EMPLOYER OR BIG BROTHER: REGULATING EMPLOYEES’ OFF-DUTY CONDUCT – WHAT HAPPENS IN VEGAS DOESN’T STAY IN VEGAS

Kimberly S. Moore
STRASBURGER & PRICE
Dallas, Texas

Kathleen Peahl
WADLEY, STARR & PETERS
Manchester, New Hampshire
Employer or Big Brother:  
Regulating Employees’ Off-Duty-Conduct

Employers are becoming increasingly involved in their employees’ conduct outside of work. In the past, employers typically became concerned with employee off-duty conduct in a purely reactionary role when the conduct affected workplace productivity. But with the advent of social media, the employers’ role is becoming more proactive. Employers have a valid interest in monitoring the off-duty conduct of employees since off-duty conduct can affect an employee’s productivity and performance in the workplace as well as impact the business’s reputation.

Issues can arise where the employer’s desire to control the company’s image is at odds with the employee’s autonomy outside of the workplace. Until recently, laws favored the employer. Now, however, the tension between the employee’s rights to engage in certain off-duty activities versus the rights of employer to prohibit its employees from doing so has garnered significant attention from state legislatures as well as local governments. While most legislation has focused on protecting particular classes of off-duty conduct, such as smoking and social media usage, a handful of states have enacted legislation protecting employees’ rights to engage in all lawful activities. As the law restricts what was once within the employer’s discretion to control, it becomes increasingly important for companies to know their boundaries when regulating employees’ conduct outside of the workplace.

I. Regulating Employees’ Social Media Accounts

With the proliferation of social media and viral videos, evidence of an employee’s conduct, or misconduct, can quickly spread leaving an employer no option but to discipline the offending employee. In December 2014, Nordstrom fired a Portland employee after the sales associate posted a controversial statement advocating the killing of police officers on his personal Facebook page.¹ Online critics went after Nordstrom simply because his personal Facebook page included a photo that appeared to be taken of the employee inside Nordstrom’s Portland store and the employee had a link to the retailer. Nordstrom used social media to respond to the angry tweets and online posts about the controversy, stating that Nordstrom does “not tolerate violence, violent conversation or threats of any kind.” Nordstrom also used social media to confirm the offending employee was no longer employed by the retailer.

Employer monitoring of social media for both its employees and applicants is, in many ways, advantageous to companies. Businesses can screen applicants based on social media profiles, conserving resources and time in developing its workforce. A childcare center in a Dallas, Texas suburb recently fired a new-hire after the employee
posted on Facebook, “I start my new job today. But I absolutely hate working at day care. I just really hate being around a lot of kids.” Not surprisingly, this post caused a social media frenzy, ultimately spreading to a group with more than 8,000 members. When the childcare center learned of the posting, it promptly fired that employee.

Employers also use social media to monitor employees’ outside employment and communications which may put the employer’s trade secrets and confidential information at risk. In addition, social media can be a tool to identify and discourage romantic relationships between employees and supervisors, thereby curtailing potential sex harassment issues. Nevertheless, it is critical for employers to balance an employee’s right to privacy and right to engage in lawful off-duty activities with the employer’s right to protect its business.

A. Laws Regulating Employer Monitoring

Employers should avoid surreptitiously monitoring their employee’s social media use. Some state laws and the federal Stored Communications Act (“SCA”), 18 U.S.C. § 2701, prohibit intentionally accessing or exceeding authorization to access a facility in which an electronic communication is provided and thereby obtaining access to an electronic communication stored in the system. In 2009, a New Jersey jury found a restaurant manager violated the SCA as well as state laws protecting the privacy of web communications after he knowingly accessed a chat-group on a social media website without authorization. The verdict was upheld by a federal court, which rejected the employer’s claim that its managers were authorized by a restaurant hostess to access the invitation-only chat group.

Given the trend towards monitoring employees’ social media activities, employers should be aware that such monitoring may raise a host of risks for businesses. As discussed above, issues may arise where policies are drafted to include “private” accounts—that is, those accounts that limit information to a restricted group. Since 2013, eighteen (18) states have enacted laws to protect employees’ private information on social media accounts, though the breadth and substance of such laws vary widely. For example, the New Jersey statute protects both job applicants and employees, while the New Mexico statute protects only job applicants and not employees. The type of conduct that is prohibited also greatly differs. The broader statutes prohibit employers from (1) seeking access to private accounts; (2) requiring employees to provide visual access to their account(s); and (3) requiring employees to alter their privacy settings to allow the employer to view their account. Likewise, the penalties for violating the statutes are inconsistent, split between either an administrative or private right of action.
In response to these variations, in April 2015, the National Conference of Commissioners on Uniform State Laws issued a draft Employee Online Privacy Protection Act. The proposed Employee Online Privacy Protection Act prohibits employers from requiring, requesting, or coercing employees to (1) disclose their social media passwords; (2) alter their privacy settings to allow the employer to view their account; and (3) login to their account in front of the employer such that the employer can observe its contents. There are, of course, exceptions. One significant exception is where it is necessary to “investigate an employee’s violation of law, or of written employer policies regarding employment-related misconduct of which the employee had reasonable notice, where the employer reasonably suspects that the employee has violated, is violating, or will violate those laws or policies, and the employer accesses only accounts, content and meta-data that it reasonably believes to be directly relevant to the investigation.”

B. The NLRB Weighs In

In addition to state and federal laws, companies should be weary of running afoul of the National Labor Relations Board (“NLRB”) when disciplining employees because of their social media use. Section 8(a)(1) of the National Labor Relations Act (“NLRA”) makes it an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of their rights to self-organize, form, join, or assist labor organizations, bargain collectively, or engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. This protection extends to certain work-related conversations conducted on social media, such as Facebook, Twitter, and LinkedIn.

The Board has consistently taken the position that limiting or prohibiting employees from connecting with each other on social media sites, talking to each other online, disparaging the company, supervisors or other employees online, or discussing compensation or other terms and conditions of employment violates the NLRA. Further, in Three D, LLC (Triple Play), 361 NLRB No. 31 (2014), the Board agreed with the Administrative Law Judge that the “Like” selection was an expression of support for the others who had shared their concerns, and that such an expression rose to the level of protected, concerted activity.

II. Regulating Employees’ Personal Appearance

A. Tattoos and Body Art in the Workplace.

One in three American workers is between the ages of 18–34. Millennials, people born between 1981 and 1996, have surpassed Generation X to become the largest generation in the American workforce and their presence is expected to grow as
millenials currently enrolled in college graduate programs begin working. Millennials have created some interesting challenges for the Baby Boomers and Gen Xers in the workplace, particularly due to their penchant for tattoos and body piercing. While historically it was not uncommon for employers to completely ban tattoos and body piercings in the workplace, with forty percent (40%) of Millennials having at least one (1) tattoo, and many Millennials usually having more than one (1), an out-right prohibition is likely no longer a practical approach.

As a general rule, employers can take action against at-will employees for any reason or no reason at all, so long as the reason, if any, is not connected to some protected status, such as race, color, religion, sex, and national origin. Employers also have a right to generally regulate an employee’s appearance at work and make employment decisions based upon certain aspect of appearance because appearance is generally not protected in most states. Arguably, most employers have written dress code policies in their employee handbooks, which regulate an employee's appearance and dress. When tested such policies have generally been found permissible as long as they are not enforced in a discriminatory manner. For example, in 2012, a candidate for Liquor Enforcement Officer with the Pennsylvania State Police was rejected for the position after he refused to remove one of his visible tattoos to qualify for the position. The candidate then filed a lawsuit claiming violation of due process and equal protection. The Third Circuit Court of Appeals rejected the candidate’s claims, noting that it is not a fundamental constitutional right to have a tattoo.

An employer’s ability to enforce its policies regulating an employee’s appearance and/or dress is not, however, without boundaries. While tattoos, piercings, or hairstyles are generally unprotected by both federal and state law, there are some states, such as California, that consider these forms of self-expression protected speech subject to the First Amendment. Further, employers may be required to accommodate certain tattoos, piercings, and hair styles if associated with the employee's religion. For example, in 2005, Red Robin Gourmet Burgers, Inc. agreed to pay $150,000 and make substantial changes to its policy prohibiting tattoos to settle a religious discrimination suit. The EEOC claimed that Red Robin refused to make an exception to its no visible body art policy as an accommodation for the employee’s Kemetic religion, which made it a sin to intentionally conceal the tattooed religious inscriptions. Similarly, in 2009, Grand Central Partnership, a not-for-profit developer of real estate, offices, and facilities around the Grand Central Terminal area in New York, settled a religious and national origin discrimination suit. The EEOC alleged GCP failed to accommodate employees' long dreadlocks and short beards worn pursuant to Rastafarian religious practice. The company’s grooming policy required that long hair, including dreadlocks, be worn inside
hats, which was impracticable. The settlement agreement allowed dreadlocks to be worn down but clipped back in neat ponytails.\textsuperscript{xvii}

Court rulings concerning religious discrimination with regards to tattoos, body piercings, and hair styles are very fact intensive and courts do not grant employees carte blanche to alter their appearance simply because they claim it is a religious symbol. In \textit{Cloutier v. Costco}, an employee sued Costco for the failure to accommodate her religious belief.\textsuperscript{xviii} The employee claimed to belong to the Church of Body Modification and asked to be allowed to wear an eyebrow piercing as an exception to Costco’s “no facial jewelry” policy. Ultimately the First Circuit ruled in Costco’s favor, indicating that the business had offered a reasonable accommodation\textsuperscript{xix} and that allowing the employee an exception to the policy would create an undue hardship. The court further noted that there was nothing in the tenets of the Church of Body Modification that required that “body modifications had to be visible at all times or that removing body modifications would violate a religious tenet.” As such, the Court found the accommodations Costco proposed would not “violate any of the established tenets” of the Church of Body Modification.\textsuperscript{“}

Similarly, in \textit{Swartzentruber v. Gunite Corp.}, an employee brought a religious discrimination claim after his employer repeatedly requested that he cover a tattoo on his arm depicting a white-hooded man and a burning cross.\textsuperscript{xx} The employee was an active member of the Ku Klux Klan and claimed the tattoo was a “religious symbol” of the Church of the American Knights of the KKK. Without making a specific finding whether the tattoo was an actual religious symbol entitled to protection, the court determined that the employer reasonably accommodated the employee’s asserted religious beliefs by requiring him to cover his tattoo and any alternative accommodation would have imposed an undue hardship on both the employer and its employees. Even if the tattoo was a “religious symbol,” the employer could still require the employee to cover it because religious freedom does not include the right to overtly offend others in the workplace.

\textbf{B. Sex Stereotyping and Dress Codes}

Generally, employers have a right to implement whatever dress guidelines they feel are appropriate if they are reasonable, serve a legitimate business purpose, and do not discriminate on the basis of any protected status. In 1989, in \textit{Price Waterhouse v. Hopkins}, the Supreme Court prohibited employers from penalizing employees for failing to conform to gender stereotypes associated with their sex.\textsuperscript{xxi} Courts, however, have continued to find certain dress and grooming policies that differentiate between male and female employees legal, despite employees’ claims of sex discrimination. For example, in \textit{Jespersen v. Harrah’s Operating Co., Inc.}, the casino had a dress and
grooming policy that required women to wear makeup and prohibited men from doing so. The employee never wore makeup and objected to the policy claiming it was discriminatory. The court, though, disagreed stating that the policy did not place a heavier burden on women than on men, nor did it sexually stereotype women. Rather, the policy required both male and female employees to maintain a similar professional look and was, therefore, legal.

Recent cases concerning transgendered employees have brought gender stereotyping to the forefront, and widespread outcry against the Jespersen ruling. In 2004, the Sixth Circuit in Smith v. City of East Salem, ruled in favor of a transsexual firefighter who claimed he had suffered employment discrimination because of his gender identity disorder. The court relied on Price Waterhouse to hold that discrimination against a male who assumes a female identity is a form of unlawful gender policing. Four years later, in Schroer v. Billington, the District of Columbia likewise found a transgendered employee was a victim of gender stereotyping, though not in a way transsexuals might usually experience such discrimination. The employer’s concern was not that the employee was transitioning from male to female status, but rather that the employee did not look feminine enough – that she instead looked like a man dressed as a woman.

It bears noting that federal courts are inconsistent with regard to transgender employees and gender stereotyping. For example, in Creed v. Family Express Corp., the court determined that the transgender employee was not fired because of stereotypical perceptions, but rather for her failure to comply with the employer’s sex-specific grooming policy, which required her to cut her hair and not wear make-up or nail polish. The court stated that, “Ms. Creed might argue that real-life experience as a member of the female gender is an inherent part of her non-conforming gender behavior, such that Family Express's dress code and grooming policy discriminates on the basis of her transgender status, but rightly or wrongly, Title VII's prohibition on sex discrimination doesn't extend so far.” Court have drawn a line distinguishing between employees who claim discrimination based on their transgendered status versus employees who claim discrimination due to their noncompliance with sexual stereotypes.

C. Reasonable Accommodations

If a dress code conflicts with an employee’s protected status, such as religion, the employer must modify the dress code or permit an exception unless doing so would result in undue hardship. It is unclear, however, whether an employer’s obligation to provide a reasonable accommodation to the dress code based on an employee's religion is triggered only after the employee requests an accommodation. The Supreme
Court recently heard oral arguments in the case of Samantha Elauf, a Muslim who applied for a sales job with Abercrombie Kids. Ms. Elauf was not hired because her hijab conflicted with Abercrombie & Fitch’s “Look Policy,” which calls for a “classic East Coast collegiate style” and prohibits employees from wearing headgear. After a district court ruled in favor of the EEOC, an appeals court overturned the decision, concluding that an employer must have actual knowledge that an applicant or an employee required a religious accommodation and that the burden rested with the job applicant to explicitly express that she might be in need of an accommodation. Since there was conflicting evidence as to whether Abercrombie needed to initiate an interactive dialogue with the applicant about the potential conflict between the “Look Policy” and her religious practices, the applicant failed to meet her burden. The Supreme Court is expected to deliver its ruling in June.

III. Regulating Employees’ Tobacco Use

While employers have become more tolerant of tattoos and body piercings, companies have become less accepting of smokers. Smoking cigarettes in the office has become a relic of corporate America – with even Reynolds American, the maker of cigarette brands such as Camel, Kool and Pall Mall, recently instituting a policy restricting indoor smoking. Outside of the tobacco industry, though, most employers, have banned indoor smoking for years. This prohibition is consistent with many state laws and local ordinances which prohibit indoor smoking. Recently, numerous employers have taken further steps to regulate their employee’s smoking habits. Many companies have instituted a ban on hiring smokers and other tobacco users. Further, companies such as Macy’s and PepsiCo charge their employees a significantly higher surcharge on their health insurance if they are a smoker.

Encouraging smoking cessation through employment bans or benefit premiums are attractive options to businesses. A recent study conducted by a professor at Ohio State University determined that a single smoker costs their employer nearly $6,000 in lost productivity and higher medical costs each year. The Centers for Disease Control and Prevention estimates that smokers cost employers approximately $193 billion each year in increased healthcare costs and lost productivity. The average employer pays approximately $4,000 per year in additional health insurance costs for each smoker. The average smoker seeking health insurance through the exchanges is also seeing insurance rates of approximately $4,000 per year above those for a comparable nonsmoker.

Most employer smoking bans apply to all nicotine products, including smokeless tobacco and e-cigarettes. These smoking bans apply to new hires, who can now add drug testing for nicotine to the interview process. For current employees, businesses
incorporate the smoking bans as an extension of their smoking cessation or wellness program. Employers should, however, be cautioned against implementing widespread smoking bans as it is now illegal in twenty-nine (29) states and the District of Columbia to discriminate against tobacco users. In California, Colorado, New York, and North Carolina, the laws are not limited to tobacco use, but rather cover all lawful activities. Further, while some states prohibit discrimination against only current employees, the vast majority of states prohibit smoking discrimination against both future and current employees.

A. ADA Considerations

Additionally, employers that discriminate against smokers may be in violation of the Americans with Disabilities Act ("ADA"). Even though smoking is not typically considered a disability, its attendant health issues may qualify as disabilities under the ADA. So, an employee that has asthma or heart disease as a result of their pack-a-day habit may qualify as disabled under the ADA.

Moreover, the ADA may prevent employers from enforcing non-smoking policies through drug testing and may restrict the breadth of wellness programs. Under the ADA, employers are prohibited from requiring medical examinations or making inquiries of applicants and employees regarding the existence, nature, and/or severity of a disability, unless it is related to the job and consistent with business necessity. The employers' ability to test for nicotine depends on whether the test would be considered a "medical examination" under the ADA. If so, the tests would be restricted by the various ADA requirements for pre-offer, post-offer, and mid-employment medical testing. It bears noting that tests to determine the illegal use of drugs are not considered medical examinations.

Under the ADA, an employer may not ask any disability related questions or require any medical examinations prior to an offer of employment. After a conditional job offer has been given, but before the employee starts working, an employer may ask disability-related questions and conduct medical examinations regardless of whether they are job related, so long as it is done for all employees in the same job category. After employment begins, an employer may make disability-related inquiries and require medical examinations only if they are job-related and consistent with business necessity.

If a business institutes a wellness program, the employer may make medical inquiries as part of a "voluntary" health program. If, however, the program contains a significant incentive or penalty, such as a large cash award, significant premium discount, or employment for non-smokers, the program may be considered a "mandatory" program and the employer could, arguably, be prohibited from inquiring into
smoking-related medical conditions. General questions about an employee’s well-being, such as, “How are you?” are permitted, whereas asking an employee specifically about a disability or a broad question about impairments that is likely to elicit information about a disability, such as, “What impairments do you have?” is not permitted.

Employees’ wellness plans may also be subject to attack under the Health Insurance Portability and Accountability Act (“HIPPA”). Under HIPAA, a covered employer cannot discriminate against or charge certain employees more for health coverage due to “health factors.” Health factors may include: health status; medical conditions, including both physical and mental illnesses; claims experience; receipt of health care; medical history; genetic information; evidence of insurability; and disability. There is, however, an exception for health-contingent wellness programs that tie incentives, such as a reduced health insurance premium for not smoking, to whether a participant has met a particular health standard. These requirements, though, must be met: (1) participants are given the opportunity to qualify for the reward at least once per year; (2) the reward is not more than 30% of the total cost of the employee-only coverage, or 50% if the program is designed to prevent or reduce tobacco use; (3) the program is reasonably designed to promote health or prevent disease; (4) the program is available to all similarly situated participants; (5) a reasonable alternative is available for those in which it is unreasonably difficult to meet the standard or medically inadvisable to attempt to meet the standard; and (6) the availability of the alternative is disclosed to the employees. In 2013, final regulations clarified that for plans containing an outcome-based standard that an individual not use tobacco, a reasonable alternative standard may be to participate in an educational program on smoking. Any individual who attends the program is entitled to the full reward, regardless of whether the individual actually quits smoking.

B. E-Cigarettes

The use of e-cigarettes has risen dramatically in recent years. The e-cigarette market exceeds $2 billion annually and continues to rise, especially among adolescents and young adults. Given the growing prevalence of e-cigarettes, employers are re-evaluating their smoking policies and questioning whether vaping should be allowed in the workplace.

E-cigarettes are battery-charged devices that heat and vaporize a liquid nicotine solution that is inhaled and puffed, producing an odorless water vapor. They are touted as a smokeless alternative to traditional cigarettes, though research regarding the health effects of inhaling e-cigarette vapor, which can contain nicotine, toxic chemicals, and traceable carcinogens, is still in its infancy.
Most local and state smoke free laws were enacted before e-cigarettes were on the market. While such laws may not explicitly mention e-cigarettes, it should not be assumed that their use is permitted since many existing smoke free laws are often interpreted to include a prohibition on e-cigarette use. Currently three (3) states, North Dakota, New Jersey, and Utah, prohibit vaping in non-hospitality workplaces, restaurants, and bars. North Dakota also prohibits e-cigarette use in gambling facilities. Eighteen (18) additional states prohibit vaping at specific locations, such as school grounds, child care facilities, and public buildings and over 354 counties and municipalities have banned vaping in public spaces, including restaurants, bars, and offices.

Some employers, such as Wal-Mart and General Electric, not subject to the aforementioned laws prohibiting e-cigarette use in the workplace have already implemented policies banning vaping while other employers have embraced e-cigarettes and view them as tools to assist their employees to quit smoking tobacco. It is an inherently company-specific decision and should be made considering a variety of factors, including the effect on productivity, distraction, and business justifications.

IV. The Catch-All: Morality Clauses

For most business owners, morality clauses are irrelevant, unless they employ celebrities or professional athletes who could tarnish the company’s image based on some “immoral” conduct, such as drug use or criminal charges. In September 2014, “morals clauses” were thrust into the limelight after a video surfaced showing Baltimore Ravens’ running back, Ray Rice, knocking out his then fiancé, now wife, and dragging her out of an elevator. After the footage was released, the Baltimore Ravens quickly cut Rice from the team and the NFL suspended Rice indefinitely, though the suspension was overturned on appeal. Nike and EA Madden NFL 15 quickly followed suit and terminated their relationship with Rice based on the morality clauses contained in their endorsement agreements.

In addition to the (in)famous, morality clauses are often contained in executive employment agreements. “A morality clause permits the employer to discharge an employee for off-duty conduct that breaches the employer’s ethical expectations as outlined in the employment agreement.” Morality clauses give employers an opportunity at the beginning of the employment relationship to lay out the moral standards and ethical expectations. They provide employers a legitimate legal reason to fire an employee if the company believes the employee could damage its reputation or impact worker performance.

While morality clauses can be effective as risk avoidance provisions and help to stem media nightmares—particularly for executives or high-profile employees—they
may be subject to attack by disgruntled ex-employees. Most commonly, the employee will attack the morality provision’s language, claiming that a defect in the drafting entitles them to breach of contract for improper termination. For example, in *Galaviz v. Post Newsweek Stations, San Antonio, Inc.*, the employee claimed the morality provision was ambiguous and failed to put the employee on notice of the type of conduct that would lead to termination. The employee, a television reporter, was fired pursuant to a morality clause after she was involved in domestic abuse that resulted in her arrest and significant negative publicity. The employee subsequently filed a lawsuit, arguing in part that she had been inappropriately terminated because the morality clause did not put her on notice of the type of conduct that would lead to termination. The court disagreed, finding that the morality clause allowing termination for “becom[ing] involved in any situation . . . tending to degrade Employee in the community or which brings Employee into public disrepute, contempt, or scandal, . . . whether or not information in regard thereto becomes public,” easily covered the incident since the employee was arrested for domestic violence and coverage of the event included footage of her in handcuffs.

In *Haywood v. Univ. of Pittsburgh*, the employee alleged the morality provision gave too much discretion to the University. The employee further claimed the University breached the contract because it did not act in good faith in determining the University had just cause to fire him. Michael Haywood, former football coach for the University of Pittsburgh, claimed he was improperly terminated pursuant to a morality clause after he was arrested for domestic battery with a child present and received national media coverage of his arrest. The employment contract provided that “just cause” meant “as determined by the University any conduct of the employees that is seriously prejudicial to the best interest of the University…” The University claimed that Haywood could not prove it breached the employment contract by violating its duty to act in good faith because the contract afforded it with sole discretion to determine when “just cause” existed for certain categories of conduct. The court agreed, finding that by giving the University discretion to determine “just cause,” the University was not required to take any specific action other than to act reasonably to make that determination.

Employers interested in including morality provisions in their employment agreements should draft the provision carefully, keeping the lessons of *Galaviz* and *Haywood* in mind. It is important to emphasize that these morality clauses are generally limited to contract employees. Employers’ ability to regulate the off-duty conduct of at-will employees by including morality provisions in their employee handbook might be limited in states that prohibit discrimination against employees engaging in lawful activities.
V. Conclusion

Employer regulation of employee off-duty conduct is an ever-changing topic that demands employers’ attention and diligence. What is in the employer's control and discretion today can easily be taken away tomorrow. Moreover, it is almost always impossible for employers to anticipate what their employees will do at their own homes. Employers should keep this in mind and institute policies and procedures that enable them to act proactively against potential media disasters yet are flexible enough to be respectful of employees’ autonomy right to privacy.

---


iv Currently, the states that have enacted employee social media statutes include: Arkansas, California, Colorado, Illinois, Louisiana, Maryland, Michigan, New Hampshire, New Jersey, New Mexico, Nevada, Oklahoma, Oregon, Rhode Island, Tennessee, Utah, Washington, and Wisconsin.


vi See id.

vii See id.


ix See, e.g., id. at § 3(1).

x See, e.g., id. at § 4(a)(2).


xiii Michigan and six U.S. cities (Binghamton, New York, Madison, Wisconsin, San Francisco, California, Santa Cruz, California, Urbana, Illinois, and Washington, D.C.) have enacted laws making it illegal for employers to discriminate against applicants or employees on the basis of weight or height. Some, including Madison, Wisconsin, prohibit discrimination based on “physical appearance.” Weight Bias Laws: Tipping the Scales Against Prejudice?, THE RIGHTS STUFF NEWSLETTER (Summer 2010), available at http://mn.gov/mdhr/education/articles/rs10_2weightlaws.html.


xv The candidate’s claim that he was treated differently than other similarly situated individuals likewise failed because it was not applicable in the public employment context.


xvii But see Xodus v. Wackenhut Corp. 619 F.3d 683 (7th Cir. 2010) (finding plaintiff failed to make an explicit religious claim requiring the employer to consider a reasonable accommodation to the dress code when, after being told he needed to cut his hair, plaintiff stated that cutting his hair would be “against his beliefs”).


xix At mediation, Costco agreed to allow the employee to replace the eyebrow piercing with a clear plastic retainer or cover the piercing with a band aid.
