

APPEARANCE DISCRIMINATION

A Focus on the Law Applicable to Minnesota and Wisconsin Employers

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These materials have been prepared by Jessica Schwie who is an insurance defense litigator, focusing her practice, in part, on the representation of public and private employers. The materials are current as of February 8, 2011. The information herein and the oral statements made at the seminar are disseminated for instructional use only and do not constitute legal advice as to any particular situation.

Introduction

Although appearance discrimination has been around for some time, these types of claims are getting renewed attention. In 2010, the E.E.O.C. experienced a record number of filings; *see* <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>, including many claims in the nature of appearance discrimination. While not proscribed under state or federal law, the Minnesota Department of Human Rights issued a newsletter on appearance discrimination. *See* http://www.humanrights.state.mn.us/education/articles/rs10_2weightlaws.html.

In case law, although the state courts in Minnesota and Wisconsin have not addressed appearance discrimination claims this year or in the recent past, the 8th Circuit issued two decisions addressing the appearance of employees and whether the employer had unlawfully discriminated against those employees; the 7th Circuit issued one. There is case law going back to the 1960's addressing various appearance, dress, and/or grooming policies under federal discrimination laws. The scope of the litigation under federal law, however, appears to be expanding to allow for increased success for employees bringing appearance discrimination claims—employees claiming that they were wrongfully discriminated against because, for example, they were “too hot” or “not pretty enough”. The purpose of these materials is to summarize the law regarding appearance discrimination and the recently issued cases.

I. Case law from the 1970's established the framework for today's appearance discrimination claim.

After the enactment of Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. §§ 2000e et seq., courts saw a subsequent flurry of cases brought in opposition to employers' grooming and dress policies. Title VII does not specifically provide that enforcement of appearance standards constitutes discrimination. Without federal legislation specifically protecting against discrimination based upon appearance, employees are limited to bringing such discrimination claims under statutorily established protections found in Title VII, the Age Discrimination in Employment Act of 1967 (“ADEA”), 29 U.S.C. § 621-634, and the American with Disabilities Act of 1990 (“ADA”), 42 U.S.C. §§ 12101 et seq. In other words, the claims are typically positioned so as to claim that the appearance standard, dress code and/or grooming policy at issue has a discriminatory effect and/or is discriminatorily enforced.

Some states, however, have enacted legislation that specifically allows employees to assert appearance discrimination claim. *See e.g. Ivey v. District of Columbia*, 949 A.2d 607, 615 (D.C. 2008) (contrasting claim by obese employee under federal law versus state law which specifically allowed appearance discrimination claim). Minnesota and Wisconsin have not adopted appearance discrimination provisions. But, the City of Madison, Wisconsin has adopted an ordinance prohibiting discrimination based upon a persons “physical appearance”. *See* City of Madison, Code of Ordinances Ch. 39, available at www.municode.com; and *Sam's Club, Inc. v. Madison Equal Opportunity Comm'n*, 2003 WI App 188, P55 (Wis. Ct. App. 2003) (upholding employer's policy against facial jewelry against appearance discrimination claim under Madison ordinance because there was a legitimate business reason for the policy).

In the early 1970s, the most notable claims under federal law were brought by male employees who wore long hair against employers' hair and grooming standards, and challenges brought by female flight attendants against employers' minimum weight requirements. Long-haired male employees sought redress under Title VII's protection against sex discrimination, alleging the employer prohibitions against long hair on males is sex discrimination if long hair is not also prohibited on females. In the line of long-hair related cases, the most relied upon case was *Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084 (5th Cir. 1975). Willingham filed suit against Macon Telephone Publishing Company for the company's refusal to hire him on the basis of his shoulder-length hair. *Id.* at 1087.

Willingham's claim was presented as a "sex-plus" claim – the classification of employees by sex in addition to one other characteristic. *Id.* at 1088-89. The company's interpretation of its grooming and dress code was that it required employees who came in contact with the public to be neatly dressed and groomed in accordance with the standards customarily accepted by the business community and that Willingham's long hair was inconsistent with generally accepted business practices and therefore in violation of its code. *Id.* at 1087. The court determined that the company's discrimination against Willingham was based upon grooming standards, not sex, and therefore Title VII was inapplicable to the employee's claim. *Id.* at 1088.

In rejecting Willingham's sex-plus claim, the court determined that any sex stereotype will not always constitute the "plus" of a sex-plus claim. *Id.* at 1092. Rather, the "plus" must be an immutable characteristic. *Id.* According to the *Willingham* court, "distinctions in employment practices between men and women on the basis of something other than immutable or protected characteristics do not inhibit employment opportunity in violation of [Title VII]. Congress sought only to give all persons equal access to the job market, not to limit an employer's right to exercise his informed judgment as to how best to run his shop."

As the decade progressed, most circuit courts rejected employees' challenges to grooming policies and refused to find Title VII violations. In most cases, the courts deferred to the employers' business-related decisions.

In addition to challenges brought by male employees in opposition to long-hair grooming policies, the 1970s also saw a flurry of cases involving challenges against airline employers' appearance requirements for female flight attendants. The most significant case here was *Gerdom v. Continental Airlines, Inc.*, 692 F.2d 602 (9th Cir. 1981), *rev'g on merits upon reconsideration en banc*, 648 F.2d 1223 (9th Cir. 1981), *cert. denied*, 460 U.S. 1074 (1983).

In *Gerdom*, the employer airline was sued by Gerdom, a stewardess and representative of other stewardesses. Gerdom was suspended, and later terminated, for exceeding the weight maximum for her height according to Continental's specifications for stewardesses. *Id.* at 603. A stewardess who was 5'2" could weigh no more than 114 pounds. *Id.* at 604. For each additional inch in height, a stewardess could weigh an additional 5 pounds. Stewardesses were weighed on a monthly basis. If, at the monthly weighing, a stewardess weighed in excess of the allowed maximum, she was put on a weight program. As part of

the program, the stewardess was required to lose 2 pounds per week. *Id.* Failure of the weight program would lead to suspension and eventual termination. *Id.*

Continental's stated purpose of the weight program was "to create the public image of an airline which offered passengers service by thin, attractive women, whom executives referred to as Continental's "girls". *Id.* Continental employed a category of employees that were exclusively male, whose duties overlapped with those of the stewardesses', who were known as 'directors of passenger service,' and who were not held to any type of weight restrictions. *Id.*

The *Gerdom* court ruled in favor of Gerdom and other stewardesses. *Id.* at 610. In doing so, the court determined that the weight program was facially discriminatory as it only applied to women. *Id.* at 608. Specifically, the court distinguished this case from others where a grooming policy had different rules for male and female employees but was applied evenhandedly and did not deprive either sex of employment opportunities. *See Barker v. Taft Broadcasting Co.*, 549 F.2d 400 (6th Cir. 1977); *see also Knott v. Missouri Pacific Railroad Co.*, 527 F.2d 1249 (8th Cir. 1975).

The court then rejected Continental's arguments in support of a legitimate business reason. The court rejected Continental's arguments that the stewardesses could not complain of discrimination because their positions are popular and highly-sought-after by prospective employees. *Id.* at 609. More remarkably, the court rejected Continental's defense of its policy on the grounds that it is necessary for the company to be competitive in the airline industry. *Id.* Because the court found the program to be facially discriminatory, and Continental's proffered business reasons were rejected, Gerdom and her fellow stewardesses were successful in challenging the employer's policies based on Title VII protection against sex discrimination. *Id.* at 610.

While Continental lost its right to enforce its weight policy in *Gerdom*, the airline in *Jarrell v. Eastern Airlines*, 430 F. Supp. 884 (E.D. Va. 1977), *aff'd per curiam*, 577 F.2d 869 (4th Cir. 1978), was free to enforce weight limitations. The primary difference—the policy was applied equally to male and female employees. *Id.* at 889-890. Eastern Airlines also fared better than United Air Lines who experienced similar litigation in *Air Line Pilots Ass'n, Internat'l v. United Air Lines*, 26 FEP 607 (E.D.N.Y. 1979) (unpublished). While United Air Lines' policy applied to both males and females, there was evidence to suggest that the policies were not equally enforced as to the sexes. *Id.* at 609. As a result, United Air lines lost out. *Id.*

II. Thirty-some years later the issues in an appearance discrimination claim are relatively the same.

By the end of April 2010, the EEOC settled three suits against employers for religious discrimination claims and filed a fourth where appearance discrimination was at the heart of the discrimination claims, *see* U.S. Equal Employment Opportunity Commission website, <http://www.eeoc.gov/index.cfm>, visited April 19, 2010, and the Eighth Circuit had issued two decisions addressing appearance discrimination, *E.E.O.C. v. Kelly Services, Inc.*, 598

F.3d 1022 (8th Cir. 2010) and *Lewis v. Heartland Inns of America, L.L.C.*, 591 F.3d 1033 (8th Cir. 2010). A handful of suits across the nation exemplified increased claims alleging similar issues, for example:

1. Two Hooters' girls claimed that they were fired for being overweight. For a current summary of the arbitration matter which has been stayed pending appellate review of jurisdictional issues, *see* www.macomdaily.com/articles/2011/02/02/news/doc4d48d941e0797038956819.txt;
2. A New York banker claimed that she was fired being "too hot". To review the media story and to see her picture, *see* <http://gawker.com/#!5553737/meet-the-hot-banker-allegedly-fired-her-for-being-too-hot>; and
3. A flight attendant claimed that she was denied an assignment because she did not dress provocatively. *See Keegan v. Delta Air Lines, and Jet Blue Airways*, 2009 U.S. Dist. LEXIS 42636 (W.D. P.A. May 20, 2009) (unpublished); *see also EEOC v. Abercrombie & Fitch Stores, Inc.*, 2009 U.S. Dist LEXIS 99589 (E.D. Mo. Oct. 26, 2009) (employee asserted religious based reason for failing to adhere to "Look Policy" which she claimed required her to dress too provocatively) (unpublished).

The appearance discrimination claims are still couched in terms of religious discrimination, disability discrimination, gender discrimination, etc. *See e.g. Kelly Services, Inc.*, 598 F.3d at 1028 (religious discrimination); *Lewis*, 591 F.3d at 1039 (gender discrimination); *Xodus v. Wackenhut Corp.*, 619 F.3d 683, 687 (7th Cir. 2010) (religious discrimination). Absent some form of protected class discrimination and/or a state statute specifically prohibiting employment decisions premised on the appearance of an employee, many courts reject these types of claims by employees. *See e.g. Brice v. Resch*, 2011 U.S. Dist. LEXIS 7163 (E.D. Wis. Jan. 24, 2011) (dismissing common law wrongful termination claim where employee alleged that her position was terminated because her superior did not like her body shape). Thus, in making out federal discrimination claims in the nature of appearance discrimination, employees must either advance evidence that:

1. They suffered an adverse employment action because of their appearance as evidenced by comments and the appearance-related comments were made because of a discriminatory animus toward a protected group. *See e.g. Lewis*, 591 F.3d at 1039 (citing supervisor's comments that she wanted employee that was "pretty" with "Midwestern Girl Look"); *Heilman v. Memeo*, 2008 U.S. Dist. LEXIS 49760 (D.Nev. June 27, 2008) (granting summary judgment dismissal of sex discrimination claim where there was no evidence of comments that female employee was unattractive), *affirmed in pertinent part and reversed on other grounds*, 359 Fed. Appx. 773, 2009 U.S. App. LEXIS 25569 (9th Cir. Nev. 2009) (unpublished); or,
2. The appearance, dress, and/or grooming policy, while neutral, had a discriminatory impact. *See e.g. Kelly Services, Inc.*, 598 F.3d at 1028 (policy prohibited loose clothing, but prevented female Muslims who observed headwear obligations from employment). In those cases where the employee intends to claim that the policy has a discriminatory impact upon a particular religion, the employee must also prove that he or she put the employer on

notice of his or her religious beliefs’ and the need for an exception. *See Xodus v. Wackenhut Corp.*, 619 F.3d 683, 687 (7th Cir. 2010).

A. Comments that evidence discriminatory application of appearance standards may result in liability.

Back in 1995, the Minnesota Supreme Court cautioned employers that, while an employer may enforce a dress code as a general matter, it should provide meaningful guidance on how to conform to that policy.¹ *Bilal v. Northwest Airlines, Inc.*, 537 N.W.2d 614, 619 (1995). In *Bilal*, the employer advised the employee that she should dress “like she was going to church” and the Muslim employee claimed religious discrimination. *Id.* at 616. The court rejected the religious discrimination claim, holding that the comment in and of itself was not evidence of discrimination. *Id.* at 619. However, the court took time to caution employers that such comments are not helpful to employees in determining how to appropriately dress. *Id.*

Sixteen years later, the tides have sufficiently changed that not only are comments as vague as those in *Bilal* deemed not to be helpful, they may be deemed discriminatory as the court found in *Lewis v. Heartland Inns of America, L.L.C.*, 591 F.3d 1033 (8th Cir. 2010). Brenna Lewis was employed by Heartland Inns of America (“Heartland”) as a front desk attendant. *Id.* 591 F.3d at 1035-1036. After having done her job “really well” and otherwise making positive impressions upon customers and management, Lewis was promoted to the more prestigious day shift at the hotel. *Id.* at 1036. Heartland’s Director of Operations approved Lewis’s promotion over the telephone and Lewis began working in the position. *Id.*

However, upon meeting Lewis, the Director sought to retract the offer. *Id.* Heartland’s personnel manual did not specify any appearance requirements, but the Director essentially promulgated a policy that Heartland’s staff “should be pretty” and have the “Midwestern girl look.” *Id.* Lewis, however, was deemed to be not pretty enough because she chose to wear loose fitting clothes, including menswear, no make-up, and short hair, resulting in a self-described “tomboyish”, “Ellen DeGeneres kind of look”. The Director ordered that Lewis’ promotion be retracted, that another hiring process be conducted, and that the candidates be subject to a video-taped interview. *Id.* at 1037. Ultimately, Lewis was fired shortly thereafter. *Id.*

Lewis brought a claim against Heartland for its enforcement of a de facto requirement that she, as a female, conform to gender stereotypes in order to maintain her employment. *Id.* At issue was whether Lewis had satisfied the fourth element of a prima facie case of sex discrimination under the *McDonnell Douglas* framework—whether the circumstances permitted a reasonable inference of discrimination. *Id.* at 1040.

¹ For example, female corporate employees might be instructed as to style and dress on the Corporette.com blog, which was even promoted by U.S. District Court Judge Joan Lefkow at last spring’s judges’ panel. Other sites are dedicated to male corporate employee fashion advice, such as ExecStyle.com/FashionBlog. These sites seek to reach the “overachieving chick” and the “well-dressed man,” respectively.

The court determined that the district court had erred in requiring Lewis to demonstrate that similarly situated men were treated differently. *Id.* Rather, the court held that in order to establish appearance discrimination, a female employee need only demonstrate that her employment was adversely affected because she failed to conform to the qualities of a stereotypical female (e.g. failed to wear make-up, heels, skirts, etc.). *Id.* at 1040, 1042 (citations and quotations omitted).

The *Lewis* court stated that “[c]ompanies may not base employment decisions for jobs ...on sex stereotypes”. *Id.* at 1042. A broader, but equally accurate, application of the *Lewis* suggests that application of appearance standards may not be premised on any protected criteria—whether related to sex, race, ethnicity, religion, etc. or other criteria that may be protected by state statute, such as sexual orientation for the Minnesota employer. *See e.g.*, Minn. Stat. § 363A.02, subd. 1(a) (2010) (the Minnesota Human Rights Acts provides for additional classes of protected persons than those classes protected by Title VII); *see generally Garside v. Hillside Family of Agencies*, 2011 U.S. Dist. LEXIS 828 (W.D.N.Y. Jan. 4, 2011) (discussing nuances between discrimination based upon gender stereotyping versus “bootstrapping” a sexual orientation claim under Title VII, which is impermissible). By way of an example, an employer would be ill-advised to terminate a Muslim employee simply because she is wearing religious headwear, absent any other considerations.

B. Legitimate business reason defense may still thwart appearance discrimination claim.

In those cases where the employee alleges that he or she was treated in a discriminatory fashion based upon their appearance, the employer still has available to it the defense that it took the adverse employment action at issue because of a legitimate business reason such as absences, poor performance, violent behavior, etc. *See e.g. Lewis*, 591 F.3d at 1038 (noting that legitimate business reason defense was available, but denying its application where there was little to no evidence of a legitimate non-discriminatory reason for the employees termination). The more difficult case for employers might be those where they have a facially neutral policy, but it allegedly has a discriminatory impact.

In *E.E.O.C. v. Kelly Services, Inc.*, 598 F.3d 1022 (8th Cir. 2010), the Eighth Circuit continued to recognize that employers may have a legitimate interest in promulgating certain appearance standards. Leading up to *Kelly Services*, there had been other Eighth Circuit cases addressing appearance standards and it can be discerned from those cases that while an appearance standard may be adopted, the purpose for doing so must be legitimate. *See e.g. Richardson v. Quick Trip Corp*, 591 F. Supp. 1151 (S.D. Iowa 1984); *Carter v. Bruce Oakley, Inc.*, 849 F. Supp. 673 (E.D. Ark. 1993); *see also* EEOC Compliance Manual § 15: Race and Color available at <http://www.eeoc.gov/policy/docs/race-color.html#VIIB5>.

The question then became what quantum of evidence was necessary to establish a dress code policy as being legitimate. In the last ten years, employers have continuously argued that their selected appearance policy was necessary to project a professional image in order to compete; this argument, however, was no longer carrying the day as it did back in the 70’s. *See e.g. Bradley v. Pizzaco of Nebraska, Inc.*, 7 F.3d 795 (8th Cir. 1993) (rejecting no-beard policy because there was insufficient evidence that it was a business necessity); *Carter v.*

Bruce Oakley, Inc., 849 F. Supp. 673 (E.D. Ark. 1993) (same); *Richardson*, 591 F. Supp. at 1154 (same); and *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 2009 U.S. Dist. LEXIS 99589 (E.D. Mo. Oct. 26, 2009) (rejecting “Look Policy” which required employees to wear clothing similar to that sold in the stores, including short skirts and otherwise revealing attire) (unpublished).

Abercrombie & Fitch came close to having its Look Policy upheld as legitimate on summary judgment, but in order to do so it presented expert and lay testimony that the store’s brand, and therefore the company, would be damaged if the plaintiff-employee was exempted from the Look Policy. *Id.* at *3. Ultimately, however, the court held that while Abercrombie’s evidence was persuasive, a jury would have to decide whether the Look Policy was sufficiently legitimate and that the company did not have to allow exceptions for claimed religious reasons. *Id.* at *4.

The Eight Circuit in *Kelly Services* provides some welcome guidance to employers. The case creates the bright-line rule that a dress code that is “safety-driven” and applied to all employees may be deemed as a matter of law to be a legitimate policy in the face of claimed discrimination. *Kelly Services*, 598 F.3d at 1030.

Kelly Services involves a dress code adopted by Nahan, a commercial printing company. *Id.* at 1023. The work at Nahan requires employees to be on or near machinery that uses fast moving parts that pose entanglement concerns. *Id.* at 1023-24. The purpose of the policy is to “prevent loose apparel from getting caught in the machinery’s moving parts and injuring workers.” *Id.* at 1024.

A Muslim employee of a temporary agency was deemed by that agency to be ineligible to be placed at Nahan because she refused to remove her religious headwear, referred to as khimar, given Nahan’s dress code. *Id.* The E.E.O.C. brought suit challenging the temporary agency’s refusal to refer the Muslim employee to Nahan. *Id.* at 1028. The Eighth Circuit rejected the claim holding that the temporary agency had a legitimate, nondiscriminatory reason for not referring the temporary employee to Nahan—that being that Nahan had a “facially-neutral, safety-driven dress policy prohibiting all employees...from wearing loose clothing or headwear.” *Kelly Services*, 598 F.3d at 1032. Furthermore, the record reflected that temporary employees who had been referred to Nahan and who violated the dress code policy had consistently been rejected, regardless of the reason for violating the dress code. *Id.* at 1024, 1026, 1031-32.

Reviewing the case law, appearance standards are likely to be upheld against appearance discrimination claims where there is evidence that the standard was crafted to fit the unique needs of the employer; and, that if the reasons for the policy are safety-driven, the policy is more likely to be upheld. Finally, an employer generally benefits from documented evidence that the appearance standards have been enforced consistently amongst all employees in similar position. *See, e.g., Heiling v. State*, 1994 Minn. App. LEXIS 727 (Minn. Ct. App. 1994) (unpublished decision) (upholding supervisor’s comments to employee regarding her inappropriate office attire because the supervisor had also commented to a male employee regarding his dress and appearance).