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Rejecting the Tattooed Applicant, Disciplining the Tattooed Employee: What Are the Risks?

Stephen Allred
University of Richmond, sallred@richmond.edu

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By Stephen Allred

In the last twenty years, there has been a significant rise in the popularity of tattoos. Once relegated to the marginal realm of sailors, motorcycle gang members, or dock workers, tattoos are now proudly displayed by NBA stars, rock artists, and film actors.[1] Perhaps not surprisingly, American workers, particularly younger workers, have emulated their idols and obtained tattoos too—at a remarkable rate. In fact, a 2012 Harris Poll found that one in five American adults had at least one tattoo.[2] And while increasing percentages of Americans view tattoos as acceptable (indeed, even as art), tattoos still carry a persistent stigma among many members of society—including many employers.[3]

There are a number of media reports of tattooed applicants being denied jobs,[4] and even stories of employees being disciplined or discharged for having tattoos.[5] But with what result? What liability may an employer have for refusing to hire an applicant with a tattoo, or for discharging a tattooed employee? This article summarizes the current state of the law on this increasingly complicated and timely question. Claims have been brought by public sector applicants and employees alleging violations of the their Fourteenth Amendment right to equal protection and/or their First Amendment right to free speech, and by private sector applicants and employees alleging violations of Title VII of the Civil Rights Act of 1964 or state nondiscrimination laws.[6] As the number of tattooed applicants and employees increases, we may expect to see further challenges to an employer's decision to reject a tattooed applicant or to discipline a tattooed employee.

Constitutional Claims

Because public agencies function in a dual role—not only as an employer supervising an employee, but also as government agents exercising control over a citizen--they may be held liable for violations of the Constitutional rights of their employees.[7] As noted above, challenges have been brought by tattooed public employees or applicants as equal protection claims or free speech claims. There is also a possibility that a claim may be brought as a Fourteenth Amendment liberty interest claim. Each of these grounds for challenge are addressed in turn below.

DR. STEPHEN ALLRED is a Professor at the University of Richmond School of Law. He is grateful to Reference Librarian Alexis Fetzer for her assistance with this article.

Equal Protection

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny any person within its jurisdiction the equal protection of the laws."[8] Reduced to its simplest terms in the employment context, the Equal Protection Clause directs that all employees similarly situated should be treated in the same manner. To determine the validity of any challenged classification, a reviewing court must determine the proper standard of review. Generally, "legislation is presumed to be valid and will be sustained if the classification drawn ... is rationally related to a legitimate state interest."[9] If, however, the classification is based on the suspect classifications of race, alienage, or national origin, or if a fundamental right is involved, the classification will be subjected to strict scrutiny and will only be upheld by the court if the classification serves a compelling state interest.[10] An applicant for employment or an employee alleging a violation of the Equal Protection Clause must show that he or she is a member of a protected class, is otherwise similarly situated to members of the unprotected class, and that he or she was treated differently from members of the unprotected class.[11] The applicant or employee must demonstrate that the employer acted with a discriminatory purpose.[12]

Two cases have arisen in which tattooed police officers challenged the employer's requirement that they cover their tattoos as a violation of the Equal Protection Clause.

In the first case, *Inturri v. City of Hartford*,[13] the Federal District Court for Connecticut denied the argument of five Hartford police officers that they had the right to display spider web tattoos on their wrists. The Hartford police chief had instructed the tattooed officers to wear long sleeves or to otherwise cover their tattoos, because the chief understood the spider web tattoos to signify support for white supremacy. The officers countered that the spider web tattoos had nothing to do with white supremacists, and that the tattoos were merely decorative; they explained that each web represented a year of service, and that they had obtained them while in the military (although they did concede that the tattoos could be interpreted to have racist overtones). The officers claimed that their rights under the Fourteenth Amendment had been violated when the police chief "arbitrarily and capriciously singl[ed] out the plaintiffs for differential treatment"[14] because of their tattoos.

The district court analyzed the officers' Fourteenth Amendment claim to determine whether the classification in question—treating tattooed versus non-tattooed employees differently—was rationally related to a legitimate governmental purpose. The court held that the police chief's concern that "the spider web tattoos could negatively affect relations among the officers in the department, and between the officers in the department and the citizens of Hartford, especially those from minority groups,"[15] constituted a legitimate government interest. The court found that the police chief "had a rational basis and justification for ordering that the tattoos be covered," and that his order "that such tattoos be concealed while an officer is on duty or in uniform [was] rationally related to the department's legitimate interest in fostering harmonious race relations both within the department and within the community."[16]

In the second case, *Riggs v. City of Fort Worth*,[17] the Federal District Court for the Northern District of Texas applied a rational basis standard of review to a police officer's claim that he was treated differently because of his tattoos. The Fort Worth police chief informed officer Michael Riggs, who worked in a bike-patrol unit, that although officers in that unit could normally wear short sleeves and shorts, Riggs could not do so. The chief's concern was that Riggs had extensive tattoos, highly visible on his arms and legs, and thus his appearance detracted from the professionalism of the police force. The chief directed Riggs to wear long sleeves and pants while on duty; Riggs complied, but as a result he soon suffered from heat exhaustion. The police chief reassigned Riggs to a desk job and later to a plain-clothes unit. The chief then told Riggs that he could wear a police officer's uniform, but only if the uniform included long sleeves and long pants.

Riggs brought an Equal Protection claim against his employer, arguing that the police chief had treated him differently from his non-tattooed counterparts, and that there was no rational basis for the chief to have done so. As in the *Inturri* case, however, the court did not agree with the tattooed employee.

The Texas federal court held that a law enforcement agency's "[c]hoice 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."[18] The opinion noted that in other appearance cases courts had long held that "the city through its police chief has the right to promote a disciplined, identifiable, and impartial police force by maintaining its police uniform as a symbol of neutral government authority, free from expressions of personal bent or bias."[19] The court concluded that the police chief had legitimate, nondiscriminatory reasons—that the tattoos would distract from the uniform appearance necessary for good police work--for requiring the only officer in the Fort Worth Police Department who had tattoos covering his legs and arms to wear a uniform not required of other police officers.

Free Speech

Some public employees have argued that their tattoos are a form of expression or speech protected by the First Amendment. Under the standard announced by the U.S. Supreme Court in *Connick v. Myers*,[20] if a public employee speaks as a citizen on a matter of public concern, then the employer may not discipline the employee unless the speech is unduly disruptive of the employer's operations.

Although few Courts have considered the issue, those that have appear to agree that a tattoo is generally not protected speech under the First Amendment. For example, in *Stephenson v. Davenport Comm. School District*,[21] the Eighth Circuit held that a high school student could be forced to remove a cross tattoo on her hand (which the school administration viewed as a gang symbol), where the student admitted that she did not view her tattoo as any form of religious expression, but was rather simply a form of self-expression.[22] The court distinguished the tattoo from political speech, such as the black armband worn by a student to protest the Viet Nam war in *Tinker v. Des Moines School District*."[23]

In *Riggs v. City of Fort Worth*, discussed above, the court held that officer Riggs' extensive tattoos did not constitute "protected expressions under the fundamental First Amendment right of free speech."[24] The court characterized Riggs's tattoos as an expression of his personal beliefs rather than speech on a matter of "legitimate public concern." [25] And in *Inturri v. City of Hartford*, also discussed above, the plaintiff employees withdrew their initial free speech claim, instead stating that their spider web tattoos were not "expressive conduct."[26]

Four recent cases involving tattooed applicants or employees show how various federal courts continue to wrestle with the First Amendment free speech question.

The first recent case in which a tattooed applicant brought a free speech claim against a public employer is *Scavone v. Pennsylvania State Police*.[27] There, the Pennsylvania State Police had a policy requiring applicants for law enforcement position to have any tattoos reviewed by an agency board to determine whether an applicant was fit to be hired. Even though applicant Ronald Scavone was otherwise qualified for a liquor enforcement officer job, he was informed by the board that he would have to have one of his tattoos removed if he wanted to continue to be considered for the position. He refused to do so, and was not hired.

Scavone brought a First Amendment retaliation claim against the agency, alleging a causal link between his constitutionally protected conduct and the decision not to hire him, arguing that the tattoo removal policy was selectively enforced against him simply because he "spoke out and hired a lawyer."[28] The court rejected that argument, finding that he was advised to remove his tattoo in early June of 2008, and that he asserted in his brief that he first "began engaging in protected speech in 'late 2008 and 2009.'"[29] The court concluded that because Scavone did not engage in any protected speech protesting the tattoo policy until after the policy was enforced against him, he was not subjected to any retaliation. More significantly, the court rejected the applicant's argument that the tattoo policy itself violated the First Amendment.[30]

The second recent First Amendment challenge arose in a Sixth Circuit case, *Roberts v. Ward*,[31] and involved three employees of the Kentucky Department of Parks who were fired for failure to comply with the agency's dress code. The policy required employees to have an overall neat appearance, to keep their shirts tucked in while on duty, and to be tattoo free. One of the three Parks Department employees, William Leslie, had a "USN" tattoo on his arm commemorating his service in the United States Navy. Leslie claimed that enforcement of the ban on tattoos violated his First Amendment free speech rights.

Although the court had little trouble dismissing the claim of the other two employees that enforcement of a dress code requiring them to tuck in their shirts was a free speech violation, the court found that Leslie's "USN" tattoo "present[ed] a potentially closer question."[32] The employee argued that his tattoo expressed his "support, loyalty and affection for the U.S. Navy."[33] The court agreed that support for the military came much closer to speech on a matter of public concern than wearing untucked shirts. Further, the court noted that Leslie's support for the military was unrelated to his job as a state park employee. The employer countered that Leslie's tattoo only reflect his personal service in the Navy, and that the tattoo was at most a matter of personal taste and decoration, not speech on a matter of public concern.

The court took at face value Leslie's claim that his tattoo was intended to show support for the military. The key to whether it also constituted protected speech was "whether the speech is generic in nature, or whether it reflects an in-depth attempt to contribute to public discourse."[34] However, because Leslie had failed to comply with the dress code in other ways (e.g., wearing his shirt untucked), the court found that the agency had an independent basis for his dismissal, and that "it need not address the closer question of the First Amendment protection of his tattoo."[35]

A third recent case involving a free speech claim by a tattooed public employee is *Medici v. City of Chicago*.[36] In that case, a Chicago police officer named Daniel Medici had "two tattoos—one relating to his military service as a Marine and the other relating to his religious beliefs."[37]

The Chicago Police Department issued a policy requiring officers to cover up any tattoos while on duty, and Medici protested, claiming that the requirement that he wear extra clothing or cover his tattoos with adhesive bandages caused him to experience "overheating in warm weather months, as well as skin irritation and discomfort from the adhesive bandages." When Medici was ordered to continue to cover his tattoos, he brought a free speech claim against the city, framing the tattoos as a form of speech on a matter of public concern.

The court held that Medici's tattoos were merely a form of personal expression, not symbolic speech on a matter of public concern. Stated the court:

> When an individual decides to place a symbol, a set of words, or a design on his or her body, he or she is engaging in a form of personal expression, rather than a form of commentary on the interests of the public. Furthermore, on-duty [police officers] are not part of the citizenry at large, but instead government employees, whose speech may be subject to restrictions that, if applied to the general public, may be unconstitutional. Therefore, because the "speech" at issue does not involve citizens commenting on matters of public concern, the *Pickering* balancing test is not applicable. However, even if this Court were to find that the tattoos constituted citizen speech on matters of public concern, as the City has assumed for purposes of its motion to dismiss, the balance substantially weighs in favor of the City . . . ."[38]

The final recent case is the only one in which a court found that an employee's tattoo constituted symbolic speech. In *Baldetta v. Harborview Medical Center*[39] the Ninth Circuit was faced with a claim from a public hospital nurse named John Baldetta, who had an "HIV Positive" tattoo which he refused to cover while on duty. He claimed that his employer's requirement that he cover his tattoo constituted an unwarranted infringement on his free speech rights as a public employee.

The Ninth Circuit Court of Appeals held that the definition of public employee speech on a matter of public concern should be construed broadly, "to include almost any matter other than speech that relates to internal power struggles within the workplace."[40] Given this broad definition, the court concluded, Baldetta's speech was on a matter of public concern. However, applying the *Pickering/Connick* balancing test, the court held that the public employer's interests in facilitating their patients' recovery outweighed the employee's interest in displaying the tattoo, as "display of the tattoo would cause stress in severely injured or ill patients which could hinder their recovery."[41]

There are two somewhat related cases in which an employee's complaints about the tattoos of fellow employees were held to be protected speech on the part of the complaining employee. In the first, *Robinson v. York*,[42] Richard Robinson, a sergeant with the Los Angeles County Office of Public Safety (OPS), filed a free speech claim in which he alleged that he was denied a promotion because he spoke out against a series of bad practices in the department. One of the matters on which Robinson spoke was the fact that several police officers in the OPS wore distinctive tattoos that were possibly indicative of anti-Semitic attitudes.[43] The court held that Robinson's complaints about officer misconduct in the OPS constituted speech on a matter of public concern, and that he was punished for that speech.

In the second case, *Hartwell v. City of Montgomery*,[44] an African American firefighter named Lee Hartwell complained that his chief, who was white, had a tattoo on his bicep showing a skull and crossbones superimposed on a Confederate battle flag. When Hartwell was demoted by the fire chief, he claimed that he was disciplined for speaking out a matter of public concern—the racially discriminatory beliefs and practices of a city official. The court found that Hartwell engaged in protected speech and ordered the case to trial.

In neither case, however, was the court called upon to decide whether the tattoos worn by the other employees constituted expressive conduct on their part.

Liberty Interest

The U.S. Supreme Court has only addressed the question of whether restrictions on a public employee's appearance might cross Constitutional boundaries once, and it was forty years ago. In *Kelley v. Johnson*, [45] the Court considered the actions of the Police Commissioner of Suffolk County, New York in establishing hair-grooming standards for all male members of the police force. The Court considered the officers' claim that their choice of personal appearance, including the decision to wear a mustache or long hair, was an ingredient of their personal liberty protected by the Fourteenth Amendment. While the Court assumed the existence of a liberty interest on the part of the officers, it also found that there was a valid interest on the part of the government employer in promoting a uniform appearance of its police officers. Stated the Court:

> The promotion of safety of persons and property is unquestionably at the core of the State's police power, and virtually all state and local governments

> employ a uniformed police force to aid in the accomplishment of that purpose. 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.[46]

The Court then focused on the question of whether the Suffolk County Police Commissioner's determination that those appearance regulations, including restrictions on hair length and facial hair, was "so irrational that it may be branded 'arbitrary,' and therefore a deprivation of respondent's "liberty" interest.[47] The Court answered that question in the negative, and upheld the grooming standards against the liberty interest challenge, stating:

> The overwhelming majority of state and local police of the present day are uniformed. This fact itself testifies to the recognition by those who direct those operations, and by the people of the States and localities who directly or indirectly choose such persons, that similarity in appearance of police officers is desirable. This choice may be based on a desire to make police officers readily recognizable to the members of the public, or a desire for the *esprit de corps* which such similarity is felt to inculcate within the police force itself. Either one is a sufficiently rational justification for regulations so as to defeat respondent's claim based on the liberty guarantee of the Fourteenth Amendment.[48]

Thus, after the Supreme Court's ruling in *Kelley*, a viable avenue was created for public employees to assert that their Fourteenth Amendment liberty interests were violated when they were told how to dress, how to wear their hair, or whether they could display their tattoos. Surprisingly, however, there have been no cases in which public employees have brought claims that tattoo bans were a violation of their liberty interest, even though there have been numerous successful subsequent liberty interest claims brought by employees against dress codes, grooming standards, and other aspects of personal appearance.[49] In only one tattoo case, *Roberts v. Ward*,[50] discussed in the section on free speech claims above, was the matter broached indirectly; there, the court noted that the plaintiff did not identify any liberty interest that would entitle him to due process protections prior to the change in the employer's dress code.

As is evident from this review of the reported cases involving tattooed applicants and employees in the public sector, there is little likelihood of a successful constitutional challenge to an employer's decision to reject a tattooed applicant or to require a tattooed employee to comply with a dress code. Equal protection challenges are likely to result in a finding that the public employer had a rational basis for treating tattooed employees differently, and free speech challenges face the substantial obstacle of convincing a court that a tattoo constitutes symbolic speech on a matter of public concern. Liberty interest challenges are, thus far, nonexistent.

However, this does not mean that public employers are free from liability. Like private sector employers, they may be challenged by tattooed applicants or employees who claim discrimination under Title VII of the Civil Rights Act of 1964.[51] We now turn to those cases.

Title VII Claims

Title VII Religion Cases

It might be surprising to learn that some tattooed employees have brought claims under Title VII of the Civil Rights act of 1964, citing the statute's prohibition against employers discriminating on the basis of religion.[52] Nonetheless, employees have been able to state such claims. The statute defines the term "religion" broadly to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's ... religious observance or practice without undue hardship on the conduct of the employer's business."[53] When an employee's bona fide religious belief or practice conflicts with an employment requirement, Title VII requires the employer to accommodate that belief or practice, within reasonable limits.[54]

How might an employee claim his or her tattoo is a religious symbol? In the case of a cross or a Star of David, the answer may be obvious. But other less conventional tattoos might also be religious symbols, since under Equal Employment Opportunity Commission ("EEOC") guidelines an employee's religious beliefs need not be espoused by a formal religion or a traditional church. The EEOC guidelines on religious discrimination recognize, "[t]he fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee."[55] This broad view has been endorsed by the Supreme Court, which has held that Title VII's protections are not limited to beliefs and practices that courts perceive as "acceptable, logical, consistent, or comprehensible to others." [56]

But even if an employee asserts a tattoo is a religious symbol, the employee must also demonstrate that the tattoo reflects a sincere belief, and is not merely a decoration. Further, the employee must notify the employer of his or her religious belief or practice, and the employee must demonstrate that the religious belief or practice was the basis for an adverse employment decision.[57] Once a plaintiff establishes a *prima facie* case of religious discrimination based on a failure to accommodate, the burden shifts to the employer to show that it offered the employee a reasonable accommodation of the religious practice, to show that any accommodation would result in undue hardship for the employer. Once an employer offers a reasonable accommodation, its obligations under Title VII are satisfied.[58] The accommodation does not have to be the best accommodation possible, and the employer does not have to demonstrate that alternative accommodations would be worse or impose an undue hardship.[59]

With this framework in mind, we review five Title VII religion cases involving tattoos in the workplace.

In the first case, *Swartzentruber v. Gunite Corporation*,[60] an employee named Sheldon Swartzentruber worked in a manufacturing plant but was also a member of the KKK. He had tattoo of a hooded figure with a burning cross prominently displayed on his forearm, which he claimed was a sacred symbol of his religion.

Although Swartzentruber agreed to cover his tattoo while at work, Gunite Corporation management received reports from other employees that he was leaving his tattoo uncovered for extended periods of time. The employer directed two of Swartzentruber's supervisors to monitor him closely. Swartzentruber believed that such monitoring was harassment, and so filed a complaint alleging that by requiring him to cover his tattoo his employer was discriminating against him on the basis of his religious beliefs.

To establish a *prima facie* case, Swartzentruber had to show that he held a sincere religious belief that conflicted with a business requirement. The court found that Swartzentruber failed to establish a *prima facie* case. Moreover, the court said that even if Swartzentruber had established a prima facie case, his claim would have failed, since allowing him to have his tattoo in plain sight at the workplace would have caused an undue hardship on the employer. The court reasoned that: "Some would certainly view a burning cross as 'a precursor to physical violence and abuse against African-Americans and . . . an unmistakable symbol of hatred and violence based on virulent notions of racial supremacy.'" [61]Accordingly, the court dismissed Swartzentruber's claim and upheld the employer's requirement that he cover the offensive tattoo.

In the second case, *EEOC v. Red Robin Gourmet Burgers Inc.*,[62] the court reached a different result. Here, a restaurant employee named Edward Rangel was fired for refusing to cover two religious tattoos on his wrist. Rangel had agreed to the restaurant's appearance policy when he was hired, and that policy prohibited visible tattoos and piercings. However, Rangel practiced Kemeticism, a religion with roots in ancient Egypt, and he had tattoos on each wrist signifying his servitude to the Egyptian sun god Ra. Rangel argued that it would be a sin for him to hide the tattoos because of their religious significance.

Unlike Swartzentruber, Rangel established a *prima facie* case of a sincere religious belief that conflicted with a business requirement. Thus, the restaurant had to show that it would suffer an undue hardship in accommodating the tattooed employee, and the employer tried to do so, arguing that tattooed employees were antithetical to the family-oriented nature of their business. However, the court found that the restaurant did not suffer any undue hardship, as Rangel had been working there for a full six months without incident before he was asked to cover his tattoos. No customers had complained, and the employer's argument was unavailing.

In the third case, *Cloutier v. Costco Wholesale Corp*,[63] an employee named Kimberly Cloutier was a member of the Church of Body Modification, an organized church that emphasizes, as part of its religious doctrine, spiritual growth through body modification. Over a two year period while working for Costco, Cloutier increasingly engaged in the practices of tattooing and body piercing. When she was moved to a sales position in the food department, she was told that although her tattoos were not a problem, her facial piercings violated Costco's dress code policy. Cloutier refused to remove her piercings, and was fired.

Cloutier sued under Title VII, but lost. Although the federal district court found that the Church of Body Modification was a bona fide religion, and that the Cloutier was sincere in her belief that practicing ancient body modification rites was essential to spirituality, there was a significant catch. Specifically, the court found that Cloutier's religion did not require a display of facial piercings at all times, and that covering her facial piercings during work hours would not infringe on her religious beliefs any more than covering her tattoos by wearing a long-sleeved shirt would. The court ruled that the employer had fully satisfied its legal obligations to provide a religious accommodation. On appeal, the Second Circuit Court of Appeals affirmed the district court, but further held that Costco had no duty to accommodate its sales employee's religious beliefs by exempting her from the organization's dress code, because to do so would impose an undue hardship.

In the fourth case, *Finkelshteyn v. Staten Island University Hospital*,[64] an employee named Lenny Finkelshteyn, who worked as a nurse, claimed that because he was Jewish he was subjected to a hostile work environment, disparate treatment, constructive discharge, and retaliation. After he had been employed for a while by the hospital, he got a tattoo, which he showed to his coworkers. Specifically, Finkelshteyn "had the emblem and Hebrew initials of the 'Israeli Defense League' (described by Finkelshteyn as a counter-terrorism, special forces unit of the Israeli military) tattooed on his upper-arm."[65] He testified that his supervisor looked at his tattoo and said he was crazy, which he claimed was evidence of a hostile working environment.

The court disagreed, holding that comments that may have been made by his supervisor or co-workers about his tattoo did not support his claim. The court noted that "Finkelshteyn fails to allege the use of incendiary language or overtly discriminatory epithets. Moreover, even he concedes that his co-worker's reactions [26] just as likely reflected their shock at his new and admittedly prominent tattoo than mockery of his faith."[66] Thus, there was no reasonable inference of discrimination arising from the supervisor's comment about his tattoo; there was, however, sufficient other evidence of a hostile working environment to cause the court to deny the employer's motion to dismiss.

In the fifth and final case, *Baltazar v. Petland Discs. Inc.*,[67] an employee named Mynor Baltazar worked as a clerk in a pet store. He was also a priest of the Garifuna religion, and he claimed he was required by his employer to cover his tattoo while at work, in violation of his religious beliefs under Title VII. The court did not render a decision on the merits of his religious discrimination claim in this case, but denied the employee's motion to amend his complaint.

Thus, a review of the reported cases involving religious discrimination claims by tattooed employees shows that an employee may be able to successfully demonstrate that a tattoo is a religious symbol. The harder question for the courts to resolve is whether display of the tattoo may be reasonably accommodated by the employer, particularly given the wide variety of settings in which employees work.

Title VII Race or Sex Discrimination Cases

Title VII includes a prohibition of discrimination in employment on the basis of race or sex, and there are a few cases in which the existence of a tattoo was offered as evidence of race or sex animus.

The first case in which a tattoo played a role in trying to discern intent to discriminate on the basis of race is *Greathouse v. Alvin Independent School District.*[68] This case was brought under the Texas Commission on Human Rights Act (TCHRA), which mirrors Title VII.[69] The case involved an African-American supervisor named Hubbard, who had a tattoo on his hand that signified, according to his subordinate employee Doug Greathouse, "African-American intolerance for Caucasians."[70] When the supervisor dismissed Greathouse, a white employee, Greathouse claimed race discrimination.

The Texas Court of Appeals considered whether Hubbard's tattoo, along with alleged anti-white statements by Hubbard, showed racial animus on his part. The court held that Greathouse raised a genuine issue of material fact concerning whether he was treated differently from non-Caucasian employees, and whether Hubbard's stated non-discriminatory reasons for terminating Greathouse were a pretext for racial discrimination.[71] Thus, the Texas Court of Appeals ruled that the trial court had mistakenly granted summary judgment for the employer and remanded the case for trial.

A second case in which a tattoo played a part in determining whether race discrimination played a part in an employer's decision first to deny a promotion and later to fire an employee is *King v. STA Mobile, Inc.*[72] There, an African-American employee named Samuel King claimed he was denied a promotion to a senior position on more than one occasion, and later fired by his white supervisor, all on account of his race. King also claimed there was a racially-hostile working environment at the company, citing a number of instances in which he was called offensive names and subjected to images of the Confederate flag in the workplace--including having to work with a white supervisor who displayed a Confederate flag tattoo.[73] The court denied the employer's motion for summary judgment, in part, and remanded the case for trial.

A third case involves a claim of both race and sex discrimination, *Goetz v. City of Forest Park*.[74] There, a firefighter named Linda Goetz had obtained a dragonfly tattoo on the left side of her neck, a dandelion tattoo on the right side of her neck, and a cross tattoo on the inner side of her left bicep. Her fire chief instructed her to cover all of these tattoos while on duty, in accordance with an appearance code the city had adopted. However, Goetz observed that another employee who was African-American had a tattoo which she was allowed to display while on duty, and that yet another co-worker who was male did not have to cover his tattoos while at work. When Goetz refused to cover her tattoos, she received a letter of reprimand; she then brought a claim of race and

sex discrimination under Title VII, claiming she was the victim of disparate treatment.

The court found no direct evidence of discrimination. As to the claim that Goetz' African-American co-worker did not have to cover up her tattoo, the court rejected the claim that her tattoo was less conspicuous than Goetz's because she was African-American while Goetz was white. The court found that the fire chief believed the African-American employee's tattoo was less conspicuous because it was smaller or in an area that was less noticeable under her uniform, not because it was less likely to show up on her darker skin. In addition, the court found no direct evidence of sex discrimination based on her assertion that a male employee had a tattoo and was not reprimanded. Importantly, Goetz admitted that no one ever told her she had to cover her tattoo because she was female. In short, there was no finding that she was treated differently because she was a white female, and the court granted summary judgment to the employer.

Although there are few cases on point, a review of Title VII race or sex discrimination decisions involving tattooed employees shows that tattoos may be cited as indicative of a frame of mind or bias; however, courts will still require a demonstration of underlying motive consistent with the established shifting-burden framework of Title VII cases.[75]

Conclusion

To return to our original question, what liability may an employer have for refusing to hire an applicant with a tattoo, or for discharging a tattooed employee? As is shown from a review of the reported cases, employers have wide latitude in taking such actions. This does not mean employers should have a cavalier attitude, of course; they need to think carefully about whether their decision to reject a tattooed applicant is grounded in a legitimate business purpose, or whether their decision to discipline a tattooed employee may be challenged as disparate treatment.

It is difficult to predict how the case law will develop in this area, but it is reasonable to expect that as more Americans, particularly younger workers now entering the workforce, get tattoos, there may be more conflict between the desire of employees to express themselves and the need of employers to preserve a professional environment. If that happens, there may be a substantial increase in the number of challenges brought by employees who are directed to cover their tattoos. Alternatively, there may be a shift in the attitude of employers over time, in which they become more tolerant of tattooed applicants and employees and do not direct them to cover their tattoos. Thus far, the courts have been largely sympathetic to the arguments of employers that their interest in a workplace free from undue disruption--or that simply turns off customers-- is a rational basis for limiting the display of tattoos on the job. Whether courts will become more sympathetic towards tattooed applicants and employees is also hard to predict. Either way, we can expect more cases to be heard in the courts in the decade to come.

ENDNOTES

1 Tammy Carter & Thomas Burns, *Tattoos and School District Dress Codes*, Inquiry & Analysis, Jan. 2016. (also noting that "Many 'regular' people—such as teachers and school district administrators—also wear tattoos.").

2 Samantha Braverman, Sr. Project Researcher, Harris Interactive, *Harris Poll # 22*, February 23, 2012. This poll found that 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 (23% versus 19%).

3 Brian Elzweig & Donna K. Peeples, *Tattoos and Piercings: Issues of Body Modification and the Workplace*, 76 SAM Adv. Mgmt. J. 13 (2015); *Tattoos May Prevent You from Getting Hired*, Economic Times, Sept. 4, 2013; Diane Stafford, *Employers Can Reject Tattoos, Piercings, but Should They?*, Kansas City Star, Jan. 16, 2016; Resenhoeft, A., Villa, J., & Wiseman, D., *Tattoos Can Harm Perceptions: A Study and Suggestions*," 56 J. Am. C. Health 593 (2008).

4 Victoria Taylor, *Will Having a Tattoo Cost you a Job? Maybe, Researcher Says*, New York Daily News, Sept. 5, 2013.

5 Sarah Gilbert, *Starbucks Employee Claims He was Fired Because of His Tattoos*, Daily Finance, Feb. 5, 2010. Starbucks amended its dress code in 2014 to permit its employees to display their tattoos at work, so long as the tattoos are tasteful and not on the employee's face or throat. Harry Bradford, *Starbucks to Finally Let Employees Show Their Tattoos*, Huffpost Business, Oct. 16, 2014.

6 Not included in this review are municipal ordinances that ban employment discrimination based on appearance. Although there are a few cases in which manner of dress or body piercings have been the subject of review (*see, e.g., Sam's Club, Inc. v. Madison EEOC*, 668 N.W.2d 562, upholding a dress code that barred a retail employee from wearing a nose ring), there are only a limited number of municipal ordinances that address the issue, and no reported cases involving tattoos.

7 See, e.g., *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1968) (recognizing First Amendment free speech rights); *O'Connor v. Ortega*, 480 U.S. 709 (1987) (recognizing Fourth Amendment privacy right of employee in a public workplace); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (recognizing Fourteenth Amendment right to a hearing before the deprivation of a property right in public employment); *Kelley v. Johnson*, 425 U.S. 238 (1976) (finding a Fourteenth Amendment liberty interest in matters of personal appearance by public employees).

8 U.S. Const. amend XIV, § 1.

9 *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985).

10 *Cleburne,* 473 U.S. at 440.

11 See, e.g., *McNabola v. Chicago Transit Authority*, 10 F.3d. 501, 513 (7th Cir. 1993*); EEOC v. Yenkin-Majestic Paint Corp.*, 112 F.3d 831, 834 (6th. Cir. 1997).

12 *Edwards v. Johnson*, 209 F.3d 772, 780 (5th Cir. 2000).

13 365 F.Supp.2d 240 (D. Conn. 2005), *aff'd,* 164 F. App'x. 66 (2d Cir. 2006).

14 365 F. Supp. at 247.

[15] 365 F. Supp. at 251. At the time the case was brought, minorities constituted 70% of Hartford's population.

[16] *Id.*

[17] 229 F. Supp. 2d 572, 581 (N.D. Tex. 2002).

[18] *Id.* at 581.

[19] *Id.* at 582, citing *Daniels v. Arlington*, 246 F.3d 500, 503 (5th Cir. 2001); *Dept. of Justice v. FLRA*, 955 F.2d 998, 1005 (5th Cir. 1992).

[20] 461 U.S. 138 (1983).

[21] 110 F.3d 1303 (8th Cir. 1997).

[22] 110 F.3d at 1307.

[23] 393 U.S. 503, 508 (1969). In a non-employment context involving regulation of tattooing, the New York Court of Appeals held that "tattooing is not speech or even symbolic speech. *People v. O'Sullivan*, 409 N.Y.S.2d 332 (N.Y. App. Div. 1978). Other cases holding that regulating tattoos does not infringe on free speech rights include *State ex rel. Med. Licensing Bd. v. Brady*, 492 N.E.2d 34 (Ind. App. 1986); *State v. White*, 348 S.C. 534 (2001). However, the Ninth Circuit Court of Appeals held in *Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010), that a municipality could not ban tattoo parlors, ruling that tattoos are "fully protected speech." 651 F.2d at 1061. The court found that the complete ban on tattoo parlors was not a reasonable time, place or manner restriction and was therefore unconstitutional. *Id.* at 1068. For a full discussion of the regulation of tattoo parlors and whether regulation is a violation of the First Amendment, see Mathew Alan Cherep, *Barbie Can Get a Tattoo, Why Can't I? First Amendment Protection of Tattooing in a Barbie World*, 46 Wake Forest L. Rev. 331 (2011).

[24] 229 F. Supp. at 580.

[25] *Id.* The court also cited *Connick v. Myers* for the proposition that "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." 461 U.S. at 153.

[26] 365 F. Supp. 2d at 246-47.

[27] 501 F. App'x. 179 (3d Cir. Pa. 2012).

[28] 501 F. App'x. at 180.

[29] *Id.*

[30] *Id.* at 182,

[31] 468 F.3d 963 (6th Cir. 2006).

[32] 468 F.3d at 969.

[33] *Id.*

[34] 468 F.2d at 971.

[35] 468 at 972.

[36] No. 15 C 5891, 2015 U.S. Dist. LEXIS 145655 (N.D. Ill. Oct. 27, 2015).

[37] 2015 U.S. Dist. LEXIS 145655 at *3.

[38] 2015 U.S. Dist. LEXIS 145655 at *8.

[39] 116 F.3d 482 (1997).

[40] 116 F.3d at 482, citing *Tucker v. Cal. Dept. of Educ.*, 97 F.3d 1204, 1210 (9th Cir. 1996).

[41] 116 F.3d at 482.

[42] 566 F.3d 817 (9th Cir. 2009).

[43] 566 F.3d at 820.

[44] 487 F. Supp. 2d 1313 (M.D. Ala. 2007).

[45] 425 U.S. 238 (1976).

[46] *Id.* at 247.

[47] *Id.* at 248.

[48] *Id.*

[49] *See, e.g.*, *Hodge v. Lynd*, 88 F. Supp. 2d 1234, 1238-39 (D.N.M. 2000); *Lowman v. Davies*, 704 F. 2d 1044 (8th Cir. 1983); *Ball v. Bd. of Trustees of Kerrville Indep. Sch. Dist.*, 584 F.2d 684 (5th Cir. 1978); *Marshall v. D.C. Gov't*, 559 F.2d 726 (D.C. Cir. 1977); *East Hartford Educ. Assoc. v. Bd. of Educ.*, 562 F.2d 838 (2nd Cir. 1977); *Tardif v. Quinn*, 545 F.2d 761, 763 (1st Cir. 1976).

[50] 468 F.3d 963 (6th Cir. 2006).

[51] 42 U.S.C. § 2000e *et. seq.*

[52] 42 U.S.C. § 2000e-2(a).

[53] *Id.* § 2000e(j).

[54] *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63 (1977).

[55] 29 C.F.R. § 1605.1.

[56] *Thomas v. Review Bd. of Ind. Emp't Sec. Div.,* 450 U.S. 707 (1981).

[57] See, e.g., *EEOC v. Union Independiente,* 279 F.3d 49 (1st. Cir. 2002); *Vetter v. Farmland Indus., Inc.,* 120 F.3d 749 (8th Cir.1997); *Chalmers v. Tulon Co. of Richmond,*101 F.3d 1012 (4th Cir.1996).

[58] *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986).

[59] *Philbrook,* 479 U.S. at 68.

[60] 99 F.Supp.2d 976 (N.D. Ind. 2000).

[61] *Id.* at 183 (*quoting United States v. Hayward*, 6 F.3d 1241, 1251 (7th Cir. 1993), *cert. denied*, 511 U.S. 1004 (1994)) (*quoting* Charles H. Hones, *Proscribing Hate: Distinctions Between Criminal Harm and Protected Expression*, 18 Wm. Mitchell L. Rev. 935, 948 (1992)).

[62] No. C04-1291JLR, 2005 WL 2090677 (W.D. Wash. Aug. 29, 2005).

[63] 311 F. Supp. 2d 190, (D. Mass 2004).

[64] 687 F. Supp. 2d 66 (E.D.N.Y. 2009).

[65] 687 F. Supp. at 70.

[66] 687 F. Supp. at 78.

[67] No. 13-cv-5139, 2014 U.S. Dist. LEXIS 92705 (E.D.N.Y. July 4, 2014).

[68] 17 S.W.3d 419 (Tex. Ct. App., 2000).

[69] Tex. Lab. Code Ann. § 21.001— § 21.306 (Vernon 1996 & Supp.2000). The TCHRA ensures the execution of the policies embodied in Title VII of the United States Code by implementing the "correlation of state law with federal law in the area of discrimination in employment." Tex. Lab. Code Ann. § 21.001(3) (Vernon 1996).

[70] 17 S.W.3d at 422.

[71] Id. at 426.

[72] No. 12-0360-WS-B, 2013 U.S. Dist. LEXIS 82270 (S.D. Ala. June 11, 2013).

[73] *Id.* at *19 n. 35.

[74] No. 11-cv-270, 2012 U.S. Dist. LEXIS 129649 (S.D. Ohio Sept. 12, 2012).

[75] The seminal case establishing this framework is *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).