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Body Art! Is There A Policy And Is It Consistently Applied?

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The demographics for Michigan law enforcement officers show that managers are dealing with a mix of Traditionalists, Boomers, Xers, and Millennials in their employees. This broad spectrum of perspective has caused significant discussion and disputes over employees having and displaying body art in the workplace. Body art includes tattoos, branding, scarification, body paint, piercing, body play or shaping, mutilation, permanent makeup and aesthetic dentistry.

Public employees claim they have a right of self-expression under the First Amendment. Public employers counterclaim that they have a legitimate business necessity to regulate body art and its visibility on officers in order to maintain public confidence in the integrity, maturity, impartiality and reliability of the agency. At issue is whether a public employer can establish policy to regulate tattoos, piercings, scaring and other forms of body art.

Recent Stats on Tats!

The reason the topic of body art has become an issue is reflected in an on line survey published in February 2012, by Harris Interactive, a division of Harris Poll. Of the 2,016 adults surveyed about tattoos between January 16-23, one in five U.S.

adults reported they had at least one tattoo (21%). Adults aged 30-39 are most likely to have a tattoo (38%) compared to both those younger (30% of those 25-29 and 22% of those 18-24) and older (27% of those 40-49, 11% of those 50-64 and just 5% of those 65 and older). Women are slightly more likely than men to have a tattoo (now 23% versus 19%).

The Poll also looked at some other forms of body art or expression. Currently 49% of U.S. adults have pierced ears. Although ear piercing is common, other piercings are not: only 7% say they have a piercing elsewhere on their body and 4% report having a facial piercing not on the ear. Only 1% of U.S. adults say that they currently have a henna, or non-permanent, tattoo.

In another study, a Pew Research Center report from 2010 shows that about 40 percent of adults between 18 and 29 have one tattoo, and 50 percent of those with tattoos have more than one. Of those who tattoo themselves, 18 percent have more than six tattoos.

The Federal Courts

Employees often argued they have a right to a personal appearance but the courts have

consistently upheld the ability of public employers to dictate their employees' appearance. In doing so, it is important that the employer state a rational, fair reason for establishing the policy. In the U.S. Supreme Court decision, *Kelley v. Johnson*, 425 U.S. 238 (1976), the court held that a law enforcement agency's "choice of organization, dress, and equipment for law enforcement personnel is a decision entitled to the same sort of presumption of legislative validity as are state choices designed to promote other aims within the cognizance of the State's police power."

Justice Powell wrote in his concurrence in *Kelley* that "When the State has an interest in regulating one's personal appearance, as it certainly does in this case, there must be a weighing of the degree of infringement of the individual's liberty interest against the need for the regulation. This process of analysis justifies the application of a reasonable regulation to a uniformed police force that would be an impermissible intrusion upon liberty in a different context."

In *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986) the U.S. Supreme Court again affirmed the public employer's ability to regulate appearance in a case involving wearing religious headgear indoors. The court stated that the "desirability of dress regulations in the military is decided by the appropriate military officials." The Court also found "the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission." In giving deference to military uniform regulations when a public employee's First Amendment rights were at issue, the court went on to say "The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission, the military must foster instinctive obedience, unity, commitment, and esprit de corps."

The Sixth Circuit Court of Appeals addressed the issue of an employer's ability to establish a

workplace policy on appearance in *Roberts v. Ward*, 468 F.3d 963 (CA 6th, 2006). In this case, the director of the Kentucky State Parks issued an appearance policy to maintain the department's "professional atmosphere" for customers. Employees were required to comply with the policy or face discipline up to and including termination. The policy covered such things as hair length for men, tattoos, body piercings and the proper wearing of the prescribed uniform.

The Director in an e-mail to all managers stated the following ...

... providing outstanding customer service in a professional atmosphere creates a very positive first impression of us to the customer. Therefore, we have implemented a new professional appearance policy that ALL employees must adhere to at each Park location. Items addressed in the policy include hair length for men above the collar, no visible body piercings with exception of in the ear lobes for women only, no visible tattoos (long sleeves, pants, bandages, or wrist bands are approved ways to cover), and the proper wearing of the prescribed uniform in each department, which in most cases includes tucking in shirts and blouses. Please be advised that there are no exceptions to this policy. . . . Failure to comply with the new policy is clearly insubordination.

It is your role as park managers to ensure that ALL employees comply with Park policies. Any regular merit employee that fails to comply with the new policy should be issued a written warning for insubordination. If they continue to fail to comply, they should be placed on suspension. Of course, the final step, should they continue to not comply would be termination.

Any interim employee that fails to comply should be given the choice to comply or be sent home. After the initial warning, any interim employee that is observed to be not complying is to be terminated.

Three subjects were seasonal maintenance employees with six years of undisciplined employment with the Park Department. In the Spring of 2004 the subjects were discovered working without their shirts tucked in and were ultimately terminated. One of the employees was required to cover a "USN" tattooed on his arm that he said was to commemorate his service in the U. S. Navy. His refusal to cover the tattoo and comply with the policy also was included in the cause for termination.

As often occurs in these cases, the subjects brought First Amendment Free Speech, Fourteenth Amendment Due Process and Equal Protection claims, plus State civil rights claims in a suit filed in the Kentucky courts. They felt the appearance policy, specifically the part about the uniform and tattoos, was discriminatory. The Kentucky court dismissed the claims and so did the U.S. District court. The Plaintiffs appealed.

The Sixth Circuit Court of Appeals, in affirming the decision of the district court, ruled that the Park Department's appearance policy did not infringe on a clearly established First Amendment right because it did not involve a matter of public concern, and thus was not protected speech for a government employee. The Court ruled that the untucked shirt was not a matter of public concern and was not protected by the First Amendment as outlined in *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1958 (2006).

Interestingly, the court deferred the tattoo issue by saying that Plaintiff Leslie's free speech claim regarding his "USN" tattoo comes much closer to amounting to a matter of public concern, taking at face value his contention that it is intended to show support for the military. Whether Leslie's tattoo is considered speech that is a matter of public concern may turn on whether the speech is generic in nature, or whether it reflects an in-depth attempt to contribute to public discourse.

The court did rule that Leslie's support for the military is unrelated to his job as a state park employee. They went on to grant qualified

immunity to the individual defendants because the Plaintiffs had no protected property interest and because some dress code limitations are permissible. The court found that an individual's decision to display a tattoo such as Leslie's is not a clearly established right.

The court dismissed all claims finding that the employees had no protected property interest in their jobs, the policy was equally applied and the employees failed to show a disparate impact in its application and the state civil rights act claims were not supported by evidence of discrimination based on disability, race, color, religion or national origin.

Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission has ruled that employers can enact dress codes and appearance policies if the policies do not discriminate based on an individual's race, color, religion, age, national origin or gender as outlined in Title VII of the Civil Rights Act of 1964. In Michigan, the Elliott-Larsen Civil Rights Act adds height, weight, familial status, or marital status to the list of items that cannot be a source of discrimination.

An employer may regulate appearance through a policy that prohibits tattoos, body piercings and other types of body art that an employer states is not in line with the organization's branding, image, values or mission as long as the employer allows for religious or national origin accommodation. The appearance policy can also prohibit displaying body art that has images or slogans that are profane, demeaning or contain messages that may be disruptive in the workplace and impact productivity.

It is important to recognize that even though a law enforcement agency is considered paramilitary and the courts have given deference to the need to have a standard appearance with no display of preference or bias, consideration must be made to finding an accommodation if a conflict arises due to religion or national origin.

Examples are cited in the EEOC guidelines of religion and national origin conflicts. Many revolve around hair styling, head coverings, beards and occasionally tattoos or body art. For example, no-beard policies have been found to have a disparate impact on African-American males because they are the only males who suffer from Pseudofolliculitis barba, a skin condition caused by shaving.

The EEOC has ruled that an employer does not have to accommodate an employee's religious beliefs or practices if doing so would cause undue hardship to the employer. An accommodation may cause undue hardship if it is costly, compromises workplace safety, decreases workplace efficiency, infringes on the rights of other employees, or requires other employees to do more than their share of potentially hazardous or burdensome work.

As an example of best practices, the EEOC gives the following guidance: When an employer has a dress or grooming policy that conflicts with an employee's religious beliefs or practices, the employee may ask for an exception to the policy as a reasonable accommodation. Religious grooming practices may relate, for example, to shaving or hair length. Religious dress may include clothes, head or face coverings, jewelry, or other items.

The EEOC went on to say: Some courts have concluded that it would pose an undue hardship if an employer was required to accommodate a religious dress or grooming practice that conflicts with the public image the employer wishes to convey to customers. There may be limited situations in which the need for uniformity of appearance is so important that modifying the dress code would pose an undue hardship. However, even in these situations, a case-by-case determination is advisable.

Cases cited by the EEOC involving police departments include:

Daniels v. City of Arlington, 246 F.3d 500 (5th Cir.) (as a government entity, police department may be

able to demonstrate that providing the requested accommodation would have posed an undue hardship because allowing the officer to wear a cross on his uniform would give the appearance of public agency endorsement of the officer's religious views, in violation of the department's constitutional obligations), cert. denied, 534 U.S. 951 (2001);

Fraternal Order of Police v. City of Newark, 170 F.3d 359 (3d Cir. 1999) (police department violated Sunni Muslim officer's First Amendment free exercise rights by refusing to make a religious exception to its "no beard" policy to accommodate his beliefs, while exempting other officers for medical reasons);

Webb v. City of Philadelphia, 2007 WL 1866763 (E.D. Pa. June 27, 2007) (undue hardship to accommodate the wearing of a traditional religious headpiece called a khimar by a Muslim police officer while in uniform, where evidence showed dress code in para-military organization promotes cooperation, fosters esprit de corps, emphasizes the hierarchical nature of the police force, and portrays a sense of authority as well as public and religious neutrality to the public).

Guidance From LEAF's Legal Advisor

In looking for guidance in addressing the issue of acceptable appearance in a law enforcement agency, LEAF turned to their legal advisor Audrey Forbush, Plunkett, Cooney PC. Forbush stated that the first step to addressing the issue of appearance is to determine what the current department practice is and whether an existing policy supports the practice. The next step is to determine if the practice/policy meets the expectations of the employer and is current to industry standards.

If there is no policy, Forbush recommends that the department determine the employer's expectations for the appearance of the employees and whether job tasks create different expectations due to assignments. Management must also evaluate what has been acceptable in the past and, if the policy is

changed, what accommodations will be made for existing employees to meet the new requirements.

According to Forbush, management has to be mindful of the conflicts that can arise when changing the rules of acceptable appearance. This is especially true if management has not enforced existing policy or has developed an informal policy that smacks of favoritism or disparate treatment of employees. To ensure all employees understand the intent of the new policy, Forbush suggests that getting employee input and or participation as the policy is being developed can save conflict at the time of implementation.

To avoid problems, Forbush gives the following suggestions,

1. Have an appearance policy that includes all aspects of appearance while performing job assignments for all employees of the department.
2. Do research to ensure the policy is founded upon legitimate standards and meets current industry standards, laws, regulations and court rulings.
3. Include in the policy how employees can request accommodations or report violations. All requests for accommodations or complaints filed must be documented and acted upon as soon as it is practical to do so.
4. Mid-level managers and supervisors must be trained to the policy, the expectations of compliance, the discretion they have in enforcing the policy and requirements for reporting requests for accommodation or violations of the policy.
5. As with all policies, ensure the application of the policy is fair and consistent.

6. If a request for a religious accommodation (no matter how communicated) is made, contact the entity's legal advisor for assistance in evaluating the request to determine the course of action to be taken.
 - Consider each request and avoid assumptions or stereotypes about what constitutes a religious belief or practice.
 - Do not prejudge what type of accommodation is appropriate.
 - Meet promptly with the employee to share information about sincerely held beliefs and religious needs to identify accommodation opportunities.
7. Maintain open communication with employees concerning the policy and periodically engage in a policy review with a cross section of employees to ensure the policy reflects the practice of the department or to determine if modifications to sections of the policy should be made.

LEAF continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. Do not hesitate to contact the Michigan Municipal League's, Loss Control Services at 800-482-2726, for your risk reduction needs and suggestions.

While compliance to the loss prevention techniques suggested herein may reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our readers are encouraged to consult with their attorneys for specific legal advice.

LAW ENFORCEMENT ACTION FORUM (LEAF) is a group of Michigan law enforcement executives convened for the purpose of assisting loss control with the development of law enforcement model policy and procedure language for the Manual of Law Enforcement Risk Reduction. Members of the LEAF Committee include chiefs, sheriffs, and public safety directors from agencies of all sizes from around the State.

The LEAF Committee meets several times yearly to exchange information and ideas relating to law enforcement issues and, specifically, to address risk reduction efforts that affect losses from employee accidents and incidents resulting from officers' participation in high-risk police activities.

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