



Tattoo Ink

THE RISING POPULARITY OF TATTOOS AND OTHER BODY MODIFICATIONS CAN LEAD TO FRICTION IN THE WORKPLACE. AS AN EMPLOYER, WHAT ARE YOUR RIGHTS IN LIMITING THOSE INDELIBLY STAMPED?

*T*he culture and employment policies are increasingly in conflict. The personal appearance of employees is of considerable concern to both employers and employees. At some point, employers, including rental dealers, have to assess their attitudes toward employees with tattoos, piercings or other voluntary body modifications. According to the Academy of Dermatology, nearly 25 percent of Americans between the ages of 18 and 50 and more than one-third of all 18- to 29-year-olds have a tattoo—and the percentage is on the rise.

BY ED WINN III

Rental dealers may be more focused on the experience, honesty and work ethic than the appearance of prospective rental employees. Many might gladly hire an account manager with Maori facial tattoos à la Mike Tyson if he or she can deliver a refrigerator to a third-floor walk-up apartment single-handedly. But for dealers who do care about the appearance of the store's work force, what, exactly, are the rules?

There are no state or federal statutes guaranteeing the right to sport tattoos in the workplace. In fact, South Carolina still has a criminal statute on the books outlawing the giving of tattoos in the state. The District of Columbia has a municipal ordinance prohibiting discrimination based on "physical appearance" and the city of Santa Clara, California, prohibits discrimination based on "physical characteristics."

Courts, however, have generally allowed employers to dictate the dress and appearance of employees despite various constitutional challenges brought by employees who did not fit the employer's mold. As a general proposition, employers can have policies concerning dress codes, hair length, the wearing of jewelry for health and safety reasons, to promote a productive work environment and project a positive, professional image to customers and the public.

Employees have made discrimination claims based on the disparate treatment of males and females. Men have sued for not being allowed to wear earrings when the company policy allowed earrings for women. The Iowa Supreme Court in just such a case decided that the earring rule had a minimum impact on employment and did not rise to the level of sex-based discrimination. Several federal courts around the country have agreed. Those courts noted that most discrimination cases have focused on certain immutable characteristics of the employee, like race, sex and national origin—factors over which the employee has no control—and not on mutable characteristics, that is, aspects of a person that can and do change over time.

However, in a 2001 Massachusetts case, a woman sued her company for sex discrimination and won when the company told her that she had to wear long sleeves to cover the hearts tattooed on her arms while a male in the company was not required to cover his Navy tattoos on his arms. The company explained that the reason for the rule was that tattoos on a woman "symbolized that she was either a prostitute, on drugs or from a broken home." The man's tattoos identified him as a hero. The court ruled that the company's policy constituted an unlawful basis for treating men and women differently.

Aggrieved employees have argued that their tattoos are protected under the First Amendment's guarantee of freedom of expression, but courts have consistently ruled that tattoos are not protected speech under

the First Amendment. This is so even when the tattoo bears a political message. In an Ohio case, a nurse bore the tattoo "HIV Positive" and wanted to display it. The hospital said no and the nurse sued. The court ruled in favor of the hospital holding that the hospital's interest in not upsetting patients outweighed the employee's interest in showing the tattoo.

Courts have likewise consistently ruled that policies forbidding tattoos, body piercings and the like altogether or requiring them to be hidden at work do not violate an employee's freedom of expression or privacy rights.

Lately, and perhaps more promising for decorated employees, are claims brought by employees on freedom-of-religion grounds. An interesting example of such a claim comes from a 2004 Massachusetts case, *Cloutier v. Costco Inc.* When she was originally hired by Costco, Cloutier had 11 ear piercings and four tattoos on her upper arms, which she covered with a shirt. After she had worked there for a while, Cloutier joined the Church of Body Modification, which was founded in 1999 (www.uscobm.com). Church members, who number about 1,000, believe in the practice of body modification and manipulation, piercing, tattooing, branding and flesh hook suspension as means of "strengthening the bond between mind, body and soul." Shortly after joining this "church," Cloutier came to work with several eyebrow rings. The Costco dress code provided that employees cannot have any visible jewelry on the face or tongue. Costco offered to let Cloutier cover the rings with a bandage during work or to replace the rings with clear plastic retainers so that the holes would not close up. Cloutier refused these offers, insisting that her religion required her piercings to be on display at all times. Costco fired her and she sued the company for \$2 million, arguing that Costco had discriminated against her on account of her religion.

Determining what is or what is not a religion is never an easy task and the United States First Circuit Court of Appeals admitted as much:

Determining whether a belief is religious is more often than not a difficult and delicate task, one to which courts are ill-suited. Fortunately...there is no need for us to delve into this thorny question in the present case. Even assuming, for argument's sake, that Cloutier established a *prima facie* [evidence that is sufficient, if not rebutted, to prove a particular proposition or fact] case, the facts here do not support a finding of impermissible religious discrimination.



Courts have generally allowed employers to dictate the dress and appearance of employees despite various constitutional challenges brought by employees who did not fit the employer's mold.

It was important to the court that Costco had been willing to accommodate Cloutier's "religious" practices. The court pointed to Title VII in the U.S. Code and noted that an employer need not waive dress codes as religious accommodation when another accommodation is available that balances religious observance with an employer's legitimate business interests.

Costco argued that it had a legitimate business interest in having its employees present a "neat, clean and professional" image and in catering to its customers' preferences. This might have been a harder case for the court had the employee not been so adamant in her refusal to cooperate with the company.

Advice for employers for whom this issue is one of concern is to develop a policy that fits the company's desired image. Offer reasons for the rules so that

employees can understand the company's point of view. Develop the rules so that they focus on reasons like personal hygiene, safety, professional appearance or the company's image. Finally, be sure to apply the policy consistently to all employees.

As the desire to conform in Western culture wanes and the society continues to see the rise of personal expression in all of its occasionally aberrant forms, employers can expect to see candidates with unique and curious habits, modes of dress and lifestyles that employers do not want in their companies and employees do not want to leave at home. So far, employers can dictate reasonable rules for employees' appearance, but the attacks are mounting, the arguments are getting increasingly creative and they will certainly continue into the future. ■

Ed Winn III is APRO's general counsel. His e-mail address is edwinn@mwvmlaw.com.