonable dress code will prevail. Case in point, in an arbitration decided several years ago, a woman of Mayan descent was required to cover up a nose ring she wore to work in her position as a hospital receptionist.

The employee viewed the nose ring as part of her Mayan cultural heritage whereas the hospital viewed it as a violation of its dress guidelines prohibiting extremes in jewelry. The arbitrator agreed with the employer. He viewed the employer's requirement that the nose ring be covered as reasonable because as a receptionist the employee was the first person to make an impression upon hospital visitors.

The case highlights that courts and arbitrators continue to support an employer's right to enforce a reasonable dress code as long as it does not encroach upon a protected activity and can be tied to reasonable business needs.

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