New Massachusetts Decision Shaves Employers' Right to Enforce Personal Appearance Policies

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A recent Massachusetts case substantially restricts the ability of employers in Massachusetts to enforce workplace personal appearance or grooming policies when an employee complains that such restrictions conflict with his or her religious beliefs. Employers can deny a request for such an exemption only if they can show that it would impose a real and significant hardship on the company.

Under both federal and state law, an employer must reasonably accommodate an employee's *bona fide* religious beliefs, unless the accommodation would be an undue hardship; that is, would force the employer to incur more than a minimal cost. Under federal law, undue hardship includes both economic costs, such as out-of-pocket expenses, as well as non-economic costs. Accordingly, in the leading federal case, *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004), the U.S. Court of Appeals for the First Circuit (which includes Massachusetts) determined that potential harm to a company's "public image" could be an undue burden that would excuse an employer from having to modify a personal appearance policy.

In guidelines published in July of 2008, the Equal Employment Opportunity Commission (EEOC) disagreed with *Cloutier*, finding that harm to public image alone probably could not justify denying a religious accommodation. (*See* EEOC Guidelines available at http://www.eeoc.gov/ policy/docs/qanda_religion.html.) Still, many assumed that *Cloutier's*holding also guided state law claims in Massachusetts. In fact, the Massachusetts Supreme Judicial Court favorably cited to *Cloutier* several times earlier this year. Nevertheless, on December 2, 2008, the Massachusetts Supreme Judicial Court declined to apply *Cloutier* to Massachusetts state law claims, interpreting state law far more restrictively for employers than its federal counterpart.

In *Brown v. F.L. Roberts & Co., Inc.*, __ Mass. __, 2008 WL 5050172, the employer maintained a policy requiring all employees with customer contact to be clean-shaven and to keep their hair "clean, combed and neatly trimmed." Plaintiff Brown, a Rastafarian, informed his manager that his religion prohibited him from shaving or cutting his hair. Relying on *Cloutier*, the company responded that it was not required to make any exceptions to the grooming policy and re-assigned the plaintiff to a less desirable position that did not involve customer contact.

The court in *Brown* held that Massachusetts law requires an employer to provide a reasonable accommodation unless the employer is able to shoulder the heavy burden of establishing undue hardship. Under federal law, an employer has considerable discretion in determining whether an accommodation would negatively affect its public image, and thus discretion in denying requests for exceptions to these policies. However, the *Brown* decision shows that Massachusetts law is much more rigorous. Indeed, a lower court specifically found that Brown could not make out a claim under the federal statute, even though he did have a case under Massachusetts law. According to the *Brown* decision, under Massachusetts law, an employer must have *specific* proof that an exception to a personal appearance policy would cause real, tangible harm to the company's business or image. The threshold for proving this is high: in *Brown*, for example, the fact that nine to twelve customers commented on employees' facial hair, and profitability actually increased after institution of the personal appearance policy, did not establish that modification of the policy would be an undue hardship.

Lessons for Massachusetts Employers

Brown does not hold that personal appearance or grooming policies are *per se* invalid. However, if a personal appearance policy conflicts with an employee's religious beliefs, unless an employer can establish an undue burden, Massachusetts state law may require that the employer grant the employee an exception. Employers should understand that denying an employee an exception to a personal appearance policy comes with great risk, absent strong, tangible proof of the harm the accommodation would cause to the company.

If an employee expresses a concern about a personal appearance policy based on his or her religion, a Massachusetts employer should not refuse the request out of hand. Instead, consider engaging the employee in a polite and informal dialogue regarding his or her exact religious requirements or restrictions. You may want to involve human resources or the employee's supervisor, but be mindful of the employee's privacy regarding this sensitive subject. Explore whether an accommodation can be reached that would be agreeable to both parties. For example, an employee who cannot cut his hair may wear it tucked inside his shirt, or under a hat. An employee who wears a headscarf could color-coordinate it with a company uniform.

If the employee insists upon a particular accommodation (such as an exemption from a personal appearance policy), carefully consider whether that accommodation would pose an undue burden. Remember that you will need to show concrete, tangible harm, such as a threat to health or safety, or actual, verifiable damage to the business. Potential losses, alone, may not be enough. If there is real evidence of undue burden, you may deny the accommodation; otherwise, it will probably need to be granted. Be sure to document the accommodation process, including the employee's initial request for accommodation, the interactive dialogue regarding alternatives, and any assessment of burden by the company.

Going forward, periodically re-examine how an accommodation is affecting your business—an accommodation that once appeared reasonable may prove to have a significant adverse impact on your business in the future.

If you have any questions about this complicated issue, consult experienced legal counsel.

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