

You (Don't) Look Marvelous

Considerations for Employers Regulating Employee Appearance

by G. ROGER KING, JEFFREY D. WINCHESTER, and DAVID SHERWYN

Under federal law, employers are generally allowed to set policies regulating employees' appearance, provided that those policies do not impinge on groups specifically protected under federal statute. State and local laws may, however, preclude employers from implementing such dress and appearance policies. Employers whose workers are unionized must consider the provisions of the bargaining agreement. One trend in connection with regulations relating to employees' appearance and dress is that creative lawyers have stretched the law to cover certain workers.

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At the beginning of its 2005-2006 season, the National Basketball Association (NBA) made headline news when it announced that it had decided to impose an off-the-court dress code on its players.¹ Along that line, *USA Today* reports that the number of employers allowing employees to dress casually is on the decline and that even "business casual" dress codes are requiring increasingly formal attire.² As the managing partner of one business summed up, "We want our image to go along with our branding. It supports how we set ourselves forth in the community."³

Wanting to present a certain image is an integral part of doing business, but it can present practical and

legal problems. Dress and appearance codes can lead to union grievances and unfair labor practice charges before the National Labor Relations Board (NLRB), costly lawsuits, and negative publicity. In 2003, for instance, Abercrombie and Fitch paid out \$2.2 million dollars to settle claims based upon its “Appearance/Look Policy,”⁴ and the company then paid \$50 million to settle three class actions in which the plaintiffs claimed that the company’s appearance-based hiring practices discriminated against women and minorities.⁵ Shortly after that, the Borgata Hotel Casino & Spa in Atlantic City, New Jersey, came under fire for its employee weight policy, which penalizes employees who experience more than a 7 percent increase in their weight after their hire date.⁶ The policy spawned a union grievance, a discrimination lawsuit, and a spate of negative press.⁷ Indeed, the NLRB has held that implementation or alteration of a dress code by an employer is a “mandatory subject of bargaining” where a company is a party to a collective bargaining agreement.⁸ As such, if an employer alters its dress code without consulting the union—unless the employer has explicitly reserved the right to do so in the collective bargaining agreement—the company may find itself facing an unfair labor practice charge before the NLRB.

Whether your business is a professional sports league, manufacturer, hotel, restaurant, casino, or retail chain, there are certain key legal issues that may be raised by your company’s dress and appearance code, as well as your employee-behavior code. As we discuss in this article, awareness of these issues may help reduce your company’s exposure to grievances, NLRB charges, lawsuits, and bad press.

Are Dress Codes and Appearance Policies Unlawful?

The proliferation of discrimination lawsuits and the often inaccurate depiction of

employment discrimination in popular culture⁹ has led many to believe that employers cannot base employment decisions on anything other than “legitimate business reasons.” The implication is that it is unlawful to “discriminate” against employees because of almost anything—including appearance, weight, taste in clothes and music, and sexual orientation. Under this type of analysis, one could argue that a dress code could unlawfully discriminate against those with long hair, body piercings, and overwhelmingly bare midriffs. This is not the case, however, because federal law prohibits discrimination based only on the following specific factors: sex, race, color, national origin, religion, age, and disability. This means that under federal law employers can lawfully discriminate against people whom the employer believes to be homosexual, ugly, or have bad taste in clothes and music. Having said that, it is true, of course, that states, counties, cities, and other municipalities may protect other characteristics,¹⁰ but federal discrimination law is limited to the seven characteristics that we enumerated.

If the matter were that simple, our article would be concluded at this point. That is, if federal law is so limited and if employers are free to discriminate against those who, for example, are unattractive or dress poorly, the obvious question is why employers have settled cases for millions of dollars when they can lawfully discriminate against people who are not specifically protected under federal law. The answer is that forty years of creative lawyering and judicial opinions have established methods for plaintiffs to “fit” their claims into one of the seven protected classes. For example, while being overweight is not protected, some courts have held that obesity is a disability and others argue that weight-related clauses are a

proxy for unlawful age discrimination. Thus, such employees may be protected. With regard to appearance policies, plaintiffs have a number of different theories they can use to recast their claims as discrimination due to sex, age, religion, or disability. To understand how plaintiffs do this, it is necessary to examine *Hopkins v. Price Waterhouse*, the case that is most likely the most famous and often cited example of a plaintiff expanding a protected class beyond what Congress most likely contemplated. This case involves gender stereotyping.

The Supreme Court Rules Gender Stereotyping Illegal

Gender stereotyping is the first important area for employers to consider when considering dress or behavior codes because it can lead to a sexual-discrimination case. The foundation of modern American gender stereotyping law is the case of *Hopkins v. Price Waterhouse*.¹¹ The plaintiff, Ann Hopkins, was a female associate who was refused admission to the accounting firm's partnership. Her primary claim was gender discrimination under Title VII. Price Waterhouse argued that negative remarks from evaluating partners regarding Hopkins's interpersonal skills and reputation among her colleagues formed a legitimate, non-discriminatory rationale for not making her a partner. Hopkins alleged that the decision to place her partnership candidacy "on hold" was based on impermissible gender-based stereotypes and standards, and as evidence she pointed to performance evaluations containing remarks that she was too "macho," that she "overcompensated for being a woman," and that she needed "a course at charm school."¹² One reviewer recommended that, to improve her chances of making partner, Hopkins ought to "walk more femininely, talk more femininely, dress more femininely, wear

make-up, have her hair styled, and wear jewelry."¹³

Writing for the majority, Justice Brennan found that Hopkins had provided sufficient evidence that she had experienced illegal gender stereotyping, in that she had been denied a promotion because of personality traits, behavior, and appearance that were tolerated by the employer among its male employees but not among females. Justice Brennan concluded,

We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to *strike at the entire spectrum of disparate treatment of men and women* [italics added] resulting from sex stereotypes.¹⁴

Accordingly, *Price Waterhouse* stands for the proposition that men and women may not be held to different behavioral standards in the workplace. Thus, a dress code that required woman to dress professionally (because appearance is important for women) but allowed men to dress like college students (because it really does not matter how guys look) would be unlawful. This does not mean, however, that dress codes cannot be different for men and women. Indeed, *Price Waterhouse* is often cited as a standard that is *not* used when analyzing appearance policies.

Dress and Appearance Codes after *Price Waterhouse*

The courts have been reluctant to expand the *Price Waterhouse* gender-stereotyping rule to dress and appearance codes, even where such codes place different requirements on men and women. Instead, the

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Issues Surrounding a Model Appearance Policy

It is impossible to outline a model dress or appearance policy because no policy has survived judicial scrutiny with regard to each of the relevant protected classes. Instead, the best we can provide is a checklist for employers to consider. Even with the following checklist, employers should check with counsel before implementing a policy.

Sex: Does this policy create a burden for one gender, but not the other?

Age: Is complying with this policy differentially difficult for workers older than forty?

Race and national origin: Does this policy infringe on a cultural aspect of specific race or national origin?

Americans with Disabilities Act: Does any covered disability prevent an employee from complying with this policy?

An affirmative answer to any of these questions may not doom the policy. It should, however, cause the company to review the policy to ensure that it is necessary to the business. In addition, as part of any new policy, employers should let employees know that they should contact the employer and explain, in writing, any reasons that prevent compliance with the policy. This written explanation should be forwarded to counsel for advice. Such a written statement establishes the employee's argument and forestalls further arguments should a creative lawyer become involved.

courts have developed an "undue burden" test, under which dress codes that place different requirements on the genders will pass muster as long as the differences do not unduly place a greater burden on one gender.

The "undue burden" test was established by *Frank v. United Airlines*,¹⁵ in which a class of female flight attendants challenged their employer's weight-restriction standards that required female employees to maintain a weight corresponding to medium-build bodies, while holding male employees to a large-build weight standard. United Airlines argued that weight was a nondiscriminatory appearance standard. The Ninth Circuit disagreed. Instead of couching its holding in the gender-stereotyping language of *Price Waterhouse*, however, the court held that the application of a different weight standard to men and women was discriminatory because it imposed "unequal burdens on men and women."¹⁶ The court went on to note that

the policy could be justified only if the employer could demonstrate that the differential policy was a bona fide occupational qualification (BFOQ). Under the holding in *Frank*, any weight standard's differentiation between the sexes must be reasonably necessary to the normal operation of the business and must concern job-related skills and aptitudes.¹⁷ Because the airline did not demonstrate that the weight standard was a BFOQ, the female flight attendants proved that the airline had violated Title VII.

A Unified Theory of Dress and Appearance Codes: *Jespersen v. Harrah's Operating Co., Inc.*

In a decision issued just before this journal went to press, *Jespersen v. Harrah's Operating Co., Inc.*, the Ninth Circuit held, in an *en banc* opinion, that an employee challenging an employer's dress code can do so on either *Price Waterhouse*

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Considerations for Bargaining Units

Most union contracts allow employers to establish and implement “reasonable” work rules. The term *reasonable* means that the right is not absolute and that any proposed rules will be subject to the grievance procedure and, ultimately, arbitration. Dress codes will almost undoubtedly fall into this category. On the other hand, appearance codes are a mandatory subject of bargaining. An employer who could not get a union to agree to an appearance policy during negotiations would likely find an arbitrator hostile to single-handed implementation of such a policy, and the employer may be found guilty of an unfair labor practice by the National Labor Relations Board.

Although arbitration decisions draw on precedent, a decision from a case involving a different employer has no binding effect. Because arbitrators refer to earlier decisions, though, it is useful to see how other such cases have been decided. When arbitrators examine the reasonableness of a dress code, they usually balance the image, safety, and health concerns of the employer against the rights of employees (under the contract) to determine their own clothing and hair style. In balancing these competing concerns, arbitrators typically look to the employees’ role in the company. For example, arbitrators will almost always allow employers to implement appearance policies for those employees who come into contact with the public. Arbitrators, however, seem to have different standards for front-of-the-house and back-of-the-house employees. While arbitrators will uphold standards of cleanliness and neatness for all employees, they may not uphold specific standards of hair length or clothing style for those who do not interact with the public.

Unionized employers seeking to implement an appearance policy during the life of a collective bargaining agreement should first determine whether the subject was addressed in negotiations. If not prohibited by the contract (or the failure to agree on such a policy), the employer should develop a rationale and make sure that the policy supports the company’s image in its interactions with the public.

gender-stereotyping grounds, *Frank v. United Airlines* undue-burden grounds, or both.¹⁸ In that case, Harrah’s “Personal Best Policy” required female bartenders and beverage servers to wear makeup (face powder, blush, and mascara) and lip color while on the job. The policy also required female servers to wear nail polish. As for male beverage servers, the policy required men to keep their hair neat (no longer than collar-length) and required them to keep their hands and fingernails clean and nails neatly trimmed at all times. The policy also forbade male bartenders and beverage servers from wearing nail polish and makeup.

Jespersen, who claimed she never wore makeup off the job, objected to the makeup requirement because, she said, it would conflict with her self-image. Jespersen testified

that the requirement to wear makeup upset her so much that she subjectively felt it would interfere with her ability to perform as a bartender. Because she was not qualified for any open positions at the casino not covered by the policy and with a similar compensation scale. Jespersen, whom the court described as an exemplary, twenty-year employee, was terminated in 2000, when Harrah’s enforced its policy. After exhausting her administrative remedies, she sued.

In finding for the employer, the Ninth Circuit held that Jespersen failed to show that women bore an unequal burden, in cost and time, in complying with Harrah’s Personal Best Policy. The court declined Jespersen’s request to take judicial notice that it takes more time and money for a woman to comply with the makeup policy

than for men to keep their hair neat and otherwise comply with the requirements of the policy. Absent proof of an unequal burden imposed by the policy on women, the court refused to find the Personal Best Policy discriminatory.

The Ninth Circuit then turned to the question of gender stereotyping. The *en banc* panel noted that, unlike the gender-biased criticism aimed at the sole plaintiff in *Price Waterhouse*, Harrah's Personal Best Policy applied to all beverage servers and did not single out Jespersen. The purpose of the policy was to ensure that Harrah's male and female beverage service employees alike present a neat and attractive appearance to customers. Because there was no evidence that the purpose of the policy was to make women beverage servers conform to a stereotypical image of what women should wear, and because there was no evidence that the policy would objectively inhibit a woman's ability to do the job, the court held that one employee's personal objection to wearing makeup could not serve as the basis for finding the policy to be discriminatory.

The *Jespersen* opinion signals a new trend: both the gender-stereotyping test and the undue-burdens test likely will be used by courts to examine employers' dress and appearance codes. For example, in a case before the federal district court of New Jersey, a male food server at a Harrah's Entertainment property, who had worn a ponytail for many years while working for Harrah's, was required to cut off his ponytail pursuant to a new grooming policy.¹⁹ The employee brought suit under Title VII, claiming that the policy was discriminatory because it allowed female employees the option of wearing their hair long while requiring male employees to keep their hair to a certain length. Even though such a policy might seem to invoke gender stereotypes, the district court found that

the policy was not on its face discriminatory because unlike race or sex, the court held, hairstyle is not an "immutable characteristic" (which Congress sought to protect in passing Title VII), a fact demonstrated by the plaintiff's cutting off his ponytail and thereby keeping his job.²⁰ The court went on to find the employer's policy to be permissible because it was evenhanded. Although it contained different hairstyle requirements for men and women, it required *both* male and female employees to keep their hair clean and neat, prohibited both male and female employees from any "extreme styles, colors, or shaved designs," and forbade both male and female employees from wearing mustaches, beards, or other facial hair.

In *Sturchio v. Ridge*, the plaintiff was a male U.S. Border Patrol employee who, as part of considering and preparing for gender reassignment surgery, began living (and therefore working) as a woman. The employee sued the United States, claiming discrimination in part because Border Patrol management would not allow him to wear a dress to work.²¹ In dismissing the discrimination claim, the federal district court of Eastern Washington held that the Border Patrol's ban on men wearing dresses to work "did not impose a greater burden on one sex than the other," and therefore was not discriminatory.²²

The dress-code and appearance-code cases appear to be well grounded. Common sense argues against applying identical dress and appearance rules to both genders. In the end, such an approach would likely require all employees to wear exactly the same clothes and sport exactly the same hairstyle at work. Federal and state discrimination statutes clearly would not appear to support any such conclusion. Further, the "commonsense" approach by courts to these cases clearly seems receptive to reasonable dress and appearance codes mandated by employers.

Religious Discrimination

Not only must employers be aware of possible gender-discrimination claims that may arise from dress and appearance codes, but they must also be cognizant of other pitfalls that can accompany dress and appearance standards. For example, dress and appearance codes that appear neutral on their face can lead to claims of religious discrimination. In fact, in recent years, religious discrimination seems to be the protected class of choice for plaintiffs seeking to have dress codes deemed unlawful. This is not an entirely negative development for employers, because their obligations to accommodate religion are minimal.

In *TWA v. Hardison*, for instance, the plaintiff could not work weekends because of his religion.²³ This was not a problem until the employee transferred to a new department. While the new position was a step up for the employee, he became the low employee on his new department's seniority chart and thus had to work Saturdays. TWA could have accommodated the employee by bumping him over a more senior employee (in violation of the collective bargaining agreement), having a manager work the job one day per week, having an overtime employee work the job, or running short-staffed. The airline wanted none of those, and the court also rejected each of these proposals because it held that an accommodation that had anything more than "*de minimis*" effect on the company was an "undue hardship" and was not required.

This "undue hardship" standard has been applied to dress codes, and courts have upheld dress codes even when they do violate the employee's religious tenets. In *Cloutier v. Costco Wholesale Corp.*, a cashier employed at a retail store engaged in various forms of body modification, including facial piercings and cuttings.²⁴ The employer initiated a new policy prohibiting

facial piercings (except pierced ears). The employee did not comply with the new policy, claiming that she was required to wear and display facial piercings by her religion, the "Church of Body Modification."²⁵ After the employee was terminated for excessive absenteeism, she filed suit, claiming religious discrimination. The First Circuit sided with the employer, held that the employer was within its rights to establish a "no facial jewelry" policy, and held that accommodating the plaintiff's request to wear facial jewelry would impose an "undue hardship" on the employer because it would result in the company's losing its ability to control how it projects its image to the public and, further, that "the company had a legitimate interest in maintaining a professional image."

Similarly, in *EEOC v. Oak-Rite Manufacturing Corp.*, the complainant, a member of the "Conservative Holiness" faith, had requested permission to wear a skirt while performing her furniture manufacturing job, claiming that her faith's interpretation of scripture prohibited her from wearing trousers.²⁶ The employer, citing safety concerns, required her to comply with its trousers-only dress code for all employees working on the plant floor. The Equal Employment Opportunity Commission sued on her behalf, arguing that the employer's refusal to allow her to wear skirts in the workplace amounted to religious discrimination. The district court rejected the claim, holding that because the trousers-only policy was based on safety concerns—specifically, concerns regarding mobility and flexibility and the danger of loose clothing becoming caught in machinery. Because the court determined that the plaintiff's request would require the employer "to carry out an experiment in employee safety that . . . no other factory has tried,"²⁷ the employer was not required to accommodate the employee's request to wear skirts at work.

In *Swartzentruber v. Gunite Corp.*, the district court for the Northern District of Indiana considered the case of an employee, a member of the “Church of American Knights of the Ku Klux Klan” who claimed that his employer’s requirement that he cover up a tattoo of a hooded figure standing before a burning cross conflicted with his religious beliefs and thereby violated Title VII.²⁸ (He also claimed that he was harassed by other employees because of his religious beliefs.) The district court held that the employer did not discriminate against the employee on the basis of his religion because the employee failed to demonstrate that his religion forbade the covering of his tattoo. Moreover, given the inflammatory nature of the tattoo and the possibility that it might incite workplace violence, the court held that the employer reasonably accommodated the employee’s religion by allowing the employee to work, as long as the tattoo remained covered. Additionally, because the record showed that the employee was harassed not because of his religious beliefs, but because of his “self identification as a member of the KKK,” he could not make an actionable case of religious harassment.²⁹

In contrast to the *Swartzentruber* case, the federal district court for the Western District of Washington recently held that a restaurant chain engaged in religious discrimination when it terminated a server who refused to cover up tattoos encircling his wrists. In *EEOC v. Red Robin Gourmet Burgers, Inc.*, the plaintiff, a follower of Kemeticism, a religion with roots in ancient Egypt, claimed that it was a sin in his religion to intentionally cover up his wrist tattoos, which, he said, were to represent his servitude to Ra.³⁰ Because the plaintiff proved that he held a bona fide religious belief, because the plaintiff’s tattoos were small, and because the restaurant had failed to prove that they tended to

deter families from visiting the restaurant, thus posing no “hardship” to the employer, the court concluded that management’s refusal to accommodate the server’s religious beliefs by allowing him to work with his wrist tattoos uncovered supported a viable claim of religious discrimination.

Despite the *Red Robin* holding, it is clear that employees have difficulty prevailing in challenges to dress codes based on religious reasons. What is unknown at this time is how challenges to dress codes based on other classes will be received. For example, we do not know whether policies such as that of the Borgata, which require little or no weight gain, will survive the inevitable age and disability claims. Likewise, we cannot predict whether dress codes that prohibit certain hairstyles favored by a particular ethnic group will survive race and national origin claims. On one hand, the language in *Cloutier* that discusses legitimate interests would lead one to believe that these types of policy would survive a legal challenge. Alternatively, the *de minimis* standard that is at the heart of the religious cases has not been applied to any other protected class, and thus these cases cannot be relied on outside the religious context.

Age, Race, the Americans with Disabilities Act (ADA), and National Origin

As we hinted in our above discussion, in addition to sex and religion, plaintiffs can use age, race, disability, and national origin to argue that appearance policies discriminate. For example, as many of us will attest, it is difficult to maintain the same weight as we age. Does that mean that weight-limitation requirements will violate the Age Discrimination in Employment Act (ADEA)? Some forms of dress and hair styles are specific to people of

certain races, cultures, or national origins. If the *de minimis* standard does not apply to national-origin claims, will a requirement that prohibits, for example, men wearing hair below their collar discriminate against Native Americans? The ADA has been used to force employers to relax facial hair policies because of skin conditions, for example, and it is possible that a thyroid condition, diabetes, or other conditions could be the basis of a challenge to weight standards.

Implications for Practice

Given that the field continues to shift, as long as employers keep a few simple rules in mind, issues surrounding employee behavior and appearance expectations should be manageable. We suggest the following principles. Do not base employment decisions on gender-specific behavioral expectations, and do not tolerate behavior by one gender but not the other. Dress and appearance codes should not overly burden one gender and should be based on reasonable business or safety considerations. If an employer has requirements regarding hair, clothing, or other aspects of appearance, the employer should regularly monitor such appearance codes for both genders. If a company is subject to a collective bargaining agreement, as with all issues relating to working conditions, it should review the contract terms to determine its bargaining obligations before implementing any new dress or appearance policies. Finally, to protect against possible attacks on dress or appearance codes under a religious-discrimination claim or other similar theory, an employer should document the business or safety reasons for its policies.

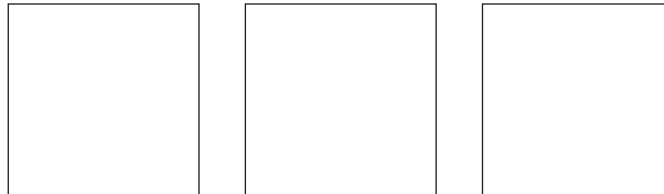
Of course, all the possible iterations of challenges to dress and appearance codes have not yet made their way into the judicial system. So far, the NBA's dress code,

which requires dress slacks with jackets be worn when players appear in public on NBA business, is sticking. The players are, however, part of a bargaining unit, and efforts to enforce the policy may give rise to a federal lawsuit or player union grievances. Similarly, the Borgata Hotel Casino's weight policy could still incur a federal court ruling that it is discriminatory. Finally, we do not know whether recent court rulings allowing disparate impact suits under the ADEA will result in a class action brought by individuals older than forty challenging employer dress codes and their alleged disparate impact on hiring and promotion of protected class members.³¹ Only time will tell.

Endnotes

1. John Eligon, "N.B.A. Dress Code Decrees: Clothes Make the Image," *New York Times*, October 19, 2005, www.nytimes.com/2005/10/19/sports/basketball/19stern.html?oref=login.
2. Stephanie Armour, "Dress Codes Gussy Up," *USA Today*, October 25, 2005, http://www.usatoday.com/money/workplace/2005-10-25-dress-code-usat_x.htm.
3. *Ibid.*
4. "Employees Win Dress Code Lawsuit," Associated Press, June 24, 2003, www.cbsnews.com/stories/2003/06/24/national/printable560245.shtml.
5. Jenny Strasburg, "Abercrombie to Pay \$50 Million in Bias Suits," *San Francisco Chronicle*, November 10, 2004, www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2004/11/10/BUGTL9ORS81.DTL.
6. John Curran, "The Borgata Stands Firm, Denying Weight Grievance," *Philadelphia Inquirer*, March 3, 2005, p. B1.
7. See *ibid.*; John Curran, "Casino Weight Ban Goes to U.S. Court," *Philadelphia Inquirer*, February 23, 2005, p. B7; "Cocktail Waitresses Get Fat Fiat," CBS News, February 18, 2005, www.cbsnews.com/stories/2005/02/18/national/main674879.shtml; and "Weight Watching: Hiring Only Svelte Servers May Shut Out Someone with Superb Skills," *Nation's Restaurant News*, March 14, 2005, www.findarticles.com/p/articles/mi_m3190/is_11_39/ai_n13471181.

8. *Yellow Enterprise Systems, Inc.*, 342 NLRB No. 77, 175 LRRM 1275 (2004); but see *Crittendon Hosp.*, 342 NLRB No. 67, 175 LRRM 1283 (2004) (holding that hospital's unilaterally banning registered nurses [RNs] from wearing acrylic nails was not a material alteration of the employer's dress code where the dress code previously limited fingernail length to one-eighth of an inch past the tip of the finger and "strongly discouraged" the use of acrylic nails).
9. Many remember the *Seinfeld* episode where Elaine complained to the EEOC that the diner where she and her friends ate only hired large-breasted woman as servers.
10. Sexual orientation is protected in many states and cities.
11. 490 U.S. 228 (1989).
12. 490 U.S. at 235.
13. *Ibid.* (quoting 618 F. Supp. 1109, 1117).
14. 490 U.S. at 251 (internal quotations omitted).
15. 216 F.3d 845 (9th Cir. 2000).
16. *Ibid.* at 855.
17. *Ibid.* (internal quotations and citations omitted).
18. *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006).
19. *Wisely v. Harrah's Entertainment, Inc.*, 2004 WL 1739724 (D. N.J. 2004).
20. *Ibid.*
21. 2005 WL 1502899 (E.D. Wash. 2005).
22. *Ibid.*
23. 432 U.S. 2264 (1977)
24. 390 F.3d 126 (1st Cir. 2004).
25. An issue not addressed by the court is the question of whether such an organization is indeed a bona fide religion. ("Determining whether a belief is religious is 'more often than not a difficult and delicate task,' one to which the courts are ill-suited.") *Ibid.* at 132 (quoting *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 714 [1981]).
26. 2001 WL 1168156 (S.D. Ind. 2001).
27. *Ibid.* at 15.
28. 99 F.Supp 2d 976 (N.D. Ind. 2000).
29. *Ibid.* at 980.
30. 2005 WL 2090677 (W.D. Wash. 2005).
31. *Smith v. City of Jackson*, 125 S. Ct. 1536, 1541-44 (2005).



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