

We hope the July edition of *The Laboring Oar* is relevant to your business. Please [let me know](#) if there are any topics you would like me to address in future issues.

Dress Codes: No Final Word Yet

By Olivia Goodkin, Esq.

Late last year a federal appellate court decided that a dress code requiring female casino bartenders to wear make-up was permissible. The court in Jespersen v. Harrah's Operating Company held that the dress code did not violate Title VII's prohibition against distinctions made on the basis of sex. The court reasoned that Harrah's also required the male employees to be well groomed, keep short haircuts and neatly trimmed nails.

Jespersen, the bartender, claimed that the make-up policy required her to be all "dolled up" and imposed unreasonable and unequal burdens because it costs money to buy make-up and it takes time to apply it and re-apply it during the day. The court rejected the argument.

The Court Held that Gender Stereotypes Did not Apply

In an earlier case, the court had held that employers cannot require employees to conform to gender stereotypes as a condition of employment. That case involved an accountant at a large firm who was denied partnership because she was viewed as unfeminine. But in Jespersen, the court said that it would not apply the gender stereotype test, as the case was not a sexual harassment case, but rather an appearance and grooming case. Whether the court was correct in making this distinction is open to interpretation.

The Jespersen case is now going to be reheard by a full complement of judges. The ruling may be clarified or overturned. Until then, here are some things to consider when you draft your dress code.

Make the Dress Code as Gender Neutral As Possible

Examples of gender neutral policies include asking all employees to: (1) dress neatly; (2) have clean fingernails; (3) not wear sandals; (4) not wear fragrances; and (5) not wear jewelry on their faces except for earrings. You may wonder about this last requirement. A client of our firm's is an alternative music store. The employees who work there typically have many piercings and tattoos. Some employees' nose, chin, lip and eyebrow rings were a bit distracting. We developed a gender-neutral policy that required employees to remove any jewelry that was not permanently affixed, except from their ears, while on their shifts.

What about "Image" Jobs?

Some of our clients own upscale retail clothing or makeup stores where image is extremely important. You may include a rule that only certain kinds of clothing may be worn, or that employees project a polished look. This rule should be applied even-handedly to both male and female employees. While Jespersen implies that it is permissible to have gender-related policies, you should be sure that the dress code is not unduly burdensome to one gender or other group of persons.



Olivia Goodkin has over two decades of experience representing corporations, individuals and closely-held businesses in employment law and business litigation. She advises on the hiring and termination of employees, wage and hour laws, employment contracts and other employment issues, and she defends companies in wrongful termination lawsuits. Olivia also creates trade secret programs for companies seeking to protect their valuable intellectual property.

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How Does the New Transgender Law In California Impact Dress Code Policies?

Last year a new law concerning gender differences went into effect in California. That law states, rather simplistically, that nothing in the discrimination laws "affects the ability of an employer to require an employee to adhere to reasonable workplace appearance, grooming, and dress standards not precluded by other provisions of state or federal law, *provided that an employer shall allow an employee to appear or dress consistently with the employee's gender identity.*" (emphasis added).

This means that if a person looks like a man, for example, but identifies himself as a woman, he must be permitted to dress like a woman.

I recall years ago getting a panicked call from a client, whose best salesperson, a man, showed up at an important trade show dressed as a woman. He had a letter from his physician explaining that he was undergoing preparation for gender reassignment, which is a lengthy and difficult process. Under California law, it is clear that the employer would need to allow the employee to dress like a woman, although in this case it resulted in extreme confusion to the salesperson's customers and a loss of business.

Let Common Sense and Caution Guide You

The law recognizes that there are immutable physical differences between the genders, such as the fact that men have facial hair. The law permits a policy that addresses one gender's immutable characteristic. Other than for the immutable differences, your dress code policy should treat the genders as equally as possible, and should be enforced with equal vigor to all persons of each gender.

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