North East Journal of Legal Studies

Volume 8 *Spring 2000* Article 5

Spring 2000

The Long and the Short of It: Are Employer Grooming Codes Discriminatory?

Sharlene A. McEvoy

55. *Planned Parenthood of Southeastern Pa v. Casey*, 505 U.S. 833 (1992).

56. See *Washington v. Glucksberg, supra* note 47.

57. See *Skinner v. Oklahoma, supra* note 50.

58. See *Skinner, supra* note 53 at 541.

59. See *Eisenstadt v. Baird, supra* note 50, re: distribution of contraceptives, *Carey v. Population Servers Int'l*, 431 U.S. 678 (1977) re: access to contraceptives.

60. 478 U.S. 186 (1986).

61. *Id.*

62. Aldous Huxley, *Brave New World* (Times Inc. Books 1963).

63. It has been reported on the Internet that a company called Genetic Savings and Clone will clone your pet. See http://www.discovery.com/news/briefs/20000218/tech_petclones.html.

64. See also Margaret Talbot, *Clone of Silence,* New York Times Magazine, April 16, 2000, at 21.

THE LONG AND THE SHORT OF IT: ARE EMPLOYER GROOMING CODES DISCRIMINATORY?

By

Dr. Sharlene A. McEvoy*

As the country becomes more diverse, employers have seen more variations in personal appearance that may clash with the corporate culture. This paper will analyze a recent Connecticut case in which an employee claimed a discriminatory dismissal based on an unequal application of the company's dress code.

INTRODUCTION

As the country becomes more diverse and individuals exercise their personal freedom, the workplace has seen a diversity of appearance and clothing styles. The "Man in the Gray Flannel Suit," a 1950's stereotype of business dress no longer applies as the workforce dresses more casually.

Can an employer fire an employee for wearing clothing the employer deems inappropriate, or can an employer dismiss a male employee for wearing long hair when other female employees can wear such a hairstyle?

Both of these issues were addressed in a recent Connecticut case, *Hart v. Knights of Columbus*[1] which arose under Connecticut's *Fair Employment Practices Act*,[2] the state counterpart of Title VII of the Civil Rights Act of 1964. Such workplace issues are sure to recur in future cases as more and more employees claim that they are victims of such discrimination.

Robert Hart was a male college graduate holding a B.A. degree in Business Management, who sued his employer, the Knights of Columbus, a New Haven based religious organization. Hart was hired as a file clerk on November 10, 1996 and a few months later ran afoul of the Knights' dress code which provided in part that:

> "Dressy shorts or shorts of reasonable lengths may be acceptable only if they are part of a total outfit that presents a professional business-like appearance."[3]

*Professor of Business Law, Fairfield University, Fairfield, Connecticut

On June 11, 1997, Hart wore shorts to work. As a result of his fashion choice, the Director of Human Resources Thomas Lynch called him into his office and in front of at least one other person ordered Hart to stand on a chair so that he (Lynch) could look at Hart's legs. Lynch then concluded that Hart's shorts were "not appropriate business attire."[4] And further stated "We would never want somebody like you to represent our company." Lynch also asked Hart the name of the College he had attended so "We don't donate any money to them."[5] Lynch conceded that if Hart were a woman there would be no problem with wearing the shorts.

The next day, June 12, 1997, when Hart wore shorts to work, Lynch again summoned Hart to his office and informed him that shorts were "not appropriate for men" and suspended him for the day without pay.[6]

Hart brought suit claiming that he was constructively discharged and forced to seek another job. Hart claimed that the Knights of Columbus enforcement of its written dress policy discriminated against him based on gender.[7] He argued that the defendant had a written dress policy that permitted the wearing of shorts but that he was not allowed to wear them because he was a man and not a woman.

DISCRIMINATION CLAIM

Hart brought his action under the State's Fair Employment Practices Act. As interpreted in another Connecticut case, *Pik Wik Stores, Inc. v. Commission on Human Rights and Opportunities*,[8] the purpose of 31-126a of the Connecticut Law is to prohibit employer discrimination based on such immutable characteristics as race, color, national origin or sex.

In the *Pik Wik* case, the issue was the chain's grooming policy, which required male employees to have "neat well groomed hair, off the collar and above the ears", but these restrictions did not affect female employees.[9]

An applicant for the job with the chain refused to comply with the grooming policy and was not hired prompting him to file a discrimination suit.

The Court found that a hiring policy which applies to issues such as grooming codes or hair length was related to an employer's decision about how to run a business rather than to equal opportunity. The *Pik Wik* Court stated that the plaintiff was denied a job as a result of a conscious choice not to cut his hair and not because of his sex.[10]

Then both the Courts in *Pik Wik* and in the Knights of Columbus cases could find no discrimination based on an immutable characteristic.[11]

BREACH OF CONTRACT

Hart alleged that the Knights of Columbus breached its written contract with him by not allowing him to wear shorts as authorized in the written dress code. The court found that a written policy can some time give way to an expressed or implied contract between the employer and employee but in this case the employer, Knights of Columbus had clarified the fact that its policy did not apply to both its male and female employees. Hart thus failed in the cause of action.[12]

EMOTIONAL DISTRESS CLAIMS

Hart alleged both the intentional and negligent infliction of emotional distress in his complaint against the Knights of Columbus.

Under Connecticut cases, [13] four elements must be established before the plaintiff can prevail on a claim of an intentional infliction of emotional distress:

1. That the defendant intended to inflict emotional distress or that he knew or should have known that emotional distress was likely to result.
2. That the defendant's conduct was extreme and outrageous.
3. That the defendant's conduct was the cause of Hart's distress.
4. That the plaintiff sustained severe emotional distress.

The Knights of Columbus denied that its conduct with respect to enforcement of the dress code was outrageous.[14] In general, the tort of the intentional infliction of emotional distress will lie only when the defendant's conduct:

> "Exceeds all bounds usually tolerated by decent society, of a nature which is especially calculated to cause and does cause mental distress of a serious kind."[15]

The Court believed that the conduct of Director of Human Resources Lynch fell far short of that standard even if it could be it could be considered "reprehensible."[16]

The Court also found Hart's claim of the negligent infliction of emotional distress failed because under Connecticut case law[17] the tort will not lie unless there is a termination of employment. As Hart was not fired by the Knights -- he resigned – the claim failed. Hart countered that he was the victim of a constructive discharge and so the requirement of "termination" was

satisfied but the Court disagreed that Hart's resignation was a constructive discharge. A constructive discharge means that an employer has made the employee's working conditions so intolerable that a reasonable person in the latter's shoes would feel compelled to resign.[18] The Court did not find that the Knights' made Hart's working conditions so difficult that he was forced to leave his job.

Thus Hart's complaint failed on four theories: the state's anti-discrimination law, breach of implied contract and the intentional and negligent infliction of emotional distress.

OTHER CASES

Based on the outcome of the *Hart* case it would appear that employees will have little leverage in challenging what they regard as unfair enforcement of a company dress code.

Frank J. Kleinsorge, an optometrist filed suit in U.S. District Court in November 1999 contending that he was fired from Eyeland Optical Center in Stroudsburg, Pennsylvania because he wore an earring in his ear. He worked at Eyeland for two months before being fired in April, 1999. Kleinsorge's lawyer noted that his client was wearing an earring when he was interviewed for the job and no one advised him that it was inappropriate. The owner of Eyeland, later informed Kleinsorge that he could not wear the earring which his lawyer insisted was a "style choice" that Kleinsorge made. As his lawyer stated, "It's the way he wants to look."[19]

The Kleinsorge case differs from Hart's in two important ways. First, Kleinsorge was fired by his employer while Hart resigned his job. Second, Kleinsorge wore the earring during the job interview so his potential employer had ample warning that Kleinsorge sported an earring that violated company rules. Clearly Hart wore shorts only after he was employed.

Both cases have in common the claim that if Hart and Kleinsorge were females they would be free to wear the shorts and the earring in the work place prompting both to claim that they were victims of gender discrimination. If the notion of "immutable characteristic" is applied to the Kleinsorge case, his suit will be unsuccessful because he can change his appearance by removing the earring. It appears that Eyeland's anti-earring policy is a matter of choice and not a denial of equal opportunity.

While the wearing of earrings has become a more prevalent style for men in recent years; so too has the wearing of tattoos by women as well as the fashion of body piercing by both sexes.

Can an employer lawfully discharge an employee who is adorned with visible tatoos or pierced body parts? As a result of the Hart case, the answer appears to be "yes." Employers can impose appearance codes because it is within their discretion to decide how their businesses should be run and what kind of appearance their employees should present as their representatives. Can an employer decline to hire or dismiss a tattooed female employee while declining to dismiss a tattooed male employee? Again the answer would appear to be "yes." The female employee might argue that the presence of tattoos is an "immutable characteristic" but the courts would not likely accept the immutability of a tattoo as comparable to the immutability of race, color, national origin or sex. Indeed, the acquisition of a tattoo is a voluntary undertaking while the latter qualities are things that are beyond the control of the employee.

CONCLUSION

As lifestyles change and fads come and go, employers are sure to be faced with decisions regarding employees whose physical appearance differs from the employer's idea. In the 1800s, pierced earrings were popular but went out of style in the early 1900s.[20] Pierced ears were once regarded as a sign that someone was part of a lower socio-economic class. In the iconoclastic 1960s, pierced ears for women made a comeback and in the 1990s the piercing of one ear and wearing of earrings became a male fad. Now many men and women have multiple piercings on the ears as well as eyebrows, lips, tongues and navels. Tattoos, once associated with naval service, were also a rite of passage for men. They too were considered a mark of lower class status, but today, tattoos are ubiquitous on both young males and females of all social classes.[21]

Despite the presence of such fashion trends, it does not appear that the Courts will allow discrimination laws to protect such fads in contravention of allowing an employer the discretion to dictate how a member of his/her workforce present themselves to the public.

ENDNOTES

[1] No. CV 98-04171125 25 Conn. L. Rptr. No. 9 304 (November 1, 1999).

[2] 46a – 60 et.seg.

[3] 25 Conn. L. Rptr. No. 9, 304.

[4] Id.

[5] Id.

[6] Id.

[7] 25 Conn L. Reptr, No. 9 305.

[8] 170 Conn. 327, 365 A. 2d.1210 (1976).

[9] 25 Conn. L. Rptr. No. 9, 305.

[10] Id.

[11] *Willingham v. Mason Telegraph Publishing Co.* 507 F. 2d 1084 (5th Cir.).

[12] 25 Conn. L. Reptr. No. 9, 305.

[13] *Honan v. Dimyas,* 52 Conn. App. P.3, 133 (1999) and *Delaurentis v. New Haven,* 220 Conn 225, 266-267, 597 A 2d 807 (1991).

[14] 25 Conn.L.Rptr. No. 9, 305.

[15] N. Prosso and W. Keeton, *Torts* (5th Ed. 1984 12 A 60). Quoted in,42 Conn.Sup. 17, 20 (1991).

[16] 25 Conn. L. Rptr. No. 9 30, 6.

[17] *Morris v. Hartford Courant,* 200 Conn 672, 682 (1986).

[18] 25 Conn. L. Reptr. No.9 306 quoting *Seery v. Yale New Haven Hospital,* 17 Conn. App. 532, 540 (1982).

[19] "Man Says Earring Cause of Firing," *Waterbury Republican,* Nov. 5, 1999 at A-2.

[20] Amy Welch, "Fashion: Boys Catching Up with Age-Old Need to Impress," *Waterbury Sunday Republican,* Jan 16, 2000. At 3G.

[21] Id.

ELECTRONIC CONTRACTS: ARE THEY ENFORCEABLE?

by

Diana D'Amico Juettner* and Roy J. Girasa

Introduction

The use of the Internet by consumers has increased dramatically since 1995. In June of 1995, there were less than 1.5 million users; however, one year later the number of users had grown to 20 million. The increase in the number of users has contributed to the growth of business to consumer sales on the Internet. By 1998, approximately 10 million households purchased a product online and the volume of sales was around $66.4 billion. The volume of sales for 1999 has been estimated at $66.4 billion with sales reaching $177.7 billion by 2003.[1] This phenomenon has propelled the use of electronic contracts by those who provide computer-generated goods and services to those who wish to take advantage of the new technology. This expansion of electronic commerce is compelling changes in contract law.

There are two types of contracts that can be entered into online. The first type concerns the delivery of products or services outside the computer system, while the second type relates to subject matter that resides within one or more computer systems. These agreements, contracted for and performed online, are created through the use of electronic agents. Currently, contracts that relate to products deliverable outside the computer may be covered by the Uniform Commercial Code (UCC) while contracts that are completed totally by computer may not be covered. The major issue is whether computer contracts should be governed by the UCC or by some other uniform statute.[2] Other important issues that must be addressed include: whether an electronic contract satisfies the Statute of Frauds; whether the writing can be authenticated; and the validity of the use of digital signatures.

In this paper, we will consider: (1) the Statute of Frauds, authentication of the writing, and the use of digital signatures; (2) applicability of the UCC to electronic contracts, (3) Uniform Computer Information Transactions Act (UCITA), (4) the Electronic Signatures in Global and National Commerce Act of 2000, (5) the potential impact of the passage of these statutes on electronic contracts, and (6) Shrink-Wrap and Click Wrap licenses.

*Professor of Law and Program Director for Legal Studies, Mercy College, Dobbs Ferry, New York. E-mail: djuettner@mercynet.edu

*Professor of Law and Program Chair, Department of Legal Studies & Taxation, Lubin School of Business, Pace University, Pleasantville, N.Y.10570. Email: rgirasa@pace.edu.