

Image Discrimination: Is That Advertising Campaign Really Worth It?

Mary B. Rogers and
Kimberly A. O'Sullivan

PITNEY HARDIN LLP

Image discrimination claims have become more and more prevalent. Marketing campaigns that feature young, conventionally attractive models, appearance and grooming standards and customer preference are, in large measure, responsible for the uptick in these kinds of claims. This article explores the types of image discrimination claims raised in recent cases, addresses the costs associated with successful claims, and provides guidance to help employers prevent image discrimination claims.

Background

Title VII of the Civil Rights Act of 1964, as amended, prohibits employment discrimination based on race, color, religion, age, sex, national origin or protected activity. What most companies aren't paying attention to is the fact that image discrimination can be based on any of these categories. On April 19, 2006, the Equal Employment Opportunity Commission ("EEOC") issued policy guidance on image discrimination issues. While specific to race and color discrimination, the EEOC's guidance addresses a wide range of contemporary workplace issues and focuses on practices that may give rise to image discrimination claims.

Employer practices can be grouped into three areas that often result in image discrimination: 1) stereotypes and bias; 2) customer preference; and 3) appearance and grooming standards.

A. Stereotypes and Bias

A company may fall prey to image discrimination when it creates a specific "look" or "image." Image discrimination claims may be based upon race, color, national origin, age, religion, and/or gender. As a result, any new "look" or "image" that focuses on youth, conventional good looks or any other feature that may be characterized as stereotypical or biased opens the company up to an image discrimination claim. Two prime examples of this kind of image discrimination are the recent suits against the clothing retailer, Abercrombie & Fitch, and the Borgata Hotel Casino & Spa in Atlantic City, New Jersey.

In 2003, nine former employees sued Abercrombie & Fitch in a class action alleging discrimination against Hispanics, Asians, African Americans, and women. The complaint asserted that the plaintiffs were asked to work in back storage rooms or put on overnight shifts rather than on the sales floor during regular business hours because they did not fit the "Abercrombie look."

Abercrombie & Fitch settled the suit

Mary B. Rogers is a Partner in Pitney Hardin's Labor and Employment practice group where she concentrates her practice in the representation of management in traditional labor matters and in employment litigation and counseling. Kimberly A. O'Sullivan is an Associate in the Labor and Employment practice group.



Mary B.
Rogers



Kimberly A.
O'Sullivan

in 2005 for approximately \$50 million dollars. Part of the settlement involves a Consent Decree that obligates Abercrombie & Fitch to develop and implement hiring and recruiting procedures to guard against discrimination against applicants based upon race, color, national origin or sex. Specifically, the Consent Decree requires, among other things, the following:

- Benchmarks for the hiring and promotion of women, Latinos, African Americans, and Asian Americans. These benchmarks are goals, rather than quotas;
- A prohibition on targeting fraternities, sororities, or specific colleges for recruitment purposes;
- The creation of a new Office and Vice President of Diversity, responsible for reporting to the CEO on Abercrombie's progress toward fair employment practices;
- The hiring of 25 recruiters who will focus on and seek women and minority employees;
- A new internal complaint procedure; and
- An obligation that Abercrombie & Fitch marketing materials reflect diversity by including members of minority racial and ethnic groups.

Abercrombie & Fitch not only paid millions in damages, but it had to change its "image" by creating a marketing strategy that reflects diversity.

Claims of stereotypes and bias resulting in image discrimination formed the basis of a 2006 lawsuit against the Borgata Hotel Casino & Spa. Two female cocktail servers filed a \$70 million sex discrimination lawsuit against the casino, claiming that it humiliated costumed "Borgata Babes" (the moniker for cocktail waitresses wearing bustiers, high heels and tight-fitting bolero-style jackets) by imposing weight limits, encouraging breast augmentation surgery and emphasizing looks over job performance. In 2005, the casino implemented a personal appearance policy for costumed waitresses and bartenders. The policy requires men to maintain V-shaped torsos, broad shoulders and slim waists. Female cocktail servers who gain too much weight are subject to unpaid suspension and given three months to drop the pounds, aided by a company-sponsored weight-loss program.

Casino officials have said they stand by the policy and that the appeal of their casino derives in part by having slim, sexy women who reinforce the casino's brand serving drinks. The case is still pending but demonstrates the way a company's "image" can result in costly litigation.

B. Customer Preference

Just when employment law practitioners assumed that customer preference

was dead as a defense to discrimination claims, it reared its head – but not for long. For example, the Seventh Circuit has held that the assignment of African American and Asian American salespersons to sales territories with a high percentage of African Americans and Asian Americans was discriminatory. See *Johnson v. Zema Sys. Corp.*, 170 F.3d 734 (7th Cir. 1999). Additionally, the Eastern District of Arkansas found that a home care agency could not lawfully refuse to hire a qualified African American aide because the clientele would not be comfortable with her. The agency, which hired aides to provide in-home assistance to elderly, disabled and ill persons, had mostly Caucasian clientele who expressed a desire for Caucasian home care aides. The court found that implementing hiring practices based upon customer preference was discriminatory and impermissible. See *Ray v. University of AK*, 866 F.Supp. 1104 (E.D. Ark. 1994). These cases demonstrate that a company cannot rely upon the defense of "it's what the customer wants."

C. Appearance & Grooming Standards

Appearance and grooming standards are particularly susceptible to image discrimination claims. As a general rule, appearance and grooming standards should be neutral, adopted for nondiscriminatory reasons, and consistently applied to persons of all racial and ethnic groups. Examples of the kinds of things that may be covered in an appearance and grooming policy include: height and weight, dress, hair, and beards and facial hair. Most companies encounter difficulties with these standards, particularly when they are applied across the board to all employees, without allowing for accommodation under certain circumstances.

There have been a number of recent cases of image discrimination resulting from appearance and grooming policies. For example, the Eighth Circuit granted the EEOC an injunction against Domino's Pizza for its "no beard" policy. The chain enforced a strict no-beard policy for all male employees. However, it failed to prove that the strict no-beard policy as applied to African Americans with PFB (pseudofolliculitis barbae) was job-related or necessary to the business. Accordingly, the policy was found to be discriminatory.

More recently, the EEOC brought a religious discrimination suit against Red Robin Gourmet Burgers, Inc., a burger chain, for refusing to accommodate a waiter's religion. The waiter had small tattoos of religious inscriptions encircling his wrists. The company believed the tattoos violated its dress code policy which prohibited visible tattoos. The company argued that the policy supported its "wholesome family image." The court did not agree. Following denial of the company's motion for summary judgment, the case settled for approximately \$150,000 and an agreement to make substantial policy and procedural changes to ensure accommodation of religious beliefs.

In July 2004, *The New York Times* covered the story of two Sikhs who had been terminated for wearing their turbans on the job as traffic enforcement agents.

The cases were unrelated but involved similar allegations that each was denied an exemption from the police uniform rules for their turbans, a central element of daily religious practice for Sikh men. An administrative law judge found the implementation of the dress code to constitute religious discrimination and reinstated the men and permitted them to wear their turbans.

The EEOC brought suit against Alamo Rent-A-Car LLC ("Alamo") based upon its "Dress Smart Policy." A Muslim employee requested an accommodation to allow her to wear a head covering during Ramadan. Alamo agreed to allow her to wear the covering, but only in the back of the office and it did not excuse the employee from working at the rental counter. Alamo terminated the employee after she refused to remove the head covering while she worked at the rental counter. The court ruled that Alamo had not offered any accommodation because the employee was required to work the rental counter and not permitted to wear the head covering during that time. The court also rejected Alamo's defense of customer preference. In May 2006, the court granted partial summary judgment to the EEOC.

What Can Companies Do To Prevent Image Discrimination Claims?

Image discrimination suits are prevalent and expensive. There are a number of routine checks a company can conduct to determine if any of its policies, and their implementation, could lead to image discrimination claims.

First, take a long hard look at your company's "image." Do your employees, especially the sales force, share a common "look?" If so, analyze the "image" or "look" to determine if it could be viewed as excluding people of color, older workers or members of certain religious groups. Check to see if any policies or procedures, especially hiring and promotion practices, have been implemented as a method of developing the "look" or "image" and analyze them to determine if they have any discriminatory effects.

Second, check to see if the company has any practices or policies that have been developed as a result of customer preference. If so, analyze what the customer preference is and determine if the preference is itself discriminatory. If not, the company should still review what effect, if any, the preference has on the practices or policies relating to employees and applicants.

Third, review any appearance and grooming standards. Make sure that there are methods for employees to request accommodations. Analyze the policy to insure that it has no discriminatory effects.

Image discrimination is a serious claim that can strike at the heart of a business. Marketing campaigns are costly propositions and image discrimination claims can be an unintended and equally expensive consequence. The "look" that a company creates can and will be used against it in a court of law. A proper analysis of current policies and procedures and marketing strategy will pay dividends by eliminating or minimizing the potential for claims of this sort.

Please email the authors at mgrogers@pitneyhardin.com or kosullivan@pitneyhardin.com with questions about this article.