

Now more than ever, keep workplace dress code neutral



With a potentially polarizing election looming, workplace conflict over politics seems almost inevitable. Employers should avoid fueling those battles. One flashpoint to beware: Dress codes that prescribe what employees must or must not wear at work, especially concerning political expression.

Granting leeway to some workers but not others is practically asking for a lawsuit.

Recent case: The Whole Foods grocery chain has a dress and grooming code that prohibits employees from wearing anything bearing slogans, messages, logos and advertising that is not company related. There's nothing unusual about a policy like that.

Enter the coronavirus pandemic and a new, essential accessory: the face mask. Some Whole Foods managers apparently allowed workers to wear masks that supported causes like gay rights or featured pop-culture characters such as SpongeBob SquarePants.

However, according to new lawsuits filed by current and former Whole Foods employees, managers drew the line at masks expressing support for the Black Lives Matter movement.

Whole Foods faces class-action suits in California, Massachusetts, New Hampshire and Washington state alleging it treated employees of color less favorably than other employees by selectively enforcing the dress

code. The lawsuits also triggered a National Labor Relations Board complaint. (*Frith v. Whole Foods*, DC MA, 2020)

Note: This isn't the only lawsuit over face masks. An Ohio restaurant server has sued, alleging she was fired for refusing to wear a "Trump Keep America Great 2020" mask on the job.

Final note: Some employees erroneously believe they have a First Amendment right to wear political messages at work. That's not usually the case. The Constitution prohibits the government from restricting free speech, but not private parties. So only government employees enjoy free-speech rights at work.

Private-sector employers can limit employee expression—as long as the speech doesn't touch on the right to organize under the National Labor Relations Act. Thus a dress code cannot ban expression that advocate for union causes.

You'll pay if workplace dress code incites harassment

If you are in the restaurant or entertainment industry and require employees to wear revealing outfits at work, prepare for an unfortunate if entirely predictable consequence: Customers may harass your workers.

That's a genuine legal risk, and it's just as serious as if a supervisor was doing the harassing.

Simply put, employers are required to protect employees from sexual harassment.

It doesn't matter whether the harassment is coming from co-workers or customers. As much as possible, it's your duty to prevent harassment and put a halt to it when it does occur.

Here's how that played out for a sports bar and retail store in Hawaii.

Recent case: Snappers Sports Bar and Grill and Snap-ette Beach and Liquor Store in Honolulu employed women as servers, bartenders and clerks.

Some of those women quit and went to the EEOC to complain they had been forced out by the behavior of owners, managers and patrons. They said the owners and their supervisors urged them to wear cut-up T-shirts that exposed lots of skin, along with short shorts.

Being forced to dress provocatively had some perhaps expected results. The women reported they had to endure lewd comments about their breasts and buttocks, not just from patrons, but from the owners and their supervisors, too.

According to their EEOC complaint, some of the women had been the victims of unwanted touching and had been called derogatory, sexist names.

They said complaining internally didn't help. Instead, they said, it prompted retaliation: They had their shifts reduced.

All the former employees who complained said they found the environment so degrading that they had no choice but to quit. The EEOC sued on their behalf.

When the owners filed for bankruptcy, they ignored the lawsuit, leading to a default judgement. The judge in charge of the case ordered an award of \$255,302 for back pay, compensatory damages and punitive damages.

The EEOC will now try to recover the award amount from the bankruptcy court. (*EEOC v. Pacific Fun Enterprises*, DC HI 2019)